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UNITED STATES COMPILED STATUTES

ANNOTATED

1916

EMBRACING THE STATUTES OF THE UNITED STATES OF A GENERAL AND PERMANENT NATURE IN FORCE AT THE CLOSE OF THE FIRST SESSION OF THE 64TH CONGRESS

AND

DECISIONS CONSTRUING AND APPLYING SAME TO APRIL 1, 1916

INCORPORATING UNDER THE HEADINGS OF THE REVISED STATUTES THE SUBSEQUENT LAWS, TOGETHER WITH EXPLANATORY AND HISTORICAL NOTES

TEXT OF THE STATUTES COMPILED BY

JOHN A. MALLORY

ASSISTED BY EDITORIAL STAFF

ANNOTATIONS BY MEMBERS OF THE PUBLISHERS' EDITORIAL STAFF

IN 12 VOLUMES

VOLUME 1

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1916

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PREFACE TO THE ANNOTATED EDITION

The Statute Text

The text of the Statutes of the United States of a general and permanent nature is presented in this compilation with completeness and accuracy. The work of compilation was in the main prepared by the late John A. Mallory, who compiled the editions of 1901 and 1913, using as the basis of his compilation the official revisions of 1874 and 1878. The revision of 1878 was the last revision authorized or approved by Congress. The basis of the annotated edition is the compilation of 1913 with the addition of the legislation passed by Congress up to the close of the first session of the 64th Congress. After the death of Mr. Mallory, the work was continued by trained editors familiar with Mr. Mallory's methods and who had become imbued with his traits of thoroughness and precision.

The Congress of the United States is not subject to constitutional restrictions with respect to the form of its enactments. It is not required to confine its measures to a single subject, or to express the subject of legislation in a comprehensive title. It is not circumscribed by any rule in respect to the amendment of the statutes. This being true, every bill passed by Congress must be carefully examined by the compiling editors to ascertain whether it contains matter appropriate for the compilation. Matters of general legislation of a permanent nature are interspersed through appropriation acts by way of proviso and otherwise. These provisions must be carefully culled from the mass of the appropriation acts and classified to their appropriate divisions of the statutes. This work has been done with thoroughness and painstaking care and all laws of Congress of a general and permanent nature appear in the compilation, and can be found by reference to the index or the tables of statutes.

The arrangement of the laws as originally presented in the official Revised Statutes of the United States of 1874 and 1878, and which has become familiar to the bench and bar and the departments of the Government has been preserved in the new compilation. This arrangement is an excellent and easily workable one, and there seems to be no occasion or necessity for the adoption of a different plan of division. Such a plan would disturb the numerical order of the sections of the official Revised Statutes and introduce confusion without serving any good purpose. While the publishers have found it necessary to renumber the sections on account of the vast amount of additional legislation enacted since the official revisions of 1874 and 1878, the section numbering in those revisions is preserved and is indicated by bracketed numbers immediately following the new section numbers. A searcher for a particular section of the Revised Statutes can turn to the provision sought for immediately by following the bracketed numbers without first resorting to the tables of statutes contained in

the index volume, except as to the Judicial Code and the Criminal Code. As to these Codes, Congress, in constructing them, made a radical departure from the old Judiciary Act and the Crimes Act and changed the order and arrangement of the chapters and sections, so that it is not now possible to follow the numerical order of the Revised Statutes in these parts of the work. Where the Revised Statute section is not readily found, a reference to the appropriate table will show the section number at which the provision appears in this compilation.

The existing laws relating to the territories and the Indians which were omitted from the compilation of 1901 have been included in the present compilation.

Copious and complete notes have been made by the editors and inserted below the text of the statute, conveying much valuable information of vital importance in fully understanding the operation, meaning, and scope of the text. These notes contain much historical matter, and also operate as cross-references to related provisions of the statutes inserted elsewhere in the compilation.

The Organic Law, including the Declaration of Independence, the Articles of Confederation, the Ordinance of 1787 for the government of the Northwest territory, and the Constitution with its amendments are reprinted from the United States Revised Statutes of 1878 with the accompanying historical and explanatory notes and analytical index to the Constitution which appeared therein. For convenience of preparation of the annotated edition all of this Organic Law has been placed in the later volumes following the statute text.

Notes of Decisions

The text of the statutes and of the Constitution, the Ordinance of 1787, and the other Organic Law has been completely and accurately annotated. These annotations consist of the decisions of the Supreme Court of the United States, the Circuit Court of Appeals, the trial courts of the United States, the Commerce Court, the Court of Customs Appeals, and the Court of Claims, as well as the opinions of the Attorney General of the United States, and the decisions of the state courts interpreting the Federal Statutes and Constitution. These decisions and opinions have been carefully edited and their various subjects indicated by black-letter lines. Where the annotations were of such magnitude as to be capable of division into 10 or more subjects or black-letter lines, an analysis of such lines has been prepared and placed at the head of the notes to facilitate ready reference. Decisions on matters which are necessarily statutory have been carried into the notes of decisions, though the statute is not expressly cited in the cases. Particular labor and pains have been put forth in annotating the Constitution. Every decision respecting the powers of Congress and the operations of the Federal Government have been carried into the annotations. Decisions in cases citing no particular article or clause of the Constitution but involving a determination necessarily based on the inherent situation arising from the form of government as created by the Constitution have been carried into the notes of decisions under the most appropriate clause of the Consti-

tution. The annotations have been carefully cross-referenced for the purpose of tying together decisions on statutes of a similar nature, and cross-references have been made between the statute annotations and the annotations appearing in the Constitution.

The Judicial Code and the Criminal Code have been exhaustively and elaborately annotated including the rules of the Supreme Court and of the Circuit Courts of Appeal.

The equity and admiralty practice of the United States courts have been fully developed in the annotations under section 1536 of the annotated compilation. The Equity Rules and the rules applicable to admiralty practice have been printed and fully annotated.

In annotating the statutes decisions based on early enactments which have been repealed or superseded have been utilized in the annotation of later enactments on the same subject where the old decisions are useful in the interpretation of the new provision. Conspicuous examples of this are the Judicial Code, the Criminal Code, the tariff acts, the internal revenue measures, and the bankruptcy acts.

The Index

The excellent index accompanying the compilation of 1913 has been utilized for the present annotated edition after adding to such index the appropriate references to new legislation. A new feature has also been introduced into this index, consisting of references to such features in the notes of decisions, as are not necessarily suggested by the text of the statutes annotated. Where the text itself suggests the subject-matter of the notes and that text has been annotated, an additional reference in the index would be unnecessary, but, where the annotations suggest matters beyond the scope of the text, it is apparent that the inclusion of these matters in the index is a very valuable feature. Still another feature introduced into the index is the inclusion of popular names of congressional acts, such as the Hepburn Act, the Carmack Amendment, etc.

Tables of Statutes

In the index volume will be found a complete table of Revised Statute sections followed by a reference to the corresponding section in this compilation. There is also a table giving the dates of the various acts of Congress, showing the chapter, section, volume, and page of the Statutes at Large at which they appear, together with the section of the Revised Statutes and the section of the present compilation under which the act in question has been classified. In addition to the tables above named, there is a table showing the acts omitted from this compilation with a reference to the page of the compilation where the omission of the act is explained by an appropriate note.

There is also in the index volume a list of acts designated by their popular names. This table includes repealed and superseded acts as well as statutes now in effect.

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UNITED STATES COMPILED STATUTES ANNOTATED

1916

VOLUME 1

TITLE I

GENERAL PROVISIONS

The Revised Statutes of the United States were enacted by the Forty-Third Congress, at the first session, by an act entitled "An act to revise and consolidate the statutes of the United States, in force on the first day of December, anno Domini one thousand eight hundred and seventy-three," which was approved June 22, 1874.

Numerous amendments of said act, "for the purpose of correcting errors and supplying omissions" therein, were made by Act Feb. 18, 1875, c. 80, 18 Stat. 316, and Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 240. And by Act March 2, 1877, c. 82, 19 Stat. 268, the preparation of a new edition of the Revised Statutes was provided for, in the text of which was incorporated all the amendments made in the Revision to the close of the Forty-Fourth Congress, March 4, 1877, with marginal references to other statutes passed subsequent to the Revised Statutes affecting or modifying any of the provisions thereof. This new edition was published as The Revised Statutes of the United States, Second Edition, 1878.

The Revised Statutes embraced, in Titles I–LXXIII, the statutes of the United States general and permanent in their nature, in force on the first day of December, 1873, as revised and consolidated therein, and repealed all statutes so embraced, but did not repeal or affect any act of Congress passed after December 1, 1873. See R. S. Title LXXIV, "Repeal Provisions," §§ 5595–5601, post, §§ 10592–10598.

Provisions for the preparation, adoption, publication, and distribution of the Revised Statutes and the Supplements thereto, which were temporary merely and have been executed, and therefore are not set forth in this compilation, were contained in the following acts and parts of acts:

Act June 27, 1866, c. 140, 14 Stat. 74.
Act May 4, 1870, c. 72, 16 Stat. 96.
Act March 3, 1873, c. 241, 17 Stat. 579.
Act June 20, 1874, c. 333, 18 Stat. 113.
Act Dec. 28, 1874, c. 9, § 1, 18 Stat. 293.
Act Feb. 18, 1875, c. 84, 18 Stat. 329.
Act March 2, 1877, c. 82, 19 Stat. 268.
Act March 9, 1878, c. 26, 20 Stat. 27.
Res. May 22, 1878, No. 22, 20 Stat. 251.
Res. Dec. 21, 1878, No. 1, 20 Stat. 487.
Res. June 7, 1880, No. 44, 21 Stat. 308.
Act March 3, 1883, c. 131, 22 Stat. 565.
Act April 9, 1890, c. 73, 26 Stat. 50.
Act Feb. 27, 1893, c. 167, 27 Stat. 477.
Act June 4, 1897, c. 2, § 1, 30 Stat. 30.
Act March 3, 1901, c. 853, § 1, 31 Stat. 1162.

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CHAPTER ONE

Definitions

Sec.
1. Definitions.
2. County.
3. Vessel.
4. Vehicle.
5. Company; association.
6. Seal.

§ 1. (R. S. § 1.) Definitions.

In determining the meaning of the revised statutes, or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular; words importing the masculine gender may be applied to females; the words "insane person" and "lunatic" shall include every idiot, non compos, lunatic, and

insane person; the word "person" may extend and be applied to partnerships and corporations, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense; and a requirement of an "oath" shall be deemed complied with by making affirmation in judicial form.

Act Feb. 25, 1871, c. 71, § 2, 16 Stat. 431. Act July 13, 1866, c. 184, § 44, 14 Stat. 163. Act June 30, 1864, c. 173, §§ 82, 126, 13 Stat. 258, 287. Act July 20, 1868, c. 186, § 104, 15 Stat. 166.

Provisions as to the meaning and application of words used in particular titles, chapters, or sections, of the Revised Statutes, or in subsequent acts, are contained in the respective titles, chapters, etc.

Provisions of a general nature, similar to those of this section, are contained in the Bankruptcy Act of 1898, Act July 1, 1898, c. 541, § 1, post, § 9585, and in the Criminal Code, Act March 4, 1909, c. 321, § 337, post, § 10511.

The provisions of R. S. §§ 1–5, apply to and govern the construction of the provisions of the Judicial Code, by section 293 thereof, post, § 1270.

A provision for the construction of the word "person," as used in R. S. Title XXXV, "Internal Revenue," is contained in R. S. § 3140, as amended by Act Feb. 27, 1877, c. 69, 19 Stat. 248, post, § 5842.

Other provisions as to the meaning of the word "person" or "persons," as used in particular acts, etc., are contained in such acts, as follows:

Act for protection of submarine cables of Feb. 29, 1888, c. 17, § 10, post, § 10096.

Sherman Anti-Trust Act of July 2, 1890, c. 647, § 8, post, § 8830.

Bankruptcy Act of July 1, 1898, c. 541, § 1, post, § 9585.

Trade-Mark Act of Feb. 20, 1905, c. 592, § 29, post, § 9515.

Bridge Act of March 23, 1906, c. 1130, § 7, post, § 9967.

Dam Act of June 21, 1906, c. 3508, § 8, as amended, Act June 23, 1910, c. 360, post, § 9983.

Food and Drugs Act of June 30, 1906, c. 3915, § 12, post, § 8728.

Criminal Code, Act March 4, 1909, c. 321, § 337, post, § 10511.

Insecticide Act of April 26, 1910, c. 191, § 12, post, § 8776.

Act to license custom-house brokers of June 10, 1910, c. 283, § 5, post, § 5554.

White-Slave Traffic Act of June 25, 1910, c. 395, § 7, post, § 8818.

United States Cotton Futures Act of Aug. 18, 1914, c. 255, § 2, post, § 6309b.

Anti-Trust Act of Oct. 15, 1914, c. 323, § 1, post, § 8835a.

A provision as to what the word "officer," as used in the Bankruptcy Act of 1898 and in proceedings pursuant thereto, shall include, is contained in section 1, subd. 18, thereof, Act July 1, 1898, c. 541, § 1, post, § 9585.

The word "oath," as used in the Bankruptcy Act of 1898 and in proceedings pursuant thereto, includes affirmation, by a provision of section 1, subd. 17, thereof, Act July 1, 1898, c. 541, § 1, post, § 9585.

References to statutory definitions of terms other than the words defined in this chapter are collected in the General Index, under the heading "Words and Phrases."

Notes of Decisions

Words importing singular number.—A grant, "for the purpose of aiding in the construction of a railroad," of public lands "on each side thereof," may extend to a main road and a branch road provided for by the granting act, subject to the adjustment applicate to the two roads. U. S. v. Oregon & C. R. Co. (1896) 17 Sup. Ct. 165, 170, 164 U. S. 526, 41 L. Ed. 541.

"Person," in R. S. § 1024, post, § 1690, as to consolidation of indictments, covers several persons as well as a single one. Emanuel v. U. S. (1912) 196 Fed. 317, 116 C. C. A. 137.

The use in R. S. §§ 4283, 4285, post, §§ 8021, 8023, of "owner," instead of the words "owner or owners" of Limitation of Liability Act March 3, 1851, c. 43, revised in those sections does not exclude a limitation of the liability of a part owner. Thommasen v. Whitwill (C. C. 1882) 12 Fed. 891, 903, affirmed (1886) 6 Sup. Ct. 1172, 118 U. S. 520, 30 L. Ed. 156.

Words importing plural number.—The provision of the fee bill, R. S. § 828, post, § 1383, for compensation to clerks for keeping "dockets," applies to a single docket, where, in actual practice, only one docket is kept. In re Rand (C. C. 1883) 18 Fed. 99, 102.

Masculine gender includes females.—Upon an application by a woman to be admitted to practice before the Court of Claims under a rule that "no counsel will be permitted to practice in the court unless he is a man of good moral character," it was held that, while the masculine gender, which is generally used in statutes, frequently embraces the feminine, it would not be so construed so as to admit the applicant. The court stated: "If a masculine word receives any such latitude of construction, it is when it is applied to those cases where law and custom recognize men and women as standing upon the same ground of right or responsibility;

the general rule being that words are to be construed according to their usual meaning. Certainly it is not obligatory on courts to construe them otherwise, unless that is made obligatory by legislation. There is no such legislation affecting this court or its rules, and certainly when the rules were made the word 'man' was used in its usual and literal meaning, and, so used, expressed all that the court then intended." Mrs. Lockwood's Case (1873) 9 Ct. Cl. 346.

Person.—"Person," in Oleomargarine Act May 9, 1902, § 6, post, § 6241, punishing any person willfully violating any provisions of the section, includes a corporation. U. S. v. Union Supply Co. (1909) 30 Sup. Ct. 15, 215 U. S. 50, 54 L. Ed. 87.

"Person," in the act punishing any person mailing certain obscene matter, embodied in R. S. § 3893, passed subsequent to Feb. 25, 1871, includes a corporation. U. S. v. New York Herald Co. (C. C. 1907) 159 Fed. 296, 297.

"Any other person," in Cr. Code, § 239, post, § 10409, punishing the collection of the purchase price of intoxicating liquor in connection with the transportation thereof, includes a national bank. U. S. v. First Nat. Bank (D. C. 1911) 190 Fed. 336.

"Person," in section 9 of Internal Revenue Act July 13, 1866, c. 184, as explained in section 44 of that act, did not include a state. (1867) 12 Op. Atty. Gen. 176.

"Person," in the provision of Act March 2, 1895, c. 193, post, § 9015, authorizing payment, from accrued pensions of deceased pensioners, "to reimburse the person who bore the expense of their last sickness and burial," includes a municipal corporation. (1901) 23 Op. Atty. Gen. 428.

Affirmation instead of oath.—Affirmation instead of oath will only be permitted when the court is satisfied that the witness belongs to a society which professes to be conscientiously scrupulous of taking an oath. Bank of Columbia v. Wright (C. C. 1827) Fed. Cas. No. 883; King v. Fearson (C. C. 1829) Fed. Cas. No. 7,790.

Affirmation by juror not a Quaker, not attached to any particular religious sect, not permitted. McIntire's Case (C. C. 1803) Fed. Cas. No. 8,824.

A juror will not be allowed to make affirmation in lieu of oath, on the ground that he is a Methodist, where it is not contrary to the principles of that religious society to take an oath. Bryan's Case (C. C. 1804) Fed. Cas. No. 2,063.

Affirmation instead of oath may be permitted where the witness has applied for admission to full participation in the membership of the society of Quakers, and usually meets with them for worship. King v. Fearson (C. C. 1829) Fed. Cas. No. 7,790.

A witness must be sworn in such a way as is binding on his conscience. The Merrimac (D. C. 1867) Fed. Cas. No. 9,474.

The oath of a Chinaman, taken on the Bible, in the usual way, held sufficient, where, on examination, it appeared that he felt solemnly bound by it. Id.

§ 2. (R. S. § 2.) County.

The word "county" includes a parish, or any other equivalent subdivision of a State or Territory of the United States.

Act July 13, 1866, c. 184, § 9, 14 Stat. 110.

§ 3. (R. S. § 3.) Vessel.

The word "vessel" includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

Act July 18, 1866, c. 201, § 1, 14 Stat. 178. Act June 29, 1870, c. 169, § 7, 16 Stat. 170.

A provision for the construction of the term "vessel," as used in R. S. Title LIII, "Merchant Seamen," is contained in R. S. § 4612, post, § 8392.

A similar provision is contained in the act for the protection of submarine cables of Feb. 29, 1888, c. 17, § 10, post, § 10096.

Notes of Decisions

1. Use for transportation.
2. Manner of propulsion.
3. Barges, canal boats, etc.
4. Scows.
5. Rafts.
6. Floating elevator.
7. Pump boat.
8. Dredges, etc.
9. Pile drivers.
10. Wharfboats, landing floats, etc.
11. Dry docks.
12. Dismantled vessels.

1. Use for transportation.—The word "transportation" is not expressly or impliedly limited to the carriage of passengers or merchandise for hire. The International (1898) 89 Fed. 484, 485, 32 C. C. A. 258.

A stern wheel steamer, licensed for the coasting trade, formerly a ferryboat, used to propel from place to place on navigable waters a floating house, in which was given, while moved to the shore, an exhibition or circus show, is a vessel engaged in commerce and navigation. The W. F. Brown (D. C. 1891) 46 Fed. 290.

Under the statutory definition, a vessel may be defined to be a navigable

structure, capable of being used for transportation, whether intended to be or actually used for that purpose. Charles Barnes Co. v. One Dredge Boat (D. C. 1909) 169 Fed. 895, 900.

2. Manner of propulsion.—A vessel is none the less one on account of the manner of her propulsion, whether by oars, sails, or steam. The Devonshire (C. C. 1882) 13 Fed. 39, 41.

The section includes sailing yachts. U. S. v. Holmes (C. C. 1900) 104 Fed. 884, 886.

A navigable structure, intended for the transportation of a permanent cargo, that has to be towed in order to navigate, is a vessel. Charles Barnes Co. v. One Dredge Boat (D. C. 1909) 169 Fed. 895, 900.

3. Barges, canal boats, etc.—Barges or canal boats, etc., used in transportation, though having no masts or sails or motive power of their own, are vessels, within admiralty jurisdiction. The Dick-Keys (C. C. 1863) Fed. Cas. No. 3,898; The Kate Tremaine (D. C. 1871) Fed. Cas. No. 7,622; The Wilmington (D. C. 1880) 48 Fed. 566; Disbrow v. The Walsh Brothers (D. C. 1888) 36 Fed. 607.

Coal barges, which are mere open boxes, floated downstream, and usually sold for lumber at the end of the voyage, are not ships or vessels in the maritime sense of the term. Jones v. Coal Barges (C. C. 1855) Fed. Cas. No. 7,-458; Wood v. Two Barges (C. C. 1891) 46 Fed. 204.

A claim against a barge for wharfage is cognizable in admiralty. Ex parte Easton (1877) 95 U. S. 68, 74, 24 L. Ed. 373.

4. Scows.—Scows, having no propelling power of their own, held vessels. The General Cass (D. C. 1871) Fed. Cas. No. 5,307; Endner v. Greco (D. C. 1880) 3 Fed. 411.

The section includes a scow, 110 feet long and 34 feet wide, without motive power of its own, employed in carrying mud from a harbor to the dumping ground. In re Eastern Dredging Co. (D. C. 1905) 138 Fed. 942, 943.

5. Rafts.—A raft made of cross-ties, used as a convenient mode of bringing them to market, manned by a pilot, crew, and cook, who lived and had shelter thereon during the voyage, which lasted many days, and propelled by the tides and by poles and large oars, is a vessel, within this section, so as to give jurisdiction to admiralty of a libel in rem against it for a collision on navigable waters. Seabrook v. Raft of Railroad Cross-Ties (D. C. 1889) 40 Fed. 596.

A steam tug towing a raft of logs must carry the lights required by law, though such raft may not be strictly a vessel, as defined by this section. The Annie S. Cooper (D. C. 1891) 48 Fed. 703, 704.

6. Floating elevator.—A former canal boat, on which had been built an elevating apparatus for hoisting grain, for transferring grain from one vessel to another, though without motive power of its own or capacity for cargo other than its elevator, is nevertheless a vessel, a subject of maritime lien. The Hezekiah Baldwin (D. C. 1876) Fed. Cas. No. 6,449.

7. Pump boat.—A pump boat, which is a floating structure equipped with engine, boiler, pumps, pipes, and capstans, used for pumping out coal barges, capable of being moved on the water by ropes attached to its capstans or by being towed, is a vessel within this section, and subject to admiralty jurisdiction. Charles Barnes Co. v. One Dredge Boat (D. C. 1909) 169 Fed. 895.

8. Dredges, etc.—A steam dredge, without motive power of its own, but capable of being towed from place to place, is a vessel, within the definitions given by this section. Saylor v. Taylor (1896) 77 Fed. 476, 477, 23 C. C. A. 343; McRae v. Bowers Dredging Co. (C. C. 1898) 86 Fed. 344, 347; The Pioneer (D. C. 1886) 30 Fed. 206; Aitcheson v. The Endless Chain Dredge (D. C. 1889) 40 Fed. 253, 254; The Atlantic (D. C. 1893) 53 Fed. 607, 608.

A steam dredge and scows used in connection therewith are vessels, within the admiralty jurisdiction. The Alabama (C. C. 1884) 22 Fed. 449; Id. (D. C. 1884) 19 Fed. 544; The Starbuck (D. C. 1894) 61 Fed. 502.

A marine pump, used to suck mud from the bottom or from scows and force it on the adjacent land, resting, while at work, on piles driven into the ground, and weighted with heavy ballast to keep it in place though capable of being towed from place to place, has none of the characteristics of a vessel. The Big Jim (D. C. 1894) 61 Fed. 503.

A steam dredge and the scows used in connection with it are each a vessel within this section, and, as such, not subject to duty under the Tariff Act of 1894. The International (D. C. 1897) 83 Fed. 840, affirmed (1898) 89 Fed. 484, 32 C. C. A. 258.

A hydraulic steam dredge, operating afloat, by sucking up material from the bottom and discharging it through adjustable pipes on adjacent land is a ship or vessel, within the admiralty jurisdiction. Bowers Hydraulic Dredging Co. v. Federal Contracting Co. (D. C. 1906) 148 Fed. 290, 294. See In re Hydraulic Steam Dredge No. 1 (1897) 80 Fed. 545, 25 C. C. A. 628.

9. Pile drivers.—A pile driver, consisting of a floating platform carrying a derrick, engine, and pile driving apparatus, having a stern wheel, by which it could propel itself, and a rudder and steering wheel, but in its existing condition not fitted for purposes

of transportation, is not such a vessel as to be the subject of admiralty jurisdiction. Pile Driver E. O. A. (D. C. 1894) 69 Fed. 1005.

A flatboat, with a pile driver and its engine erected thereon, mainly used in constructing bulkheads for the erection of channel lights, but also employed in transporting materials used in the work, being towed by a tug for that purpose, is to be classed as a vessel, subject to maritime jurisdiction. Lawrence v. Flatboat (D. C. 1897) 84 Fed. 200, affirmed Southern Log Cart & Supply Co. v. Lawrence (1898) 86 Fed. 907, 30 C. C. A. 480.

10. Wharfboats, landing floats, etc.—A float, supporting a floor and a house, used to store oars and sails of small boats landing at it, and as a means of egress from there to the wharf at which it was moved, and thence to the shore, being stationary, and never employed in transportation upon the water, cannot be held to be a ship or vessel. Woodruff v. One Covered Scow (D. C. 1887) 30 Fed. 269.

A floating structure, designed to be moored alongside a wharf, so that carts could be driven over it with refuse to be dumped into boats lying alongside, which was mainly stationary, though capable of being towed from one wharf to another, is not a vessel within the meaning of the maritime law. Ruddiman v. A Scow Platform (D. C. 1889) 38 Fed. 158.

11. Dry docks.—A floating dry dock, being a fixed structure, not used for the purpose of navigation, is not a ship or vessel, such as to be a subject of salvage service. Cope v. Vallette Dry Dock Co. (1887) 119 U. S. 625, 7 Sup. Ct. 336, 337, 30 L. Ed. 501; Snyder v. A Floating Dry-Dock (D. C. 1884) 22 Fed. 685.

A dry dock held not a vessel, within R. S. §§ 4283–4285, post, §§ 8021–8023, providing for limitation of liability on behalf of the owners of any ship or vessel. Berton v. Tietjen & Lang Dry Dock Co. (D. C. 1915) 219 Fed. 763.

12. Dismantled vessels.—A steamboat, stripped of her boiler, engine, and paddle wheels, and fitted up and used as a saloon and hotel, is not, while being towed to another place, to be there used in a similar way, engaged in commerce or navigation, so as to be liable in rem in admiralty for services rendered to it. The Hendrick Hudson (D. C. 1869) Fed. Cas. No. 6,355.

A dismantled steamboat, moored on a navigable river, and undergoing alterations and repairs to fit her for use as a wharfboat, such use being in aid of commerce and navigation, is liable in rem to a charge for salvage. The Old Natchez (D. C. 1881) 9 Fed. 476.

An old steamboat, from which the boilers, wheel, engines, and machinery had been removed, and which had been changed into a pleasure barge for the transportation of excursion parties, having no independent means of propulsion, but intended to be towed by a towboat, is a vessel, within the meaning of the term as used in Pennsylvania statutes and in the maritime law, and as such subject to a maritime lien. The City of Pittsburgh (D. C. 1891) 45 Fed. 699.

Cited without definite application, The Conqueror (1897) 17 Sup. Ct. 510, 513, 166 U. S. 110, 41 L. Ed. 937; U. S. v. One Gasoline Launch (1904) 133 Fed. 42, 43, 66 C. C. A. 148 (dissenting opinion).

§ 4. (R. S. § 4.) Vehicle.

The word "vehicle" includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land.

Act July 18, 1866, c. 201, § 1, 14 Stat. 178.

§ 5. (R. S. § 5.) Company; association.

The word "company" or "association," when used in reference to a corporation, shall be deemed to embrace the words "successors and assigns of such company or association," in like manner as if these last-named words, or words of similar import, were expressed.

Act July 25, 1866, c. 242, § 9, 14 Stat. 241.

§ 6. (R. S. § 6.) Seal.

In all cases where a seal is necessary by law to any commission, process, or other instrument provided for by the laws of Congress, it shall be lawful to affix the proper seal by making an impression therewith directly on the paper to which such seal is necessary; which shall be as valid as if made on wax or other adhesive substance.

Act May 31, 1854, c. 60, § 2, 10 Stat. 297.

Notes of Decisions

Impression on paper or parchment.—Any forcible indentation on a parchment, though it be not wax, wafer, or a scrawl, may be a seal, if so intended. Follett v. Rose (C. C. 1844) Fed. Cas. No. 4,900.

A seal impressed on paper is equivalent to sealing with wax. Roberts v.

Pillow (C. C. 1851) Fed. Cas. No. 11,-909.

Scroll or other mark.—The word "Seal" in a scroll is a sufficient seal. U. S. v. Hedges (C. C. 1812) Fed. Cas. No. 15,339.

The common-law rule, that a seal must consist of wax, or some tenacious substance, does not apply to a bond taken under an act of congress; and, under the general usage, a scroll is sufficient to make the instrument a sealed instrument. U. S. v. Stephenson's Ex'rs (C. C. 1839) Fed. Cas. No. 16,386.

A scroll made with a pen, inclosing the letters "L. S.," will be held to be a seal, if so intended, though not expressly stated in the instrument. Burton v. Le Roy (C. C. 1879) Fed. Cas. No. 2,217.

A mark with ink, acknowledged by the maker of a deed, held sufficient to create a specialty. U. S. v. Coffin (D. C. 1799) Fed. Cas. No. 14,823.

Joint seal.—There cannot be a joint seal for diverse persons not incorporated. Tingey v. Carroll (C. C. 1829) Fed. Cas. No. 14,056.

Official seal.—Any impression upon sealing wax or wafer adhering to the paper, without any device or words indicative of the particular official, is evidence of the official character of the officer signing. In re Phillips (D. C.) 1876) Fed. Cas. No. 11,098.

Evidence and determination of fact.—Person acquainted with parchment patents may be examined, as to the traces of a seal, on the question whether such a writing had been originally sealed. Follett v. Rose (C. C. 1844) Fed. Cas. No. 4,900.

Where there is doubt whether an instrument has been sealed, the fact is properly referable to the jury. Id.

Cited without definite application, Clough v. U. S. (C. C. 1891) 47 Fed. 791, 795, modified 55 Fed. 374, 5 C. C. A. 140.

CHAPTER TWO

Form and Enactment of Statutes and Effect of Repeals

Sec.
7. Enacting clause.
8. Resolving clause.
9. No enacting words after first section.
10. Numbering and frame of sections.
11. Title of appropriation acts.
12. Printing in lieu of engrossing and enrolling of bills and joint resolutions.
13. Repeal not to revive former act.
14. Repeals not to affect liabilities, unless, etc.

§ 7. (R. S. § 7.) Enacting clause.

The enacting clause of all acts of Congress hereafter enacted shall be in the following form: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled."

Act Feb. 25, 1871, c. 71, § 1, 16 Stat. 431.

§ 8. (R. S. § 8.) Resolving clause.

The resolving clause of all joint resolutions shall be in the following form: "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled."

Act Feb. 25, 1871, c. 71, § 1, 16 Stat. 431.

§ 9. (R. S. § 9.) No enacting words after first section.

No enacting or resolving words shall be used in any section of an act or resolution of Congress except in the first.

Act Feb. 25, 1871, c. 71, § 1, 16 Stat. 431.

§ 10. (R. S. § 10.) Numbering and frame of sections.

Each section shall be numbered, and shall contain, as nearly as may be, a single proposition of enactment.

Act Feb. 25, 1871, c. 71, § 1, 16 Stat. 431.

§ 11. (R. S. § 11.) Title of appropriation acts.

The style and title of all acts making appropriations for the support of Government shall be as follows: "An act making appropriations, (here insert the object) for the year ending June thirtieth (here insert the calendar year.)"

Act Aug. 26, 1842, c. 207, § 2, 5 Stat. 537.

No act of Congress was to be construed to make an appropriation out of

the Treasury of the United States unless such act, in specific terms, declares an appropriation to be made, by Act June 30, 1906, c. 3914, § 9, post, § 6763.

The committees of Congress in reporting general appropriation bills were required, as far as practicable, to follow the general order and arrangement of the respective appropriation acts for the year preceding, by a provision of Act June 22, 1906, c. 3514, § 4, post, § 6672.

§ 12. (Act March 2, 1895, c. 177, § 1.) Printing in lieu of engrossing and enrolling of bills and joint resolutions.

Hereafter the engrossing and enrolling of bills and joint resolutions of either House of Congress shall be done in accordance with the concurrent resolution adopted by the Fifty-third Congress at its first session, November first, eighteen hundred and ninety-three: Provided, That during the last six days of a session such engrossing and enrolling of bills and joint resolutions may be done otherwise than as prescribed in said concurrent resolution, upon the order of Congress by concurrent resolution. (28 Stat. 769.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above.

The concurrent resolution referred to in this provision was as follows:

"Resolved by the House of Representatives (the Senate concurring), That, beginning with the first day of the regular session of the Fifty-third Congress, to wit, the first Monday in December, 1893, in lieu of being engrossed, every bill and joint resolution in each House of Congress at the stage of the consideration at which a bill or joint resolution is at present engrossed, shall be printed, and such printed copy shall take the place of what is now known as, and shall be called the engrossed bill, or resolution as the case may be, and it shall be dealt with in the same manner as engrossed bills and joint resolutions are dealt with at present, and shall be sent in printed form, after passing, to the other House, and in that form shall be dealt with by that House, and its officers in the same manner in which engrossed bills and joint resolutions are now dealt with.

"Resolved, That when such bill or joint resolution shall have passed both Houses, it shall be printed on parchment, which print shall be in lieu of, what is now known as, and shall be called, the enrolled bill, or joint resolution as the case may be, and shall be dealt with in the same manner in which enrolled bills and joint resolutions are now dealt with.

"Resolved, That the Joint Committee on Printing is hereby charged with the duty of having the foregoing resolutions properly executed, and is empowered to take such steps as may be necessary to carry them into effect, and provide for the speedy execution of the printing herein contemplated."

Conc't Res. Nov. 1, 1893, 28 Stat. Appendix, 5.

The printing and distribution of copies of bills and resolutions were provided for by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 55, as amended by Act Jan. 20, 1905, c. 50, § 2, post, § 7025.

§ 13. (R. S. § 12.) Repeal not to revive former act.

Whenever an act is repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided.

Act Feb. 25, 1871, c. 71, § 3, 16 Stat. 431.

Notes of Decisions

Previous rule.—Before the enactment of this provision, by Act Feb. 25, 1871, c. 71, § 3, the repeal of a repealing act restored the law as it was before the passage of the latter act, without formal words for that purpose, unless the effect of such repeal was limited by its own terms, or by some general statutes to the abrogation of the act repealed. U. S. v. Philbrick (1887) 7 Sup. Ct. 413, 416, 120 U. S. 52, 30 L. Ed. 559.

No retroactive effect.—The provision of the act of 1871, re-enacted in this section, was not retroactive. U. S. v. Philbrick (1887) 7 Sup. Ct. 413, 416, 120 U. S. 52, 30 L. Ed. 559.

Rule of construction merely.—This section prescribes a rule of construction and does nothing more. Jacksonville, P. & M. R. Co. v. U. S. (1886) 21 Ct. Cl. 155.

Implied repeal of repealing act.—A statute providing that the repeal of a repealing act shall not revive the original act applies to cases of repeal by implication. Milne v. Huber (C. C. 1843) Fed. Cas. No. 9,617.

Expiration of repealing act.—When a statute contains an absolute affirmative repeal of an antecedent statute, or part of it, the expiration of the subsequent statute by its own limitation will not revive the repealed act. U. S. v. Twenty-Five Cases of Cloths (D. C. 1840) Fed. Cas. No. 16,563.

On the expiration of a repealing act

by its own limitation, the act repealed is revived; this section having no application to such a case. (1892) 20 Op. Atty. Gen. 466, 467.

Cited without definite application, Kohlsaat v. Murphy (1877) 96 U. S. 153, 154, 24 L. Ed. 844; Chicago, M. & St. P. R. Co. v. U. S. (1888) 8 Sup. Ct. 1194, 1195, 127 U. S. 406, 32 L. Ed. 180; Stanley v. Schwalby (1896) 16 Sup. Ct. 754, 765, 162 U. S. 255, 40 L. Ed. 960; Munos v. Southern Pac. Co. (1892) 51 Fed. 188, 190, 2 C. C. A. 163.

§ 14. (R. S. § 13.) Repeals not to affect liabilities, unless, etc.

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Act Feb. 25, 1871, c. 71, § 4, 16 Stat. 432.

Notes of Decisions

Previous rule.—The repeal of a statute pending proceedings to enforce a penalty or forfeiture under it barred further proceedings, where there was no saving clause. Union Iron Co. v. Pierce (C. C. 1869) Fed. Cas. No. 14,367; Eastman v. Clackamas County (C. C. 1887) 32 Fed. 24, 33; U. S. v. Six Fermenting Tubs (D. C. 1868) Fed. Cas. No. 16,296.

By the repeal of an act without any reservation of its penalties, all criminal proceedings taken under it fell. U. S. v. Tynen (1870) 11 Wall. 88, 95, 20 L. Ed. 153; U. S. v. Reisinger (1888) 128 U. S. 398, 9 Sup. Ct. 99, 100, 32 L. Ed. 480.

After the expiration or repeal of a law, no penalty could be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some special provision was made for that purpose by statute. Yeaton v. U. S. (1809) 5 Cranch, 281, 3 L. Ed. 101.

An offense against a temporary act could not be punished, after the expiration of the act, unless a particular provision was made by law for the purpose. The Irresistible (1822) 7 Wheat. 551, 5 L. Ed. 520.

An indictment could not be sustained under a statute which had been repealed without any saving clause. U. S. v. Passmore (C. C. 1804) Fed. Cas. No. 16,005, 4 Dall. 372, 374, 1 L. Ed. 871.

An offense created by law fell by a repeal of the law without reservation of jurisdiction. Anonymous (C. C. 1804) Fed. Cas. No. 475.

Where a statute giving the right to recover money paid under an illegal contract is repealed, a pending suit and the cause of action involved in it fall with the repeal. Kimbro v. Colgate (C. C. 1864) Fed. Cas. No. 7,778.

—— Particular saving clauses.—An action commenced on the day a law was repealed was within a saving clause of all actions commenced before the passage of the repealing act. In re Ankrim (C. C. 1843) Fed. Cas. No. 395.

The repealing clause of Act March 2, 1863, saved prosecution under Act March 3, 1823, for offenses previously committed. U. S. v. Kohnstamm (C. C. 1864) Fed. Cas. No. 15,542.

An offense punishable by fine and imprisonment, under Act Jan. 9, 1809, was not saved from repeal by the saving clause in Act June 28, 1809, § 2. U. S. v. Mann (C. C. 1812) Fed. Cas. No. 15,718.

The repealing clause of Act Jan. 11, 1868, did not operate to prevent conviction and punishment for an offense under Act July 13, 1866, § 42. In re Callicot (C. C. 1870) Fed. Cas. No. 2,323.

Operation and effect of section as to subsequent repeals and saving clauses.—As this section has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment. But, while this is true, its provisions are to be treated as if incorporated in and as a part of subsequent enactments, and therefore, under the general principles of construction requiring, if possible, that effect be given to all the parts of a law, the section must be enforced unless, either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of this section. Great Northern R. Co. v. U. S. (1908) 28 Sup. Ct. 313, 316, 208 U. S. 452, 52 L. Ed. 567; Hertz v. Woodman (1910) 30 Sup. Ct. 621, 625, 218 U. S. 205, 54 L. Ed. 1001.

This section was not an attempt by the Congress which enacted it to curtail the authority of succeeding Congresses by limiting in advance the effect to be given to their enactments, but was the substitution of a new rule of construction to be observed by the courts with respect to statutes to be thereafter enacted which is to be followed until abrogated by some later Congress. U. S. v. Standard Oil Co. (D. C. 1907) 148 Fed. 719; (D. C. 1907) U. S. v. Chicago, St. P., M. & O. Ry. Co., 151 Fed. 84,

judgment affirmed (1908) Chicago, St. P., M. & O. R. Co. v. U. S., 162 Fed. 835, 90 C. C. A. 211, writ of certiorari denied (1909) 29 Sup. Ct. 689, 212 U. S. 579, 53 L. Ed. 659.

This section does not limit the power of succeeding Congresses, but merely prescribes a rule of construction, binding upon the courts, as a substitute for the common-law rule with respect to the effect of a repealing statute as a release from penalties and prosecutions for offenses committed under the statute repealed, and under it the repeal of the penal statute extinguishes no penalties previously incurred thereunder, in the absence of an express extinguishing clause in the repealing act. U. S. v. Standard Oil Co. (D. C. 1907) 148 Fed. 719, 722; United States v. Chicago, St. P., M. & O. Ry. Co. (D. C. 1907) 151 Fed. 84, judgment affirmed (1908) Chicago, St. P., M. & O. R. Co. v. United States, 162 Fed. 835, 90 C. C. A. 211, writ of certiorari denied (1909) 29 Sup. Ct. 689, 212 U. S. 579, 53 L. Ed. 659.

It was the obvious intention of this section to extend the similar provision of R. S. § 5598, post, § 10595, relating to the repeal of statutes embraced in the Revised Statutes, to the repeal of any statute not embraced in said revision. U. S. v. Reisinger (1888) 9 Sup. Ct. 99, 100, 128 U. S. 398, 32 L. Ed. 480.

In enacting this provision, in Act Feb. 25, 1871, c. 71, § 4, Congress was not addressing itself particularly to succeeding Congresses, but to the courts. The courts are commanded by this section to treat a repealed statute as still remaining in force for punishment of violations thereof, unless the courts shall find that the repealing act "expressly provides" that such repealed act shall not sustain any prosecution for its violation. Lang v. U. S. (1904) 133 Fed. 201, 205, 66 C. C. A. 225 (concurring opinion).

As applied to subsequent repealing acts, which do not, expressly or by necessary implication, contravene its provisions, this section is effective and obligatory upon the courts, but beyond this it is without effect and not obligatory upon any one. Notwithstanding its enactment, Congress remained at liberty to legislate respecting its subject-matter in any manner they might choose. Great Northern Ry. Co. v. U. S. (1907) 155 Fed. 945, 958, 84 C. C. A. 93, affirmed (1908) 28 Sup. Ct. 313, 208 U. S. 452, 52 L. Ed. 567.

Offenses and penalties, etc., and prosecutions within section.—The words "penalty," "forfeiture," and "liability," are synonymous with "punishment," in connection with crimes of every grade, and the section was intended to apply to all offenses. U. S. v. Reisinger (1888) 9 Sup. Ct. 99, 100, 128 U. S. 398, 32 L. Ed. 480; U. S. v. Ulrici (C. C. 1875) Fed. Cas. No. 16,594; U. S. v. Barr (D. C. 1877) Fed. Cas. No. 14,527; U. S. v. Van Vliet (D. C. 1885) 23 Fed. 35.

It is no defense to a prosecution for taking illegal fees, under Act June 20, 1878, relating to claim agents and attorneys in pension cases, instituted after the repeal of that act by Act July 4, 1884, that the repealing act contained no reservation of the right to punish for offenses committed prior to the repeal. U. S. v. Reisinger (1888) 9 Sup. Ct. 99, 128 U. S. 398, 32 L. Ed. 480.

The section covers a prosecution under a statute which authorizes imprisonment as well as fine. U. S. v. Mathews (C. C. 1885) 23 Fed. 74.

Statutes and repeals within section.—The exception from the operation of the general repeal of conflicting laws, made by Hepburn Act June 29, 1906, c. 3591, § 10, in favor of pending causes, which "shall be prosecuted to conclusion in the manner heretofore provided by law," did not supersede the general provision of this section, so as to prevent future criminal prosecutions for offenses against Elkins Act Feb. 19, 1903, c. 708, committed prior to the enactment of the Hepburn Act. Great Northern R. Co. v. U. S. (1908) 28 Sup. Ct. 313, 208 U. S. 452, 52 L. Ed. 567; U. S. v. New York Cent. & H. R. R. Co. (D. C. 1907) 153 Fed. 630, judgment reversed New York Cent. & H. R. R. Co. v. U. S. (1908) 166 Fed. 267, 92 C. C. A. 331.

In view of this section, the inheritance tax imposed by the War Revenue Act of 1898, although not "due and payable" under section 30 of that act, as amended by Act March 2, 1901, § 11, post, §§ 2851, 2868, until one year after the death of the testator, must be deemed to have become an obligation immediately upon the passing by death of a vested right to the present possession or enjoyment of a legacy or distributive share, so as to be within the saving clause of section 6369, preserving all taxes "imposed" prior to the taking effect of that act, although the testator's death was less than one year prior to such date. Hertz v. Woodman (1910) 30 Sup. Ct. 621, 218 U. S. 205, 54 L. Ed. 1001.

Jurisdiction of the federal courts to establish title of heirs of an Indian allottee dying intestate during the trust period was taken away, even as to pending cases, by Act June 25, 1910, notwithstanding this section. Hallowell v. Commons (1916) 239 U. S. 506, 36 Sup. Ct. 202, 60 L. Ed. —.

This section applies only to cases where the statute defining an offense has been repealed. Moore v. U. S. (1898) 85 Fed. 465, 470, 29 C. C. A. 269.

The section is inapplicable where a law affecting the territories of the United States becomes inoperative as to one of them by its admission as a state, as this is not a repeal of the statute. Moore v. U. S. (1898) 85 Fed. 465, 29

C. C. A. 269. CONTRA, U. S. v. Baum (C. C. 1896) 74 Fed. 43, 45.

Although Chinese Exclusion Act May 6, 1882, post, § 4290, was, by its terms, limited to a period of 10 years, a violation thereof committed within that period might be indicted and punished after its expiration, even without the continuance of that act in force by Act May 5, 1892, § 1, post, § 4315. Sims v. U. S. (1903) 121 Fed. 515, 58 C. C. A. 92.

Sugars remaining in the place where they were refined when Act June 5, 1794, was repealed, are not subject to duties. Coxe v. Pennington (C. C. 1803) Fed. Cas. No. 3,311.

The provision of Act Feb. 25, 1871, § 4, embodied in this section, did not apply to an act not forbidden by statute at the time of its commission, although such act was an offense under a statute which had then been repealed, and was again made punishable under a subsequent statute. U. S. v. Bennett (C. C. 1874) Fed. Cas. No. 14,570.

Act June 27, 1898, c. 503, amending Act March 3, 1887, § 2, post, § 991 (20), which conferred jurisdiction on the Circuit and District Courts over suits on claims against the government, by excluding from such jurisdiction suits by officers of the United States or their assigns for the recovery of fees or compensation having been passed without a saving clause, applies to such suits then pending. Fairchild v. U. S. (C. C. 1899) 91 Fed. 297.

In a federal court suits were instituted by railroad companies against the Railroad Commission of Alabama and the Attorney General to enjoin the enforcement of a statute fixing railroad rates and to test its constitutionality, and as provided for by the statute itself injunctions were granted suspending its operation on the giving of bonds by the complainants to repay to shippers any sums collected above the statutory rates in case they should be sustained. Pending each suit, and after claims had been filed by shippers for recovery on the bonds of excess charges, the statute was repealed and substitutes enacted, which were subject to the same constitutional objections, but which expressly deprived the Commission and the Attorney General of any power to take action for their enforcement, leaving it to private parties to bring actions and prosecutions for their violation. Held, that such repeal did not abate the suits, and that supplemental bills might be filed therein to enjoin the enforcement of the new acts. Central of Georgia Ry. Co. v. Railroad Commission of Alabama (C. C. 1908) 161 Fed. 925, decree reversed Railroad Commission of Alabama v. Central of Georgia R. Co. (1909) 170 Fed. 225, 95 C. C. A. 117.

The repealing clause, paragraph 182 of the Revenue Act of August, 1894 (28 Stat. 521), expressly repealed those clauses of the revenue act of October 1, 1890 (26 Stat. 583), granting bounty to licensed sugar producers; and such repeal had reference, not only to licenses to be granted producers thereafter, but also to licenses granted and existing at the date of the passage of the act of 1894. U. S. v. Carlisle (1895) 5 App. D. C. 138.

Liabilities within section.—The liability of a creditor who had received property from his debtor, under circumstances constituting an unlawful preference within the Bankruptcy Act, to refund it to the assignee of the debts in bankruptcy, is a "liability" within this section. Tinker v. Van Dyke (C. C. 1876) Fed. Cas. No. 14,058; Warren v. Garber (C. C. 1877) Fed. Cas. No. 17,-196; Bradbury v. Galloway (D. C. 1875) Fed. Cas. No. 1,764.

This section is not alone applicable to penalties and forfeitures under penal statutes. It extends as well to "liabilities," and a liability or obligation to pay a tax imposed under a repealed statute is not only within the letter, but the spirit and purpose, of the provision. Hertz v. Woodman (1909) 30 Sup. Ct. 621, 625, 218 U. S. 205, 54 L. Ed. 1001.

The repeal of a lien law after the lien has attached by performance of work does not defeat the lien. In re Hope Min. Co. (D. C. 1871) Fed. Cas. No. 6,681; Sabin v. Connor (D. C. 1871) Fed. Cas. No. 12,197.

The liability to forfeiture of imported goods knowingly entered by means of a false invoice is within the section. U. S. v. Four Cases of Lastings (D. C. 1879) Fed. Cas. No. 15,145.

A tax on capital and deposits of banks, etc., imposed by an internal revenue law, for which such banks, etc., would not become liable until the end of the half year current at the time of the repeal of the provision therefor, is not a "liability incurred," which could be saved by these provisions from the operation of the repeal. (1883) 17 Op. Atty. Gen. 539, 544.

Under this section, after a subcontractor had sued in a state circuit court government building contractors and their surety on a bond given under Act Aug. 13, 1894, post, § 6923, binding them to pay for all labor and material used for a balance due under the subcontract, the subsequent amendment of that act by Act Feb. 24, 1905, c. 778, limiting jurisdiction of such actions to the federal circuit courts, did not oust the state court's jurisdiction; that amendment not disclosing an intent to affect existing actions. Burton v. Frank A. Seifert Plastic Relief Co. (1908) 61 S. E. 933, 108 Va. 338.

Application of section to particular offenses.—Offense saved: Rebating by carriers, Great Northern Ry. Co. v. U. S. (1908) 28 Sup. Ct. 313, 316, 208 U. S. 452, 52 L. Ed. 567; U. S. v. Standard Oil Co. (D. C. 1907) 148 Fed. 719,

722; taking excessive pension fee, U. S. v. Reisinger (1888) 9 Sup. Ct. 99, 100, 128 U. S. 398, 32 L. Ed. 480; U. S. v. Mathews (C. C. 1885) 23 Fed. 74; U. S. v. Van Vliet (D. C. 1885) 23 Fed. 35, reversing 22 Fed. 641; landing Chinese laborers, Sims v. U. S. (1903) 121 Fed. 515, 517, 58 C. C. A. 92; importing women for immoral purposes, U. S. v. Lair (1912) 195 Fed. 47, 115 C. C. A. 49; failure to make required alteration of bridge obstructing navigation, U. S. v. Keokuk & H. Bridge Co. (D. C. 1891) 45 Fed. 178, 188; failure of carriers to file rates, U. S. v. New York Cent. & H. R. R. Co. (D. C. 1907) 153 Fed. 630, 635, reversed 166 Fed. 267, 92 C. C. A. 331; cutting timber on public mineral lands, in violation of regulation prescribed under Act June 3, 1878, post, §§ 4989–4991, U. S. v. Williams (1888) 8 Mont. 85, 19 Pac. 288.

Cited without definite application, U. S. v. Jacobus (1899) 96 Fed. 260, 261, 37 C. C. A. 466; Sackett v. McCaffrey (1904) 131 Fed. 219, 223, 65 C. C. A. 205; Franklin Sugar Refining Co. v. U. S. (C. C. 1906) 144 Fed. 563, 565.

TITLE II

THE CONGRESS

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CHAPTER ONE

Election of Senators

Sec.
14a. Time for election of Senators by people of State.

Sec.
14b. Mode of election of Senators until provision therefor by legislature of State.

(R. S. §§ 14–19. Superseded.)

This chapter of Title 2 of the Revised Statutes included sections 14–19 thereof, providing for election of Senators by the legislatures of the several states, in accordance with the Const. Art. I, § 3, cl. 1, ante, p. xlvii. They were superseded by the amendment to the Constitution providing that Senators shall be elected by the people of the several states, Const. Amend. XVII.

§ 14a. (Act June 4, 1914, c. 103, § 1.) Time for election of Senators by people of State.

At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the fourth day of March next thereafter. (38 Stat. 384.)

§ 14b. (Act June 4, 1914, c. 103, § 2.) Mode of election of Senators until provision therefor by legislature of State.

In any State wherein a United States Senator is hereafter to be elected either at a general election or at any special election called by the executive authority thereof to fill a vacancy, until or unless otherwise specially provided by the legislature thereof, the nomination of candidates for such office not heretofore made shall be made, the election to fill the same conducted, and the result thereof determined, as near as may be in accordance with the laws of such State regulating the nomination of candidates for and election of Members at Large of the National House of Representatives: Provided, That in case no provision is made in any State for the nomination or election of Representatives at Large, the procedure shall be in accordance with the laws of such State respecting the ordinary executive and administrative officers thereof who are elected by the vote of the people of the entire State: And provided further, That in any case the candidate for Senator receiving the highest number of votes shall be deemed elected. (38 Stat. 384.)

Section 3 of said Act June 4, 1914, c. 103, provided that this section (§ 2) should expire by limitation at the end of three years from the date of its approval.

CHAPTER TWO

Apportionment and Election of Representatives

Sec.
15. Number of Representatives, and apportionment.
16. Representatives from States of Arizona and New Mexico.
17. Election by districts.
18. Election of additional Representatives at large in cases of increase in number.
19. Nominations of candidates for Representatives to be elected at large.
20. Reduction of representation under amendment 14.
21. Time of election.
22. Time for election of Representatives not to apply to certain States.
23. Vacancies.
24. Votes by ballot or voting machine.

(R. S. § 20. Superseded.)

This section prescribed the number and apportionment of Representatives, which were changed by subsequent apportionments, the last of which was made by Act Aug. 8, 1911, c. 5, § 1, post, § 15.

§ 15. (Act Aug. 8, 1911, c. 5, § 1.) Number of Representatives, and apportionment.

After the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-three Members, to be apportioned among the several States as follows:

Alabama, ten.
Arkansas, seven.
California, eleven.
Colorado, four.
Connecticut, five.
Delaware, one.
Florida, four.
Georgia, twelve.
Idaho, two.
Illinois, twenty-seven.
Indiana, thirteen.
Iowa, eleven.
Kansas, eight.
Kentucky, eleven.
Louisiana, eight.
Maine, four.
Maryland, six.
Massachusetts, sixteen.
Michigan, thirteen.
Minnesota, ten.
Mississippi, eight.
Missouri, sixteen.
Montana, two.
Nebraska, six.
Nevada, one.
New Hampshire, two.
New Jersey, twelve.
New York, forty-three.
North Carolina, ten.
North Dakota, three.
Ohio, twenty-two.
Oklahoma, eight.
Oregon, three.
Pennsylvania, thirty-six.
Rhode Island, three.
South Carolina, seven.
South Dakota, three.
Tennessee, ten.
Texas, eighteen.
Utah, two.
Vermont, two.
Virginia, ten.
Washington, five.
West Virginia, six.
Wisconsin, eleven.
Wyoming, one.

(37 Stat. 13.)

The apportionment of Representatives in Congress among the several States which was incorporated in R. S. § 20, was made originally, under the Ninth Census, by Act Feb. 2, 1872, c. 11, 17 Stat. 28. Thereafter, apportionments were made under the successive Censuses, as follows:

Under the Tenth Census, by Act Feb. 25, 1882, c. 20, 22 Stat. 5.
Under the Eleventh Census, by Act Feb. 7, 1891, c. 116, 26 Stat. 735.
Under the Twelfth Census, by Act Jan. 16, 1901, c. 93, 31 Stat. 733.
Under the Thirteenth Census, by Act Aug. 8, 1911, c. 5, 37 Stat. 13.

Each apportionment, in turn, superseded that which preceded it. In like manner, R. S. § 21, relating to Representatives of new States, and R. S. § 23, providing for election of Representatives by districts, were superseded by provisions to the same effect in Act Feb. 25, 1882, which were repeated in sub-

stance in each of the subsequent apportionment acts, and are now contained in Act Aug. 8, 1911, c. 5, §§ 2–4, post, §§ 16–18. Hence, the provisions of the acts of 1882, 1891, and 1901, as well as those of R. S. §§ 20, 21, 23, are omitted, and the act of 1911 is included as the only law in force on the subjects covered by it.

§ 16. (Act Aug. 8, 1911, c. 5, § 2.) Representatives from States of Arizona and New Mexico.

If the Territories of Arizona and New Mexico shall become States in the Union before the apportionment of Representatives under the next decennial census they shall have one Representative each, and if one of such Territories shall so become a State, such State shall have one Representative, which Representative or Representatives shall be in addition to the number four hundred and thirty-three, as provided in section one of this Act, and all laws and parts of laws in conflict with this section are to that extent hereby repealed. (37 Stat. 14.)

Previous provisions for Representatives from New Mexico and Arizona were made by the enabling act for the admission of those States, Act June 20, 1910, c. 310, §§ 5, 23, 36 Stat. 561, 571.

Provisions for representation of Alaska and Hawaii by Delegates in the House of Representatives are contained in Act May 7, 1906, c. 2083, § 1, post, § 3545, and Act April 30, 1900, c. 339, § 85, as amended by Act June 28, 1906, c. 3582, post, § 3726.

Provisions for two Resident Commissioners from the Philippine Islands are contained in Act Aug 29, 1916, c. 416, § 20, post, under Title XXIII, "The Territories and Insular Possessions," Chapter Three D, "The Philippine Islands."

Provisions for a Resident Commissioner from Porto Rico are contained in Act April 12, 1900, c. 191, § 39, post, § 3796.

§ 17. (Act Aug. 8, 1911, c. 5, § 3.) Election by districts.

In each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative. (37 Stat. 14.)

Notes of Decisions

Members elected by districts representatives of entire state.—Under the provision of Act June 25, 1842, c. 47, § 2, 5 Stat. 491, for election of representatives by districts, carried forward as R. S. § 23, it has never been doubted that representatives thus chosen represented the entire people of the state acting in their sovereign capacity. McPherson v. Blacker (1892) 13 Sup. Ct. 3, 7, 146 U. S. 1, 36 L. Ed. 869.

§ 18. (Act Aug. 8, 1911, c. 5, § 4.) Election of additional Representatives at large in cases of increase in number.

In case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed. (37 Stat. 14.)

§ 19. (Act Aug. 8, 1911, c. 5, § 5.) Nominations of candidates for Representatives to be elected at large.

Candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as

candidates for governor, unless otherwise provided by the laws of such State. (37 Stat. 15.)

(R. S. § 21. Superseded.)

This section provided for additional Representatives from new States admitted to the Union. It was superseded by provisions for the same purpose in the subsequent apportionment acts. See note to Act Aug. 8, 1911, c. 5, § 1, ante, § 15, and section 2 of that act, ante, § 16.

§ 20. (R. S. § 22.) Reduction of representation under amendment 14.

Should any State deny or abridge the right of any of the male inhabitants thereof, being twenty-one years of age, and citizens of the United States, to vote at any election named in the amendment to the Constitution, article fourteen, section two, except for participation in the rebellion or other crime, the number of representatives apportioned to such State shall be reduced in the proportion which the number of such male citizens shall have to the whole number of male citizens twenty-one years of age in such State.

Act Feb. 2, 1872, c. 11, § 6, 17 Stat. 29.

(R. S. § 23. Superseded.)

This section provided for the election of Representatives by districts in each State. It was superseded by provisions for the same purpose in the subsequent apportionment acts. See note to Act Aug. 8, 1911, c. 5, § 1, ante, § 15, and sections 3, 4, of that act, ante, §§ 17, 18.

(R. S. § 24. Repealed.)

This section incorporated the provision of Act March 3, 1873, c. 239, 17 Stat. 578, fixing the time for the election in the year 1874 of Representatives from the State of California to the Forty-Fourth Congress. That act was repealed by Act May 21, 1874, c. 187, 18 Stat. 48, which, though passed before the enactment of the Revised Statutes, took effect, by virtue of R. S. § 5601, post, § 10598, as a subsequent statute, repealing any portion of the revision inconsistent therewith.

§ 21. (R. S. § 25.) Time of election.

The Tuesday next after the first Monday in November, in the year eighteen hundred and seventy-six, is established as the day, in each of the States and Territories of the United States, for the election of Representatives and Delegates to the Forty-fifth Congress; and the Tuesday next after the first Monday in November, in every second year thereafter, is established as the day for the election, in each of said States and Territories, of Representatives and Delegates to the Congress commencing on the fourth day of March next thereafter.

Act Feb. 2, 1872, c. 11, § 3, 17 Stat. 28.

This section was modified, so as not to apply to certain states, by a provision of Act March 3, 1875, c. 130, § 6, post, § 22.

Notes of Decisions

Purpose of provision.—The provisions of Act Feb. 2, 1872, c. 11, incorporated in this section, were passed to remedy evils arising from the election of members of Congress occurring at different times in the different states. Ex parte Yarbrough (1884) 4 Sup. Ct. 152, 157, 110 U. S. 651, 28 L. Ed. 274.

§ 22. (Act March 3, 1875, c. 130, § 6.) Time for election of Representatives not to apply to certain states.

Section twenty-five of the Revised Statutes prescribing the time for holding elections for Representatives to Congress, is hereby modified so as not to apply to any State that has not yet changed its day of election, and whose constitution must be amended in order to effect a change in the day of the election of State officers in said State. (18 Stat. 400.)

§ 23. (R. S. § 26.) Vacancies.

The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such

vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

Act Feb. 2, 1872, c. 11, § 4, 17 Stat. 29.

Notes of Decisions

Duty of state Legislature to order election.—When, at a regular biennial election for a member of the United States House of Representatives, there is a failure to elect found by the General Assembly on its count of the vote, it is the duty of the General Assembly to order a new election, whether such new election be ordered before or after the ensuing 4th day of March. In re Congressional Election (1887) 15 R. I. 624, 9 Atl. 224.

§ 24. (R. S. § 27, as amended, Act Feb. 14, 1899, c. 154.) Votes by ballot or voting machine.

All votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been duly authorized by the State law; and all votes received or recorded contrary to this section shall be of no effect.

Act Feb. 28, 1871, c. 99, § 19, 16 Stat. 440. Act May 30, 1872, c. 239, 17 Stat. 192. Act Feb. 14, 1899, c. 154, 30 Stat. 836.

This section, as enacted in the Revised Statutes, made no provision for use of voting machines, and contained, at the end of the section, a provision that it should not apply to any State voting otherwise whose election for Representatives occurred previous to the regular meeting of its legislature next after February 28, 1871.

It was amended by Act Feb. 14, 1899, c. 154, last cited above, by inserting, after the word "ballot," the words, "or voting machine the use of which has been duly authorized by the State law," and omitting the provision which suspended temporarily its application to certain States.

CHAPTER THREE

Organization of Meetings of Congress

Sec.
25. Oath of Senators.
26. Oath of President of the Senate.
27. Oath of Senators, etc., may be administered by presiding officer.
28. Oath of officers of Senate and witnesses may be administered by Secretary of Senate or Chief Clerk.
29. Oath of Speaker, members, and delegates.
30. Roll of Representatives-elect.
31. When roll made by Sergeant-at-Arms.
32. When roll made by Door-keeper.
33. President may change place of meeting, when.

§ 25. (R. S. § 28.) Oath of Senators.

The oath of office shall be administered by the President of the Senate to each Senator who shall hereafter be elected, previous to his taking his seat.

Act June 1, 1789, c. 1, § 2, 1 Stat. 23.

All oaths or affirmations required by the Constitution, or by law, to be taken by any Senator, may be administered by the presiding officer, for the time being, of the Senate, by Act April 18, 1876, c. 66, § 1, post, § 27.

Provisions as to oaths of office in general were made by R. S. §§ 1756–1759, and subsequent statutes post, §§ 3216–3223.

Notes of Decisions

Necessity of taking oath.—The taking by a Senator-elect of the oath required by Const. art. 6, and by R. S. § 28, embodied in this section, at the bar of the Senate, is the usual manner of indicating acceptance and of being inducted into the office; but it is not probable that a failure to take the oath would affect the acts of one who is by the Senate actually admitted to a seat therein, and who actually exercises the functions of that office, or that it would constitute any defense to a prosecution for a criminal offense committed during his incumbency of the office. U. S. v. Dietrich (C. C. 1904) 126 Fed. 676, 682.

This section, referring to a Senator, so terms him when he has not taken the oath. (1879) 16 Op. Atty. Gen. 271, 274.

Cited without definite application, (1882) 17 Op. Atty. Gen. 419.

§ 26. (R. S. § 29.) Oath of President of the Senate.

When a President of the Senate has not taken the oath of office, it shall be administered to him by any member of the Senate.

Act June 1, 1789, c. 1, § 2, 1 Stat. 23.

§ 27. (Act April 18, 1876, c. 66, § 1.) Oath of Senators, etc., may be administered by presiding officer.

The presiding officer, for the time being, of the Senate of the United States, shall have power to administer all oaths and affirmations that are or may be required by the Constitution, or by law, to be taken by any Senator, officer of the Senate, witness, or other person, in respect to any matter within the jurisdiction of the Senate. (19 Stat. 34.)

This section and the section next following were an act entitled "An act further to provide for the administering of oaths in the Senate."

§ 28. (Act April 18, 1876, c. 66, § 2.) Oath of officers of Senate and witnesses may be administered by Secretary of Senate or Chief Clerk.

The Secretary of the Senate, and the Chief Clerk thereof, shall, respectively, have power to administer any oath or affirmation required by law, or by the rules or orders of the Senate, to be taken by any officer of the Senate, and to any witness produced before it. (19 Stat. 34.)

Further provisions for administration of oaths to witnesses in congressional investigations were made by R. S. § 101, and Act June 26, 1884, c. 128, post, §§ 155, 156.

§ 29. (R. S. § 30.) Oath of Speaker, members, and delegates.

At the first session of Congress after every general election of Representatives, the oath of office shall be administered by any member of the House of Representatives to the Speaker; and by the Speaker to all the members and delegates present, and to the Clerk, previous to entering on any other business; and to the members and delegates who afterward appear, previous to their taking their seats.

Act June 1, 1789, c. 1, § 2, 1 Stat. 23.

Notes of Decisions

"Members."—This section indicates distinctly that the "members" there referred to are gentlemen who have not taken the oath. (1879) 16 Op. Atty. Gen. 271, 274.

Cited without definite application, (1882) 17 Op. Atty. Gen. 419.

§ 30. (R. S. § 31.) Roll of Representatives-elect.

Before the first meeting of each Congress the Clerk of the next preceding House of Representatives shall make a roll of the Representatives-elect, and place thereon the names of those persons, and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their States respectively, or the laws of the United States.

Act Feb. 21, 1867, c. 56, § 1, 14 Stat. 397. Act March 3, 1863, c. 108, 12 Stat. 804.

Notes of Decisions

Jurisdiction of state courts before issue of election certificate.—Before certificate of election had issued to either candidate for Congress, and before either had been accepted by Congress or sworn in as a member, the state courts were open to the candidate complaining that a certificate of election was about to be issued in violation of law. People ex rel. Brown v. Board of Sup'rs of Suffolk County (N. Y. 1915) 110 N. E. 776.

Right to be placed on roll.—A person who presents credentials showing that he was regularly elected must be placed on the roll of Representatives-elect. Page v. U. S. (1888) 8 Sup. Ct. 1026, 1027, 127 U. S. 67, 32 L. Ed. 65.

Cited without definite application, U. S. v. Dietrich (C. C. 1904) 126 Fed. 676, 680.

§ 31. (R. S. § 32.) When roll made by Sergeant-at-Arms.

In case of a vacancy in the office of Clerk of the House of Representatives, or of the absence or inability of the Clerk to discharge the duties imposed on him by law or custom relative to the preparation of the roll of Representatives or the organization of the House, those duties shall devolve on the Sergeant-at-Arms of the next preceding House of Representatives.

Act Feb. 21, 1867, c. 56, § 2, 14 Stat. 397.

§ 32. (R. S. § 33.) When roll made by Door-keeper.

In case of vacancies in the offices of both the Clerk and the Sergeant-at-Arms, or of the absence or inability of both to act, the duties of the Clerk relative to the preparation of the roll of the House of Representatives or the organization of the House shall be performed by the Door-keeper of the next preceding House of Representatives.

Act Feb. 21, 1867, c. 56, § 2, 14 Stat. 397.

§ 33. (R. S. § 34.) President may change place of meeting, when.

Whenever Congress is about to convene, and from the prevalence of contagious sickness, or the existence of other circumstances, it would, in the opinion of the President, be hazardous to the lives or health of the members to meet at the seat of Government, the President is authorized, by proclamation, to convene Congress at such other place as he may judge proper.

Act April 3, 1794, c. 17, 1 Stat. 353.

In case of the prevalence of a contagious or epidemic disease at the seat of Government, the President may direct the removal of the public offices to another place by R. S. § 4798, post, § 9180.

Notes of Decisions

Members within meaning of section.— The word "members" may apply either to members who have or who have not taken the oath. (1879) 16 Op. Atty. Gen. 271, 274.

CHAPTER FOUR

Compensation of Members

Sec.
34. Salaries of members of Congress.
35. Pay and mileage of Senators, Representatives, and Delegates.
36. Compensation of Speaker, Vice-President, heads of Executive Departments, and of Senators, Representatives, Delegates, and Resident Commissioner from Porto Rico.
37. Compensation of President of the Senate.
38. Salary of Speaker.
39. Salary payable monthly to Senators-elect.
40. Salary payable monthly to Representatives and Delegates elect.
41. Salary payable monthly after taking oath.
42. Deductions for absence.
43. Deductions for withdrawal from seat.
44. Deductions for books.
45. Newspapers.
46. Postage.
47. Salary in lieu of all allowances, except traveling.
48. Mode of payment.
49. Certificate of salary and accounts.
50. Effect of certificate.
51. Certificate of salary of Representatives during recess of Congress.
52. Substitute for Speaker to sign certificates for salary and accounts.
53. Pay of member dying after commencement of a Congress.
54. Limits of the rule.
55. Monuments to deceased Senators or members of House of Representatives interred in Congressional Cemetery.
56. Pay of members elected to fill vacancies.
57. Salaries of Senators elected or appointed to fill vacancies.
57a. Salaries of Representatives, Delegates, etc., elected for unexpired terms.

§ 34. (R. S. § 35.) Salaries of members of Congress.

Each Senator, Representative, and Delegate is entitled to a salary (except as to the Speaker) of seven thousand five hundred dollars a year.

Act March 3, 1873, c. 226, § 1, 17 Stat. 486.

The provisions of the legislative, executive, and judicial appropriation act of March 3, 1873, c. 226, § 1, cited above, which increased the compensation of the President, the Vice President, the Justices of the Supreme Court, the heads and assistant secretaries of the Executive Departments, Senators, Representatives, and Delegates in Congress, and officers, clerks, and others in the employ of the Senate and House of Representatives, and which were sometimes referred to as the "Salary Grab Act," were incorporated, as the law in force at the time, in the Revised Statutes, as part of this and of the numerous other sections which set forth the salaries of the various officers. But Act Jan. 20, 1874, c. 11, 18 Stat. 4, repealed so much of said Act March 3, 1873, as provided "for the increase of the compensation of public officers and employés, whether members of Congress, Delegates, or others, except the President of the United States and the Justices of the Supreme Court," and further provided that "the salaries, compensation, and allowances of all said persons, except as aforesaid, shall be as fixed by the laws in force at the time of the passage of said act." As said repealing Act of Jan. 20, 1874, though passed before the enactment of the Revised Statutes, took effect, pursuant to R. S. § 5601, post, § 10598, as a subsequent statute, repealing any portion of the revision inconsistent therewith, it operated as a repeal of so much of R. S. § 35, as fixed the amount of the salary of each Senator, Representative, and Delegate at $7,500 a year, and restored, as the law previously in force, the provisions of Act July 28, 1866, c. 296, § 17, post, § 35. The compensation of each Senator, Representative, and Delegate fixed by said previous act was $5,000 per annum, and, in addition, mileage at the rate prescribed thereby. Such compensation was again increased to $7,500 per annum by Act Feb. 26, 1907, c. 1635, § 4, post, § 36.

§ 35. (Act July 28, 1866, c. 296, § 17.) Pay and mileage of Senators, Representatives, and Delegates.

The compensation of each Senator, Representative, and Delegate in Congress shall be five thousand dollars per annum, to be computed from the first day of the present Congress, and in addition thereto mileage at the rate of twenty cents per mile, to be estimated by the nearest route usually traveled in going to and returning from each regular session; but nothing herein contained shall affect mileage accounts already accrued under existing laws: Provided, That hereafter mileage accounts of Senators shall be certified by the President of the Senate, and those of Representatives and Delegates by the Speaker of the House of Representatives: And provided further, That the pay of the Speaker shall be eight thousand dollars per annum. (14 Stat. 323.)

This section was part of the sundry civil appropriation act for the fiscal year 1867, cited above. It was superseded by the provisions of Act March 3, 1873, c. 226, § 1, for increased compensation, which were incorporated into the Revised Statutes as section 35 thereof, ante, § 34; but on the repeal of those provisions, by Act Jan. 20, 1874, c. 11, 18 Stat. 4, this section was revived, by express provision of said repealing act, as part of "the laws in force at the time of the passage of said act" so repealed. But the compensation of Senators, Representatives, and Delegates was again increased to $7,500 per annum, and the pay of the Speaker to $12,000 per annum, by Act Feb. 26, 1907, c. 1635, § 4, post, § 36.

The provisions of this section as to mileage, in addition to compensation per annum, were not superseded by any subsequent act.

§ 36. (Act Feb. 26, 1907, c. 1635, § 4.) Compensation of Speaker, Vice-President, heads of Executive Departments, and of Senators, Representatives, Delegates, and Resident Commissioner from Porto Rico.

On and after March fourth, nineteen hundred and seven, the compensation of the Speaker of the House of Representatives, the Vice-President of the United States and the heads of Executive Departments who are members of the President's Cabinet shall be at the rate of twelve thousand dollars per annum each, and the compensation of

Senators, Representatives in Congress, Delegates from Territories, and Resident Commissioner from Porto Rico shall be at the rate of seven thousand five hundred dollars per annum each. (34 Stat. 993.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1908, cited above. It superseded the provisions relating to the annual compensation of the members of Congress and officers named, contained in Act July 28, 1866, c. 296, § 17, ante, § 35, and in R. S. §§ 37, 154, 160, post, §§ 38, 226, 234.

This section was repealed, in so far as it related to the annual compensation of the Secretary of State, and his annual compensation was to be at the rate of $8,000, by Act Feb. 17, 1909, c. 137, post, §§ 285, 286. Appropriations of $8,000 therefor were made for the fiscal years 1910 and 1911; but the sum of $12,000 was appropriated for the Secretary of State for the subsequent years.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

The election of a Resident Commissioner from Porto Rico was authorized by Act April 12, 1900, c. 191, § 39, post, § 3796, which provided that the salary should be at the rate of $5,000 per annum.

The election of two Resident Commissioners from the Philippine Islands was authorized by Act July 1, 1902, c. 1369, § 8, post, § 3815, which provided that they should be entitled to a salary at the rate of $5,000 per annum, and $2,000 additional to cover all expenses. But by a provision of Act May 22, 1908, c. 186, § 1, post, § 3817, the salary of each is to be the same as that of the Resident Commissioner from Porto Rico.

§ 37. (R. S. § 36.) Compensation of President of the Senate.

Whenever there is no Vice-President, the President of the Senate for the time being is entitled to the compensation provided by law for the Vice-President.

Act Aug. 16, 1856, c. 123, § 2, 11 Stat. 48.

The compensation of the Vice-President was fixed at $12,000 per annum by Act Feb. 26, 1907, c. 1635, § 4, ante, § 36.

§ 38. (R. S. § 37.) Salary of Speaker.

The Speaker of the House of Representatives is entitled to receive, in full for all his services, compensation at the rate of ten thousand dollars a year.

Act March 3, 1873, c. 226, § 1, 17 Stat. 486.

The repeal, by Act Jan. 20, 1874, c. 11, 18 Stat. 4, of that part of the provisions of Act March 3, 1873, c. 226, § 1, which was incorporated in R. S. § 37, and the further provision of said Act Jan. 20, 1874, c. 11, as stated in the note to R. S. § 35, ante, § 34, operated as a repeal of so much of R. S. § 37, as fixed the amount of the salary of the Speaker at $10,000, and restored, as the law previously in force on the subject, the provision of Act July 28, 1866, c. 296, § 17, ante, § 35, which fixed his salary at $8,000.

The compensation of the Speaker was fixed at $12,000 per annum, on and after March 4, 1907, by Act Feb. 26, 1907, c. 1635, § 4, ante, § 36.

§ 39. (Act March 3, 1883, c. 143.) Salary payable monthly to Senators-elect.

Senators elected, whose term of office begins on the fourth day of March, and whose credentials in due form of law shall have been presented in the Senate, but who have had no opportunity to be qualified, may receive their compensation monthly, from the be-

ginning of their term, until there shall be a session of the Senate. (22 Stat. 632.)

This was a provision of the sundry civil appropriation act for the fiscal year 1884, cited above. A previous similar provision for payment of compensation of Representatives and Delegates elect was contained in R. S. § 38, post, § 40.

Cited without definite application,
U. S. v. Dietrich (C. C. 1904) 126 Fed. 676, 680, 685.

§ 40. (R. S. § 38, as amended, Act March 3, 1875, c. 130, § 1.) Salary payable monthly to Representatives and Delegates elect.

Representatives and Delegates elect to Congress, whose credentials in due form of law have been duly filed with the Clerk of the House of Representatives, in accordance with the provisions of section thirty-one, may receive their compensation monthly, from the beginning of their term until the beginning of the first session of each Congress, upon a certificate in the form now in use to be signed by the Clerk of the House, which certificate shall have the like force and effect as is given to the certificate of the Speaker.

Act March 3, 1873, c. 226, § 1, 17 Stat. 488. Act March 3, 1875, c. 130, § 1, 18 Stat. 389.

A further provision contained in this section, that "in case the Clerk of the House of Representatives shall be notified that the election of any such holder of a certificate of election will be contested, his name shall not be placed upon the roll of members elect so as to entitle him to be paid, until he shall have been sworn in as a member, or until such contest shall be determined," was repealed by a provision of Act March 3, 1875, c. 130, § 1, last cited above.

The certificate of the Speaker, referred to in this section, was provided for by R. S. § 47, post, § 49.

Notes of Decisions

Right to compensation.—One who presented credentials showing that he was regularly elected, and who was placed on the roll of Representatives-elect, and sworn in and took his seat, and who voted and served on committees, was entitled to salary. Page v. U. S. (1888) 8 Sup. Ct. 1026, 1027, 127 U. S. 67, 32 L. Ed. 65.

A territory having adopted a Constitution and formed a state government, cannot have a representative in Congress until she is admitted into the Union; therefore a representative to Congress, elected before the state is admitted, is entitled to pay only from the time of such admission. Conway v. U. S. (1863) 1 Ct. Cl. 68.

Cited without definite application,
U. S. v. Dietrich (C. C. 1904) 126 Fed. 676, 680, 685.

§ 41. (R. S. § 39.) Salary payable monthly after taking oath.

Each member and delegate, after he has taken and subscribed the required oath, is entitled to receive his salary at the end of each month.

Res. March 29, 1867, No. 18, 15 Stat. 24.

Cited without definite application,
U. S. v. Dietrich (C. C. 1904) 126 Fed. 676, 680.

§ 42. (R. S. § 40.) Deductions for absence.

The Secretary of the Senate and Sergeant-at-Arms of the House, respectively, shall deduct from the monthly payments of each member or delegate the amount of his salary for each day that he has been absent from the Senate or House, respectively, unless such member or delegate assigns as the reason for such absence the sickness of himself or of some member of his family.

Act Aug. 16, 1856, c. 123, § 6, 11 Stat. 49.

Notes of Decisions

Authority of sergeant-at-arms of House.—This provision is a recognition that the money in the hands of the sergeant-at-arms is under his official control. Crain v. U. S. (1890) 25 Ct. Cl. 204.

§ 43. (R. S. § 41.) Deductions for withdrawal from seat.

When any member or delegate withdraws from his seat and does not return before the adjournment of Congress, he shall, in addition to the sum deducted for each day, forfeit a sum equal to the amount which would have been allowed by law for his traveling expenses in returning home; and such sum shall be deducted from his compensation, unless the withdrawal is with the leave of the Senate or House of Representatives respectively.

Res. July 17, 1862, No. 68, § 2, 12 Stat. 628.

§ 44. (R. S. § 42.) Deductions for books.

When any book is ordered to and received by any member or delegate, by a resolution of either or both Houses of Congress, the price paid for the same shall be deducted from the compensation of such member or delegate; except books ordered to be printed by the Congressional Printer during the Congress for which the member or delegate was elected.

Act Aug. 16, 1856, c. 123, § 5, 11 Stat. 49.

Provisions for the distribution, to members of Congress and others, of public documents printed at the Government Printing Office, are collected under Title XLV, "Public Printing, Advertisements, and Public Documents."

The Congressional Printer was designated as the Public Printer by Act July 31, 1876, c. 246, 19 Stat. 102, and Act Jan. 12, 1895, c. 23, § 17, post, § 6971.

§ 45. (R. S. § 43.) Newspapers.

No member or delegate is entitled to any allowance for newspapers.

Act Feb. 12, 1868, c. 8, § 1, 15 Stat. 35.

§ 46. (R. S. § 44.) Postage.

No compensation or allowance shall now or hereafter be made to Senators, Representatives, or Delegates on account of postage.

Act Jan. 31, 1873, c. 82, 17 Stat. 421.

Provisions authorizing the Vice-President, Senators, Representatives, and Delegates in Congress, the Secretary of the Senate, and the Clerk of the House of Representatives to send and receive through the mail all public documents printed by order of Congress, and granting to the Vice-President, members and members-elect of, and Delegates and Delegates-elect to, Congress the franking privilege for correspondence, are collected under Title XLVI, "The Postal Service," c. 4, post, §§ 7378, 7379.

§ 47. (R. S. § 45.) Salary in lieu of all allowances, except traveling.

The compensation of Senators, Representatives, and Delegates, as prescribed in section thirty-five, shall be in lieu of all pay and allowance, except actual individual traveling expenses from their homes to the seat of government and return, by the most direct route of usual travel, once for each session of the House to which such Senator, Representative, or Delegate belongs, to be certified under his hand to the disbursing officer and filed as a voucher.

Act March 3, 1873, c. 226, § 1, 17 Stat. 486.

The repeal, by Act Jan. 20, 1874, c. 11, 18 Stat. 4, of so much of Act March 3, 1873, c. 226, § 1, incorporated in part in R. S. §§ 35, 45, and in other sections of this chapter, as provided for the increase of the compensation of Senators, Representatives, and Delegates in Congress, and the further provision of Act Jan. 20, 1874, c. 11, that their salaries, compensation, and allowances should be as fixed by the laws in force at the time of the passage of said act of March 3, 1873, c. 226, § 1, operated as a repeal of so much of this section as provided for the payment to Senators, Representatives, and Delegates of "actual individual traveling expenses from their homes to the seat of government and return, by the most direct route of usual travel, once for each session of the House to which such Senator, Representative, or Delegate belongs," and restored, as the law previously in force on the subject, the provision of Act July 28, 1866, c. 296, § 17, ante, § 35, which fixed the compensation of each Senator, Representative, and Delegate at $5,000 per annum, "and in addition thereto

mileage at the rate of twenty cents per mile, to be estimated by the nearest route usually traveled in going to and returning from each regular session."

The rate of compensation per annum was increased to $7,500 by Act Feb. 26, 1907, c. 1635, § 4, ante, § 36.

Notes of Decisions

Mileage not part of salary.—Congress has not made mileage an inseparable part of the salary or compensation of members. Wilson v. U. S. (1909) 44 Ct. Cl. 428.

Cited without definite application, Crain v. U. S. (1890) 25 Ct. Cl. 204.

§ 48. (R. S. § 46.) Mode of payment.

The compensation of members and delegates shall be passed as public accounts, and paid out of the public Treasury.

Act Jan. 22, 1818, c. 5, § 3, 3 Stat. 404. Act Feb. 10, 1854, c. 11, § 1, 10 Stat. 267.

Provisions for disbursement of compensation of Senators by the Secretary of the Senate were made by R. S. § 56, post, § 80; of compensation of members of the House and Delegates by the Sergeant-at-Arms of the House, by Act Oct. 1, 1890, c. 1256, §§ 1, 3, post, §§ 98, 100; and, in case such disbursements cannot be lawfully made by or through the officers specially charged therewith, they may be made by the Treasurer of the United States, under Act June 22, 1882, c. 236, post, § 479.

§ 49. (R. S. § 47.) Certificate of salary and accounts.

The salary and accounts for traveling expenses in going to and returning from Congress of Senators shall be certified by the President of the Senate, and those of Representatives and Delegates by the Speaker of the House of Representatives.

Act July 28, 1866, c. 296, § 17, 14 Stat. 323. Act Jan. 22, 1818, c. 5, § 3, 3 Stat. 404.

By a proviso annexed to Act July 28, 1866, c. 296, § 17, ante, § 35, which was incorporated into this section of the Revised Statutes, and was restored to force by Act Jan. 20, 1874, c. 11, as stated in the note to R. S. § 45, ante, § 47, "mileage accounts of Senators shall be certified by the President of the Senate, and those of Representatives and Delegates by the Speaker of the House of Representatives."

The Speaker was authorized to designate a substitute to sign for him all certificates required by this section, by a provision of Res. Nov. 12, 1903, No. 1, post, § 52.

Notes of Decisions

Necessity of certificate.—The salary and mileage of Representatives are not dependent upon the certificate of the Speaker of the House. Wilson v. U. S. (1909) 44 Ct. Cl. 428.

§ 50. (R. S. § 48.) Effect of certificate.

The certificate given pursuant to the preceding section shall be conclusive upon all the Departments and officers of the Government.

Act Sept. 30, 1850, c. 90, § 1, 9 Stat. 523.

Notes of Decisions

Conclusiveness of certificate under previous statutes.—Under Act Sept. 22, 1789, c. 17, § 6, and Act Jan. 22, 1818, c. 5, § 3, which provided that the compensation due to members and officers of the Senate should be certified by the President thereof, and be passed as public accounts and paid out of the Treasury, and the certificate of such President, the presumed act of the Senate pro hac vice, was conclusive upon the matter as between that body and the accounting officers. (1841) 3 Op. Atty. Gen. 662; (1849) 5 Op. Atty. Gen. 191, 207.

Under Act Jan. 22, 1818, c. 5, § 1, the Secretary of the Senate was entitled to credit for such payments, whether the certificate of the presiding officer was conclusive or not. (1849) 5 Op. Atty. Gen. 191, 207, 218.

§ 51. (Act Aug. 15, 1876, c. 287, § 1.) Certificate of salary of Representatives during recess of Congress.

The Clerk of the House of Representatives is authorized and directed to sign, during the recess of Congress after the first session and until the first day of the second session, the certificates for the monthly compensation of members and delegates in Congress, which certificates shall be in the form now in use, and shall have the like

force and effect as is given to the certificate of the Speaker. (19 Stat. 145.)

This was a provision accompanying an appropriation for compensation of the officers, etc., in the service of the House, in the legislative, executive, and judicial appropriation act for the fiscal year 1877, cited above.

§ 52. (Res. Nov. 12, 1903, No. 1.) Substitute for Speaker to sign certificates for salary and accounts.

The Speaker is authorized to designate from time to time some one from among those appointed by him and appropriated for and employed in his office, whose duty it shall be under the direction of the Speaker to sign in his name and for him all certificates required by section forty-seven of the Revised Statutes for salary and accounts for traveling expenses in going to and returning from Congress of Representatives and Delegates. (33 Stat. 1.)

§ 53. (R. S. § 49.) Pay of member dying after commencement of a Congress.

When any person who has been elected a member of or delegate in Congress dies after the commencement of the Congress to which he has been elected, his salary shall be computed and paid to his widow, or, if no widow survive him, to his heirs at law, for the period that has elapsed from the commencement of such Congress, or from the last payment received by him to the time of his death, at the rate of seven thousand five hundred dollars a year, with any traveling expenses remaining due for actually going to or returning from any session of Congress.

Res. March 3, 1859, No. 14, § 1, 11 Stat. 442.

As to the rate of compensation of members and delegates, and payment to them of mileage instead of actual traveling expenses, see note to R. S. § 35, ante, § 34, and the provisions of Act July 28, 1866, § 17, and Act Feb. 26, 1907, c. 1635, § 4, ante, §§ 35, 36.

Notes of Decisions

Salary of deceased Senator not payable to his assignee.—The Senate has no power, by a resolution of its own, to direct the payment of the salary of a deceased member to his assignee. (1860) 9 Op. Atty. Gen. 446.

§ 54. (R. S. § 50.) Limits of the rule.

Salaries allowed under the preceding section shall be computed and paid, in all cases, for a period of not less than three months from the commencement of the Congress.

Res. March 3, 1859, No. 14, § 1, 11 Stat. 442.

§ 55. (Act May 23, 1876, c. 103.) Monuments to deceased Senators or members of House of Representatives interred in Congressional Cemetery.

Hereafter whenever any deceased Senator or Member of the House of Representatives shall be actually interred in the Congressional Cemetery, so-called, it shall be the duty of the Sergeant-at-Arms of the Senate, in the case of a Senator, and of the Sergeant-at-Arms of the House of Representatives, in the case of a member of the House, to have a monument erected, of granite, with suitable inscriptions, and the cost of the same shall be a charge upon and paid out either from the contingent funds of the Senate or of the House of Representatives, to whichever the deceased may have belonged, and any existing omissions of monuments or inscriptions, as aforesaid, are hereby directed and authorized to be supplied in like manner, and all laws upon the subject of monuments in the Congressional Cemetery are hereby repealed. (19 Stat. 54.)

This was an act entitled "An act relating to interments in the Congressional Cemetery."

§ 56. (R. S. § 51.) Pay of members elected to fill vacancies.

Whenever a vacancy occurs in either House of Congress, by death or otherwise, of any member or delegate elected or appointed

thereto after the commencement of the Congress to which he has been elected or appointed, the person elected or appointed to fill it shall be compensated and paid from the time that the compensation of his predecessor ceased.

Res. July 12, 1862, No. 54, 12 Stat. 624.

Salaries of Senators elected or appointed to fill vacancies are to commence on the date of election or appointment, by a subsequent provision of Act July 31, 1894, c. 174, § 1, post, § 57. This section continues applicable to members and delegates elected or appointed to the House of Representatives.

Notes of Decisions

Vacancy and predecessor within meaning of section.—P. presented his credentials, showing that he had been duly elected, was placed on the roll, sworn in, took his seat, was recognized as the sitting member, voted, served on committees, and drew the salary up to the time the house declared the seat vacant because he had not been duly elected. Held, that P. was the predecessor of the person appointed to fill the vacancy, within the meaning of this section, and such person would be entitled to compensation from the date the seat was declared vacant. Page v. U. S. (1888) 8 Sup. Ct. 1026, 127 U. S. 67, 32 L. Ed. 65.

This section refers only to a vacancy occurring after the commencement of a particular Congress and in the membership of that Congress, and the reference to a predecessor applies only to a predecessor in that Congress. Page v. U. S. (1888) 8 Sup. Ct. 1026, 1027, 127 U. S. 67, 32 L. Ed. 65.

The term "predecessor" must be restricted to him who was predecessor, not in abstract right by virtue of a legal election, but predecessor in the matter of the salary of the place. Shelley v. U. S. (1884) 19 Ct. Cl. 653.

The statute does not undertake to pay both sitting and contesting members. Id.

Cited without definite application, U. S. v. Dietrich (C. C. 1904) 126 Fed. 676, 685.

§ 57. (Act July 31, 1894, c. 174, § 1.) Salaries of Senators elected or appointed to fill vacancies.

The salaries of Senators elected or appointed to fill vacancies in the Senate and of Senators elected for a full term subsequent to the commencement of such term, shall commence on the date of their election or appointment. (28 Stat. 162.)

This was a proviso annexed to the appropriation for compensation of Senators in the legislative, executive, and judicial appropriation act for the fiscal year 1895, cited above.

Cited without definite application, U. S. v. Dietrich (C. C. 1904) 126 Fed. 676, 685.

§ 57a. (Act July 16, 1914, c. 141, § 1.) Salaries of Representatives, Delegates, etc., elected for unexpired terms.

The salaries of Representatives in Congress, Delegates from Territories, and Resident Commissioners, elected for unexpired terms, shall commence on the date of their election and not before. (38 Stat. 458.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1915, cited above.

CHAPTER FIVE

Officers and Persons in the Employ of the Senate and House of Representatives

In this chapter of the Revised Statutes, sections 52 and 53 thereof contained lists of officers and employés of the Senate and House of Representatives, respectively, with the amount of the salary of each. The officers, clerks, and other employés so enumerated were those who, at the time of the compilation of the Revised Statutes, were in the service of the two Houses, as authorized by the legislative, executive, and judicial appropriation act for that year, Act March 3, 1873, c. 226, § 1, 17 Stat. 486, and the salaries were at the rates of compensation prescribed by that act, the provisions of which were thus in-

corporated into R. S. §§ 52, 53. But the amounts of such salaries had been increased, over the rates of compensation under the laws previously in force, by said Act March 3, 1873; and its provisions for such increase were repealed, and the salaries, etc., as fixed by the laws in force at the time of its passage were restored, by Act Jan. 20, 1874, c. 11, 18 Stat. 4. Thereby, although said repealing act was passed before the enactment of the Revised Statutes, the provisions of R. S. §§ 52, 53, as to amounts of salaries, were repealed, by virtue of R. S. § 5601, post, § 10598.

In the annual appropriation acts subsequent to the Revised Statutes, the subordinate officers and employés provided for, from year to year, and their rates of compensation, vary from those enumerated in R. S. §§ 52, 53. Hence, although those sections have not been specifically repealed or amended, nor even superseded by any legislation of a permanent character, their provisions for such subordinate positions may be regarded as no longer in force for any practical purpose, and are therefore omitted.

The officers, clerks, and others actually appointed or employed in the service of the Senate and House of Representatives, and their respective salaries and other compensation, depend on the specific provisions made in the annual appropriation acts, each providing for the fiscal year next following. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Some special provisions for particular officers or employés, which are repeated from year to year, but not enacted in permanent form, are referred to in the notes to R. S. §§ 52, 53, post, §§ 58, 59.

Provisions of a more permanent nature, relating to the duties, services, and compensation of officers, clerks, and employés of the two Houses, and of clerks, etc., to Senators and Representatives, are set forth in this chapter.

A document room and a folding room of each of the two Houses, and the appointment of a superintendent to be in charge of each of them, and of the necessary number of assistants, were provided for by the Printing and Binding Act of Jan. 12, 1895, c. 23, §§ 60, 71, post, §§ 7037, 7050.

Sec.
58. Officers and employés of Senate.
59. Officers and employés of House of Representatives.
60. Limit of compensation of Sergeant-at-Arms and Door-keeper of Senate.
61. Limit of compensation of Sergeant-at-Arms of House of Representatives.
62. Limit of compensation of officers and employés of Senate to rate provided.
63. Subletting duties of employés forbidden.
64. Performance of duties by employés of House of Representatives.
65. Division of salaries, etc., of employés of House of Representatives forbidden.
66. Subletting of duties of employés of House of Representatives forbidden.
67. Limit of age of pages in House of Representatives.
68. Officers' certificates to pay rolls of employés in House of Representatives.
69. Violation of foregoing provisions cause for removal from office.
70. Inquiry by Committee on Accounts of House of Representatives into enforcement of foregoing provisions, and report thereon.
71. Compensation of clerks to committees whose salaries are not fixed by specific appropriations.
72. Time of beginning of compensation of clerks to committees of House of Representatives employed during session only.
73. Janitors to committees of House of Representatives; appointment; duties; removal.
74. Clerks to Senators.
75. Clerks to Members and Delegates of House of Representatives.
76. Clerks to Members of House of Representatives.

Sec.
77. Reporters for House of Representatives.
78. Pay of official reporters.
79. Chaplains' salaries.
80. Secretary of the Senate a disbursing officer.
81. Bond of Secretary of the Senate.
82. Bond of Clerk of the House.
83. Custody of bonds.
84. Reports of Secretary and Clerk.
85. What to exhibit.
86. Reports of subordinate disbursing officers.
87. Reports of expenditures.
88. Statements of appropriations and offices.
89. Preparation and contents of statement of appropriations.
90. Contents of statement of appropriations.
91. Advertisements for stationery.
92. Form of advertisement.
93. Notice of acceptance of proposals.
94. Contracts for separate parts of stationery.
95. American goods to be preferred.
96. Detailed reports of receipts and expenditures.
97. Fees for copies from journals.
98. Duties of Sergeant-at-Arms of House of Representatives.
99. Symbol of office of Sergeant-at-Arms of House.
100. Compensation of Members and Delegates to be disbursed by Sergeant-at-Arms of House.
101. Bond of Sergeant-at-Arms of House.
102. Custody of bond of Sergeant-at-Arms.
103. Tenure of office of Sergeant-at-Arms.
104. Statement of disbursements by Sergeant-at-Arms.
105. Accounts of property.

Sec.
106. Door-keepers' duties.
107. Purchases of stationery and materials for folding.
108. Payments from contingent fund of Senate for expenses of committees, and vouchers therefor.
109. Payments from contingent funds of Senate and House of Representatives, and vouchers therefor.
109a. Repeal of Senate resolutions authorizing payment from contingent fund for clerical and messenger service.
109b. Payment from moneys of House of Representatives of certain bills for barber shops, unlawful.
110. Temporary Committee on Accounts of House of Representatives to approve payments from contingent fund.
111. Payments from contingent fund of House of Representatives, on vouchers approved by Committee on Accounts, conclusive.
112. Publication of laws.
113. Contracts involving employment of horses for service of House of Representatives.
114. Contracts for hire of horses and mail wagons for mail service of House of Representatives.
115. Contracts for packing boxes for use of House.
116. Sale of waste paper, etc., and condemned furniture.
117. Actions against officers for official acts; district attorney to enter appearance; application of provisions for removal of suits, withholding of executions, and payment of judgments against revenue or other officers; defense of actions.

§ 58. (R. S. § 52.) Officers and employés of Senate.

The following persons are employed in the service of the Senate:

One Secretary of the Senate, * *

One Sergeant-at-Arms and Door-keeper, * *

One Postmaster to the Senate, * *

One Chaplain to the Senate, * *

Act March 3, 1873, c. 226, § 1, 17 Stat. 486.

The portions of this section set forth here are those only which provided for officers who are elected by the Senate. The section as enacted in the Revised Statutes prescribed the salary of each of those officers, and it further provided for various subordinate officers and for numerous clerks and other employés, and prescribed their salaries. These portions of the section are omitted, for reasons stated in the note at the beginning of this chapter.

For the Secretary of the Senate, the recent appropriations, including compensation as disbursing officer of salaries of Senators and of the contingent fund of the Senate, are $6,500. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

The employment, in the office of the Secretary of the Senate, of an Assistant Secretary of the Senate (Henry M. Rose), at an annual salary of $5,000, was authorized by a provision of Act March 3, 1905, c. 1484, § 1, 33 Stat. 1245, and an appropriation therefor was made by that act and was continued in the appropriation acts for the subsequent years. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

For the Sergeant-at-Arms and Doorkeeper, the recent appropriations are $6,500. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat. He was forbidden to receive fees or other compensation

for performing the duties of the office, or in connection therewith, by a provision of Act June 20, 1874, c. 328, § 1, post, § 60.

For the Postmaster, the recent appropriations are $2,250. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

The offices, for the Senate, of chief clerk of the post office, at $1,800, and messenger at the card door, at $1,600, were created, in lieu of the offices of assistant postmaster and mail carrier, and of clerk, provided for in previous appropriation acts, by a provision of Res. Aug. 8, 1911, No. 4, 37 Stat. 37, and appropriations for those officers were made in the appropriation acts for subsequent years. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

For the Chaplain, the recent appropriations are $1,200. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See, also, notes at the beginning of this chapter.

§ 59. (R. S. § 53.) Officers and employés of House of Representatives.

The following persons are employed in the service of the House of Representatives:

One Clerk of the House, * *
One Sergeant-at-Arms, * *
One Doorkeeper, * *
One Postmaster to the House, * *
One Chaplain to the House, * *

Act March 3, 1873, c. 226, § 1, 17 Stat. 488.

The portions of this section set forth here are those only which provide for officers who are elected by the House. The section as enacted in the Revised Statutes prescribed the salary of each of those officers, and it further provided for various subordinate officers and for numerous clerks and other employés, and prescribed their salaries. These portions of the section are omitted, for reasons stated in the note at the beginning of this chapter.

For the Clerk of the House, the recent appropriations, including compensation as disbursing officer of the contingent fund, are $6,500; and for hire of horse and wagon for use of the Clerk's office, $900, or so much thereof as may be necessary. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

In connection with a provision placing the library of the House under the control of the Librarian of Congress, the appointment of a librarian, two assistant librarians, and assistant in the library, thereby provided for, was vested in the Clerk, with the approval of the Speaker, and removals from such positions except for cause were prohibited, by Act March 3, 1901, c. 830, § 1, post, § 154.

For the Sergeant-at-Arms, the recent appropriations are $6,500, and for hire of horse and wagon, $600. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat. He was forbidden to receive fees or other compensation for performing the duties of the office, or in connection therewith, by a provision of Act June 20, 1874, c. 328, § 1, post, § 61.

Employés in the office of the Sergeant-at-Arms were enumerated by Act Oct. 1, 1890, c. 1256, § 8, 26 Stat. 646, but different provisions were made by the subsequent annual appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

For the Doorkeeper, the recent appropriations are $5,000, and for hire of horses and wagons and repairs of same, $1,200, or so much thereof as may be necessary. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

A provision authorizing the appointment by the Doorkeeper of certain specified employés "for labor in folding books, speeches, and pamphlets," contained in Act March 3, 1883, c. 128, § 1, 22 Stat. 535, was superseded by the establishment of a folding room of the House, to be in charge of a superintendent to be appointed, with the necessary assistants, by the Doorkeeper, by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 71, post, § 7050.

For the Postmaster, the recent appropriations are $4,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

For the Chaplain, the recent appropriations are $1,200. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See, also, notes at the beginning of this chapter.

§ 60. (Act June 20, 1874, c. 328, § 1.) Limit of compensation of Sergeant-at-Arms and Door-keeper of Senate.

Senate * * Sergeant-at-Arms and Door-keeper, * * Hereafter he shall receive, directly or indirectly, no fees or other com-

pensation or emolument whatever for performing the duties of the office, or in connection therewith, otherwise than as aforesaid. (18 Stat. 85.)

This was a proviso annexed to an appropriation of $4,320 for the Sergeant-at-Arms and Door-keeper in Act March 3, 1873, c. 226, § 1, 17 Stat. 487, and incorporated therefrom into R. S. § 52, which was repeated with the similar appropriation for the fiscal year 1875, cited above, and in the subsequent appropriation act, 18 Stat. 344.

See, also, notes at the beginning of this chapter.

§ 61. (Act June 20, 1874, c. 328, § 1.) Limit of compensation of Sergeant-at-Arms of House of Representatives.

House of Representatives * * Sergeant-at-Arms, * * Hereafter he shall receive, directly or indirectly, no fees or other compensation or emolument whatever for performing the duties of the office, or in connection therewith, otherwise than as aforesaid. (18 Stat. 87.)

This was a proviso annexed to an appropriation of $4,320, for the Sergeant-at-Arms in Act March 3, 1873, c. 226, § 1, 17 Stat. 489, and incorporated therefrom into R. S. § 53, which was repeated with the similar appropriation for the fiscal year 1875, cited above, and in the subsequent appropriation act, 18 Stat. 346.

See, also, notes at the beginning of this chapter.

Notes of Decisions

Compensation for summoning witnesses.—Before this provision, the Sergeant-at-Arms of the House of Representatives was entitled to compensation for trouble and expense in summoning witnesses before committees of the House. (1858) 9 Op. Atty. Gen. 167.

§ 62. (Act Aug. 5, 1882, c. 390, § 1.) Limit of compensation of officers and employés of Senate to rate provided.

Hereafter no officer or employee of the Senate shall receive pay for any services performed by him at any rate higher than that provided for the office or employment to which he has been regularly appointed. (22 Stat. 270.)

This was a proviso annexed to an appropriation for additional pay for certain services, in the legislative, executive, and judicial appropriation act for the fiscal year 1883, cited above.

Payment from the contingent fund of additional salary or compensation to any officer or employé of the Senate was prohibited by a provision of Act Oct. 2, 1888, c. 1069, § 1, post, § 109.

See, also, notes at the beginning of this chapter.

§ 63. (Act March 2, 1895, c. 177, § 1.) Subletting duties of employés forbidden.

Hereafter no employee of Congress, either in the Senate or House, shall sublet to, or hire, another to do or perform any part of the duties or work attached to the position to which he was appointed. (28 Stat. 771.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above.

A similar provision in regard to employés of the House was made by Act March 3, 1901, c. 830, § 1, post, § 66.

§ 64. (Act March 3, 1901, c. 830, § 1.) Performance of duties by employés of House of Representatives.

Hereafter employees of the House of Representatives under the Clerk, Sergeant-at-Arms, Doorkeeper, and Postmaster shall only be assigned to and engaged upon the duties of the positions to which they are appointed and for which compensation is provided, except that in cases of emergency or congestion of public business incident to the close of a session of Congress or other like cause an employee or employees may be assigned or required to aid in the discharge of the duties of any other employee or employees, and in the discretion of the Doorkeeper not more than one folder may, if necessary, be assigned to do clerical work under the direction of the foreman

of the folding room, but all assignments made hereunder shall be without additional compensation and shall not constitute the basis of a claim therefor. (31 Stat. 968.)

This paragraph and the six paragraphs next following were provisions of the legislative, executive, and judicial appropriation act for the fiscal year 1902, cited above.

Payment from the contingent fund of additional salary or compensation to any officer or employé of the House was prohibited by a provision of Act Oct. 2, 1888, c. 1069, § 1, post, § 109.

§ 65. (Act March 3, 1901, c. 830, § 1.) Division of salaries, etc., of employés of House of Representatives forbidden.

It shall not be lawful to appoint or employ in any position under the House of Representatives more than one person at any one time, or to require or permit any such person to divide with another any portion of his salary or compensation while so employed. (31 Stat. 968.)

§ 66. (Act March 3, 1901, c. 830, § 1.) Subletting of duties of employés of House of Representatives forbidden.

It shall not be lawful to require or permit any person in the employ of the House of Representatives to sublet to another the discharge of any portion of the duties of the position to which he is appointed. (31 Stat. 968.)

§ 67. (Act March 3, 1901, c. 830, § 1.) Limit of age of pages in House of Representatives.

No person shall be appointed or employed as a page in the service of the House of Representatives who is under twelve years or more than eighteen years of age; but this provision shall not apply to chief pages, riding pages, and telephone pages. (31 Stat. 968.)

§ 68. (Act March 3, 1901, c. 830, § 1.) Officers' certificates to pay rolls of employés in House of Representatives.

The Clerk, Sergeant-at-Arms, Doorkeeper, and Postmaster shall make certificate each month to their respective pay rolls, stating whether the persons named in such pay rolls and employed in their respective departments have been actually present at their respective places of duty and have actually performed the services for which compensation is provided in said pay rolls, and in each case where a person carried on such pay roll has been absent and has not performed the services in whole or in part for which payment is proposed, the reason for such absence and for such nonperformance of services shall be stated. (31 Stat. 968.)

§ 69. (Act March 3, 1901, c. 830, § 1.) Violation of foregoing provisions cause for removal from office.

The violation of any of the foregoing provisions of law shall, upon ascertainment thereof, be deemed to be cause for removal from office. (31 Stat. 968.)

The provisions referred to in this paragraph are those contained in the five paragraphs next preceding. See note to the first of said paragraphs, ante, § 64.

§ 70. (Act March 3, 1901, c. 830, § 1.) Inquiry by Committee on Accounts of House of Representatives into enforcement of foregoing provisions, and report thereon.

It shall be the duty of the Committee on Accounts of the House of Representatives from time to time to inquire into the enforcement or violation of any of the foregoing provisions of law; and for this purpose they are hereby authorized to send for persons and papers, and to administer oaths; and they shall report to the House at least once every session their compliance with the duty herein imposed. (31 Stat. 968.)

The provisions referred to in this paragraph are those contained in the six paragraphs next preceding. See note to § 64, ante.

§ 71. (Act March 3, 1875, c. 129, § 1.) Compensation of clerks to committees whose salaries are not fixed by specific appropriations.

Hereafter clerks of committees of either branch of Congress (except those whose salaries are fixed by specific appropriations,) shall be paid not more than six dollars per day, and during the session only. (18 Stat. 345.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1876, cited above.

Provision for payment of such clerks to committees of the House from the time they enter upon the discharge of their duties was made by Res. June 28, 1886, No. 15, post, § 72.

Appropriations are made annually for a certain number of clerks to committees of the House, at $6 each per day during the session. The construction of the words "during the session" in such provisions, as to the days included in the particular session, is fixed by a further provision of each act. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 72. (Res. June 28, 1886, No. 15.) Time of beginning of compensation of clerks to committees of House of Representatives employed during session only.

The pay of the clerks to committees of the House of Representatives which have been or may be hereafter authorized by the House, who are paid during the session only shall begin from the time such clerks entered upon the discharge of their duties, which shall be ascertained and evidenced by the certificate of the chairman of the several committees employing clerks for the session only. (24 Stat. 342.)

This was a joint resolution entitled "Joint Resolution fixing the time when the pay of certain clerks of committees of House of Representatives shall begin."

§ 73. (Act May 10, 1916, c. 117, § 1.) Janitors to committees of House of Representatives; appointment; duties; removal.

Janitors under the foregoing shall be appointed by the chairmen, respectively, of said committees, and shall perform under the direction of the Doorkeeper all of the duties heretofore required of messengers detailed to said committees by the Doorkeeper, and shall be subject to removal by the Doorkeeper at any time after the termination of the Congress during which they were appointed. (39 Stat.)

This was a provision accompanying appropriations for clerks, messengers, and janitors to certain specified committees of the House of Representatives in the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above. It was repeated in the legislative, executive, and judicial appropriation acts for the fiscal years 1914, 1915, and 1916.

The words at the beginning of this provision, "Janitors under the foregoing," refer to janitors provided for by said preceding appropriations, and the words "said committees" refer to the committees specified therein. While the appropriations are for the fiscal year 1917 only, this provision as to manner of appointment of, and performance of duties, etc., by janitors may be applicable to those provided for in like manner by subsequent appropriations.

§ 74. (Act March 2, 1895, c. 177, § 1.) Clerks to Senators.

Hereafter Senators elected, whose term of office begins on the fourth day of March, and whose credentials in due form of law shall have been presented to the Senate, or filed with the Secretary, but who have not been qualified, are authorized to appoint a clerk to serve from the date of the commencement of their terms, respectively, whose compensation shall be paid out of the appropriation for clerks to Senators who are not chairmen of committees. (28 Stat. 766.)

This was a proviso annexed to the usual appropriation for "annual clerks to Senators who are not chairmen of committees," in the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above. A similar proviso, without the word "hereafter," was annexed to the like appropriation for the preceding year, Act July 31, 1894, c. 174, § 1, 28 Stat. 164.

The appropriation for clerks to Senators who are not chairmen of commit-

tees, referred to in the last clause of this provision, has been made annually since the fiscal year 1886. See Act March 3, 1885, c. 343, § 1, 23 Stat. 390, and subsequent similar appropriation acts. The recent appropriations are for 24 annual clerks at $2,000 each, and also for 24 assistant clerks to such Senators, at $1,200 each, and 24 messengers, at $1,200 each. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

The committees of the Senate entitled to clerks were enumerated in R. S. § 52; but the actual numbers and salaries of such clerks depend upon the annual appropriation acts. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 75. (Res. March 3, 1893, No. 21.) Clerks to Members and Delegates of House of Representatives.

On and after April first, eighteen hundred and ninety-three, each Member and Delegate of the House of Representatives of the United States may, on the first day of every month during sessions of Congress certify to the Clerk of the House of Representatives the amount which he has paid or agreed to pay for clerk hire necessarily employed by him in the discharge of his official and representative duties during the previous month, and the amount so certified shall be paid by the Clerk out of the contingent fund of the House on the fourth day of each month to the person or persons named in each of said certificates so filed: Provided, That the amount so certified and paid for clerical services rendered to each Member and Delegate shall not exceed one hundred dollars for any month during the session: And provided further, That the provisions of this resolution shall not apply to members who are chairmen of committees entitled under the rules to a clerk. (27 Stat. 757.)

This was a joint resolution entitled "Joint Resolution authorizing members to certify monthly the amount paid by them for clerk hire, and directing the same to be paid out of the contingent fund of the House."

The last proviso of this resolution, that it shall not apply to members who are chairmen of committees entitled to a clerk, was superseded by provisions that such members shall be entitled to the same allowance for clerk hire as other members, made by Act July 7, 1898, c. 571, § 1, post, § 76.

See, also, notes referring to the subject of this resolution under said provisions of Act July 7, 1898, post, § 76.

§ 76. (Act July 7, 1898, c. 571, § 1.) Clerks to members of House of Representatives.

Hereafter Members of the House of Representatives who are chairmen of committees entitled to annual clerks shall be entitled to the same allowance for clerk hire as is authorized to other Members of the House of Representatives who are not chairmen of committees by the Joint Resolution approved March third, eighteen hundred and ninety-three, and by House Resolution passed May eighth, eighteen hundred and ninety-six; and the appropriation for clerk hire to Members and Delegates made in the legislative, executive, and judicial appropriation Act for the fiscal year eighteen hundred and ninety-nine is hereby made available to pay such clerk-hire as herein provided: Provided, That this provision shall apply to members of committees entitled to annual clerks, during the vacation of Congress only. (30 Stat. 687.)

This was a provision of the deficiency appropriation act for the fiscal year 1898, cited above.

The joint resolution referred to therein was Res. March 3, 1893, No. 21, ante, § 75.

The House resolution of May 8, 1896, also referred to, was as follows:

"Resolved, That the Clerk of the House of Representatives be, and he is hereby, authorized to pay out of the contingent fund of the House to each Member and Delegate for annual clerk hire an amount not exceeding the sum of $100 per month, to be certified by them on the first day of each calendar month in the manner provided in the joint resolution approved March 3, 1893: Provided, That the provisions of this resolution shall not apply to members who are chairmen of committees entitled under the rules to annual clerks." Congressional Record, 54th Congress, 1st Sess., part 5, pp. 4990, 4998.

The appropriation for clerk hire for the fiscal year 1899, also referred to in

this provision, was that made by Act March 15, 1898, c. 68, § 1, 30 Stat. 282. The legislative, executive, and judicial appropriation act of each subsequent year made a similar appropriation. To each of these appropriations was added a clause extending the benefit of the particular appropriation to Representatives and Delegates elect. The later acts, instead of the appropriation contained in previous acts, "to pay Members and Delegates the amounts which they certify they have paid or agreed to pay for clerk hire," as provided by Res. March 3, 1893, No. 21, ante, § 75, the first proviso of which limited the amount so that it should not exceed $100 for any month during the session, made an appropriation to each Member and Delegate for clerk hire of $1,500 per annum, in monthly installments, or so much thereof as may be necessary. Recent acts also provided for such payment to each Resident Commissioner as well as to each Member and Delegate; and a proviso was added requiring all such clerks to be placed on the roll of employés of the House.

The provision for the fiscal year 1917, by Act May 10, 1916, c. 117, § 1, 39 Stat., was as follows:

"Clerk hire, Members and Delegates: To pay each Member, Delegate, and Resident Commissioner, for clerk hire, necessarily employed by him in the discharge of his official and representative duties, $1,500 per annum, in monthly installments, $660,000, or so much thereof as may be necessary; and Representatives and Delegates elect to Congress whose credentials in due form of law have been duly filed with the Clerk of the House of Representatives, in accordance with the provisions of section thirty-one of the Revised Statutes of the United States, shall be entitled to payment under this appropriation: Provided, That all clerks to Members, Delegates, and Resident Commissioners shall be placed on the roll of employees of the House and be subject to be removed at the will of the Member, Delegate, or Resident Commissioner by whom they are appointed; and any Member, Delegate, or Resident Commissioner may appoint one or more clerks, who shall be placed on the roll as the clerk of such Member, Delegate, or Resident Commissioner making such appointments."

The committees of the House entitled to clerks were enumerated in R. S. § 53; but the actual numbers and salaries of such clerks depend upon the annual appropriation acts. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 77. (R. S. § 54.) Reporters for House of Representatives.

No person shall be employed as a reporter for the House of Representatives without the approval of the Speaker.

Act April 2, 1872, c. 79, § 3, 17 Stat. 47.

§ 78. (Act June 22, 1874, c. 388, § 1.) Pay of official reporters.

Hereafter the pay of the official reporters of the proceedings and debates of each House shall be fifty thousand dollars for each Congress; and the pay of official reporters of committees of the House shall be five thousand dollars each per annum, and this shall be in lieu of all other compensation for such services in reporting the proceedings of each and all of said committees. (18 Stat. 145.)

This provision of the deficiency appropriation act of 1874 was annexed to the appropriation therein for payment of the official reporters of the House. Appropriations for reporting the proceedings and debates of each house are regularly made at each session. The provisions for 1917 were by Act May 10. 1916, c. 117, § 1, 39 Stat.

§ 79. (R. S. § 55.) Chaplains' salaries.

The salaries of the Chaplains of the two Houses of Congress are payable as follows: one-twelfth thereof on the last day of each month during each regular session of Congress, and the residue at the end of each regular session.

Act Aug. 4, 1854, c. 242, § 12, 10 Stat. 573. Res. March 3, 1857, No. 14, 11 Stat. 255.

For each Chaplain, the recent appropriations are $1,200. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

See, also, notes at the beginning of this chapter.

§ 80. (R. S. § 56.) Secretary of the Senate a disbursing officer.

The moneys which may be appropriated for the compensation of members and officers, and for the contingent expenses of the Senate, shall be paid at the Treasury, on requisitions drawn by the Secretary of the Senate, and shall be kept, disbursed, and accounted for by him

according to law, and the Secretary shall be deemed a disbursing officer.

Act Feb. 10, 1854, c. 11, § 1, 10 Stat. 267.

Certificates of salary and accounts of Senators were provided for by R. S. §§ 47, 48, ante, §§ 49, 50; and their passage as public accounts, and payment out of the public Treasury, were provided for by R. S. § 46, ante, § 48.

When such disbursements cannot be lawfully made by or through the officer specially charged therewith, the Treasurer of the United States is authorized to make them, by Act June 22, 1882, c. 236, post, § 479.

The fiscal year for the adjustment of the accounts of the Secretary of the Senate extends to July 3, under R. S. § 237, post, § 369.

The Secretary of the Senate was excepted from the requirement that disbursing officers shall render their accounts quarterly, imposed by Act Aug. 30, 1890, c. 837, § 4, post, § 6617.

The annual appropriation for the Secretary of the Senate includes compensation as disbursing officer. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

Cited without definite application,
McKnight's Case (1877) 13 Ct. Cl. 292, 304.

§ 81. (R. S. § 57.) Bond of Secretary of the Senate.

The Secretary of the Senate shall, within thirty days after entering upon the duties of his office, and before making any requisition upon the Treasury to draw any portion of the moneys appropriated for the compensation of members and officers or the contingent expenses of the Senate, give a bond to the United States, with one or more sureties, to be approved by the First Comptroller of the Treasury, in the penal sum of twenty thousand dollars, with condition for the faithful application and disbursement of such funds as may be drawn by him from the Treasury as disbursing officer of the Senate.

Act Feb. 10, 1854, c. 11, § 2, 10 Stat. 267. Act Feb. 23, 1815, c. 51, § 1, 3 Stat. 212.

See note to R. S. § 59, post, § 83.

§ 82. (R. S. § 58.) Bond of Clerk of the House.

The Clerk of the House of Representatives shall, within thirty days after entering upon the duties of his office, and before making any requisition upon the Treasury to draw any portion of the moneys appropriated for the contingent expenses of the House, give a bond to the United States, with one or more sureties, to be approved by the First Comptroller of the Treasury, in the penal sum of twenty thousand dollars, with condition for the faithful application and disbursement of such portions of the contingent fund of the House as shall come into his hands.

Act Feb. 23, 1815, c. 51, § 1, 3 Stat. 212.

See note to R. S. § 59, post, § 83.

§ 83. (R. S. § 59.) Custody of bonds.

The bonds given pursuant to the two preceding sections shall be deposited in the office of the First Comptroller of the Treasury.

Act Feb. 23, 1815, c. 51, § 1, 3 Stat. 212. Act Feb. 10, 1854, c. 11, § 2, 10 Stat. 267.

The First Comptroller of the Treasury was designated Comptroller of the Treasury by the Dockery Act of July 31, 1894, c. 174, § 4, post, § 402. The custody of these bonds, and the duties of the Comptroller in regard thereto, were transferred to the Secretary of the Treasury by Act March 2, 1895, c. 177, § 5, post, § 3288.

§ 84. (R. S. § 60.) Reports of Secretary and Clerk.

The Secretary of the Senate and the Clerk of the House of Representatives shall prepare and submit to the two Houses, respectively, at the commencement of each session of Congress, the following statements in writing:

First. A statement showing the names of all the clerks and other persons who have been, during the preceding year or any part thereof, employed in their respective offices, and those of the messengers of

the respective Houses; together with the time that each clerk or other person and each messenger was actually employed, and the sums paid to each. This statement must also show whether such clerks or other persons, or such messengers, have been usefully employed; whether the services of any of them can be dispensed with without detriment to the public service, and whether the removal of any particular persons, and the appointment of others in their stead, is required for the better dispatch of business.

Second. A detailed statement, by items, of the manner in which the contingent fund for each House has been expended during the preceding year. This statement must give the names of every person to whom any portion of the fund has been paid; and if for anything furnished, the quantity and price; and if for any services rendered, the nature of such service, and the time employed, and the particular occasion or cause, in brief, that rendered such service necessary, and the amount of all former appropriations in each case on hand, either in the Treasury or in the hands of any disbursing officer or agent.

Act Aug. 26, 1842, c. 202, §§ 11, 20, 5 Stat. 525, 527.

The authority for payments from the contingent funds of the two Houses, respectively, was prescribed by R. S. § 76, which was superseded by subsequent provisions, post, §§ 108–111.

§ 85. (R. S. § 61.) What to exhibit.

Each of the statements required by the preceding section shall exhibit, also, the several sums drawn by the Secretary and Clerk, respectively, from the Treasury, and the balances, if any, remaining in their hands.

Res. March 1, 1823, No. 1, 3 Stat. 789.

A similar statement was required from the Sergeant-at-Arms of the House, by Act Oct. 1, 1890, c. 1256, § 7, post, § 104.

§ 86. (R. S. § 62.) Reports of subordinate disbursing officers.

The Secretary of the Senate and the Clerk of the House of Representatives shall each require of the disbursing officers acting under their direction or authority, the return of precise and analytical statements and receipts for all the moneys which may have been from time to time, during the next preceding year, expended by them; and the results of such returns and the sums total shall be communicated annually to Congress, by the Secretary and Clerk, respectively.

Act Aug. 26, 1842, c. 202, § 20, 5 Stat. 527.

§ 87. (R. S. § 63.) Reports of expenditures.

All expenditures of the Senate and House of Representatives shall be made up to the end of each fiscal year, and shall be reported to Congress at the commencement of each regular session.

Act May 8, 1872, c. 140, § 1, 17 Stat. 64. Act Aug. 15, 1876, c. 287, 19 Stat. 156.

§ 88. (R. S. § 64.) Statements of appropriations and offices.

The Secretary of the Senate and the Clerk of the House of Representatives shall, as soon as may be after the close of each session of Congress, prepare and publish a statement of all appropriations made during the session, a statement of the new offices created and the salaries attached to each, and a statement of the offices the salaries attached to which are increased and the amount of such increase.

Act July 4, 1836, c. 356, § 6, 5 Stat. 117.

The statements provided for in this section are to be prepared under the direction of the Committees on Appropriations of the two Houses, and to include additional matters, by subsequent provisions, post, §§ 89, 90.

§ 89. (Act Oct. 19, 1888, c. 1210, § 1.) Preparation and contents of statement of appropriations.

Hereafter the statement of all appropriations made during each session of Congress, including new offices created and the sala-

ries of each and salaries of the offices which are increased and the amounts of such increase authorized by the act of July fourth, eighteen hundred and thirty-six, shall be prepared under the direction of the Committees on Appropriations of the Senate and House of Representatives, and said statement shall hereafter show also the offices the salaries of which are reduced or omitted, and the amount of such reduction, and shall also contain a chronological history of the regular appropriation bills passed during the session for which it is prepared. (25 Stat. 587.)

This was a provision of the deficiency appropriation act for the fiscal year 1888, cited above.

The provisions of Act July 4, 1836, mentioned in this act, were incorporated in R. S. § 64, ante, § 88.

Further provisions as to the contents of statements of appropriations were contained in Act July 19, 1897, c. 9, § 1, post, § 90.

§ 90. (Act July 19, 1897, c. 9, § 1.) Contents of statement of appropriations.

Statement of appropriations: * * * And said statements shall hereafter indicate the amount of contracts authorized by appropriation acts in addition to appropriations made therein, and shall also contain specific reference to all indefinite appropriations made each session. (30 Stat. 136.)

This was a provision accompanying an appropriation in the deficiency appropriation act of 1897, cited above, for preparation of the statement of appropriations as required by Act Oct. 19, 1888, c. 1210, § 1, ante, § 89.

The portion of the paragraph omitted here consisted of the appropriation and other temporary provisions.

A similar appropriation for the preparation of such statement is made by the sundry civil appropriation act for each year. The provision for the fiscal year 1917, was by Act July 1, 1916, c. 209, § 1, 39 Stat.

§ 91. (R. S. § 65, as amended Act Feb. 18, 1875, c. 80, § 1.) Advertisements for stationery.

The Secretary of the Senate and Clerk of the House of Representatives shall annually advertise, once a week for at least four weeks, in one or more of the principal papers published in the District of Columbia, for sealed proposals for supplying the Senate and House of Representatives, respectively, during the next session of Congress with the necessary stationery.

Res. March 3, 1815, No. 11, 3 Stat. 249. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 316.

The whole section originally enacted was stricken out, and the above provision inserted, as one of the amendments made by Act Feb. 18, 1875, c. 80, "An Act to Correct Errors and to Supply Omissions in the Revised Statutes of the United States."

A subsequent provision that purchases of stationery and materials for folding shall be made in accordance with this and the four next following sections, was made by Act March 3, 1887, c. 392, § 1, post, § 107.

§ 92. (R. S. § 66.) Form of advertisement.

The advertisement published under the preceding section must describe the kind of stationery required, and must require the proposals to be accompanied with sufficient security for their performance.

Res. March 3, 1815, No. 11, 3 Stat. 249.

§ 93. (R. S. § 67, as amended Act Feb. 18, 1875, c. 80, § 1.) Notice of acceptance of proposals.

All such proposals shall be kept sealed until the day specified in such advertisement for opening the same, when the same shall be opened in the presence of at least two persons, and the contract shall be given to the lowest bidder, provided he shall give satisfactory security to perform the same, under a forfeiture not exceeding double the contract price in case of failure; and in case the lowest bidder

shall fail to enter into such contract and give such security, within a time to be fixed in such advertisement, then the contract shall be given to the next lowest bidder, who shall enter into such contract, and give such security. And in case of failure by the person entering into such contract to perform the same, he and his sureties shall be liable for the forfeiture specified in such contract, as liquidated damages, to be sued for in the name of the United States.

Res. March 3, 1815, No. 11, 3 Stat. 249. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 316.

The whole section originally enacted was stricken out, and the above provision inserted, as one of the amendments made by Act Feb. 18, 1875, c. 80, § 1, referred to in the note to R. S. § 65, ante, § 91.

§ 94. (R. S. § 68.) Contracts for separate parts of stationery.

The three preceding sections shall not prevent either the Secretary or the Clerk from contracting for separate parts of the supplies of stationery required to be furnished.

Res. March 3, 1815, No. 11, 3 Stat. 249.

§ 95. (R. S. § 69.) American goods to be preferred.

The Secretary of the Senate and the Clerk of the House of Representatives shall, in disbursing the public moneys for the use of the two Houses, respectively, purchase only articles the growth and manufacture of the United States, provided the articles required can be procured of such growth and manufacture upon as good terms as to quality and price as are demanded for like articles of foreign growth and manufacture.

Act June 17, 1844, c. 105, § 1, 5 Stat. 681.

Provisions as to purchases and contracts for supplies in any of the departments of the government, and advertisements for proposals and bids therefor, were made by R. S. §§ 3709, 3710, and subsequent provisions, post, §§ 6832–6837.

A similar provision as to purchase of furniture for the President's House, of domestic manufacture, was made by R. S. § 1829, post, § 3341.

§ 96. (R. S. § 70.) Detailed reports of receipts and expenditures.

The Secretary of the Senate and the Clerk of the House of Representatives, respectively, shall report to Congress on the first day of each regular session, and at the expiration of their terms of service, a full and complete statement of all their receipts and expenditures as such officers, showing in detail the items of expense, classifying them under the proper appropriations, and also showing the aggregate thereof, and exhibiting in a clear and concise manner the exact condition of all public moneys by them received, paid out, and remaining in their possession as such officers.

Act July 15, 1870, c. 302, § 1, 16 Stat. 365.

Reports to Congress at the commencement of each session were required from the Secretary of the Senate and the Clerk of the House by R. S. §§ 60–63, ante, §§ 84–87, and from the Sergeant-at-Arms of the House by Act Oct. 1, 1890, c. 1256, § 7, post, § 104.

§ 97. (R. S. § 71.) Fees for copies from journals.

The Secretary of the Senate and the Clerk of the House of Representatives, respectively, are entitled, for transcribing and certifying extracts from the journal of the Senate or the executive journal of the Senate when the injunction of secrecy has been removed, or from the journal of the House of Representatives, except when such transcripts are required by an officer of the United States in a matter relating to the duties of his office, to receive from the persons for whom such transcripts are prepared the sum of ten cents for each sheet containing one hundred words.

Act Aug. 8, 1846, c. 107, § 2, 9 Stat. 80. Act Sept. 15, 1789, c. 14, § 6, 1 Stat. 69. Act April 23, 1856, c. 20, 11 Stat. 5.

§ 98. (Act Oct. 1, 1890, c. 1256, § 1.) Duties of Sergeant-at-Arms of House of Representatives.

It shall be the duty of the Sergeant-at-Arms of the House of Representatives to attend the House during its sittings, to maintain order under the direction of the Speaker, and, pending the election of a Speaker or Speaker pro tempore, under the direction of the Clerk, execute the commands of the House and all processes issued by authority thereof, directed to him by the Speaker, keep the accounts for the pay and mileage of members and delegates, and pay them as provided by law. (26 Stat. 645.)

This and the six sections next following were sections 1–7 of an act entitled "An act defining certain duties of the Sergeant-at-Arms of the House of Representatives, and for other purposes," cited above.

Section 8 of the act enumerated the officers and other persons employed in the office of the Sergeant-at-Arms, with their respective salaries. Different provisions for such officers and employés are made in the subsequent annual appropriation acts, varying from year to year, and the section is therefore omitted. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

Section 9 of the act amended R. S. § 237. Said amendment is incorporated in R. S. § 237, post, § 369.

Section 10 of the act repealed all laws and parts of laws inconsistent therewith.

In case of a vacancy in the office of Clerk of the House, or of his absence or inability, his duties as to the preparation of the roll of Representatives or the organization of the House devolve on the Sergeant-at-Arms of the next preceding House, by R. S. § 32, ante, § 31.

§ 99. (Act Oct. 1, 1890, c. 1256, § 2.) Symbol of office of Sergeant-at-Arms of House.

The symbol of his office shall be the mace, which shall be borne by him while enforcing order on the floor. (26 Stat. 645.)

§ 100. (Act Oct. 1, 1890, c. 1256, § 3.) Compensation of Members and Delegates to be disbursed by Sergeant-at-Arms of House.

The moneys which have been, or may be, appropriated for the compensation and mileage of members and delegates shall be paid at the Treasury on requisitions drawn by the Sergeant-at-Arms of the House of Representatives, and shall be kept, disbursed, and accounted for by him according to law, and he shall be a disbursing officer, but he shall not be entitled to any compensation additional to the salary now fixed by law. (26 Stat. 645.)

Certificates of salary and accounts of Members and Delegates were provided for by R. S. §§ 47, 48, ante, §§ 49, 50; and their passage as public accounts, and payment out of the public treasury were provided for by R. S. § 46, ante, § 48.

Whenever appropriations for salaries of Members and Delegates cannot be lawfully disbursed by or through the officers specially charged therewith, the Treasurer of the United States is authorized to make such disbursements by Act June 22, 1882, c. 236, post, § 479.

Notes of Decisions

Functions and acts of Sergeant-at Arms as disbursing officer.—The Sergeant-at-Arms was recognized by previous statutes to be a disbursing officer. Crain v. U. S. (1890) 25 Ct. Cl. 204.

When the Sergeant-at-Arms presents to the Treasurer of the United States a member's receipt for salary, with the Speaker's or Clerk's certificate that it is due, and receives the money, he is acting as a public agent. Id.

If a public agent be authorized by law to make certain payments, a failure on his part, or on the part of the Treasury officers, to comply with the forms of law for drawing the money from the Treasury, cannot affect the party entitled to be paid. Id.

A rule of the House can not create a personal agency between an officer and a member; and where the officer draws the member's salary pursuant to the rule, and in accordance with long-established usage, and before it is legally due, and when payment to the member would be an illegal advance, the transfer of the money to the officer is not a payment to the member. Id.

§ 101. (Act Oct. 1, 1890, c. 1256, § 4.) Bond of Sergeant-at-Arms of House.

The Sergeant-at-Arms shall, within twenty days after entering upon the duties of his office, and before receiving any portion of the moneys appropriated for the compensation of mileage of members and delegates, give a bond to the United States, with two or more sureties, to be approved by the First Comptroller of the Treasury, in the sum of fifty thousand dollars, with condition for the proper discharge of the duties of his office, and the faithful keeping, application, and disbursement of such moneys as may be drawn from the Treasury and paid to him as disbursing officer of the United States, and shall, from time to time, renew his official bond as the First Comptroller of the Treasury shall direct. No member of Congress shall be approved as surety on such bond. (26 Stat. 645.)

See note to section 5 of this act, post, § 102.

§ 102. (Act Oct. 1, 1890, c. 1256, § 5.) Custody of bond of Sergeant-at-Arms.

The bonds given pursuant to this act shall be deposited in the office of the First Comptroller of the Treasury. (26 Stat. 646.)

The First Comptroller of the Treasury was designated Comptroller of the Treasury by the Dockery Act of July 31, 1894, c. 174, § 4, post, § 402. The custody of this bond, and the duties of the Comptroller in regard thereto, were transferred to the Secretary of the Treasury, by Act March 2, 1895, c. 177, § 5, post, § 3288.

§ 103. (Act Oct. 1, 1890, c. 1256, § 6.) Tenure of office of Sergeant-at-Arms.

Any person duly elected and qualified as Sergeant-at-Arms of the House of Representatives shall continue in said office until his successor is chosen and qualified, subject however, to removal by the House of Representatives. (26 Stat. 646.)

§ 104. (Act Oct. 1, 1890, c. 1256, § 7.) Statement of disbursements by Sergeant-at-Arms.

The Sergeant-at-Arms of the House of Representatives shall prepare and submit to the House of Representatives, at the commencement of each regular session of Congress, a statement in writing exhibiting the several sums drawn by him pursuant to the provisions of this act, the application and disbursement of the same, and the balance, if any, remaining in his hands. (26 Stat. 646.)

Provisions for reports and statements of similar disbursements by the Secretary of the Senate, the Clerk of the House, and the disbursing officers acting under them, and for reports of all expenditures of the Senate and House, were made by R. S. §§ 60–63, ante, §§ 84–87.

§ 105. (R. S. § 72.) Accounts of property.

The Secretary of the Senate, the Clerk of the House of Representatives, the Sergeant-at-Arms, the Postmasters of the Senate and House of Representatives, and the Door-keeper of the House of Representatives, shall, severally, make out and return to Congress, on the first day of each regular session, and at the expiration of their respective terms of service, a full and complete account of all property belonging to the United States in their possession, respectively, at the time of returning such account.

Act July 15, 1870, c. 302, § 2, 16 Stat. 365.

Provisions for accounts of public property in and about the Capitol, the President's House, and the Botanic Garden were made by R. S. §§ 1832, 1833, post, §§ 3418, 3419, and Act June 25, 1910, c. 384, § 9, post, § 231, and for accounts of public property in the buildings occupied by the Executive Departments, by R. S. § 197, post, § 280.

§ 106. (R. S. § 73.) Door-keepers' duties.

The Door-keepers of the Senate and House of Representatives shall perform the usual services pertaining to their respective offices during the session of Congress, and shall in the recess, under the

direction of the Secretary of the Senate and Clerk of the House of Representatives, take care of the apartments occupied by the respective Houses, and provide fuel and other accommodations for their subsequent session.

Act April 12, 1792, c. 20, 1 Stat. 252.

Provisions as to the duties of officers of the House of Representatives in regard to the preparation of the roll and organization of the succeeding House were made by R. S. §§ 31–33, ante, §§ 30–32.

§ 107. (Act March 3, 1887, c. 392, § 1.) Purchases of stationery and materials for folding.

Purchases of stationery and materials for folding shall be made in accordance with sections, sixty-five, sixty-six, sixty-seven, sixty-eight, and sixty-nine, of the Revised Statutes of the United States:

Provided further, That all contracts and bonds for purchases made under the authority of this act shall be filed with the Committee to Audit and Control the Contingent Expenses of the Senate or the Committee on Accounts of the House of Representatives respectively. (24 Stat. 596.)

These were provisions of the legislative, executive, and judicial appropriation act for the fiscal year 1888, cited above.

R. S. §§ 65–69, mentioned therein, are set forth ante, §§ 91–95.

The Door-keepers of the two Houses were required to provide fuel by R. S. § 73, ante, § 106.

Provisions for inspection of fuel purchased for the public service in the District of Columbia were contained in R. S. §§ 3711–3713, post, §§ 6838–6840.

The requirement of Rev. St. § 3743, as amended by Act July 31, 1894, c. 174, § 18, post, § 6894, as to the filing of contracts in the offices of the Auditors of the Treasury, did not apply to the existing laws in regard to the contingent funds of Congress.

(R. S. § 74. Stricken out.)

This section, relating to mileage to officers or others executing any precept or summons of either House, was stricken out, as one of the amendments made by Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 317.

(R. S. § 75. Superseded.)

This section provided for editing and indexing portions of the documents accompanying the annual reports of the Departments, suitable for popular distribution. It was superseded by the re-enactment, in substance, of its provisions in the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 44, post, § 7089.

(R. S. § 76. Superseded.)

This section prohibited any payment from the contingent fund of either House of Congress, unless sanctioned by a specified committee of such House. It was superseded by the re-enactment, in substance, of its provisions, in Act Oct. 2, 1888, c. 1069, § 1, post, § 109.

§ 108. (Act March 3, 1879, c. 183, § 1.) Payments from contingent fund of Senate for expenses of committees, and vouchers therefor.

When any duty is imposed upon a committee of the Senate involving expenses which are ordered to be paid out of the contingent fund of the Senate, upon vouchers to be approved by the chairman of the committee charged with such duty, the receipt of the chairman of such committee for any sum paid to him or his order out of said contingent fund by the Secretary of the Senate shall be taken and passed by the accounting officers of the Treasury as a full and sufficient voucher; but it shall be the duty of such chairman, as soon as practicable, to furnish vouchers in detail for the disbursement of such moneys to the Secretary of the Senate, who shall file them with the accounting officers aforesaid. (20 Stat. 419.)

This was a provision of the deficiency appropriation act for the fiscal year 1879, cited above. Subsequent general provisions relating to payments from the contingent funds of both Houses, contained in Act Oct. 2, 1888, c. 1069, § 1, are set forth post, § 109.

§ 109. (Act Oct. 2, 1888, c. 1069, § 1.) Payments from contingent funds of Senate and House of Representatives, and vouchers therefor.

Hereafter no payment shall be made from the contingent fund of the Senate unless sanctioned by the Committee to Audit and Control the Contingent Expenses of the Senate, or from the contingent fund of the House of Representatives unless sanctioned by the Committee on Accounts of the House of Representatives. And hereafter payments made upon vouchers approved by the aforesaid respective committees shall be deemed, held, and taken, and are hereby declared to be conclusive upon all the departments and officers of the Government: Provided, That no payment shall be made from said contingent funds as additional salary or compensation to any officer or employé of the Senate or House of Representatives. (25 Stat. 546.)

This was a provision of the sundry civil appropriation act for the fiscal year 1889, cited above. Subsequent provisions for the appointment of a temporary Committee on Accounts of the House of Representatives, and for the conclusiveness of payments made upon vouchers approved by the committee on Accounts of the House, contained in Act March 2, 1895, c. 177, § 1, and Act March 4, 1911, c. 240, are set forth post, §§ 110, 111.

A previous provision for payments for monuments to deceased Senators or Members of the House of Representatives interred in the Congressional Cemetery, from the contingent fund of the House to which the deceased belonged, was made by Act May 23, 1876, c. 103, ante, § 55.

Previous provisions for payments from the contingent fund of the Senate for expenses of committees, contained in Act March 3, 1879, c. 183, § 1, are set forth ante, § 108.

Further restrictions on expenditure of appropriations for contingent expenses of either House of Congress were imposed by R. S. § 3680, and by a provision of Act Feb. 14, 1902, c. 17, post, § 6780.

The provision of R. S. § 3743, as amended by Act July 31, 1894, c. 174, § 18, post, § 6894, requiring contracts necessitating the advance of money, or in any manner connected with the settlement of public accounts, to be deposited in the offices of the Auditors of the Treasury, are not applicable to existing laws relating to the contingent funds of Congress, by said section.

All public accounts were required to be settled in the Treasury Department by R. S. § 236, post, § 368.

§ 109a. (Act July 16, 1914, c. 141, § 1.) Repeal of Senate resolutions authorizing payment from contingent fund for clerical and messenger service.

All Senate resolutions passed prior to July first, nineteen hundred and fourteen, authorizing the payment for clerical and messenger services from the contingent fund of the Senate are hereby repealed. (38 Stat. 456.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1915, cited above.

§ 109b. (Act July 16, 1914, c. 141, § 1.) Payment from moneys of House of Representatives of certain bills for barber shops, unlawful.

Hereafter it shall be unlawful for the Clerk of the House to pay out of any moneys of the House of Representatives any bills for laundry, furniture, supplies, or utensils used in the barber shops of the House Office Building or the House side of the Capitol. (38 Stat. 462.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1915, cited above.

§ 110. (Act March 2, 1895, c. 177, § 1.) Temporary Committee on Accounts of House of Representatives to approve payments from contingent fund.

The Speaker of the House of Representatives of the Fifty-third Congress shall, before the expiration of his term of service, appoint from among the Representatives-elect to the Fifty-fourth Congress a temporary committee on accounts, of three members,

which said committee on accounts shall have the same powers and perform the same duties in reference to payments made from the contingent fund of the House of Representatives of the Fifty-fourth Congress as are now authorized by law and the rules of the present House of Representatives; and which said temporary committee on accounts shall begin to exercise its powers immediately upon the termination of this Congress, and shall continue to exercise and discharge said duties until after the meeting and organization of the House of Representatives of the Fifty-fourth Congress, and until the appointment of the regular committee on accounts.

And all payments made out of the contingent fund of the House of Representatives upon vouchers approved by said temporary committee on accounts shall be deemed, held, and taken, and are hereby declared to be conclusive upon all the Departments and auditing officers of the Government.

And hereafter the Speaker of the House of Representatives of each subsequent Congress shall, before the termination of the last session of each Congress, appoint, from the Representatives-elect, a temporary committee on accounts of three members, with similar powers and for the same purposes. (28 Stat. 768.)

These were provisions of the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above.

A subsequent provision declaring payments from the contingent fund of the House, approved by the Committee on Accounts, conclusive, contained in Act March 4, 1911, c. 240, is set forth post, § 111.

§ 111. (Act March 4, 1911, c. 240.) Payments from contingent fund of House of Representatives, on vouchers approved by Committee on Accounts, conclusive.

Hereafter the payments made from the contingent fund of the House of Representatives upon vouchers approved by the Committee on Accounts shall be deemed, held, and taken, and are hereby declared to be conclusive upon all the departments and officers of the Government. (36 Stat. 1318.)

This was a provision of the deficiency appropriation act for the fiscal year 1911, cited above.

A previous provision to the same effect, contained in Act Oct. 2, 1888, c. 1069, § 1, is set forth ante, § 109.

Notes of Decisions

Jurisdiction of committee under previous laws.—The committee on accounts of the House of Representatives has exclusive and final jurisdiction to audit and settle accounts chargeable upon the contingent fund of the House. (1858) 9 Op. Atty. Gen. 167.

Such accounts are not open to inquiry before the Auditor and Comptroller of the Treasury. Id.

(R. S. § 77. Superseded.)

This section provided for the compilation of the Congressional Directory at each session of Congress under the direction of the Joint Committee on Public Printing. It was superseded by different provisions for the compilation, printing, distribution, etc., of the Directory, contained in the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 43, post, § 7088.

The printing, etc., of the Senate Manual and Digest and of the Manual of the House of Representatives were also provided for by the same section, Act Jan. 12, 1895, c. 23, § 73, par. 42, post, § 7087.

(R. S. § 78. Superseded.)

This section provided that, "until a contract for publishing the debates of Congress is made, such debates shall be printed by the Congressional Printer, under the direction of the Joint Committee on Public Printing," etc. The provision was derived from Act March 3, 1873, c. 227, § 1, 17 Stat. 510, which was amended, to supply an omission, by Act Jan. 22, 1874, c. 14, 18 Stat. 5. But the original provision and amendment were superseded by the provisions for the printing, distribution, and sale of the Congressional Record, and of Indexes thereto, contained in the Printing and Binding Act of Jan. 12, 1895, c. 23, §§ 13, 14, and § 73, pars. 45–60, post, §§ 6967, 6968, 7090.

§ 112. (R. S. § 79, as amended, Act Feb. 18, 1875, c. 80, § 1.) Publication of laws.

After the fourth day of March, eighteen hundred and seventy-five, the publication of the laws in newspapers shall cease.

Act May 8, 1872, c. 140, § 1, 17 Stat. 66. Act Feb. 18, 1875, c. 80, 18 Stat. 317.

This section as originally enacted, providing that, after the date specified, "no money shall be paid from the Treasury for the publication of the laws in newspapers," was changed to read as set forth here, as one of the amendments made by Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 316.

The printing and publication of the laws at the Government Printing Office were provided for by Act Jan. 12, 1895, c. 23, § 73, pars. 18–25, and other subsequent provisions collected post, §§ 7070–7073.

§ 113. (Act March 3, 1885, c. 360.) Contracts involving employment of horses for service of House of Representatives.

In all contracts hereafter made for service for the House of Representatives involving the employment of horses, the expense of keeping such horses shall be covered by the contract; and no money hereafter appropriated for contingent or other expenses of the House of Representatives shall be expended for stables or forage. (23 Stat. 512.)

This was a provision of the sundry civil appropriation act for the fiscal year 1886, cited above.

§ 114. (Act March 3, 1891, c. 541, § 1.) Contracts for hire of horses and mail wagons for mail service of House of Representatives.

Hereafter the appropriations for hire of horses and mail wagons for carrying the mails for the House of Representatives shall be expended under the direction of the Postmaster of the House, under contracts to be let annually to the lowest responsible bidder therefor after due advertisement. (26 Stat. 914.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1892, cited above.

§ 115. (Act March 3, 1901, c. 830, § 1.) Contracts for packing boxes for use of House.

Hereafter packing boxes for the use of the House of Representatives shall be procured after advertisement for proposals therefor, under specifications to be prepared by the Clerk of the House, and from the lowest and best bidder to furnish the same. (31 Stat. 960.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1902, cited above.

§ 116. (Act Aug. 7, 1882, c. 433, § 1.) Sale of waste paper, etc., and condemned furniture.

It shall be the duty of the Clerk and Doorkeeper of the House of Representatives and the Secretary and Sergeant-at-Arms of the Senate to cause to be sold all waste paper and useless documents and condemned furniture that have accumulated during the fiscal year eighteen hundred and eighty-two, or that may hereafter accumulate, in their respective departments or offices, under the direction of the Committee on Accounts of their respective houses and cover the proceeds thereof into the Treasury; and they shall, at the beginning of each regular session of Congress, report to their respective houses the amount of said sales. (22 Stat. 337.)

This was a provision of the sundry civil appropriation act for the fiscal year 1883, cited above.

Provisions for the disposition of accumulations of useless papers in the Executive Departments are set forth under R. S. § 197, post, § 280, or referred to in notes thereto.

§ 117. (Act March 3, 1875, c. 130, § 8.) Actions against officers for official acts; district attorney to enter appearance; application of provisions for removal of suits, withholding of executions, and payment of judgments against revenue or other officers; defense of actions.

In any action now pending, or which may be brought against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the district attorney for the district within which the action is brought, on being thereto requested by the officer sued, shall enter an appearance in behalf of such officer; and all provisions of the eighth section of the act of July twenty-eighth, eighteen hundred and sixty-six, entitled "An act to protect the revenue, and for other purposes," and also all provisions of the sections of former acts therein referred to, so far as the same relate to the removal of suits, the withholding of executions, and the paying of judgments against revenue or other officers of the United States, shall become applicable to such action and to all proceedings and matters whatsoever connected therewith, and the defense of such action shall thenceforth be conducted under the supervision and direction of the Attorney General. (18 Stat. 401.)

This was a section of the sundry civil appropriation act for the fiscal year ending June 30, 1876, cited above.

The provisions of Act July 28, 1866, c. 298, § 8, 14 Stat. 329, referred to in this section, were not re-enacted in terms in the Revised Statutes, but the "provisions of the sections of former acts therein referred to," also referred to in this section, were incorporated in the Revised Statutes in various sections to which reference is made in the following paragraphs of this note.

Provisions for appearance by the district attorney in suits against revenue officers for their official acts were contained in R. S. § 771, post, § 1296, and provisions relating to compensation for such services in R. S. §§ 827, 834, post, §§ 1381, 1395.

Provisions for removal from State courts to the courts of the United States of suits and prosecutions against revenue officers for their official acts, etc., were contained in R. S. § 643, and were incorporated in the Judicial Code, § 33, post, § 1015.

Provisions for the withholding of executions against revenue officers, on recovery in suits against them for their official acts, and for the payment of judgments so recovered against them, were contained in R. S. § 989, post, § 1635.

CHAPTER SIX

The Library of Congress

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§ 118. (R. S. § 80.) Collections composing Library.

The Library of Congress, composed of the books, maps, and other publications which now remain in existence, from the collections heretofore united under the act of January twenty-six, eighteen hundred and two, chapter two; the resolution of October twenty-one, eighteen hundred and fourteen; the act of January thirty, eighteen hundred and fifteen, chapter twenty-seven; the act of June twenty-five, eighteen hundred and sixty-four, chapter one hundred and forty-seven, section one; the resolution of July twenty-five, eighteen hundred and sixty-six; the act of March two, eighteen hundred and sixty-seven, chapter one hundred and sixty-seven, section one; and those added from time to time by purchase, exchange, donation, reservation from publications ordered by Congress, deposit to secure copyright, and otherwise, shall be preserved in the Capitol in the rooms which were, on the fourth day of July, eighteen hundred and seventy-two, appropriated to its use, and in such others as may hereafter be assigned thereto.

Act Jan. 26, 1802, c. 2, 2 Stat. 128. Res. Oct. 21, 1814, No. 3, 3 Stat. 246. Act Jan. 30, 1815, c. 27, 3 Stat. 195. Act June 25, 1864, c. 147, § 1, 13 Stat. 148. Res. July 25, 1866, No. 77, 14 Stat. 365. Act March 2, 1867, c. 167, § 1, 14 Stat. 464.

Provisions for the removal of the Library to the Library Building, erected pursuant to Act April 15, 1886, c. 50, 24 Stat. 12, and for the custody, care, and maintenance of that building, were made by Act Feb. 19, 1897, c. 265, § 1, 29 Stat. 544.

Notes of Decisions

Bequests to Library.—There is no indication in the statutes concerning the Library that it is a corporation or artificial person, and "the Library of Congress" is not a proper legatee to be named in a bequest. (1907) 26 Op. Atty. Gen. 447.

The best form of a bequest to the Library depends upon the law of the testator's domicile, and it is therefore impossible to formulate any particular style of bequest that will be everywhere valid and in proper form. Id.

However, a bequest "to the United States of America, to be deposited in the Library of Congress," which latter part may be varied, in case of pecuniary bequests, to "to be applied to the increase or improvement of the Library of Congress," will, it is believed, be a satisfactory form to be used generally in the states of the Union and in other English-speaking countries. Id.

§ 119. (R. S. § 81.) Library to be in two departments.

The Library of Congress shall be arranged in two departments, a general library and a law library.

Act July 14, 1832, c. 221, § 1, 4 Stat. 579.

§ 120. (R. S. § 82.) Joint Committee upon Library.

The unexpended balance of any sums appropriated by Congress for the increase of the general library, together with such sums as may hereafter be appropriated to the same purpose, shall be laid out under the direction of a joint committee of Congress upon the

Library, to consist of three members of the Senate and three members of the House of Representatives.

Act April 24, 1800, c. 37, § 5, 2 Stat. 56. Act Jan. 26, 1802, c. 2, § 6, 2 Stat. 129.

The number of members of each house constituting the committee was increased by Res. Feb. 7, 1902, No. 5, post, § 122.

§ 121. (Act March 3, 1883, c. 141, § 2.) Joint Committee upon Library during recess of Congress.

The portion of the Joint Committee of Congress upon the Library on the part of the Senate remaining in office as Senators shall during the recess of Congress exercise the powers and discharge the duties conferred by law upon the Joint Committee of Congress upon the Library. (22 Stat. 592.)

This was a provision of the deficiency appropriation act for the fiscal year 1883, cited above.

§ 122. (Res. Feb. 7, 1902, No. 5.) Number of members of Joint Committee upon Library.

The Joint Committee of Congress upon the Library, authorized by section eighty-two of the Revised Statutes, shall hereafter consist of five members of the Senate and five members of the House of Representatives. (32 Stat. 735.)

This was a joint resolution entitled "Joint Resolution increasing the membership of the Joint Committee of Congress upon the Library."

R. S. § 82, mentioned in this resolution, is set forth ante, § 120.

§ 123. (R. S. § 83.) Incidental expenses of law library.

The incidental expenses of the law library shall be paid out of the appropriations for the Library of Congress.

Act July 14, 1832, c. 221, § 3, 4 Stat. 579.

§ 124. (R. S. § 84.) Purchase of books for law library.

The Librarian shall make the purchases of books for the law library, under the direction of and pursuant to the catalogue furnished him by the Chief Justice of the Supreme Court.

Act July 14, 1832, c. 221, § 4, 4 Stat. 579.

Printing and binding for the Library are to be done at the Government Printing Office, by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 93, post, § 7172.

§ 125. (R. S. § 85.) Regulations for the Library.

The Joint Committee upon the Library is authorized to establish regulations, not inconsistent with law, in relation to the Library of Congress or either department thereof; and from time to time to alter, amend, or repeal the same; but such regulations as to the law library shall be subject to those imposed by the justices of the Supreme Court under section ninety-five. And until they impose new regulations or restrictions, the care and business of the Library shall continue to be regulated by such rules as may have been heretofore imposed by any lawful authority.

Act Jan. 26, 1802, c. 2, § 2, 2 Stat. 129.

So much of this section as authorized the Joint Committee upon the Library to establish regulations was probably superseded by the provision that the Librarian should make rules and regulations for the government of the Library, contained in Act Feb. 19, 1897, c. 265, § 1, post, § 129.

R. S. § 95, mentioned in this section, authorizing the Justices of the Supreme Court to make regulations for the use of the Law Library, is set forth post, § 143.

§ 126. (R. S. § 86.) Duplicate, injured, or wasted books.

The Joint Committee upon the Library may, at any time, exchange, or otherwise dispose of duplicate, injured, or wasted books of the Library, or documents, or any other matter in the Library not deemed proper to it, as they deem best.

Act June 26, 1848, c. 73, § 1, 9 Stat. 240.

Subsequent provisions for the disposition, by the Librarian, of books, etc., no

longer necessary to the uses of the Library, and of material that has become useless, contained in Act March 4, 1909, c. 297, § 1, are set forth post, § 150.

§ 127. (R. S. § 87.) Agents for exchange, etc., of documents.

The Joint Committee upon the Library may from time to time appoint such agents as they deem requisite, to carry into effect the donation and exchange of documents and other publications placed at their disposal for the purpose.

Act June 26, 1848, c. 73, § 1, 9 Stat. 240.

§ 128. (R. S. § 88.) Appointment of Librarian.

The President, solely, shall appoint from time to time a Librarian to take charge of the Library of Congress.

Act Jan. 26, 1802, c. 2, § 3, 2 Stat. 129.

So much of this section as provided for the appointment of the Librarian by the President, solely, was superseded by the provision for such appointment with the advice and consent of the Senate, contained in Act Feb. 19, 1897, c. 265, § 1, post, § 129.

§ 129. (Act Feb. 19, 1897, c. 265, § 1.) Appointment of Librarian, and government of Library.

For Librarian of Congress, to be appointed by the President, by and with the advice and consent of the Senate, [five thousand dollars]; and the Librarian shall make rules and regulations for the government of the Library of Congress. (29 Stat. 544.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1898, cited above. The words inclosed in brackets, "five thousand dollars," stated the amount appropriated for the Librarian for that year. Subsequent annual appropriations were for increased amounts. The appropriation for the fiscal year 1917 was $6,500, by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 130. (R. S. § 89.) Librarian's bond.

The librarian of Congress shall, before entering upon the duties of his office, give a bond payable to the United States, * * Such bond shall be deposited in the office of the Secretary of State.

Act Jan. 26, 1802, c. 2, § 3, 2 Stat. 129.

The portion of this section omitted here related to the amount and security, and prescribed the conditions of the Librarian's bond. This provision, and a further provision of R. S. § 4950, requiring him to give bond in the sum of $5,000, conditioned to render a true account of all moneys received by virtue of his office, were superseded by the provision relating to the Librarian's bond of Act Feb. 19, 1897, c. 265, § 1, post, § 131.

§ 131. (Act Feb. 19, 1897, c. 265, § 1.) Librarian's bond.

The Librarian of Congress shall on and after July first, eighteen hundred and ninety-seven, give bond, payable to the United States, in the sum of twenty thousand dollars, with sureties approved by the Secretary of the Treasury, for the faithful discharge of his duties according to law. (29 Stat. 546.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1898, cited above.

Notes of Decisions

Form of bond.—See (1885) 18 Op. Atty. Gen. 274 holding that, where the form of the bond is not prescribed by statute, its form may be determined by the officer whose duty it is to approve the same.

§ 132. (R. S. § 90.) Librarian's salary.

The Librarian of Congress is entitled to a salary of four thousand dollars a year.

Act July 8, 1870, c. 230, § 85, 16 Stat. 212.

The appropriation for the Librarian made in connection with provisions for the removal of the Library to and its maintenance in the Library Building, by Act Feb. 19, 1897, c. 265, § 1, 29 Stat. 544, was $5,000, and subsequent annual appropriations further increased the amount. The appropriation for the fiscal year 1917 was $6,500, by Act May 10, 1916, c. 117, § 1, 39 Stat.

See, also, notes to § 129, ante.

§ 133. (Act Feb. 19, 1897, c. 265, § 1.) Librarian's report.

The Librarian of Congress shall make to Congress at the beginning of each regular session, a report for the preceding fiscal year, as to the affairs of the Library of Congress, including the copyright business, and said report shall also include a detailed statement of all receipts and expenditures on account of the Library and said copyright business. (29 Stat. 546.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1898, cited above.

(R. S. § 91. Superseded.)

This section, incorporating the provisions of Act March 3, 1871, c. 136, 16 Stat. 584, authorized the Librarian "to employ from time to time the following assistants in the business of the Library," specifying three assistant librarians and eleven other assistants, at various rates of compensation. The increase of their pay of 15 per cent., by a provision of Act March 3, 1873, c. 226, § 1, 17 Stat. 487, was repealed by Act Jan. 20, 1874, c. 11, 18 Stat. 4.

Provisions for an enlarged and reorganized force of officers and employés, in connection with appropriations for the removal of the Library to and its maintenance in the Library Building, were made by the legislative, executive, and judicial appropriation act for the fiscal year 1898. That act provided "for the following, to be selected by the Librarian of Congress, by reason of special aptitude for the work of the Library, including the copyright work," specifying a chief assistant librarian, assistant librarian (superintendent of reading room), chief of catalogue department, and superintendents of other departments, etc., with numerous assistants and others, designated as attendants, attendants and collaters, watchmen, and laborers, and prescribing the compensation of each; and in the Copyright Department it provided for a Register of Copyrights, describing his duties and the bond required of him, and for various clerks, also prescribing the compensation of each. Act Feb. 19, 1897, c. 265, § 1, 29 Stat. 544.

Subsequent annual appropriations provided for officers, besides the Librarian and chief assistant librarian, in divisions of the Library corresponding to those named in said act of 1897, with some additions, but designated most of such officers by other titles and changed their compensation, and provided in like manner for assistants, clerks, and other employés; the number of officers and others employed, and the amounts appropriated for them respectively, varying from year to year. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

The provisions of said Act Feb. 19, 1897, c. 265, § 1, relating to the Register of Copyrights, his duties, bond, etc., and his assistants, and to the Copyright Department of the Library, were superseded by the more permanent provisions of the Copyright Act of March 4, 1909, c. 320, §§ 47–51, post, §§ 9568–9572.

§ 134. (Act Feb. 19, 1897, c. 265, § 1.) Superintendent of Library building and grounds; appointment, compensation, duties, and bond; employment of subordinates.

For superintendent of the Library building and grounds, to be appointed by the President, by and with the advice and consent of the Senate, [five thousand dollars]; and said superintendent shall disburse all appropriations made for and on account of the Library and Library building and grounds, and shall on and after July first,

eighteen hundred and ninety-seven, give bond, payable to the United States in the sum of thirty thousand dollars, with sureties approved by the Secretary of the Treasury, for the faithful discharge of his duties; and for the employment by said superintendent of all necessary clerks, messengers, watchmen, engineers, firemen, electrician, elevator conductors, mechanics, laborers, charwomen, and others for the proper custody, care, and maintenance of said building and grounds. (29 Stat. 545.)

These were provisions, under the heading "Custody, care, and maintenance of Library building and grounds," of the legislative, executive, and judicial appropriation act for the fiscal year 1898, cited above.

Specific annual appropriations were made for the same purposes by the subsequent similar acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

The words "five thousand dollars," inclosed in brackets, in this section, were superseded by a provision in the legislative, executive, and judicial appropriation act for the fiscal year 1916, reducing the salary of the superintendent of the Library building and grounds to $3,000, post, § 134a.

The superintendent of the Library building and grounds is also to disburse certain other appropriations, by a provision of Act July 16, 1897, c. 9, § 1, post, § 136.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 134a. (Act March 4, 1915, c. 141, § 1.) Superintendent of Library building and grounds; salary.

Library building and grounds: Superintendent, $3,000, and the salary of the superintendent of the Library building and grounds shall, from and after the passage of this Act, be at the rate of $3,000 per annum, and the amount appropriated for the salary of said superintendent for the balance of the fiscal year nineteen hundred and fifteen shall be available for the payment of said salary at the rate of $3,000 per annum. (38 Stat. 1006.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1916, cited above.

See notes to § 134, ante.

§ 135. (Act Feb. 19, 1897, c. 265, § 1.) Persons employed in and about Library to be appointed solely with reference to fitness.

All persons employed in and about said Library of Congress, under the Librarian or the superintendent of the Library building and grounds shall be appointed solely with reference to their fitness for their particular duties. (29 Stat. 545.)

This was a proviso annexed to the provisions of the legislative, executive, and judicial appropriation act for the fiscal year 1898, cited above, for care, etc., of the Library building and grounds, ante, § 134.

Notes of Decisions

Power of superintendent to dispose of property.—The superintendent of the Library building and grounds has no authority to transfer certain disused portions of the lighting and heating plant of the Library of Congress to the Bureau of Mines of the Department of the Interior. (1912) 29 Op. Atty. Gen. 524.

Assistant in division for the blind.—The provision in Appropriation Act Aug. 23, 1912, c. 350, § 1, 37 Stat. 369,

for an assistant in the division for the blind in the Library, created a particular position, but did not designate the particular person who was to fill it; the phrase "formerly in the free Public Library," being merely descriptive of the character of the duties of the position created. (1912) 29 Op. Atty. Gen. 532.

§ 136. (Act July 16, 1897, c. 9, § 1.) Disbursements by superintendent of Library building and grounds.

The superintendent of the Library building and grounds shall hereafter disburse all appropriations made for and on account of the Botanic Garden, and shall also disburse all appropriations authorized to be expended by the Joint Committee on the Library. (30 Stat. 136.)

This was a provision of the deficiency appropriation act for the fiscal year 1897, cited above.

§ 137. (R. S. § 92.) No maps to be taken out.

No map shall be taken out of the Library by any person.

Act Jan. 26, 1802, c. 2, § 4, 2 Stat. 129.

§ 138. (R. S. § 93.) Who may take out books.

No book shall be taken from the Library except by the President, the Vice-President, Senators, Representatives, and Delegates in Congress, and the persons enumerated in section ninety-four, or otherwise authorized by law.

Act Jan. 26, 1802, c. 2, § 4, 2 Stat. 129.

§ 139. (R. S. § 94.) Persons specially privileged to use Library.

The Joint Committee on the Library is authorized to grant the privilege of using and drawing books from the Library, in the same manner and subject to the same regulations as members of Congress, to any of the following persons:

First. Heads of Departments.

Second. The Chief Justice and Associate Justices, the reporter, and clerk of the Supreme Court.

Third. Members of the diplomatic corps.

Fourth. The judges and clerk of the Court of Claims.

Fifth. The Solicitor-General, and Assistant Attorneys-General.

Sixth. The Secretary of the Senate.

Seventh. The Clerk of the House of Representatives.

Eighth. The Chaplains of the two Houses of Congress.

Ninth. The Solicitor of the Treasury.

Tenth. The financial agent of the Joint Committee on the Library.

Eleventh. The Smithsonian Institution, through its Secretary.

Twelfth. Any person, when in the District of Columbia, who has been President.

Act May 1, 1810, c. 50, 2 Stat. 612. Res. March 2, 1812, No. 1, 2 Stat. 786. Act April 16, 1816, c. 46, § 3, 3 Stat. 284. Res. Jan. 13, 1830, No. 2, 4 Stat. 429. Res. Aug. 11, 1848, No. 26, 9 Stat. 340. Act March 3, 1863, c. 92, § 4, 12 Stat. 765. Act April 5, 1866, c. 25, § 3, 14 Stat. 13.

§ 140. (Act March 3, 1875, c. 179.) Use of Library by Regents of Smithsonian Institution.

That the Joint Committee of both Houses of Congress on the Library be authorized to extend the use of the books in the Library of Congress to the Regents of the Smithsonian Institution resident in Washington on the same conditions and restrictions as members of Congress are allowed to use the Library. (18 Stat. 512.)

This was an act entitled "An act extending the privilege of the Library of Congress to the Regents of the Smithsonian Institution."

§ 141. (Res. Aug. 28, 1890, No. 41.) Use of Library by Interstate Commerce Commission, and by Chief of Engineers of Army.

That the Joint Committee of Congress on the Library be au-

thorized to extend the use of the books in the Library of Congress to the members and secretary of the Interstate Commerce Commission, and the Chief of Engineers of the Corps of Engineers United States Army, resident in Washington, on the same conditions and restrictions as members of Congress are allowed to use the Library. (26 Stat. 678.)

§ 142. (Res. Jan. 27, 1894, No. 9.) Use of Library by Justices of Courts of District of Columbia.

That the chief justice and associate justices of the court of appeals of the District of Columbia and the chief justice and associate justices of the supreme court of said District be authorized to use and take books from the Library of Congress in the same manner and subject to the same regulations as Justices of the Supreme Court of the United States. (28 Stat. 577.)

§ 143. (R. S. § 95.) Use and regulation of law library.

The justices of the Supreme Court shall have free access to the law library; and they are authorized to make regulations, not inconsistent with law, for the use of the same during the sittings of the court. But such regulations shall not restrict any person authorized to take books from the Library from having access to the law library, or using the books therein in the same manner as he may be entitled to use the books of the general Library.

Act July 14, 1832, c. 221, § 2, 4 Stat. 579.

§ 144. (Act July 11, 1888, c. 615, § 1.) Law library to be open while Congress in session.

Hereafter the law library shall be kept open every day so long as either House of Congress is in session. (25 Stat. 262.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1889, cited above.

§ 145. (R. S. § 96.) Copies of Statutes at Large.

Ten of the copies of the Statutes at Large, published by Little, Brown & Co., which were deposited in the Library prior to February fifth, eighteen hundred and fifty-nine, shall be retained by the Librarian for the use of the justices of the Supreme Court, during the terms of court.

Act Feb. 5, 1859, c. 22, § 11, 11 Stat. 381.

§ 146. (R. S. § 97.) Copies of journals and documents.

Two copies of the journals and documents, and of each book printed by either House of Congress, well bound in calf, shall be deposited in the Library, and must not be taken therefrom.

Res. Jan. 28, 1857, No. 5, § 5, 11 Stat. 253.

§ 147. (R. S. § 98.) Deposit in Library of journals of Senate and House.

Twenty-five copies of the public journals of the Senate, and of the House of Representatives, shall be deposited in the Library of the United States, at the seat of Government, to be delivered to members of Congress during any session, and to all other persons authorized by law to use the books in the Library, upon their application to the Librarian, and giving their responsible receipts for the same, in like manner as for other books.

Res. Dec. 27, 1813, No. 1, 3 Stat. 140. Res. July 20, 1840, No. 5, 5 Stat. 409.

Provisions for distribution of the journals of each House, including 52 bound copies of each, to the Library of Congress, were made by Act Oct. 19, 1888, c. 1213, 25 Stat. 610; and subsequent provisions for the printing at the Government Printing Office and distribution of the journals were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 57, post, § 7030.

§ 148. (Act June 6, 1900, c. 791, § 1.) Delivery to and preservation in Library of bound volumes from files of House of Representatives.

The Clerk of the House of Representatives is hereby authorized and directed to deliver to the Librarian of Congress all bound volumes of original papers, general petitions, printed matter, books, and manuscripts now in, or that may hereafter come into, the files of the House, which in his judgment are not required to be retained in the immediate custody of the file clerk; and it shall be the duty of the Librarian of Congress to cause all such matter so delivered to him to be properly classified by Congress and arranged for preservation and ready reference. All of such matter to be held as a part of the files of the House of Representatives, subject to its orders and rules. (31 Stat. 642.)

This was a provision of the sundry civil appropriation act for the fiscal year 1901, cited above.

§ 149. (Act Feb. 25, 1903, c. 755, § 1.) Transfer to Library of books, etc., from Executive Departments or bureaus, etc.

The head of any Executive department or bureau or any commission of the Government is hereby authorized from time to time to turn over to the Librarian of Congress, for the use of the Library of Congress, any books, maps, or other material in the library of the department, bureau, or commission no longer needed for its use, and in the judgment of the Librarian of Congress appropriate to the uses of the Library of Congress. (32 Stat. 865.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1904, cited above.

§ 150. (Act March 4, 1909, c. 297, § 1.) Transfer to other libraries of books, etc., and disposition of useless material.

The Librarian of Congress may from time to time transfer to other governmental libraries within the District of Columbia, including the Public Library, books and material in the possession of the Library of Congress in his judgment no longer necessary to its uses, but in the judgment of the custodians of such other collections likely to be useful to them, and may dispose of or destroy such material as has become useless. (35 Stat. 858.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1910, cited above.

§ 151. (Act June 28, 1902, c. 1301, § 1.) Sale of copies of card indexes and other publications.

The Librarian of Congress is hereby authorized to furnish to such institutions or individuals as may desire to buy them, such copies of the card indexes and other publications of the Library as may not be required for its ordinary transactions, and charge for the same a price which will cover their cost and ten per centum added, and all moneys received by him shall be deposited in the Treasury. (32 Stat. 480.)

This was a provision of the sundry civil appropriation act for the fiscal year 1903, cited above.

§ 152. (R. S. § 99.) Smithsonian library.

The library collected by the Smithsonian Institution under the provisions of the act of August ten, eighteen hundred and forty-six, chapter twenty-five, and removed from the building of that Institution, with the consent of the Regents thereof, to the Library of Congress, shall, while there deposited, be subject to the same regulations as the Library of Congress, except as hereinafter provided.

Act April 5, 1866, c. 25, § 1, 14 Stat. 13.

§ 153. (R. S. § 100.) How to be kept and used.

The Smithsonian Institution shall have the use thereof in like manner as before its removal, and the public shall have access thereto

for purposes of consultation on every ordinary week-day, except during one month of each year, in the recess of Congress, when it may be closed for renovation. All the books, maps, and charts of the Smithsonian library shall be properly cared for and preserved in like manner as are those of the Congressional Library; from which the Smithsonian library shall not be removed except on re-imbursement by the Smithsonian Institution to the Treasury of the United States of expenses incurred in binding and in taking care of the same, or upon such terms and conditions as shall be mutually agreed upon by Congress and the Regents of the Institution.

Act April 5, 1866, c. 25, § 2, 14 Stat. 13.

§ 154. (Act March 3, 1901, c. 830, § 1.) Library of House of Representatives under control of Librarian of Congress.

The library of the House of Representatives shall hereafter be under the control and direction of the Librarian of Congress, who shall provide all needful books of reference therefor. The librarian, two assistant librarians, and assistant in the library, * * shall be appointed by the Clerk of the House, with the approval of the Speaker of the House of Representatives of the Fifty-sixth Congress, and thereafter no removals shall be made from the said positions except for cause reported to and approved by the Committee on Rules. (31 Stat. 964.)

This was a provision accompanying appropriations for the office of the Clerk of the House of Representatives in the legislative, executive, and judicial appropriation act for the fiscal year 1902, cited above. The words omitted here, "above provided for," referred to appropriations therein.

Stealing, wrongfully defacing, etc., any book, pamphlet, etc., belonging to the Library of Congress, or to any public library in the District of Columbia, when not otherwise punishable by some statute of the United States, was made punishable by provisions of Act June 19, 1878, c. 317, 20 Stat. 171.

CHAPTER SEVEN

Congressional Investigations

Sec.
155. Oaths to witnesses, by whom administered.
156. Oaths to witnesses may be administered by any member of Congress.
157. Refusal of witness to testify.
158. No privilege to refuse to answer criminating questions.
159. Proceedings against witnesses failing to testify.
160. Fees of witnesses residing in District of Columbia.

§ 155. (R. S. § 101.) Oaths to witnesses, by whom administered.

The President of the Senate, the Speaker of the House of Representatives, or a chairman of a Committee of the Whole, or of any committee of either House of Congress, is empowered to administer oaths to witnesses in any case under their examination.

Act May 3, 1798, c. 36, § 1, 1 Stat. 554. Act Feb. 8, 1817, c. 10, 3 Stat. 345.

Provisions for administration of oaths in the Senate, by the Presiding Officer for the time being, the Secretary of the Senate, or the Chief Clerk, including oaths to witnesses, are contained in Act April 18, 1876, c. 66, ante, §§ 27, 28.

Authority to administer oaths to witnesses was also conferred upon members of either House by Act June 26, 1884, c. 123, post, § 156; and upon masters in chancery, on examination of witnesses as to private claims pending before any committee, by Act Feb. 3, 1879, c. 40, post, § 6409.

Notes of Decisions

Power to require attendance of witnesses.—Either house of Congress in the discharge of the powers and duties devolved upon it by the Constitution and as necessarily incident thereto, has the undoubted right to require the per-

sonal attendance, before its committees as a witness, of any citizen, to be paid for his attendance or not, according to its will and pleasure. Lilley v. U. S. (1878) 14 Ct. Cl. 539.

§ 156. (Act June 26, 1884, c. 123.) Oaths to witnesses may be administered by any member of Congress.

Any member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a member, or any committee thereof. (23 Stat. 60.)

This was an act entitled "An act to provide for the administration of oaths to witnesses in matters depending in either House of Congress," cited above.

§ 157. (R. S. § 102.) Refusal of witness to testify.

Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

Act Jan. 24, 1857, c. 19, § 1, 11 Stat. 155.

Notes of Decisions

Validity of provisions.—This section is constitutional. In re Chapman (1897) 17 Sup. Ct. 677, 678, 166 U. S. 661, 41 L. Ed. 1154. See, also, In re Chapman (1895) 15 Sup. Ct. 331, 156 U. S. 211, 39 L. Ed. 401; Chapman v. U. S. (1895) 5 App. D. C. 122.

This section is not so connected with R. S. § 103, post, § 158, that, if the latter section be held unconstitutional, the former must fall with it. In re Chapman (1897) 17 Sup. Ct. 677, 679, 166 U. S. 661, 41 L. Ed. 1154.

Scope of inquiry.—The words "any matter under inquiry" mean any matter within the jurisdiction of the two houses which are before them for consideration and proper for their action, and questions pertinent thereto and facts or papers bearing thereon. In re Chapman (1897) 17 Sup. Ct. 677, 678, 166 U. S. 661, 41 L. Ed. 1154.

The Senate has jurisdiction to inquire as to charges in the public press as to alleged dealings of Senators in the stock of a corporation whose business was affected by a pending tariff bill, thereby impugning the integrity of such members in a manner calculated to destroy public confidence in that body, and to subject the individuals to censure or expulsion.

It is not essential to the jurisdiction in such a case that the preamble and resolution for the investigation shall declare that the proceeding is taken for the purpose of censure or expulsion. In re Chapman (1897) 17 Sup. Ct. 677, 680, 166 U. S. 661, 41 L. Ed. 1154.

Power of courts to require attendance and testimony of witnesses.—The power of the United States courts to authorize the taking of depositions on letters rogatory from courts of foreign countries exists by international comity; but no comity of any kind can be invoked, by a mere investigating commission appointed by Congress, to authorize a peremptory order to compel a witness to answer interrogatories propounded by the commission. In re Pacific Ry. Commission (C. C. 1887) 32 Fed. 241, 256.

§ 158. (R. S. § 103.) No privilege to refuse to answer criminating questions.

No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

Act Jan. 24, 1862, c. 11, 12 Stat. 333.

Provisions that testimony given by the witness shall not be used against him in any criminal proceeding were made by R. S. § 859, post, § 1467.

Cited without definite application, In re Chapman (1895) 15 Sup. Ct. 331, 332, 156 U. S. 211, 39 L. Ed. 401; In re Chapman (1897) 17 Sup. Ct. 677, 678, 166 U. S. 661, 41 L. Ed. 1154.

§ 159. (R. S. § 104.) Proceedings against witnesses failing to testify.

Whenever a witness summoned as mentioned in section one hundred and two fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

Act Jan. 24, 1857, c. 19, § 3, 11 Stat. 156.

Notes of Decisions

Punishment for contempt.—The Senate and House may punish persons other than its own members for contempts of its authority. Anderson v. Dunn (1821) 6 Wheat. 204, 5 L. Ed. 242; Ex parte Nugent (C. C. 1848) Fed. Cas. No. 10,375.

Though the Constitution gives no power to either House of Congress to punish for contempt, except when committed by their own members, the House of Representatives, while a Congress is sitting, may convict one for contempt for breach of the privileges of the House and of the dignity and authority of the same. Anderson v. Dunn (1821) 6 Wheat. 204, 225, 5 L. Ed. 242.

K., for refusing to answer certain questions put to him, as a witness, by the House, concerning the business of a real estate partnership of which he was a member, and to produce certain books and papers in relation thereto, was, by an order of the house, imprisoned for 45 days in the common jail of the District of Columbia. He brought suit to recover damages therefor against the sergeant-at-arms, who executed the order, and the members of the committee who caused him to be brought before the house, where he was adjudged to be in contempt of its authority. Held that, although the house can punish its own members for disorderly conduct, or for failure to attend its sessions, and can decide cases of contested elections, and determine the qualifications of its members, and exercise the sole power of impeachment of officers of the government, and may, where the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness, there is not found in the United States Constitution any general power vested in either house to punish for contempt. Kilbourn v. Thompson (1880) 103 U. S. 168, 26 L. Ed. 377.

The court, without affirming that such a power can arise in any case other than those already specified, decides that it can exist in no case where the house, attempting to exercise it, invokes its aid in a matter to which its authority does not extend, such as an inquiry into the private affairs of the citizen. Id.

The resolution of the House under which K. was summoned and examined as a witness directed its committee to examine into the history and character of what was called the "real estate pool" of the District of Columbia. The preamble recited, as the grounds of the investigation, that J. C. & Co., who were debtors of the United States, and whose affairs were then in litigation before a bankruptcy court, had an interest in the pool, or were creditors of it. The subject-matter of the investigation was judicial, and not legislative. It was then pending before the proper court, and there existed no power in Congress, or in either house thereof, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, to investigate the affairs of that partnership, and consequently no authority to compel a witness to testify on the subject. Id.

The parliament of England, before its separation into bodies since known as the "House of Lords" and the "House of Commons," was a high court of judicature, the highest in the realm, possessed of the general power incident to such a court of punishing for contempt, and on its separation the power remained with each body, but neither house of Congress was constituted a part of any court of general jurisdiction, nor has it any history to which the exercise of such power can be traced. Its power must be sought alone in some express grant in the Constitution, or be found necessary to carry into effect such powers as are there granted. Id.

An investigation by a committee of Congress, under a resolution reciting that a certain firm, who were debtors of the United States, were interested in a so-called real estate pool in the District of Columbia, the history and character of which the committee was to examine, on the assumption that a settlement had been made in bankruptcy proceedings against said debtor to the disadvantage of the United States, was judicial in its nature, and therefore not a legitimate subject of legislative inquiry. Id.

An inquiry by the United States Senate as to what person, if any, had violated the rule of the Senate which requires that all treaties laid before them should be kept secret until the Senate should take off the injunction of secrecy, is a matter within the jurisdiction

of the Senate, and it may punish for contempt of such rule. Ex parte Nugent (C. C. 1848) Fed. Cas. No. 10,-375.

The Senate of the United States has a right to hold secret sessions whenever in its judgment the proceedings shall require secrecy, and may pronounce judgment in secret session for a contempt which took place in secret session. Id.

The Senate and House are the sole judges of their own contempts; and in case of commitment for contempt no other body or court can have a right to inquire directly into the correctness or propriety of the commitment, or to discharge the prisoner on habeas corpus. Id.

Congress cannot compel the production of private books and papers of citizens for its inspection, except in the course of judicial proceedings, or in suits instituted for that purpose, and then only upon averments that its rights in some way depend upon evidence therein contained. In re Pacific Ry. Commission (C. C. 1887) 32 Fed. 241.

Congress cannot empower a commission to investigate the private affairs, books, and papers of the officers and employés of corporations indebted to the government, as to their relations to other companies with which such corporations have had dealings, except so far as such officers and employés are willing to submit the same for inspection; and the investigation of the Pacific Railway Commission into affairs of officers and employés of the Pacific Railway Companies, under the act of March 3, 1887, is limited to that extent. Id.

The judicial power of the United States is limited to "cases" and "controversies" enumerated in article 3, § 1, Const., as modified by the eleventh amendment, and to petitions on habeas corpus, and cannot be extended by Congress; and by such "cases" and "controversies" are meant the claims of litigants brought for determination by regular judicial proceedings established by law or custom. Id.

The House of Representatives has power to commit for contempt, and hence when a person called as a witness before a House committee is found guilty of a contempt in refusing to answer questions, the order of the House directing his imprisonment is a complete protection to the speaker who orders him into custody of the sergeant-at-arms. Stewart v. Blaine (D. C. 1874) 1 MacArthur, 453.

A warrant issued by order of the Senate for the arrest of a witness for contempt in refusing to appear before a committee, and addressed only to the sergeant-at-arms, cannot be served by deputy in Massachusetts. Sanborn v. Carleton (1860) 81 Mass. (15 Gray) 399.

Either house may issue its warrant or attachment to bring before it, for the purpose of giving necessary evidence in legislative proceedings, a witness charged with contempt, and by such process may take him from the custody of the sheriff by whom he is imprisoned on execution in a proceeding in a state court. Congress is not restricted to proceeding by habeas corpus in such cases. Wilckens v. Willet (N. Y. 1864) 4 Abb. Dec. 596.

Validity of provisions.—This section is not unconstitutional, either on the ground that it delegates exclusive jurisdiction to the criminal court of the district, and thereby deprives the houses of their right to punish witnesses for contempt; or on the ground that, if the houses still retain their authority, the witnesses would be put twice in jeopardy for the same offense. In re Chapman (1897) 17 Sup. Ct. 677, 681, 166 U. S. 661, 41 L. Ed. 1154.

Cited without definite application. In re Chapman (1895) 15 Sup. Ct. 331, 332, 156 U. S. 211, 39 L. Ed. 401.

§ 160. (Act May 1, 1876, c. 88.) Fees of witnesses residing in District of Columbia.

Witnesses residing in the District of Columbia and not in the service of the government of said District or of the United States, who shall be summoned to give testimony before any committee of the House of Representatives, shall not be allowed exceeding two dollars for each day's attendance before said committee. (19 Stat. 41.)

This was a proviso annexed to an appropriation in the deficiency appropriation act for the fiscal year 1876, cited above.

CHAPTER EIGHT

Contested Elections

Sec.
161. Notice of intention to contest.
162. Time for answer.
163. Time for taking testimony.
164. Computation of time for taking testimony.
165. Notice of depositions; service.
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§ 161. (R. S. § 105.) Notice of intention to contest.

Whenever any person intends to contest an election of any member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice, in writing, to the member whose seat he designs to contest, of his intention to contest the same, and, in such notice, shall specify particularly the grounds upon which he relies in the contest.

Act Feb. 19, 1851, c. 11, § 1, 9 Stat. 568.

Notes of Decisions

Rights, etc., of member pending contest.—Until a decision is made which unseats them, members of Congress whose seats are contested are considered to be in all respects endowed with the same rights, powers, and privileges as other members. (1896) 21 Op. Atty. Gen. 342.

§ 162. (R. S. § 106.) Time for answer.

Any member upon whom the notice mentioned in the preceding section may be served shall, within thirty days after the service thereof, answer such notice, admitting or denying the facts alleged therein, and stating specifically any other grounds upon which he rests the validity of his election; and shall serve a copy of his answer upon the contestant.

Act Feb. 19, 1851, c. 11, § 2, 9 Stat. 568.

§ 163. (R. S. § 107.) Time for taking testimony.

In all contested-election cases the time allowed for taking testimony shall be ninety days, and the testimony shall be taken in the following order: The contestant shall take testimony during the first forty days, the returned member during the succeeding forty days, and the contestant may take testimony in rebuttal only during the remaining ten days of said period.

Act Jan. 10, 1873, c. 24, § 1, 17 Stat. 408.

This section was construed by Act March 2, 1875, c. 119, § 2, post, § 164.

Notes of Decisions

Perjury.—Defendant was charged before a state court with perjury in having testified falsely before a notary public in a proceeding under R. S. tit.

2, c. 8 (this chapter), regulating the taking of testimony in a contest for a seat in the house of representatives of the United States. Held, that the offense is cognizable only by the federal courts, under R. S. § 5392, post, § 10295, providing for the punishment of perjury in any case in which the laws of the United States authorize an oath to be administered, and the second section of the Judiciary Act of Aug. 13, 1888, post, § 1233, subd. 1, giving the United States courts exclusive cognizance of all crimes cognizable under the authority of the United States. In re Loney (C. C. 1889) 38 Fed. 101, judgment affirmed Thomas v. Loney (1890) 10 S. Ct. 584, 134 U. S. 372, 33 L. Ed. 949.

§ 164. (Act March 2, 1875, c. 119, § 2.) Computation of time for taking testimony.

Section one hundred and seven of the Revised Statutes of the United States shall be construed as requiring all testimony in cases of contested election to be taken within ninety days from the day on which the answer of the returned member is served upon the contestant. (18 Stat. 338.)

This section was part of an act entitled "An act further supplemental to the various acts prescribing the mode of obtaining evidence in cases of contested elections."

Section 1 of the act repealed in part R. S. § 127, post, § 184.

§ 165. (R. S. § 108.) Notice of depositions; service.

The party desiring to take a deposition under the provisions of this chapter shall give the opposite party notice, in writing, of the time and place, when and where the same will be taken, of the name of the witnesses to be examined and their places of residence, and of the name of an officer before whom the same will be taken. The notice shall be personally served upon the opposite party, or upon any agent or attorney authorized by him to take testimony or cross-examine witnesses in the matter of such contest, if, by the use of reasonable diligence, such personal service can be made; but if, by the use of such diligence, personal service cannot be made, the service may be made by leaving a duplicate of the notice at the usual place of abode of the opposite party. The notice shall be served so as to allow the opposite party sufficient time by the usual route of travel to attend, and one day for preparation, exclusive of Sundays and the day of service. Testimony in rebuttal may be taken on five days' notice.

Act Jan. 10, 1873, c. 24, §§ 1, 3, 17 Stat. 408. Act Feb. 19, 1851, c. 11, § 6, 9 Stat. 569.

§ 166. (R. S. § 109.) Testimony taken at several places at same time.

Testimony in contested-election cases may be taken at two or more places at the same time.

Act Jan. 10, 1873, c. 24, § 1, 17 Stat. 408.

Cited without definite application,
In re Howell (D. C. 1902) 119 Fed. 465.

§ 167. (R. S. § 110.) Who may issue subpœnas.

When any contestant or returned member is desirous of obtaining testimony respecting a contested election, he may apply for a subpœna to either of the following officers who may reside within the congressional district in which the election to be contested was held:

First. Any judge of any court of the United States.

Second. Any chancellor, judge, or justice of a court of record of any State.

Third. Any mayor, recorder, or intendent of any town or city.

Fourth. Any register in bankruptcy or notary public.

Act Feb. 19, 1851, c. 11, § 3, 9 Stat. 568. Act Jan. 23, 1869, c. 15, 15 Stat. 267.

Cited without definite application, Thomas v. Loney (1890) 10 Sup. Ct. 584, 585, 134 U. S. 372, 33 L. Ed. 949, affirming (C. C. 1889) 38 Fed. 101; U. S. v. Cover (D. C. 1891) 46 Fed. 284.

§ 168. (R. S. § 111.) What the subpœna shall contain.

The officer to whom the application authorized by the preceding section is made shall thereupon issue his writ of subpœna, directed to all such witnesses as shall be named to him, requiring their attendance before him, at some time and place named in the subpœna, in order to be examined respecting the contested election.

Act Feb. 19, 1851, c. 11, § 3, 9 Stat. 568.

Cited without definite application, U. S. v. Cover (D. C. 1891) 46 Fed. 284.

§ 169. (R. S. § 112.) When justices of the peace may act.

In case none of the officers mentioned in section one hundred and ten are residing in the congressional district from which the election is proposed to be contested, the application thereby authorized may be made to any two justices of the peace residing within the district; and they may receive such application, and jointly proceed upon it.

Act Feb. 19, 1851, c. 11, § 10, 9 Stat. 570.

Cited without definite application, U. S. v. Cover (D. C. 1891) 46 Fed. 284.

§ 170. (R. S. § 113.) Depositions by consent.

It shall be competent for the parties, their agents or attorneys authorized to act in the premises, by consent in writing, to take depositions without notice; also, by such written consent, to take depositions (whether upon or without notice) before any officer or officers authorized to take depositions in common law, or civil actions, or in chancery, by either the laws of the United States or of the State in which the same may be taken, and to waive proof of the official character of such officer or officers. Any written consent given as aforesaid shall be returned with the depositions.

Act Jan. 10, 1873, c. 24, § 3, 17 Stat. 408.

§ 171. (R. S. § 114.) Service of subpœna.

Each witness shall be duly served with a subpœna, by a copy thereof delivered to him or left at his usual place of abode, at least five days before the day on which the attendance of the witness is required.

Act Feb. 19, 1851, c. 11, § 4, 9 Stat. 569.

Cited without definite application, U. S. v. Cover (D. C. 1891) 46 Fed. 284.

§ 172. (R. S. § 115.) Witnesses need not attend out of the county.

No witness shall be required to attend an examination out of the county in which he may reside or be served with a subpœna.

Act Feb. 19, 1851, c. 11, § 4, 9 Stat. 569.

Cited without definite application, U. S. v. Cover (D. C. 1891) 46 Fed. 284.

§ 173. (R. S. § 116.) Penalty for failure to attend or testify.

Any person who, having been summoned in the manner above directed, refuses or neglects to attend and testify, unless prevented by sickness or unavoidable necessity, shall forfeit the sum of twenty

dollars, to be recovered, with costs of suit, by the party at whose instance the subpœna was issued, and for his use, by an action of debt, to any court of the United States; and shall also be liable to an indictment for a misdemeanor, and punishment by fine and imprisonment.

Act Feb. 19, 1851, c. 11, § 5, 9 Stat. 569.

Notes of Decisions

Indictment for refusal to attend, etc.—An indictment under this section which avers that defendant, having been duly served with a subpœna, etc., "did refuse and neglect to attend and testify," but which fails to allege special statutory authority for the issue of the subpœna, and the particular official by whom it was issued, is insufficient. U. S. v. Cover (D. C. 1891) 46 Fed. 284.

Jurisdiction of prosecution for perjury.—A state court has no jurisdiction of a prosecution for perjury in giving a deposition before a notary public of the state to be used in proceedings to contest an election of a member of the House of Representatives. In re Loney (1890) 10 Sup. Ct. 584, 585, 134 U. S. 372, 33 L. Ed. 949.

§ 174. (R. S. § 117.) Witnesses outside of district.

Depositions of witnesses residing outside of the district and beyond the reach of a subpœna may be taken before any officer authorized by law to take testimony in contested-election cases in the district in which the witness to be examined may reside.

Act Jan. 10, 1873, c. 24, § 2, 17 Stat. 408.

§ 175. (R. S. § 118.) Party notified may select an officer.

The party notified as aforesaid, his agent or attorney, may, if he see fit, select an officer (having authority to take depositions in such cases) to officiate, with the officer named in the notice, in the taking of the depositions; and if both such officers attend, the depositions shall be taken before them both, sitting together, and be certified by them both. But if only one of such officers attend, the depositions may be taken before and certified by him alone.

Act Jan. 10, 1873, c. 24, § 3, 17 Stat. 408.

§ 176. (R. S. § 119.) Depositions taken by party or agent.

At the taking of any deposition under this chapter, either party may appear and act in person, or by agent or attorney.

Act Jan. 10, 1873, c. 24, § 3, 17 Stat. 408.

§ 177. (R. S. § 120.) Examination of witnesses.

All witnesses who attend in obedience to a subpœna, or who attend voluntarily at the time and place appointed, of whose examination notice has been given, as provided by this chapter, shall then and there be examined on oath by the officer who issued the subpœna, or, in case of his absence, by any other officer who is authorized to issue such subpœna, or by the officer before whom the depositions are to be taken by written consent, or before whom the depositions of witnesses residing outside of the district are to be taken, as the case may be, touching all such matters respecting the election about to be contested as shall be proposed by either of the parties or their agents.

Act Feb. 19, 1851, c. 11, § 7, 9 Stat. 569.

Cited without definite application,
U. S. v. Cover (D. C. 1891) 46 Fed. 284.

§ 178. (R. S. § 121.) Testimony, to what confined.

The testimony to be taken by either party to the contest shall be confined to the proof or disproof of the facts alleged or denied in the notice and answer mentioned in sections one hundred and five and one hundred and six.

Act Feb. 19, 1851, c. 11, § 9, 9 Stat. 569.

§ 179. (R. S. § 122.) Testimony, how written out and attested.

The officer shall cause the testimony of the witnesses, together with the questions proposed by the parties or their agents, to be reduced to writing in his presence, and in the presence of the parties or their agents, if attending, and to be duly attested by the witnesses respectively.

Act Feb. 19, 1851, c. 11, § 7, 9 Stat. 569.

§ 180. (R. S. § 123.) Production of papers.

The officer shall have power to require the production of papers; and on the refusal or neglect of any person to produce and deliver up any paper or papers in his possession pertaining to the election, or to produce and deliver up certified or sworn copies of the same in case they may be official papers, such person shall be liable to all the penalties prescribed in section one hundred and sixteen. All papers thus produced, and all certified or sworn copies of official papers, shall be transmitted by the officer, with the testimony of the witnesses, to the Clerk of the House of Representatives.

Act Feb. 19, 1851, c. 11, § 8, 9 Stat. 569.

Notes of Decisions

Requiring preservation of ballots.— Under this section a district judge has power, and it is his duty, on proper application, to require the ballots cast at the election to be taken from the boxes and preserved, where it is shown that they are desired as evidence by one of the parties to the contest, and that under the state law they would be destroyed before they could be used; and it is immaterial whether or not the issues to the contest have been made up so as to authorize the taking of testimony when such application is made. In re Howell (D. C. 1902) 119 Fed. 465, 467.

§ 181. (R. S. § 124.) Adjournments.

The taking of the testimony may, if so stated in the notice, be adjourned from day to day.

Act Jan. 10, 1873, c. 24, § 3, 17 Stat. 408.

§ 182. (R. S. § 125.) Notice, etc., attached to depositions.

The notice to take depositions, with the proof or acknowledgment of the service thereof, and a copy of the subpœna, where any has been served, shall be attached to the depositions when completed.

Act Feb. 19, 1851, c. 11, § 7, 9 Stat. 569. Act Jan. 10, 1873, c. 24, § 3, 17 Stat. 408.

§ 183. (R. S. § 126.) Copy of notice and answer to accompany testimony.

A copy of the notice of contest, and of the answer of the returned member, shall be prefixed to the depositions taken, and transmitted with them to the Clerk of the House of Representatives.

Act Feb. 19, 1851, c. 11, § 9, 9 Stat. 569.

§ 184. (R. S. § 127, as amended, Act March 2, 1875, c. 119, § 1, Act March 2, 1887, c. 318.) How testimony to be sent to Clerk of House of Representatives; how opened; printing testimony, etc.; briefs.

All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward the same, by mail or by express, addressed to the Clerk of the House of Representatives of the United States, Washington, District of Columbia; and shall also indorse upon the envelope containing such deposition or testimony the name of the case in which it is taken, together with the name of the party in whose behalf it is taken, and shall subscribe such endorsement.

The Clerk of the House of Representatives, upon the receipt of such deposition or testimony, shall notify the contestant and the

contestee, by registered letter through the mails, to appear before him at the Capitol, in person or by attorney, at a reasonable time to be named, not exceeding twenty days from the mailing of such letter, for the purpose of being present at the opening of the sealed packages of testimony and of agreeing upon the parts thereof to be printed. Upon the day appointed for such meeting the said clerk shall proceed to open all the packages of testimony in the case, in the presence of the parties or their attorneys, and such portions of the testimony as the parties may agree to have printed shall be printed by the Public Printer, under the direction of the said clerk; and in case of disagreement between the parties as to the printing of any portion of the testimony, the said clerk shall determine whether such portion of the testimony shall be printed; and the said clerk shall prepare a suitable index to be printed with the record. And the notice of contest and the answer of the sitting member shall also be printed with the record.

If either party, after having been duly notified, should fail to attend, by himself or by an attorney, the clerk shall proceed to open the packages, and shall cause such portions of the testimony to be printed, as he shall determine.

He shall carefully seal up and preserve the portions of the testimony not printed, as well as the other portions when returned from the Public Printer, and lay the same before the Committee on Elections at the earliest opportunity. As soon as the testimony in any case is printed the clerk shall forward by mail, if desired, two copies thereof to the contestant and the same number to the contestee; and shall notify the contestant to file with the clerk, within thirty days, a brief of the facts and the authorities relied on to establish his case. The clerk shall forward by mail two copies of the contestants' brief to the contestee, with like notice.

Upon receipt of the contestee's brief the clerk shall forward two copies thereof to the contestant, who may, if he desires, reply to new matter in the contestee's brief within like time. All briefs shall be printed at the expense of the parties respectively, and shall be of like folio as the printed record; and sixty copies thereof shall be filed with the clerk for the use of the committee on Elections.

Act Jan. 10, 1873, c. 24, § 4, 17 Stat. 409. Act March 2, 1875, c. 119, § 1, 18 Stat. 338. Act March 2, 1887, c. 318, 24 Stat. 445.

R. S. § 127, as originally enacted, consisted of a provision nearly the same as the first paragraph set forth here, with a further clause authorizing the Clerk of the House, on the written request of either party, to open any deposition and furnish a copy to either party. This latter portion of the original section was repealed by Act March 2, 1875, c. 119, § 1, cited above; and the section was further amended by Act March 2, 1887, c. 318, also cited above, to read as set forth here.

§ 185. (R. S. § 128.) Fees of witnesses.

Every witness attending by virtue of any subpœna herein directed to be issued shall be entitled to receive the sum of seventy-five cents for each day's attendance, and the further sum of five cents for every mile necessarily traveled in going and returning. Such allowance shall be ascertained and certified by the officer taking the examination, and shall be paid by the party at whose instance such witness was summoned.

Act Feb. 19, 1851, c. 11, § 11, 9 Stat. 570.

§ 186. (R. S. § 129.) Fees of officers.

Each judge, justice, chancellor, chief executive officer of a town or city, register in bankruptcy, notary public, and justice of the peace, who shall be necessarily employed pursuant to the provisions of this chapter, and all sheriffs, constables, or other officers who may be employed to serve any subpœna or notice herein authorized, shall be entitled to receive from the party at whose instance the service

shall have been performed such fees as are allowed for similar services in the State wherein such service may be rendered.

Act Feb. 19, 1851, c. 11, § 11, 9 Stat. 570.

(R. S. § 130. Superseded.)

This section prohibited payment by the House of Representatives for expenses incurred in prosecuting or defending a contested election case. It was practically superseded by the provision limiting such payments, contained in Act March 3, 1879, c. 182, § 1, post, § 187.

§ 187. (Act March 3, 1879, c. 182, § 1.) Limitation of payment for expenses of contest for seat in House of Representatives; account and vouchers therefor.

Hereafter no contestee or contestant for a seat in the House of Representatives shall be paid exceeding two thousand dollars for expenses in election contests; and before any sum whatever shall be paid to a contestant or contestee for expenses of election contest, he shall file with the clerk of the Committee on Elections a full and detailed account of his expenses, accompanied by the vouchers and receipts for each item, which account and vouchers shall be sworn to by the party presenting the same, and no charges for witness fees shall be allowed in said accounts unless made in strict conformity to section one hundred and twenty eight Revised Statutes of the United States. (20 Stat. 400.)

This was a provision accompanying appropriations for expenses incurred in contested election cases in the sundry civil appropriation act for the fiscal year 1880, cited above.

R. S. § 128, mentioned in this provision, is set forth ante, § 185.

CHAPTER EIGHT A

Contributions for Purpose of Influencing Elections

This chapter, inserted here as additional to the original chapters of Title II of the Revised Statutes, includes the provisions of Act June 25, 1910, c. 392, entitled "An act providing for publicity of contributions made for the purpose of influencing elections at which Representatives in Congress are elected," as amended by Act Aug. 19, 1911, c. 33, entitled "An act to amend" said first-mentioned act, "and extending the same to candidates for nomination and election to the offices of Representative and Senator in the Congress of the United States and limiting the amount of campaign expenses," and further amended by Act Aug. 23, 1912, c. 349, 37 Stat. 360.

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188. "Political committee" defined.
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191. Account to treasurer and record of contributions, etc.
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194. Statements by others than political committees of expenditures, etc., of $50 or more.
195. (1) "Candidate" defined.
(2) Statements by candidate for nomination or election as Representative, of moneys, etc., received and expended, etc., to be filed with Clerk of House of Representatives, before nomination and before election.
(3) Statements by candidate for nomination or election as Senator, of moneys, etc., received and expended, etc., to be filed with Secretary of Senate, before nomination and before election.
(4) Statements by candidate of moneys, etc., received and expended, etc., to be filed

Sec.
after nomination and after election.
(5) Statements by candidates to include statement of promises, etc., made relative to appointment, etc., or that no such promise, etc., has been made.
(6) Candidates forbidden to promise office, etc.; candidates for Senator forbidden to contribute, etc., to nomination or election of candidate for legislature of State; contributions to political committees permitted.
(7) Contributions or expenditures, etc., by candidates not to exceed amount allowed under laws of State; limit of aggregate for candidate for Representative for Senator; assessments, etc., under laws of State, and certain personal expenses, not within this section.
(8) Details in successive statements.
(9) Person contributing, etc., to nomination or election of member of legislature, and thereafter a candidate for or elected Senator, required to comply with this section; details of statements.
(10) Verification of statements; officers before whom to be made; filing statements by registered mail.
(11) Effect of act on laws of State.
196. Personal expenses for traveling, stationery, etc., for influencing, in two or more states, election of Representatives, not subject to act.
197. Legal expenses in election contests not limited or affected by act.
198. Punishment for violation of act.

§ 188. (Act June 25, 1910, c. 392, § 1.) "Political committee" defined.

The term "political committee" under the provisions of this Act shall include the national committees of all political parties and the national congressional campaign committees of all political parties and all committees, associations, or organizations which shall in two or more States influence the result or attempt to influence the result of an election at which Representatives in Congress are to be elected. (36 Stat. 822.)

§ 189. (Act June 25, 1910, c. 392, § 2.) Political committee to have chairman and treasurer; treasurer's duties.

Every political committee as defined in this Act shall have a chairman and a treasurer. It shall be the duty of the treasurer to keep a detailed and exact account of all money or its equivalent received by or promised to such committee or any member thereof, or by or to any person acting under its authority or in its behalf, and the name of every person, firm, association, or committee from whom received, and of all expenditures, disbursements, and promises of payment or disbursement made by the committee or any member thereof, or by any person acting under its authority or in its behalf, and to whom paid, distributed, or disbursed. No officer or member of such committee, or other person acting under its authority or in its behalf, shall receive any money or its equivalent, or expend or promise to expend any money on behalf of such committee, until after a chairman and treasurer of such committee shall have been chosen. (36 Stat. 823.)

§ 190. (Act June 25, 1910, c. 392, § 3.) Receipts for payments, etc., by political committee to be preserved.

Every payment or disbursement made by a political committee exceeding ten dollars in amount be evidenced by a receipted bill stating the particulars of expense, and every such record, voucher, receipt, or account shall be preserved for fifteen months after the election to which it relates. (36 Stat. 823.)

§ 191. (Act June 25, 1910, c. 392, § 4.) Account to treasurer and record of contributions, etc.

Whoever, acting under the authority or in behalf of such political committee, whether as a member thereof or otherwise, receives any contribution, payment, loan, gift, advance, deposit, or

promise of money or its equivalent shall, on demand, and in any event within five days after the receipt of such contribution, payment, loan, gift, advance, deposit, or promise, render to the treasurer of such political committee a detailed account of the same, together with the name and address from whom received, and said treasurer shall forthwith enter the same in a ledger or record to be kept by him for that purpose. (36 Stat. 823.)

§ 192. (Act June 25, 1910, c. 392, § 5, as amended, Act Aug. 19, 1911, c. 33, § 1.) Statements by treasurer to be filed with Clerk of House of Representatives; to be preserved and open to inspection.

The treasurer of every such political committee shall, not more than fifteen days and not less than ten days next before an election at which Representatives in Congress are to be elected in two or more States, file in the office of the Clerk of the House of Representatives at Washington, District of Columbia, with said Clerk, an itemized detailed statement; and on each sixth day thereafter until such election said treasurer shall file with said Clerk a supplemental itemized detailed statement. Each of said statements shall conform to the requirements of the following section of this Act, except that the supplemental statement herein required need not contain any item of which publicity is given in a previous statement. Each of said statements shall be full and complete, and shall be signed and sworn to by said treasurer.

It shall also be the duty of said treasurer to file a similar statement with said Clerk within thirty days after such election, such final statement also to be signed and sworn to by said treasurer and to conform to the requirements of the following section of this Act. The statements so filed with the Clerk of the House shall be preserved by him for fifteen months and shall be a part of the public records of his office and shall be open to public inspection. (36 Stat. 823. 37 Stat. 25.)

This section, as originally enacted, contained only provisions for the filing, etc., of a statement after election, similar to those of the second paragraph of the section as set forth here. It was amended by Act Aug. 19, 1911, c. 33, § 1, cited above, chiefly by inserting the requirements as to statements before election, contained in the first paragraph.

§ 193. (Act June 25, 1910, c. 392, § 6, as amended, Act Aug. 19, 1911, c. 33, § 1.) Details of statements.

The statements required by the preceding section of this Act shall state:

(1) Contributions, etc., of $100 or more.

First. The name and address of each person, firm, association, or committee who or which has contributed, promised, loaned, or advanced to such political committee, or any officer, member, or agent thereof, either in one or more items, money or its equivalent of the aggregate amount or value of one hundred dollars or more, and the amount or sum contributed, promised, loaned, or advanced by each.

This subdivision was amended by Act Aug. 19, 1911, c. 33, § 1, by adding, at the end thereof, the words "and the amount or sum contributed, promised, loaned, or advanced by each."

(2) Aggregate of contributions, etc., of less than $100.

Second. The aggregate sum contributed, promised, loaned, or advanced to such political committee, or to any officer, member, or agent thereof, in amounts of less than one hundred dollars.

This subdivision was amended by Act Aug. 19, 1911, c. 33, § 1, by substituting the word "aggregate" for the original word "total," and by inserting the word "of" before the words "less than one hundred dollars."

(3) Total of contributions, etc.

Third. The total sum of all contributions, promises, loans, and advances received by such political committee or any officer, member, or agent thereof.

(4) Disbursements, etc., of $10 or more.

Fourth. The name and address of each person, firm, association, or committee to whom such political committee, or any officer, member, or agent thereof, has distributed, disbursed, contributed, loaned, advanced, or promised any sum of money or its equivalent of the amount or value of ten dollars or more, stating the amount or sum distributed, disbursed, contributed, loaned, advanced, or promised to each, and the purpose thereof.

This subdivision was amended by Act Aug. 19, 1911, c. 33, § 1, by changing the order of the words "disbursed, distributed" to "distributed, disbursed," where they first occur, and by inserting the words "stating the amount or sum distributed, disbursed, contributed, loaned, advanced, or promised to each," before the words "and the purpose thereof."

(5) Aggregate of disbursements, etc., of less than $10.

Fifth. The aggregate sum distributed, disbursed, contributed, loaned, advanced, or promised by such political committee, or any officer, member, or agent thereof, where the amount or value of such distribution, disbursement, loan, advance, or promise to any one person, firm, association, or committee in one or more items is less than ten dollars.

This subdivision was amended by Act Aug. 19, 1911, c. 33, § 1, by substituting the word "aggregate" for the original word "total," and by changing the order of the words "disbursed, distributed," to "distributed, disbursed," and of the words "disbursement, distribution," to "distribution, disbursement."

(6) Total of disbursements, etc.

Sixth. The total sum disbursed, distributed, contributed, loaned, advanced, or promised by such political committee, or any officer, member, or agent thereof. (36 Stat. 823. 37 Stat. 25.)

§ 194. (Act June 25, 1910, c. 392, § 7.) Statements by others than political committees of expenditures, etc., of $50 or more.

Every person, firm, association, or committee, except political committees as hereinbefore defined, that shall expend or promise any sum of money or other thing of value amounting to fifty dollars or more for the purpose of influencing or controlling, in two or more States, the result of an election at which Representatives to the Congress of the United States are elected, unless he or it shall contribute the same to a political committee as hereinbefore defined, shall file the statements of the same under oath, as required by section six of this Act, in the office of the Clerk of the House of Representatives, at Washington, District of Columbia, which statements shall be held by said Clerk in all respects as required by section five of this Act. (36 Stat. 824.)

§ 195. (Act June 25, 1910, c. 392, § 8, as amended, Act Aug. 19, 1911, c. 33, § 2, and Act Aug. 23, 1912, c. 349.) (1) "Candidate" defined.

The word "candidate" as used in this section shall include all persons whose names are presented for nomination for Representative or Senator in the Congress of the United States at any primary election or nominating convention, or for indorsement or election at any general or special election held in connection with the nomination or election of a person to fill such office, whether or not such persons are actually nominated, indorsed, or elected.

(2) Statements by candidate for nomination or election as Representative, of moneys, etc., received and expended, etc., to be filed with Clerk of House of Representatives, before nomination and before election.

Every person who shall be a candidate for nomination at any primary election or nominating convention, or for election at any general or special election, as Representative in the Congress of the United States, shall, not less than ten nor more than fifteen days before the day for holding such primary election or nominating convention, and not less than ten nor more than fifteen days before the day of the general or special election at which candidates for Representatives are to be elected, file with the Clerk of the House of Representatives at Washington, District of Columbia, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made, for the purpose of procuring his nomination or election.

(3) Statements by candidate for nomination or election as Senator, of moneys, etc., received and expended, etc., to be filed with Secretary of Senate, before nomination and before election.

Every person who shall be a candidate for nomination at any primary election or nominating convention, or for indorsement at any general or special election, or election by the legislature of any State, as Senator in the Congress of the United States, shall, not less than ten nor more than fifteen days before the day for holding such primary election or nominating convention, and not less than ten nor more than fifteen days before the day of the general or special election at which he is seeking indorsement, and not less than five nor more than ten days before the day upon which the first vote is to be taken in the two houses of the legislature before which he is a candidate for election as Senator, file with the Secretary of the Senate at Washington, District of Columbia, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made for the purpose of procuring his nomination or election.

(4) Statements by candidate of moneys, etc., received and expended, etc., to be filed after nomination and after election.

Every such candidate for nomination at any primary election or nominating convention, or for indorsement or election at any general or special election, or for election by the legislature of any State, shall, within fifteen days after such primary election or nominating convention, and within thirty days after any such general or special election, and within thirty days after the day upon which the legislature shall

have elected a Senator, file with the Clerk of the House of Representatives or with the Secretary of the Senate, as the case may be, a full, correct, and itemized statement of all moneys and things of value received by him or by anyone for him with his knowledge and consent, from any source, in aid or support of his candidacy, together with the names of all those who have furnished the same in whole or in part; and such statement shall contain a true and itemized account of all moneys and things of value given, contributed, expended, used, or promised by such candidate, or by his agent, representative, or other person for and in his behalf with his knowledge and consent, up to, on, and after the day of such primary election, nominating convention, general or special election, or election by the legislature, together with the names of all those to whom any and all such gifts, contributions, payments, or promises were made for the purpose of procuring his nomination, indorsement, or election.

(5) Statements by candidates to include statement of promises, etc., made relative to appointment, etc., or that no such promise, etc., has been made.

Every such candidate shall include therein a statement of every promise or pledge made by him, or by any one for him with his knowledge and consent or to whom he has given authority to make any such promise or pledge, before the completion of any such primary election or nominating convention or general or special election or election by the legislature, relative to the appointment or recommendation for appointment of any person to any position of trust, honor, or profit, either in the county, State, or Nation, or in any political subdivision thereof, or in any private or corporate employment, for the purpose of procuring the support of such person or of any person in his candidacy, and if any such promise or pledge shall have been made the name or names, the address or addresses, and the occupation or occupations, of the person or persons to whom such promise or pledge shall have been made, shall be stated, together with a description of the position relating to which such promise or pledge has been made. In the event that no such promise or pledge has been made by such candidate, that fact shall be distinctly stated.

(6) Candidates forbidden to promise office, etc.; candidates for Senator forbidden to contribute, etc., to nomination or election of candidate for legislature of State; contributions to political committees permitted.

No candidate for Representative in Congress or for Senator of the United States shall promise any office or position to any person, or to use his influence or to give his support to any person for any office or position for the purpose of procuring the support of such person, or of any person, in his candidacy; nor shall any candidate for Senator of the United States give, contribute, expend, use, or promise any money or thing of value to assist in procuring the nomination or election of any particular candidate for the legislature of the State in which he resides, but such candidate may, within the limitations and restrictions and subject to the requirements of this act, contribute to political committees having charge of the disbursement of campaign funds.

(7) Contributions or expenditures, etc., by candidates not to exceed amount allowed under laws of State; limit of aggregate for candidate for Representative or for Senator; assessments, etc., under laws of State, and certain personal expenses, not within this section.

No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause

to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the State in which he resides: Provided, That no candidate for Representative in Congress shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding five thousand dollars in any campaign for his nomination and election; and no candidate for Senator of the United States shall give, contribute, expend, use, or promise any sum, in the aggregate, exceeding ten thousand dollars in any campaign for his nomination and election: Provided further, That money expended by any such candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or for his necessary personal expenses, incurred for himself alone, for travel and subsistence, stationery and postage, writing or printing (other than in newspapers), and distributing letters, circulars, and posters, and for telegraph and telephone service, shall not be regarded as an expenditure within the meaning of this section, and shall not be considered any part of the sum herein fixed as the limit of expense and need not be shown in the statements herein required to be filed.

(8) Details in successive statements.

The statements herein required to be made and filed before the general election, or the election by the legislature at which such candidate seeks election, need not contain items of which publicity is given in a previous statement, but the statement required to be made and filed after said general election or election by the legislature shall, in addition to an itemized statement of all expenses not theretofore given publicity, contain a summary of all preceding statements.

(9) Person contributing, etc., to nomination or election of member of legislature, and thereafter a candidate for or elected Senator, required to comply with this section; details of statements.

Any person, not then a candidate for Senator of the United States, who shall have given, contributed, expended, used, or promised any money or thing of value to aid or assist in the nomination or election of any particular member of the legislature of the State in which he resides, shall, if he thereafter becomes a candidate for such office, or if he shall thereafter be elected to such office without becoming a candidate therefor, comply with all of the provisions of this section relating to candidates for such office, so far as the same may be applicable; and the statement herein required to be made, verified, and filed after such election shall contain a full, true, and itemized account of each and every gift, contribution, expenditure, and promise whenever made, in any wise relating to the nomination or election of members of the legislature of said State, or in any wise connected with or pertaining to his nomination and election of which publicity is not given in a previous statement.

(10) Verification of statements; officers before whom to be made; filing statements by registered mail.

Every statement herein required shall be verified by the oath or affirmation of the candidate, taken before an officer authorized to administer oaths; and the depositing of any such statement in a regular post office, directed to the Clerk of the House of Representatives or to the Secretary of the Senate, as the case may be, duly stamped and registered within the time required herein shall be deemed a sufficient filing of any such statement under any of the provisions of this Act.

(11) Effect of act on laws of State.

This Act shall not be construed to annul or vitiate the laws of any State, not directly in conflict herewith, relating to the nomination or election of candidates for the offices herein named, or to exempt any such candidate from complying with such State laws. (36 Stat. 824. 37 Stat. 26. 37 Stat. 360.)

This section was inserted as a new section after section 7 of Act June 25, 1910, c. 392, by section 2 of the amendatory act of Aug. 19, 1911, c. 33, cited above. As so enacted, it contained provisions, in the 10th paragraph thereof, following the words "an officer authorized to administer oaths," describing the officers before whom the oath required should be taken. It was amended by Act Aug. 23, 1912, c. 349, also cited above, by omitting said provisions, making the paragraph read as set forth here.

§ 196. (Act June 25, 1910, c. 392, § 9, as amended, Act Aug. 19, 1911, c. 33, § 2.) Personal expenses for traveling, stationery, etc., for influencing, in two or more states, election of Representatives, not subject to act.

Any person may in connection with such election incur and pay from his own private funds for the purpose of influencing or controlling, in two or more States, the results of an election at which Representatives to the Congress of the United States are elected, all necessary personal expenses for his traveling, for stationery, and postage, and for telegraph and telephone service without being subject to the provisions of this Act. (36 Stat. 824. 37 Stat. 26.)

This section, which was originally enacted as section 8 of Act June 25, 1910, c. 392, was amended and it and sections 9 and 10 of said act were renumbered as sections 9, 10, and 11, by Act Aug. 19, 1911, c. 33, § 2 cited above. By said amendment the word "necessary" was inserted before the words "personal expenses for his traveling," and the words immediately following in the section as originally enacted, "and for purposes incidental to traveling," were omitted.

§ 197. (Act June 25, 1910, c. 392, § 10, as amended, Act Aug. 19, 1911, c. 33, § 2.) Legal expenses in election contests not limited or affected by act.

Nothing contained in this Act shall limit or affect the right of any person to spend money for proper legal expenses in maintaining or contesting the results of any election. (36 Stat. 824. 37 Stat. 26.)

See note to preceding section.

§ 198. (Act June 25, 1910, c. 392, § 11, as amended, Act Aug. 19, 1911, c. 33, § 2.) Punishment for violation of act.

Every person willfully violating any of the foregoing provisions of this Act shall, upon conviction, be fined not more than one thousand dollars or imprisoned not more than one year, or both. (36 Stat. 824. 37 Stat. 26.)

See note to section 9 of this act, ante, § 196.

TITLE III

THE PRESIDENT

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CHAPTER ONE

Presidential Elections

Sec.
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§ 199. (R. S. § 131.) Time of appointing electors.

[Except in case of a presidential election prior to the ordinary period, as specified in sections one hundred and forty-seven to one hundred and forty-nine, inclusive, when the offices of President and Vice-President both become vacant,] the electors of President and Vice-President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice-President.

Act March 1, 1792, c. 8, § 1, 1 Stat. 239. Act Jan. 23, 1845, c. 1, 5 Stat. 721.

The clause at the beginning of this section inclosed in brackets, commencing with the words, "Except in case of a presidential election prior to the ordinary period," etc., became inoperative on the repeal of R. S. §§ 147–149, by Act Jan. 19, 1886, c. 4, § 3, 24 Stat. 1, without making any express provisions for an election in case of vacancy in both offices.

Notes of Decisions

Jurisdiction of prosecution for fraudulent voting for electors.—The electors are state officers and it is within the exclusive jurisdiction of the state to punish fraudulent voting for them. Fitzgerald v. Green (1890) 10 Sup. Ct. 586, 587, 134 U. S. 377, 33 L. Ed. 951.

Congress has never undertaken to interfere with the manner of appointing electors, or where (according to the now general usage) the mode of appointment prescribed by the law of the state is election by the people, to regulate the conduct of such election, or to punish any fraud in voting for electors, but has left those matters to the control of the states. Id.

Cited without definite application, McPherson v. Blacker (1892) 13 Sup. Ct. 3, 13, 146 U. S. 1, 36 L. Ed. 869.

§ 200. (R. S. § 132.) Number of electors.

The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice-President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

Act March 1, 1792, c. 8, § 1, 1 Stat. 239.

§ 201. (R. S. § 133.) Vacancies in electoral college.

Each State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote.

Act Jan. 23, 1845, c. 1, 5 Stat. 721.

Notes of Decisions

Ineligibility of person elected.—One who, being under the constitution ineligible, by reason of holding an "office of trust or profit," receives the highest number of votes for elector of president, cannot, by declining the appointment, create a vacancy such as may be filled under a statute providing for filling vacancies; only a person who has been lawfully elected can create a vacancy by resigning. In re Corliss (1877) 11 R. I. 638, 23 Am. Rep. 538.

Nor can he render his appointment valid by resigning the inconsistent office, but to be available such resignation must precede his appointment as elector. Id.

Provisions of state laws for filling vacancies.—Presidential electors are "state officers," within Const. Ky. § 152, providing that if the unexpired term of an elective officer does not end at the next succeeding annual election at which either city or state officers, etc., are elected, and three months intervene before such election, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election. Todd v. Johnson (1896) 99 Ky. 548, 36 S. W. 987, 34 L. R. A. 193.

Pub. Acts Mich. 1891, No. 50, entitled "An act to provide for the election of electors of President and Vice President of the United States," is not invalid because it fails to provide for filling a vacancy in case it may occur by the death of both the elector and the alternate. McPherson v. Secretary of State (1892) 92 Mich. 377, 52 N. W. 469, 31 Am. St. Rep. 587, 16 L. R. A. 475.

Cited without definite application, McPherson v. Blacker (1892) 13 Sup. Ct. 3, 13, 146 U. S. 1, 36 L. Ed. 869.

§ 202. (R. S. § 134.) Failure to make a choice on the appointed day.

Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

Act Jan. 23, 1845, c. 1, 5 Stat. 721.

Cited without definite application, McPherson v. Blacker (1892) 13 Sup. Ct. 3, 13, 146 U. S. 1, 36 L. Ed. 869.

(R. S. § 135. Superseded.)

Section provided that the electors should vote on the first Wednesday in December. They were required to vote on the second Monday of January, by Act Feb. 3, 1887, c. 90, § 1, post, § 203.

(R. S. § 136. Repealed.)

This section provided for the delivery of lists of electors of each State by the executive of the State to the electors. It was repealed by Act Feb. 3, 1887, c. 90, § 3, post, § 205.

§ 203. (Act Feb. 3, 1887, c. 90, § 1.) Meeting and vote of electors.

The electors of each State shall meet and give their votes on the second Monday in January next following their appointment, at such place in each State as the legislature of such State shall direct. (24 Stat. 373.)

This section and the two sections next following were part of an act entitled "An act to fix the day for the meeting of electors of President and Vice-President, and to provide for and regulate the counting of the votes for

President and Vice-President, and the decision of questions arising thereon." The remaining sections, 4–7, of the act are set forth post, §§ 215–218.

Provisions supplementary to this act, relating to the forwarding of the certificates and lists of votes of electors, are made by Act Oct. 19, 1888, c. 1216, § 1, post, § 210.

Notes of Decisions

State law fixing time for meeting and vote.—A state law which fixes the time at which the presidential electors of the state shall meet and vote, which is different from that prescribed by an act of Congress, is invalid as to such provision. McPherson v. Blacker (1892) 13 Sup. Ct. 3, 13, 146 U. S. 1, 36 L. Ed. 869.

§ 204. (Act Feb. 3, 1887, c. 90, § 2.) Determination of controversy as to appointment of electors.

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned. (24 Stat. 373.)

§ 205. (Act Feb. 3, 1887, c. 90, § 3.) Certificates of appointment of electors, and of determination of controversy.

It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State, by the final ascertainment under and in pursuance of the laws of such State providing for such ascertainment, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by the preceding section to meet, the same certificate, in triplicate, under the seal of the State; and such certificate shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of Government the lists of all persons voted for as President and of all persons voted for as Vice-President; and section one hundred and thirty-six of the Revised Statutes is hereby repealed; and if there shall have been any final determination in a State of a controversy or contest as provided for in section two of this act, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the Secretary of State of the United States, as soon as practicable after the receipt at the State Department of each of the certificates hereinbefore directed to be transmitted to the Secretary of State, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress thereafter he shall transmit to the two Houses of Congress copies in full of each and every such certificate so received theretofore at the State Department. (24 Stat. 373.)

§ 206. (R. S. § 137.) Manner of voting.

The electors shall vote for President and Vice-President, respectively, in the manner directed by the Constitution.

Act March 26, 1804, c. 50, § 1, 2 Stat. 295.

§ 207. (R. S. § 138.) Certificates to be made and signed.

The electors shall make and sign three certificates of all the votes given by them, each of which certificates shall contain two distinct lists, one of the votes for President, and the other of the votes for Vice-President, and shall annex to each of the certificates one of the lists of the electors which shall have been furnished to them by direction of the executive of the State.

Act March 1, 1792, c. 8, §§ 2, 3, 1 Stat. 239. Act March 26, 1804, c. 50, § 1, 2 Stat. 295.

§ 208. (R. S. § 139.) Certificates to be sealed and indorsed.

The electors shall seal up the certificates so made by them, and certify upon each that the lists of all the votes of such State given for President, and of all the votes given for Vice-President, are contained therein.

Act March 1, 1792, c. 8, § 2, 1 Stat. 239. Act March 26, 1804, c. 50, § 1, 2 Stat. 295.

§ 209. (R. S. § 140.) Transmission of the certificates.

The electors shall dispose of the certificates thus made by them in the following manner:

One. They shall, by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the President of the Senate, at the seat of Government, before the first Wednesday in January then next ensuing, one of the certificates.

Two. They shall forthwith forward by the post-office to the President of the Senate, at the seat of Government, one other of the certificates.

Three. They shall forthwith cause the other of the certificates to be delivered to the judge of that district in which the electors shall assemble.

Act March 1, 1792, c. 8, § 2, 1 Stat. 239. Act March 26, 1804, c. 50, § 1, 2 Stat. 295.

The certificate and lists are to be forwarded to the President of the Senate forthwith after the second Monday in January, by Act Oct. 19, 1888, c. 1216, § 1, post, § 210.

§ 210. (Act Oct. 19, 1888, c. 1216, § 1.) Time for transmission of the certificates to the President of the Senate.

The certificates and lists of votes for President and Vice-President of the United States, mentioned in chapter one of title three of the Revised Statutes of the United States, and in the act to which this is a supplement, shall be forwarded, in the manner therein provided, to the President of the Senate forthwith after the second Monday in January, on which the electors shall give their votes. (25 Stat. 613.)

This was the first section of an act entitled as supplementary to Act Feb. 3, 1887, c. 90, referred to therein as "the act to which this is a supplement," the provisions of which are set forth ante, §§ 203-205, and post, §§ 215-218.

Section 2 of this act amended R. S. § 141. The amendment is incorporated in that section as set forth post, § 212.

The changes made by this act in the time fixed by R. S. § 140, ante, § 209, for forwarding the certificates and lists of votes to the President of the Senate, and the time fixed by R. S. § 141, if such certificate, etc., should not be received, for sending for the list delivered to the district judge were needed to conform to the change of the date on which the electors should give their votes, by Act Feb. 3, 1887, c. 90, § 1, ante, § 203.

§ 211. (R. S. § 141, as amended, Act Oct. 19, 1888, c. 1216, § 2.) When Secretary of State shall send for district judge's list.

Whenever a certificate of votes from any State has not been re-

ceived at the seat of Government on the fourth Monday of the month of January in which their meeting shall have been held, the Secretary of State shall send a special messenger to the district judge in whose custody one certificate of the votes from that State has been lodged, and such judge shall forthwith transmit that list to the seat of Government.

Act March 1, 1792, c. 8, § 4, 1 Stat. 240. Act Oct. 19, 1888, c. 1216, § 2, 25 Stat. 613.

This section, as enacted in the Revised Statutes, was amended by Act Oct. 19, 1888, c. 1216, § 2, cited above, by changing the time for sending for the list from "the first Wednesday of January, indicated by the preceding section" (R. S. § 140, ante, § 209), to "the fourth Monday of the month of January in which their meeting shall have been held."

See note to first section of said amendatory act, ante, § 210.

Failure to receive certificates to be sent by messenger.—It was the duty of the Secretary of State, under this section, as amended by Act Oct. 19, 1888, to send a special messenger to the district judge holding the certificates of the votes of his state, in each state where the messenger had failed to deliver to the President on the fourth Monday in January, 1893, the package containing the certificate of the votes of his State, although packages purporting to contain the electoral votes from all the states had been received. (1893) 20 Op. Atty. Gen. 522.

The expression in the section as so amended, "whenever a certificate of votes from any state has not been received," should be construed so as to read "whenever *any* certificate of votes required by law from any State has not been received." Id.

(R. S. § 142. Superseded.)

This section provided for the counting of the electoral votes in Congress. It was superseded by the more detailed provisions of Act Feb. 3, 1887, c. 90, §§ 4–7, post, §§ 215–218.

§ 212. (R. S. § 143.) Provision for absence of President of the Senate.

In case there shall be no President of the Senate at the seat of Government on the arrival of the persons intrusted with the certificates of the votes of the electors, then such persons shall deliver such certificates into the office of the Secretary of State, to be safely kept, and delivered over as soon as may be to the President of the Senate.

Act March 1, 1792, c. 8, § 6, 1 Stat. 240.

§ 213. (R. S. § 144.) Mileage of messengers.

Each of the persons appointed by the electors to deliver the certificates of votes to the President of the Senate shall be allowed, on the delivery of the list intrusted to him, twenty-five cents for every mile of the estimated distance, by the most usual road, from the place of meeting of the electors to the seat of Government of the United States.

Act March 1, 1792, c. 8, § 7, 1 Stat. 240.

§ 214. (R. S. § 145.) Forfeiture for messenger's neglect of duty.

Every person who, having been appointed, pursuant to subdivision one of section one hundred and forty or to section one hundred and forty-one, to deliver the certificates of the votes of the electors to the President of the Senate, and having accepted such appointment, shall neglect to perform the services required from him, shall forfeit the sum of one thousand dollars.

Act March 1, 1792, c. 8, § 8, 1 Stat. 240.

§ 215. (Act Feb. 3, 1887, c. 90, § 4.) Counting electoral votes in Congress.

Congress shall be in session on the second Wednesday in February succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of one o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part

of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted in the manner and according to the rules in this act provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section three of this act from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section two of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section two of this act, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the Executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall im-

mediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of. (24 Stat. 373.)

Special provisions for counting the electoral votes for President and Vice-President for the term commencing March 4, 1877, including the creation of a commission to decide questions in cases where more than one return had been received from a State, were made by Act Jan. 29, 1877, c. 37, 19 Stat. 227.

§ 216. (Act Feb. 3, 1887, c. 90, § 5.) Preservation of order in joint meeting; no debate.

While the two Houses shall be in meeting as provided in this act the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw. (24 Stat. 374.)

§ 217. (Act Feb. 3, 1887, c. 90, § 6.) Limit of debate in each House.

When the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate. (24 Stat. 375.)

§ 218. (Act Feb. 3, 1887, c. 90, § 7.) Seats for officers and members of two Houses in joint meeting; meeting not to dissolve until count completed and result declared; recess.

At such joint meeting of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this act, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of ten o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House. (24 Stat. 375.)

(R. S. §§ 146–150. Repealed.)

These sections provided for proceedings in case of vacancy in the offices of both President and Vice-President, and for an election to fill the vacancies. They were repealed by Act Jan. 19, 1886, c. 4, § 3, 24 Stat. 1, other provisions for such a case having been made by sections 1 and 2 of that Act, post, §§ 219, 220.

§ 219. (Act Jan. 19, 1886, c. 4, § 1.) Vacancy in offices of both President and Vice-President.

In case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary

of State, or if there be none, or in case of his removal, death, resignation or inability, then the Secretary of the Treasury, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Navy, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Interior, shall act as President until the disability of the President or Vice-President is removed or a President shall be elected: Provided, That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting. (24 Stat. 1.)

§ 220. (Act Jan. 19, 1886, c. 4, § 2.) Officers eligible to act as President in case of vacancy.

The preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of President under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively. (24 Stat. 1.)

The preceding section of this act, mentioned in this section, is set forth ante, § 219.

§ 221. (R. S. § 151.) Resignation or refusal of office.

The only evidence of a refusal to accept, or of a resignation of the office of President or Vice-President, shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State.

Act March 1, 1792, c. 8, § 11, 1 Stat. 241.

CHAPTER TWO

Office and Compensation of the President

Sec.
222. Commencement of term of office.
223. President's salary.
224. Increase of President's compensation.
225. President's traveling expenses.
226. Vice-President's salary.
227. Officers of the President's household.
228. Salary of Secretary to the President.
229. Detail of employés of Executive Departments, etc., to office of the President.
230. Accommodations for horses, carriages, etc., to be provided by Quartermaster General of the Army.
231. Custody and annual inventory of public property in and belonging to Executive Mansion.

§ 222. (R. S. § 152.) Commencement of term of office.

The term of four years for which a President and Vice-President shall be elected, shall, in all cases, commence on the fourth day of March next succeeding the day on which the votes of the electors have been given.

Act March 1, 1792, c. 8, § 12, 1 Stat. 241.

§ 223. (R. S. § 153.) President's salary.

The President shall receive in full for his services during the term for which he shall have been elected the sum of [fifty thousand dollars] a year, to be paid monthly, and shall be entitled to the use of the furniture and other effects belonging to the United States and kept in the Executive Mansion.

Act Sept. 24, 1789, c. 19, 1 Stat. 72. Act Feb. 18, 1793, c. 9, 1 Stat. 318. Act March 3, 1873, c. 226, § 1, 17 Stat. 486.

The words of this section inclosed in brackets, "fifty thousand dollars," were superseded by the increase of the compensation of the President, after March 3, 1909, to $75,000, by a provision of Act March 4, 1909, c. 297, § 1, post, § 224.

The payment of the traveling expenses of the President, not exceeding $25,000 per annum, was provided for by Act June 23, 1906, c. 3523, post, § 225.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 224. (Act March 4, 1909, c. 297, § 1.) Increase of President's compensation.

After the third of March, nineteen hundred and nine, the compensation of the President of the United States shall be seventy-five thousand dollars per annum. (35 Stat. 859.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1910, cited above.

§ 225. (Act June 23, 1906, c. 3523.) President's traveling expenses.

Hereafter there may be expended for or on account of the traveling expenses of the President of the United States such sum as Congress may from time to time appropriate, not exceeding twenty-five thousand dollars per annum, such sum when appropriated to be expended in the discretion of the President and accounted for on his certificate solely. (34 Stat. 454.)

This provision was part of an act entitled "An act to provide for the traveling expenses of the President of the United States."

The act also made an appropriation for the purposes authorized for the fiscal year. A similar appropriation was repeated in subsequent sundry civil appropriation acts. The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

§ 226. (R. S. § 154.) Vice-President's salary.

The Vice-President shall receive in full for his services during the terms for which he shall have been elected the sum of [ten thousand dollars] a year, to be paid monthly.

Act March 3, 1873, c. 226, § 1, 17 Stat. 486.

The salary of the Vice-President, having been increased from $8,000 to $10,000 by a provision of Act March 3, 1873, c. 226, § 1, incorporated into this section of the Revised Statutes, and cited above, was reduced to $8,000, and the words of this section inclosed in brackets, "ten thousand dollars," were superseded, by the repeal of so much of that act as increased the amount, by Act Jan. 20, 1874, c. 11, 18 Stat. 4. But his compensation, on and after March 4, 1907, was increased to $12,000 per annum, by Act Feb. 26, 1907, c. 1635, § 4, ante, § 36.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés ap-

propriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specifically authorized, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 227. (R. S. § 155.) Officers of the President's household.

The President is authorized to appoint or employ in his official household the following officers:

One private secretary, at a salary of three thousand five hundred dollars a year.

One assistant secretary, who shall be a short-hand writer, at a salary of two thousand five hundred dollars a year.

Two executive clerks, at a salary of two thousand three hundred dollars a year each.

One steward of the President's household, at a salary of two thousand dollars a year.

One messenger, at a salary of one thousand two hundred dollars a year.

Act March 3, 1857, c. 108, § 2, 11 Stat. 228. Act July 23, 1866, c. 208, § 4, 14 Stat. 206. Act July 20, 1868, c. 176, § 1, 15 Stat. 96.

The officers enumerated in this section, with their respective salaries, were those provided for by the statutes in force at the time of the compilation of the Revised Statutes, which are cited above, and by the legislative, executive, and judicial appropriation act for the fiscal year 1874, Act March 3, 1873, c. 226, § 1, 17 Stat. 491.

But the officers and others actually appointed or employed are those authorized from year to year by the appropriation acts, and the enumeration of officers in this section, although not expressly repealed or amended, may be regarded as practically superseded, for the time being, by each annual appropriation.

Appropriations for a "Private Secretary," of varying amounts, were made each year until 1897, when the designation of the office was changed to "Secretary," and the salary increased to $5,000, by Act Feb. 19, 1897, c. 265, § 1, 29 Stat. 546, and thereafter similar provisions were made, in recent years for a still larger salary. His salary was fixed at $7,500 by a provision of Act March 4, 1913, c. 149, post, § 228.

The force of subordinate officers and employés in the office of the President was extensively reorganized in the appropriations therefor for the fiscal year 1912, by Act March 4, 1911, c. 237, § 1, 36 Stat. 1184. In that act, the two assistant secretaries, previously provided for, were omitted; one executive clerk, only, was provided for, but a chief clerk, an appointment clerk, a record clerk, two expert stenographers, an accountant, two correspondents, and a disbursing clerk were added; other changes were made in the numbers and salaries of various clerks and other employés; and no specific appropriation was made for a steward. The provisions for the years following were nearly the same. Those for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum,

with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

A proviso annexed to said appropriations, repeated in each similar act since 1905, authorizes the detail of employés of the Executive Departments, etc., from time to time, to the office of the President. Said provision of Act Feb. 3, 1905, c. 297, § 1, is set forth post, § 229.

The appointment of an officer of the Signal Corps as chief of the telegraph and cipher bureau of the Executive Office was authorized by a provision of Act March 2, 1903, c. 975, post, § 1864.

The appropriation made annually, by the sundry civil appropriation acts, under the heading "Detection and prosecution of crimes," of a sum to be expended under the direction of the Attorney-General, includes among the purposes specified, in recent years, "the protection of the person of the President of the United States." The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

Provisions for the custody of the plate, furniture, and public property in the Executive Mansion, and for an annual inventory thereof, were made by Act June 25, 1910, c. 384, § 9, post, § 231.

The usual annual appropriations for care, repair, and refurnishing of the Executive Mansion, and for horses and vehicles for official purposes, for care, etc., of greenhouses, for fuel, and for lighting, were made by the sundry civil appropriation act for the fiscal year 1917, Act July 1, 1916, c. 209, § 1, 39 Stat.

Accommodations for the horses, carriages, and other vehicles of the President and of the Executive Office are to be provided by the Quartermaster General of the Army, by a provision of Act March 4, 1911, c. 285, § 1, post, § 230.

The Public Printer is to execute such printing and binding for the President as he shall order, and deliver to the Executive Mansion two copies of all documents, bills, etc., printed, by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 88, post, § 7162.

§ 228. (Act March 4, 1913, c. 149.) Salary of Secretary to the President.

To make the salary of the Secretary to the President at the rate of $7,500 per annum from March fourth, nineteen hundred and thirteen, to June thirtieth, nineteen hundred and fourteen, inclusive, $3,312.50, and hereafter said salary is fixed at the rate of $7,500 per annum. (37 Stat. 913.)

This was a provision of the deficiency appropriation act for the fiscal year 1913, cited above.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 209, post, § 3230a.

§ 229. (Act Feb. 3, 1905, c. 297, § 1.) Detail of employés of Executive Departments, etc., to office of the President.

Employees of the Executive Departments and other establishments of the executive branch of the Government may be detailed from time to time to the office of the President of the United States, for such temporary assistance as may be necessary. (33 Stat. 642.)

This was a proviso annexed to an appropriation for officers, clerks, and employés in the office of the President, in the legislative, executive, and judicial appropriation act for the fiscal year 1906, cited above. It was repeated in the similar acts for subsequent years. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

Notes of Decisions

Details not authorized under previous laws.—Before this provision, the Postmaster General had no authority to detail a registry clerk from the Washington post office on detached service at the White House. (1904) 25 Op. Atty. Gen. 302.

§ 230. (Act March 4, 1911, c. 285, § 1.) Accommodations for horses, carriages, etc., to be provided by Quartermaster General of the Army.

The Quartermaster General of the Army shall provide suitable accommodations for the horses, carriages, and other vehicles of the President and of the Executive Office, in the stables maintained in the District of Columbia by and for the use of his department. (36 Stat. 1404.)

This was a provision of the sundry civil appropriation act for the fiscal year 1912, cited above.

(R. S. §§ 156, 157. Superseded.)

These sections prescribed the duties of the steward of the President's household, and required him to give bond for the faithful discharge of his trust. They were superseded by similar provisions of Act June 25, 1910, c. 384, § 9, post, § 231.

Subsequent provisions requiring an inventory to be made annually, by the steward, under the direction of the officer in charge of public buildings and grounds, of all the public property in and belonging to the Executive Mansion, to be submitted to Congress with the annual report of the officer in charge of public buildings and grounds, made by Act April 17, 1900, c. 192, § 1, were also superseded by more comprehensive provisions for the making of such inventory, to be kept for reference in the office of public buildings and grounds, made by Act June 25, 1910, c. 384, § 2, post, § 231.

§ 231. (Act June 25, 1910, c. 384, § 9.) Custody and annual inventory of public property in and belonging to Executive Mansion.

Hereafter the steward, housekeeper, or such other employee of the Executive Mansion as the President may designate, shall, under the direction of the President, have the charge and custody of and be responsible for the plate, furniture, and public property therein, and shall, before entering upon the duties of the office, give bond for the faithful discharge thereof, said bond to be in the sum of ten thousand dollars, and be approved by the Secretary of War. And hereafter a complete inventory, in proper books, shall be made annually in the month of June, under the direction of the officer in charge of public buildings and grounds, of all the public property in and belonging to the Executive Mansion, showing when purchased, its cost, condition, and final disposition. This inventory shall be submitted to the President for his approval, and shall then be kept for reference in the Office of Public Buildings and Grounds, which shall furnish a copy thereof to the steward, housekeeper, or other employee responsible for the property. (36 Stat. 773.)

This section was part of the sundry civil appropriation act for the fiscal year 1911, cited above. It superseded previous similar provisions of R. S. §§ 156, 157, and Act April 17, 1900, c. 192, § 1, 31 Stat. 97.

Other previous requirements of an annual statement and an inventory of such property with other public property were contained in R. S. §§ 1832, 1833, post, §§ 3418, 3419.

TITLE IV

PROVISIONS APPLICABLE TO ALL THE EXECUTIVE DEPARTMENTS

Sec.
232. Application of provisions of this Title.
233. Word "Department."
234. Salaries of heads of Departments.
235. Departmental regulations.
236. Hours of business.
237. Closing Department on decease of ex-official forbidden.
238. Hours of labor and leaves of absence of clerks and other employés; monthly reports as to condition of business; bringing up arrears; quarterly reports as to condition of business.
239. Annual leave of absence, notwithstanding leave on account of sickness.
240. Annual leave of absence, exclusive of Sundays and legal holidays.
241. Recording clocks not to be used.
242. Classification of Department clerks.
243. Clerkships open to women.
244. Distribution of clerks.
245. Diminution of number of clerks of higher, and increase of number of clerks of lower grades; preference in making reduction of force, of discharged soldiers and sailors, etc.
246. Salaries of persons employed in the Departments.
247. Temporary clerks.
248. Authority to employ clerks and other employés.
249. Officers, clerks, and other employés to be only as specifically appropriated for; repeal of inconsistent laws; details from places outside District of Columbia for duty within District prohibited; lapsed salaries and unusual appropriations.
250. Punishment for violation of prohibition of employment of services except as specifically appropriated for.
251. Transfer of clerks or other employés from one Department to another.
252. Detail of civil officers, clerks, or other employés in public service outside District of Columbia for duty in Department in the District.
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253. Extra compensation to clerks prohibited.
254. Restriction on employing extra clerks.
255. Chief clerks to supervise subordinate clerks.

Sec.
256. Chief clerks to distribute duties, etc.
257. Duty of chief on receipt of report.
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260. Vacancies in subordinate offices.
261. Discretionary authority of the President.
262. Temporary appointments limited to thirty days.
263. Restriction on temporary appointments.
264. Extra compensation disallowed.
265. Oaths to witnesses, authority of officers, etc., to administer.
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267. Witnesses' fees.
268. Compelling testimony.
269. Professional assistance; how obtained.
270. Evidence to be furnished by the Departments in suits pending in the Court of Claims.
271. Employment of attorneys or counsel.
272. Persons formerly in the Departments not to prosecute claims in them.
272a. Use of name of member of Congress or officer of Government in advertising practice before departments or office of Government unlawful.
273. Expenditures for newspapers.
274. Expenditures for transportation of remains of deceased employés.
275. Annual reports of expenditure of contingent funds.
276. Reports of expenditure for contingent expenses of sub-treasuries, and in government departments and bureaus.
277. Reports of traveling expenses of officers and employés at Washington.
278. Time of making annual reports.
279. Department reports, when to be furnished to printer.
279a. Copy for annual reports and accompanying documents; time for furnishing.
280. Inventories of property.
281. Transfer of miscellaneous books not required for use of Departments, etc., to Public Library of District of Columbia.
282. Disposition of useless papers in the Departments.
283. Disposition of useless papers in buildings under control of the Departments.

§ 232. (R. S. § 158.) Application of provisions of this Title.

The provisions of this Title shall apply to the following Executive Departments:

First. The Department of State.
Second. The Department of War.
Third. The Department of the Treasury.
Fourth. The Department of Justice.
Fifth. The Post-Office Department.
Sixth. The Department of the Navy.
Seventh. The Department of the Interior.

This section was amended to include the Department of Agriculture, and the provisions of this Title of the Revised Statutes, including all amendments thereto, were made applicable to said Department by Act Feb. 9, 1889, c. 122, § 1, post, § 789.

The section was also amended to include the Department of Commerce, and the provisions of this Title of the Revised Statutes, including all amendments thereto, were made applicable to said Department, by Act Feb. 14, 1903, c. 552, § 1, post, § 853.

The section was further amended to include the Department of Labor, and the provisions of this Title of the Revised Statutes, including all amendments thereto, were made applicable to said Department, by Act March 4, 1913, c. 141, § 1, post, § 932.

Notes of Decisions

Powers and duties of heads of departments.—The powers and duties of all officers of the United States are limited and defined by the Constitution and laws of Congress, and on the question of the authority of the head of one of the Executive Departments, the court must look mainly to the acts of Congress. Pierce v. U. S. (1868) 7 Wall. 666, 677, 19 L. Ed. 169.

Departments, offices, etc., included in term "Executive Departments."—The several executive departments are by law established at the seat of government; they have no existence elsewhere. Only those bureaus and offices can be deemed bureaus or offices in any of these departments which are constituted such by the law of its organization. The department, with its bureaus or offices, is, in contemplation of the law, an establishment distinct from the branches of the public service and the offices thereof which are under its supervision. Thus, the office of postmaster, or of collector of internal revenue, or of pension agent, or of consul, is not properly a departmental office—not an office in the department having supervision over the branch of the public service to which it belongs. The official relation which exists between the office and the department, one of subordination of the former to the latter, does not make the office a part of the department. (1877) 15 Op. Atty. Gen. 262, 267; (1907) 26 Op. Atty. Gen. 209, 254.

The office of the Surgeon General was held to be a part of the War Department. The Twenty Per Cent. Cases (1873) 20 Wall. 179, 180, 188, 22 L. Ed. 339; Id. (1873) 9 Ct. Cl. 103, 106, 124; Schaeffer v. U. S. (1875) 11 Ct. Cl. 730, 732.

The term "executive departments," as used in acts of Congress and in the Revised Statutes, invariably applies to one or more of the several executive departments mentioned in this section, or included within its terms by subsequent enactments, unless a different meaning is clearly indicated by the context. (1898) 22 Op. Atty. Gen. 62; (1907) 26 Op. Atty. Gen. 209.

The Government Printing Office is not a bureau or division of, or under the control of, any one of the executive departments. U. S. v. Allison (1875) 91 U. S. 303, 307, 23 L. Ed. 372.

No board, commission, bureau, or office which is not expressly or by implication under the control of the head of one of the executive departments can be considered as belonging properly to one of them. (1898) 22 Op. Atty. Gen. 62.

The Civil Service Commission is not attached to any of the executive departments, nor is it subject to the control of any of the heads of those departments. Id.

The Government Printing Office, the Interstate Commerce Commission, and the Smithsonian Institution are independent of any of the executive departments mentioned in R. S. § 158, this section. (1907) 26 Op. Atty. Gen. 209.

Judicial notice of appointment and tenure of office of heads of departments.—Courts will take judicial notice of the appointment and tenure of office of a member of the President's Cabinet. Frederick v. Goodbee (La. 1908) 45 So. 606.

Relation of heads of departments to President and Congress.—Congress can impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the Constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President. Kendall v. U. S. (1838) 12 Pet. 524, 610, 9 L. Ed. 1181.

The postmaster general, in the discharge of those duties which are prescribed by law, is not lawfully subject to the control of the President. U. S. v. Kendall (C. C. 1837) Fed. Cas. No. 15,517.

Heads of departments have a threefold relation: (1) To the President; whose political or confidential ministers they are, to execute his will, or rather to act in his name and by his constitutional authority, in cases in which the President possesses a constitutional or legal discretion. (2) To the law; for where the law has directed them to perform certain acts, and where the rights of individuals are dependent on those acts, then, in such cases, a head of department is an officer of the law, and amenable to the laws for his conduct. And (3) to Congress; in the conditions contemplated by the Constitution. This last relation is one of the great elements of responsibility and legality in their action. They are created by law; most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty; and it may, if it see fit, interpose by legislation concerning them, when required by the interests of the government. (1854) 6 Op. Atty. Gen. 326, 344.

The authority of each head of a department is a parcel of the executive power of the President. To coerce the head of a department is to coerce the President. This can be accomplished in no other way than by a law, constitutional in its nature, enacted in accordance with the forms of the Constitution. (1854) 6 Op. Atty. Gen. 680, 682.

Express statutory authority is not required for every administrative act. (1911) 28 Op. Atty. Gen. 549.

Heads of departments representatives of President.—The direction of the President is to be presumed in all instructions and orders issuing from a competent department, and official instructions, issued by the heads of the several executive departments, within their respective jurisdictions, are valid, without containing express reference to the direction of the President. Wilcox v. Jackson ex dem. McConnel (1839) 13 Pet. 498, 513, 10 L. Ed. 264; U. S. v. Eliason (1842) 16 Pet. 291, 302, 10 L. Ed. 968; The Confiscation Cases (1873) 20 Wall. 92, 108, 22 L. Ed. 320; U. S. v. Fletcher (1893) 148 U. S. 84, 89, 13 Sup. Ct. 552, 37 L. Ed. 378; Scott v. Carew (1905) 25 Sup. Ct. 193, 196, 196 U. S. 100, 49 L. Ed. 403; U. S. v. Cutter (C. C. 1856) Fed. Cas. No. 14,911; U. S. v. Tichenor (C. C. 1882) 12 Fed. 415, 423, 8 Sawy. 142; Northern Pac. Ry. Co. v. Mitchell (D. C. 1913) 208 Fed. 469; Medkirk v. U. S. (1909) 44 Ct. Cl. 469, 482; (1855) 7 Op. Atty. Gen. 453; (1862) 10 Op. Atty. Gen. 171, 183; U. S. v. Bayard (1885) 15 App. D. C. 310, 320.

The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Wilcox v. Jackson ex dem. McConnel (1839) 13 Pet. 498, 513, 10 L. Ed. 264; Williams v. U. S. (1843) 1 How. 290, 297, 11 L. Ed. 135; U. S. v. Farden (1878) 99 U. S. 10, 19, 25 L. Ed. 267; Wolsey v. Chapman (1879) 101 U. S. 755, 769, 25 L. Ed. 915; Runkle v. U. S. (1887) 122 U. S. 543, 557, 7 Sup. Ct. 1141, 30 L. Ed. 1167; Lockington v. Smith (C. C. 1817) Fed. Cas. No. 8,448, Pet. C. C. 466; U. S. v. Cutter (C. C. 1856) Fed. Cas. No. 14,911; Northern Pac. Ry. Co. v. Mitchell (D. C. 1913) 208 Fed. 469; (1854) 6 Op. Atty. Gen. 583, 587; (1855) 7 Op. Atty. Gen. 453; (1877) 15 Op. Atty. Gen. 290, 293.

An order sent out from the appropriate executive department in the regular course of business is the legal equivalent of the President's own order to the same effect. Wolsey v. Chapman (1879) 101 U. S. 755, 770, 25 L. Ed. 915; Medkirk v. U. S. (1909) 44 Ct. Cl. 469, 482; Medkirk v. U. S. (1910) 45 Ct. Cl. 395, 403.

Rules and regulations promulgated through the Secretary of War must be received as the acts of the Executive. U. S. v. Eliason (1842) 16 Pet. 291, 301, 10 L. Ed. 968.

Orders issued by the Department of State in relation to such public measures as are not immediately connected with the duties of some other department are to be considered as orders of the President. Lockington v. Smith (C. C. 1817) Fed. Cas. No. 8,448.

A proclamation by the Secretary of the Interior creating a forest reserve need not be signed by the President. U. S. v. Blendauer (D. C. 1903) 122 Fed. 703, reversed (1904) 128 Fed. 910, 63 C. C. A. 636.

Where the President intervenes personally and prohibits an act of one of his ministers, not specially confided by Congress to that minister, such an act could have no more validity, and be no more binding on the government, than the act of any other person. (1862) 10 Op. Atty. Gen. 171, 182.

As to rules and orders promulgated by the Secretary of War, by direction of the President, see notes to § 318.

Assistants to heads of departments as representing them.—A letter written by an Assistant Secretary of the Treasury to a collector of customs concerning the deposit of money in the collector's custody will be presumed to have been written by authority of the Secretary. U. S. v. Adams (C. C. 1885) 24 Fed. 348.

The declaration, by an Assistant Secretary of the Treasury, of the amount of foreign sugar bounties, which the

Secretary was required to ascertain and declare, under Tariff Act July 24, 1897, c. 11, § 5, 30 Stat. 205, will be presumed to have been properly issued in the performance of such duty. Franklin Sugar Refining Co. v. U. S. (C. C. 1910) 178 Fed. 743.

The duties of assistants to the heads of departments, or bureaus are generally not specifically defined by law, but are left to the direction and regulation of the superior officers. Such assistants are supposed to be officially engaged in carrying out the will of their principals in the details of the work. When their acts, decisions, or directions are reduced to writing, signed by them in their official capacity, filed or recorded among the archives of the department, and do not appear to have been revoked, annulled, or modified by the head of the department or bureau, they must be held, in the absence of fraud, mistake, or irregularity, to have been done within the scope of the authority of the assistant, and to be as binding on the government as though expressly ordered by the superior. McCollum v. U. S. (1881) 17 Ct. Cl. 92, 101.

The presumption is that an order from the proper executive department in the regular course of business is sent with the knowledge and approval of the head of the department. Medkirk v. U. S. (1910) 45 Ct. Cl. 395.

It being impossible that each head of department should perform in person all the business of his department, the constitution and the laws allow him to appoint clerks, among whom a portion of his duties may be distributed, and whose legal power is included in his, just as his own is included in that of the President. (1854) 6 Op. Atty. Gen. 583, 587.

The attestation of commissions, treasury warrants, passports, and the like, by heads of departments, or chiefs of bureaus, or other certifying officers of the government, cannot be delegated, unless when specially authorized by Congress. (1855) 7 Op. Atty. Gen. 594.

Decisions of heads of departments conclusive on successors.—The head of a department cannot, in a matter involving judgment and discretion, reverse the decision and action of his predecessor, even in a matter relating to the general officers and management of the department. U. S. v. Bank of the Metropolis (1841) 15 Pet. 377, 400, 10 L. Ed. 774; Lavalette v. U. S. (1864) 1 Ct. Cl. 147; Jackson v. U. S. (1884) 19 Ct. Cl. 504; (1831) 2 Op. Atty. Gen. 463; (1849) 5 Op. Atty. Gen. 122; (1852) 5 Op. Atty. Gen. 664; (1857) 9 Op. Atty. Gen. 32, 34; (1859) 9 Op. Atty. Gen. 300, 302; (1868) 12 Op. Atty. Gen. 355; (1869) 13 Op. Atty. Gen. 33, 35; (1870) 13 Op. Atty. Gen. 226, 228; (1871) 13 Op. Atty. Gen. 387, 388. But see (1861) 10 Op. Atty. Gen. 56, 62.

The principle of res judicata applies to departmental action of a final nature. Day v. U. S. (1886) 21 Ct. Cl. 262; (1831) 2 Op. Atty. Gen. 463; (1841) 3 Op. Atty. Gen. 684; (1848) 5 Op. Atty. Gen. 28; (1891) 20 Op. Atty. Gen. 280.

It is a rule of action, prescribed to itself by each administration, to consider the acts of its predecessors conclusive as far as the executive is concerned. (1825) 2 Op. Atty. Gen. 8, 9; (1829) 2 Op. Atty. Gen. 280, 283; (1869) 13 Op. Atty. Gen. 33, 35.

The right in an incumbent of reviewing a predecessor's decisions extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor. A third party is interested, and he cannot be deprived of a payment on a credit so given, but by the intervention of a court to pass upon his right. U. S. v. Bank of the Metropolis (1841) 15 Pet. 377, 401, 10 L. Ed. 774.

A subject, once disposed of by a department, ought to be regarded as settled, except under peculiarly strong circumstances. (1844) 4 Op. Atty. Gen. 341.

There is no law which authorizes the head of any department to supervise the acts of his predecessors, and to award damages for their assumed misconduct, errors, or omissions, to be paid out of the public treasury. (1848) 5 Op. Atty. Gen. 28.

A plainly unlawful opinion of a head of department is not closed against future inquiry into the merits of the case. (1856) 8 Op. Atty. Gen. 198, 214.

When a Secretary has officially decided or determined any matter or case, and goes out of office leaving the decision on record, his successor cannot lawfully overturn it, unless upon the production of such new evidence as would be sufficient in a court of chancery to sustain a bill of review, or to get a new trial in a court of law. (1857) 9 Op. Atty. Gen. 100, 101.

The well-settled principle, that the final decision of a case before a head of department is binding upon his successors in the same department, is subject to some equally well-established exceptions, and these are where there has been a palpable error of calculation, or where new facts are subsequently brought forward, which show that the former decision was erroneous,

and would probably not have been made if they had been known at that time. It is also well established that such a decision may be opened by a resolution or act of Congress directing it to be done. (1868) 12 Op. Atty. Gen. 355, 358. And see (1859) 9 Op. Atty. Gen. 387, 388; (1870) 13 Op. Atty. Gen. 226, 228.

When a matter has once been passed upon and finally disposed of by the head of a department, it should not be disturbed or reopened by his successors, excepting under extraordinary circumstances, such as the discovery of new facts, and the like. (1882) 17 Op. Atty. Gen. 315.

The fact that an application for reexamination of a matter disposed of had been made to and had not been acted upon by the head of the department by whom the decision was rendered does not withdraw the case from the operation of the rule. Id.

The Postmaster General is not bound by the construction placed by a predecessor in office on the statute relating to second-class matter, so as to preclude him from revoking a certificate of entry of a publication as second-class matter, which had been issued by such predecessor, where no vested right has been created by such certificate. Columbian Correspondence College v. Wynne (1905) 25 App. D. C. 149.

Acts of heads of departments conclusive on other departments of the government.—A finding of land officers in proceedings resulting in the issuance of patents on commuted homestead entries, that such lands were agricultural and not coal lands, is not conclusive against the government in a suit to cancel the patents as fraudulently procured by misrepresenting their character. Washington Securities Co. v. United States (1914) 34 Sup. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220, affirming decree (1912) 194 Fed. 59, 114 C. C. A. 79.

The executive departments have not a judicial, nor even a quasi judicial, character. Their acts are not judicial, and are binding on executive officers, but not on the courts. Alire v. U. S. (1865) 1 Ct. Cl. 233.

The position of head of the War Department involves the highest responsibilities, and constantly calls for the exercise of the soundest judgment and discretion; and where such judgment and discretion are exercised, in respect to any purely executive function appropriate to that department, every other department of the government is bound by the action. It is conclusive. Peirce v. U. S. (1865) 1 Ct. Cl. 270, 279.

But the Secretary of War has no general or unlimited power to bind the government by accepting or indorsing negotiable paper. Peirce v. U. S. (1865) 1 Ct. Cl. 270.

Usage cannot aid such a transaction. An illegal practice prevailing among officers of the government, no matter how long continued or extensive, can never ripen into a binding usage. Id.

The decision of the head of a department, directing payment of a particular claim, is binding upon all the subordinate officers by whom the account is to be audited and passed. (1849) 5 Op. Atty. Gen. 87.

The President ought not, as a general rule, to entertain an appeal from the decision of the head of a department respecting a private claim against the government. (1863) 10 Op. Atty. Gen. 526.

Liabilities of heads of departments for official acts.—The act of the head of one of the departments in calling the attention of any person having business with such department to a statute relating in any way to such business, cannot be made the foundation of an action against such officer. Spalding v. Vilas (1896) 16 Sup. Ct. 631, 635, 161 U. S. 483, 40 L. Ed. 780.

The head of a department cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive that prompted his action, for personal motives cannot be imputed to duly authorized official conduct. Spalding v. Vilas (1896) 16 Sup. Ct. 631, 637, 161 U. S. 483, 40 L. Ed. 780.

§ 233. (R. S. § 159.) Word "Department."

The word "Department" when used alone in this Title, and Titles five, six, seven, eight, nine, ten, and eleven, means one of the Executive Departments enumerated in the preceding section.

The Department of Agriculture was included in this definition by Act Feb. 9, 1889, c. 122, § 1, post, § 789.

The Department of Commerce was included in this definition by Act Feb. 14, 1903, c. 552, § 1, post, § 853.

The Department of Labor was included in this definition by Act March 4, 1913, c. 141, § 1, post, § 932.

Notes of Decisions

Meaning of term "department," as used in statutes generally.—The term "department," as used in acts of Congress and in the Revised Statutes, invariably applies to one or more of the several executive departments men-

tioned in R. S. § 158, ante, § 232, or included within the terms of that section by subsequent enactments, unless a different meaning is clearly indicated by the context. (1907) 26 Op. Atty. Gen. 209.

The term "department," as used in laws relating to the civil service, is distinguished from "office," "bureau," and "branch;" and subordinates of the several executive departments are distinguished from employés of the last-mentioned governmental agencies. Id.

§ 234. (R. S. § 160.) Salaries of heads of Departments.

Each head of a Department is entitled to a salary of [ten thousand dollars] a year, to be paid monthly.

Act March 3, 1873, c. 226, § 1, 17 Stat. 486.

The salaries of the heads of Departments, having been increased from $8,000 to $10,000 by provisions of Act March 3, 1873, c. 226, § 1, incorporated into this section of the Revised Statutes, and cited above, were reduced to $8,000, and the words of this section inclosed in brackets, "ten thousand dollars," were superseded by the repeal of so much of that act as increased their compensation, by Act Jan. 20, 1874, c. 11, 18 Stat. 4.

The salary of the Secretary of the Treasury was declared to be $8,000 in the provisions of the sundry civil appropriation act for the fiscal year 1876, prescribing the organization of the Treasury Department and the offices thereof, and the salaries to be paid to the persons therein, Act March 3, 1875, c. 130, § 2, post, § 352.

The Secretary of Agriculture receives the same salary as is paid to the secretary of each of the Executive Departments, by section 3 of the act making that Department an Executive Department, Act Feb. 9, 1889, c. 122, § 3, post, § 791.

The Secretary of Commerce was to receive a salary of $8,000 per annum, by section 1 of the act establishing the Department of Commerce, Act Feb. 14, 1903, c. 552, § 1, post, § 853.

But the compensation of the heads of Executive Departments who are members of the President's cabinet, on and after March 4, 1907, was increased to $12,000 per annum by Act Feb. 26, 1907, c. 1635, § 4, ante, § 36.

Said section 4 of Act Feb. 26, 1907, c. 1635, in so far as it related to the annual compensation of the Secretary of State, was repealed, and his annual compensation was again made $8,000, by Act Feb. 17, 1909, c. 137, § 1, post, § 285, and Act March 4, 1909, c. 297, § 1, post, § 287. But the appropriations for the Secretary of State for the fiscal year 1912 and subsequent years were $12,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

The Secretary of Labor receives a salary of $12,000 per annum, by section 1 of the act establishing the Department of Labor, Act March 4, 1913, c. 141, § 1, post, § 932.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 235. (R. S. § 161.) Departmental regulations.

The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

Act July 27, 1789, c. 4, 1 Stat. 28. Act Sept. 15, 1789, c. 14, 1 Stat. 68. Act Aug. 7, 1789, c. 7, 1 Stat. 49. Act Sept. 2, 1789, c. 12, 1 Stat. 65. Act June 8, 1872, c. 335, 17 Stat. 283. Act April 30, 1798, c. 35, 1 Stat. 553. Act June 22, 1870, c. 150, § 8, 16 Stat. 163. Act March 3, 1849, c. 108, 9 Stat. 395.

Provisions authorizing each head of a Department to alter the distribution

of clerks among the various bureaus and offices, and to reduce the force employed, were made by R. S. § 166, post, § 244, and Act Aug. 15, 1876, c. 287, § 3, post, § 245.

Heads of Departments were required to make and enforce regulations to carry out the provisions of Act March 29, 1894, c. 49, relating to the making of returns of public property, by section 4 of that act, post, § 442.

Heads of Departments were also required to make regulations to secure an administrative examination of accounts, before transmission to the Auditors of the Treasury, as provided by the Dockery Act of July 31, 1894, c. 174, § 12, post, § 428, and for the execution of other requirements of that act, by section 22 of the act, post, § 437.

Appropriations to enable the President, by the employment of accountants and experts from official and private life, to more effectively inquire into the methods of transacting the public business of the Government in the executive departments and other executive government establishments, with the view of inaugurating new or changing old methods of transacting such public business so as to attain greater efficiency and economy therein, and to ascertain and recommend to Congress what changes in law may be necessary to carry into effect such results of his inquiry as can not be carried into effect by executive action alone, were made by the sundry civil appropriation acts for recent fiscal years. The provision for the fiscal year 1913 was by Act Aug. 24, 1912, c. 355, § 1, 37 Stat. 417.

Notes of Decisions

1. Making and requisites of regulations.
2. Regulations not to be inconsistent with law.
3. Implied legislative ratification.
4. Regulations for government of department, conduct of officers, etc.
5. Regulations for carrying out particular laws.
6. Custody, use, etc., of property.
7. Preservation of records, etc.
8. Protection from disclosure as evidence of records or of facts known officially.
9. Force and effect of regulations as law.
10. Judicial notice of regulations.
11. Violations of regulations.

1. Making and requisites of regulations.—Usages have been established in every part of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. U. S. v. Macdaniel (1833) 7 Pet. 1, 14, 8 L. Ed. 587. See Benson v. Henkel (1905) 25 Sup. Ct. 569, 571, 198 U. S. 1, 49 L. Ed. 919.

A decision of a department in a particular case, being the opinion of the secretary upon the law and regulations as they existed, is not in any sense a regulation under this section, and, though entitled to great respect and consideration by the Supreme Court, is not binding on the court as a valid regulation of the department. Smith v. U. S. (1898) 18 Sup. Ct. 626, 629, 170 U. S. 372, 380, 42 L. Ed. 1074.

Regulations for government of a department need not be promulgated in any set form, nor in writing. Haas v. Henkel (1910) 30 Sup. Ct. 249, 254, 216 U. S. 462, 54 L. Ed. 569, 17 Ann. Cas. 1112.

The requirement by the department under whose authority an officer is acting, such as will make his action official, need not be prescribed by written rule or regulation. It may also be found in an established usage which constitutes the common law of the department, and fixes the duties of those engaged in its activities. In numerous instances, duties not completely defined by written rules are clearly established by settled practice. U. S. v. Birdsall (1914) 34 Sup. Ct. 512, 514, 233 U. S. 223, 58 L. Ed. 930.

A "regulation of an executive department" is a rule made by the head of the department for its action, under an act of Congress conferring power so to do. An order of the President or of a secretary of a department is not such a regulation. Harvey v. U. S. (1867) 3 Ct. Cl. 38.

2. Regulations not to be inconsistent with law.—The head of an executive department is limited in what he does by the law; but he need not show express statutory authority for an administrative detail incident to a power conferred. U. S. v. Macdaniel (1833) 7 Pet. 1, 14, 8 L. Ed. 587; Small v. U. S. (1909) 45 Ct. Cl. 13; (1911) 28 Op. Atty. Gen. 549.

A regulation adopted under this section should not be disregarded or annulled by the courts unless it is plainly and palpably inconsistent with law. Boske v. Comingore (1900) 20 Sup. Ct. 701, 706, 177 U. S. 459, 44 L. Ed. 846.

A regulation of an executive department must conform to the law, if a law exists upon the subject of the regulation. Symonds v. U. S. (1886) 21 Ct. Cl. 148.

A departmental regulation contrary to law is no regulation. Sherlock v. U. S. (1908) 43 Ct. Cl. 161.

The Secretary of the Treasury cannot legally, by departmental order, change a practice or course of office procedure prescribed by statute for the settlement of accounts. (1888) 19 Op. Atty. Gen. 176.

A regulation may supplement a statute, but cannot supersede it. Roberts v. U. S. (1909) 44 Ct. Cl. 411.

3. Implied legislative ratification.—When Congress permit the orders of an executive department to be formulated as regulations, and published, and

carried into effect, the legislative ratification must be implied. Maddux v. U. S. (1885) 20 Ct. Cl. 193, 197.

Treasury regulations having been in force for a number of years and in operation in every port of the United States except one, and having received the tacit. if not express, approval of Congress, the court will not disregard them and hold that they are not authorized by law. Garlinger v. U. S. (1895) 30 Ct. Cl. 473.

4. Regulations for government of department, conduct of officers, etc.—The power conferred by this section is administrative only. It does not justify any additions to the requirements of R. S. § 2291, post, § 4532, as to proof by a homestead entryman of cultivation and residence by two credible witnesses. U. S. v. George (1913) 33 Sup. Ct. 412, 414, 228 U. S. 14, 57 L. Ed. 712.

Under Act July 12, 1876, § 5, post, § 7189, dividing postmasters into four classes, and defining the second class as including all those whose annual salaries are between $2,000 and $3,000, and Act March 3, 1883, § 1, post, § 7217, providing that the respective compensation of postmasters of the first, second, and third classes shall be annual salaries assigned in even hundreds of dollars, to be ascertained and fixed from their respective quarterly returns to the auditor at the rates therein specified, which are based on the gross receipts, the Postmaster General had no authority to make a regulation, pursuant to this section, that, in determining the gross receipts for the purpose of fixing a postmaster's salary, unusual sales of stamps should not be included, and that a statement of such sales should not be made to the auditor, but to the First Assistant Postmaster General, since the regulation was not an attempt to define "gross receipts" nor to clear up an ambiguity in the statute or supply details, but in effect made salaries dependent, not upon gross receipts returned to the auditor as provided by statute, but upon such part of such gross receipts as, in the opinion of some departmental official, was not unusual, or for use outside the district. U. S. v. Foster (D. C. 1913) 211 Fed. 206.

That the validity of a regulation by the Postmaster General was unquestioned for a long time was of little force in determining its validity, where the only persons directly affected thereby were subordinate office holders, who would be very reluctant to attack the validity of a regulation made by their superior officer. Id.

The treasury regulations; prescribing the duties and watches of night inspectors, have the force of law and regulate the service and hours of service. Garlinger v. U. S. (1895) 30 Ct. Cl. 208.

Rights, duties, and obligations defined by statute cannot be taken away or abridged by regulations of department. Laurey v. U. S. (1897) 32 Ct. Cl. 259, 265.

The Secretary of the Treasury had power, under this section, to make a regulation that the oaths to be taken by an officer of the Revenue Marine Service, or an officer or employé in any branch of the customs service, to the correctness of his account for pay or salary, as required by R. S. § 1790, post, § 3265, and section 2693, should be taken before some person authorized to administer oaths generally. (1889) 19 Op. Atty. Gen. 401.

A head of a department has, under the powers conferred by this section, the right to say what the officers and clerks under him shall do or not do, so long as he does not go counter to any law. (1889) 19 Op. Atty. Gen. 401, 403.

Chiefs of division, in the Department of Agriculture, in charge of the several divisions of natural science which are employed in accomplishing the objects of that department, are subject to all regulations prescribed in accordance with law by the head of the department. (1894) 20 Op. Atty. Gen. 703.

Under the authority to prescribe regulations given by this section, there seems to be no limitation to the right of the head of a department to demand service of his subordinates. (1894) 20 Op. Atty. Gen. 728, 729.

It was not "inconsistent with law," within this section, for the head of the Department of Commerce and Labor, in organizing that department upon its creation, to change the names of officers assigned to the department. (1903) 24 Op. Atty. Gen. 697, 698.

The Secretary of Commerce and Labor was not authorized by law to consolidate the Bureau of Manufactures and the Bureau of Statistics into one bureau called the Bureau of Foreign and Domestic Commerce. (1909) 27 Op. Atty. Gen. 542.

The duties previously performed by the disbursing clerk of the Bureau of the Census could not be transferred to the disbursing clerk of the Department of Commerce and Labor, consistently with law, within the meaning of this section. (1911) 29 Op. Atty. Gen. 247.

5. Regulations for carrying out particular laws.—The head of a department, authorized to make regulations in aid of the law, cannot make regulations which defeat the law. Morrill v. Jones (1882) 1 Sup. Ct. 423, 106 U. S. 466, 27 L. Ed. 267; Campbell v. U. S. (1882) 2 Sup. Ct. 759, 107 U. S. 407, 27 L. Ed. 592; Williamson v. U. S. (1908) 28 Sup. Ct. 163, 207 U. S. 425, 52 L. Ed. 278; Bong v. Alfred S. Campbell Art Co. (1909) 29 Sup. Ct. 628, 631, 214 U. S. 236, 53 L. Ed. 979, 16 Ann. Cas. 1126.

The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regu-

late the mode of proceeding to carry into effect what Congress has enacted. Morrill v. Jones (1882) 1 Sup. Ct. 423, 106 U. S. 466, 27 L. Ed. 267.

The authority of a postmaster general under this section to make regulations for the government of the department includes power to prescribe that, in determining the gross receipts of a post office on which the salary of the postmaster is to be fixed, stamps sold in unusual quantities for other offices shall not be considered. U. S. v. Foster (1914) 34 Sup. Ct. 666, 233 U. S. 515, 58 L. Ed. 1074, reversing judgment (D. C. 1913) 211 Fed. 206.

Postmaster General held authorized, under this section, to limit number of sample copies mailed as second-class matter to amount of publisher's legitimate subscriptions. Lewis Pub. Co. v. Wyman (1910) 182 Fed. 13, 16, 104 C. C. A. 453, affirmed (1910) 33 Sup. Ct. 599, 228 U. S. 610, 57 L. Ed. 989.

A regulation of an executive officer or department under legislative authority to make rules to enforce an act of Congress, which subjects classes of property to forfeiture and classes of persons to penalties that are excluded by the statute, is void. U. S. v. Eleven Thousand One Hundred and Fifty Pounds of Butter (1912) 195 Fed. 657, 115 C. C. A. 463, affirming judgment (D. C. 1911) 188 Fed. 157.

The secretary of the treasury is not authorized to impose, by regulations, burdens on commerce not imposed or authorized by the statute. Siegfried v. Phelps (C. C. 1889) 40 Fed. 660, 661, reversed (1892) 12 Sup. Ct. 391, 142 U. S. 602, 35 L. Ed. 1128.

6. Custody, use, etc., of property.—This section, and R. S. § 217, post, § 319, do not authorize the granting of licenses for the occupation of parts of military reservations for the erection of hotels, church edifices, etc. (1897) 21 Op. Atty. Gen. 537.

7. Preservation of records, etc.—A regulation of the Treasury Department declaring that all records in the offices of collectors of internal revenue, or any of their deputies, are in their custody and control for purposes relating to the collection of the revenues only, and that collectors have no control of them, and no discretion with regard to permitting the use of them for any other purpose, is within the power conferred by this section, and is not inconsistent with law. Boske v. Comingore (1900) 20 Sup. Ct. 701, 705, 177 U. S. 459, 44 L. Ed. 846; In re Weeks (D. C. 1897) 82 Fed. 729; In re Comingore (D. C. 1899) 96 Fed. 552, 559; In re Lamberton (D. C. 1903) 124 Fed. 446. And see In re Hirsch (C. C. 1896) 74 Fed. 928, affirmed (1898) 87 Fed. 1005, 31 C. C. A. 350.

The head of a department may take from a subordinate all discretion as to permitting the records in his custody to be used for any other purposes than the collection of the revenue, and reserve for his own determination all matters of that character. Boske v. Comingore (1900) 20 Sup. Ct. 701, 706, 177 U. S. 459, 44 L. Ed. 846.

Papers filed in the proper accounting office of the treasury as vouchers and documents for settlement of a public account, cannot be taken from such office by replevin. Brent v. Hagner (C. C. 1836) Fed. Cas. No. 1,839, 5 Cranch C. C. 71.

The archives of a department are not in the possession of the head of the department or chief of a bureau, but in the possession of the United States, and papers cannot be taken therefrom, by replevin against such officer, on a claim of them as private property. (1853) 6 Op. Atty. Gen. 7.

8. Protection from disclosure as evidence of records or of facts known officially.—Treasury regulations prohibiting a collector of internal revenue from producing his office records, or copies thereof, in a state court, are valid, and such court cannot punish him for obeying such regulations. Boske v. Comingore (1900) 20 Sup. Ct. 701, 706, 177 U. S. 459, 44 L. Ed. 846, affirming In re Comingore (D. C. 1899) 96 Fed. 552, 559; In re Huttman (D. C. 1895) 70 Fed. 699, 701; In re Weeks (D. C. 1897) 82 Fed. 729; In re Lamberton (D. C. 1903) 124 Fed. 446.

A storekeeper and gauger of the internal revenue department cannot be compelled by a state court to testify as to matters which he is prohibited from divulging by the regulations of the department. Stegall v. Thurman (D. C. 1910) 175 Fed. 813, 816. But see In re Hirsch (C. C. 1896) 74 Fed. 928, 932, affirmed (1898) 87 Fed. 1005, 31 C. C. A. 350.

Official communications on subjects of a confidential nature are privileged from production as evidence in suits between private persons. (1877) 15 Op. Atty. Gen. 378, 415; (1878) 16 Op. Atty. Gen. 24.

Where the disclosure of facts stated, etc., in communications which are not privileged, as made in the course of official and public duties, would, in the judgment of the head of the department, be attended with serious damage to the public interest, the department would be justified in representing to the court that, upon public considerations, it declined to furnish such communications. (1877) 15 Op. Atty. Gen. 415, 416.

Recommendations for office and objections to appointments, filed by parties for their own convenience, and permitted to be withdrawn when desired, are not records or papers required by this section to be kept by the departments in which they are deposited; and they should not be submitted to examination by a representative of a newspaper with a view of establishing that improper persons have been rec-

ommended for office by a certain senator and a certain representative. (1877) 15 Op. Atty. Gen. 342.

The head of an Executive Department is not legally bound, in obedience to a subpœna of a court, to appear in a suit between private parties and testify to facts which have come to his knowledge officially; but he may appear and give such testimony as he shall deem proper. (1905) 25 Op. Atty. Gen. 326.

The head of an Executive Department may properly decline to furnish official records of his Department, or copies thereof, or to give testimony in a cause pending in court between private parties, respecting facts which have come to his knowledge officially, whenever in his judgment the production of such papers or the giving of such testimony might prove prejudicial, for any reason, to the government or to the public interest. Id.

The head of an Executive Department may legally prohibit the chief of a bureau from producing in court any official records of the Department, or certified copies thereof, in obedience to a subpœna duces tecum, and from making or certifying copies of such official records. Id.

The records of Executive Departments are quasi-confidential in their nature, and must be classed as privileged communications whose production can not be compelled by a court without express authority of law. Id.

9. Force and effect of regulations as law.—A regulation prescribed by the head of a department, within this section, when not inconsistent with law, has the force of law. Caha v. U. S. (1894) 14 Sup. Ct. 513, 517, 152 U. S. 221, 38 L. Ed. 415; Ex parte Reed (1879) 100 U. S. 13, 25 L. Ed. 538; (1895) 21 Op. Atty. Gen. 122.

A regulation of a department, in conformity to a particular act of Congress, becomes a part of the law, and of as binding force as if incorporated in the body of the law itself. Wilkins v. U. S. (1899) 96 Fed. 837, 841, 37 C. C. A. 588, writ of certiorari denied (1899) 20 Sup. Ct. 1023, 175 U. S. 727, 44 L. Ed. 339; U. S. v. Sibray (C. C. 1910) 178 Fed. 144, reversed (1911) 185 Fed. 401, 107 C. C. A. 483; U. S. v. Barrows (D. C. 1869) Fed. Cas. No. 14,529, 1 Abb. U. S. 351.

Regulations cannot have retroactive effect. U. S. v. Davis (1889) 10 Sup. Ct. 105, 132 U. S. 334, 33 L. Ed. 390; Same v. Schofield (1889) 10 Sup. Ct. 106, 132 U. S. 337, 33 L. Ed. 392.

The head of an executive department is not liable in damages on account of official communications made by him, pursuant to an act of congress, and in respect of matters within his authority, by reason of any personal or malicious motive that prompted his action. Spalding v. Vilas (1896) 16 Sup. Ct. 631, 161 U. S. 483, 40 L. Ed. 780.

Departmental practice in the administration of a statute will control the courts only when such practice is reasonable. Robinson v. Lundrigan (1913) 33 Sup. Ct. 255, 227 U. S. 173, 57 L. Ed. 468.

The postmaster general has authority to make regulations for the government of the postal service, not inconsistent with the provisions of the Post Office Act. Myrick v. U. S. (1915) 219 Fed. 1, 134 C. C. A. 619. And this includes power to prescribe that, in determining the gross receipts of a post office on which the salary of the postmaster is to be fixed, stamps sold in unusual quantities for other offices shall not be considered. U. S. v. Foster (1914) 34 Sup. Ct. 666, 233 U. S. 515, 58 L. Ed. 1074, reversing judgment (D. C. 1913) 211 Fed. 206.

While department regulations duly promulgated have the force of law, in a limited sense, they cannot enlarge or restrict the liability of an officer on his bond. Meads v. U. S. (1897) 81 Fed. 684, 26 C. C. A. 229.

A lawful rule made by the chief of an executive department to which the enforcement of a law is intrusted, which appoints a subordinate for the purpose and imposes upon him the duty of enforcing the law, is a sufficient process of law to authorize him to prevent its violation when he can do so without infringing upon any personal or property right of those who threaten to break it. Buster v. Wright (1905) 135 Fed. 947, 68 C. C. A. 505.

The regulations of a department in settling its accounts are subject to the revision of a court and jury, when they work manifest injustice to individuals. U. S. v. Cadwalader (D. C. 1835) Fed. Cas. No. 14,706.

Treasury regulations with reference to the internal revenue and for the government of the officers of the Revenue Department have the force of law. In re Huttman (D. C. 1895) 70 Fed. 699, 702; Stegall v. Thurman (D. C. 1910) 175 Fed. 813, 816, 818.

Regulations are matters of departmental business; law and justice require that they be upheld so long as the head of the department allows them to be in force. Real Estate Savings Bank of Pittsburgh v. U. S. (1880) 16 Ct. Cl. 335.

Regulations of the heads of departments, within the scope of their respective duties, are treated as the acts of the President. Maxwell v. U. S. (1914) 49 Ct. Cl. 262.

The rules adopted by the treasury department for the payment of arrears due deceased officers, seamen, etc., in the navy, have the force of law. Low v. Hanson (1881) 72 Me. 104.

10. Judicial notice of regulations.—The courts take judicial notice of the regulations of the executive departments. Ex parte Reed (1879) 100 U. S. 13, 25 L. Ed. 538; Wilkins v. U. S.

(1899) 96 Fed. 837, 841, 37 C. C. A. 588; Weimer v. Zevely (1905) 138 Fed. 1006, 70 C. C. A. 683, affirming decree Zevely v. Weimer (1904) 82 S. W. 941, 5 Ind. T. 646; Beck v. Johnson (C. C. 1909) 169 Fed. 154; Low v. Hanson (1881) 72 Me. 104.

Whenever, by the express language of any act of Congress, power is intrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a part of that body of public records of which the courts take judicial notice. Caha v. U. S. (1894) 14 Sup. Ct. 513, 517, 152 U. S. 221, 38 L. Ed. 415.

A federal appellate court should not be asked to take judicial notice of department regulations, but where relied on they should be read and put into the record in the trial court. Nagle v. U. S. (1906) 145 Fed. 302, 76 C. C. A. 181.

II. Violations of regulations.—Violation of department regulations is not a criminal offense, in the absence of a statute distinctly making it so. U. S. v. Eaton (1892) 12 Sup. Ct. 764, 767, 144 U. S. 677, 36 L. Ed. 591; U. S. v. 11,150 Pounds of Butter (1912) 195 Fed. 657, 115 C. C. A. 463; U. S. v. Van Wert (D. C. 1912) 195 Fed. 974.

If Congress has not made an act a punishable offense, no head of a department can do it by force of a regulation. No authority is given by this section to make rules for the conduct of persons not connected with the departments. (1883) 17 Op. Atty. Gen. 524, 525.

Cited without definite application. Moses v. U. S. (1897) 17 Sup. Ct. 682, 689, 166 U. S. 571, 41 L. Ed. 1119; John Shillito Co. v. McClung (1892) 51 Fed. 868, 871, 2 C. C. A. 526; U. S. v. Moses (1903) 126 Fed. 58, 61, 60 C. C. A. 600, 70 L. R. A. 281, writ of certiorari denied (1904) 25 Sup. Ct. 789, 195 U. S. 632, 49 L. Ed. 353; Franklin Sugar Refining Co. v. U. S. (C. C. 1910) 178 Fed. 743; U. S. v. Mayers (D. C. 1896) 81 Fed. 159, 161; Shipman v. U. S. (1892) 27 Ct. Cl. 129; Woog v. U. S. (1913) 48 Ct. Cl. 80; (1881) 17 Op. Atty. Gen. 205, 210.

§ 236. (R. S. § 162.) Hours of business.

From the first day of October until the first day of April, in each year, all the Bureaus and offices in the State, War, Treasury, Navy, and Post-Office Departments, and in the General Land-Office, shall be open for the transaction of the public business at least eight hours in each day; and from the first day of April until the first day of October, in each year, at least ten hours in each day; except Sundays and days declared public holidays by law.

Act July 4, 1836, c. 352, § 12, 5 Stat. 112.

Subsequent provisions making it the duty of the heads of the several Executive Departments to require of all clerks and other employés not less than seven hours of labor each day, except Sundays and public holidays, contained in Act March 3, 1883, c. 128, § 4, 22 Stat. 563, were re-enacted in Act March 3, 1893, c. 211, § 5, which was amended by Act March 15, 1898, c. 68, § 7, to read as set forth post, § 238.

§ 237. (Act March 3, 1893, c. 211, § 4.) Closing Department on decease of ex-official forbidden.

Hereafter the Executive Departments of the Government shall not be closed as a mark to the memory of any deceased ex-official of the United States. (27 Stat. 715.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1894, cited above.

The draping of any public building in mourning was forbidden by section 3 of this act, post, § 6939.

§ 238. (Act March 3, 1893, c. 211, § 5, as amended, Act March 15, 1898, c. 68, § 7.) Hours of labor and leaves of absence of clerks and other employés; monthly reports as to condition of business; bringing up arrears; quarterly reports as to condition of business.

Hereafter it shall be the duty of the heads of the several Executive Departments, in the interest of the public service, to require of all clerks and other employees, of whatever grade or class, in their respective Departments, not less than seven hours of labor each day, except Sundays and days declared public holidays by law or Executive order: Provided, That the heads of the Departments may, by

special order, stating the reason, further extend the hours of any clerk or employee in their Departments, respectively; but in case of an extension it shall be without additional compensation: Provided further, That the head of any Department may grant thirty days' annual leave with pay in any one year to each clerk or employee: And provided further, That where some member of the immediate family of a clerk or employee is afflicted with a contagious disease and requires the care and attendance of such employee, or where his or her presence in the Department would jeopardize the health of fellow-clerks, and in exceptional and meritorious cases, where a clerk or employee is personally ill, and where to limit the annual leave to thirty days in any one calendar year would work peculiar hardship, it may be extended, in the discretion of the head of the Department, with pay, not exceeding thirty days in any one case or in any one calendar year.

This section shall not be construed to mean that so long as a clerk or employee is borne upon the rolls of the Department in excess of the time herein provided for or granted that he or she shall be entitled to pay during the period of such excessive absence, but that the pay shall stop upon the expiration of the granted leave.

Hereafter it shall be the duty of the head of each Executive Department to require monthly reports to be made to him as to the condition of the public business in the several bureaus or offices of his Department at Washington; and in each case where such reports disclose that the public business is in arrears, the head of the Department in which such arrears exist shall require, as provided herein, an extension of the hours of service to such clerks or employees as may be necessary to bring up such arrears of public business.

Hereafter it shall be the duty of the head of each Executive Department, or other Government establishment at the seat of government, not under an Executive Department, to make at the expiration of each quarter of the fiscal year a written report to the President as to the condition of the public business in his Executive Department or Government establishment, and whether any branch thereof is in arrears. (27 Stat. 715. 30 Stat. 316.)

Provisions relating to hours of labor, etc., contained in the legislative, executive, and judicial appropriation act of March 3, 1883, c. 128, § 4, 22 Stat. 563, were incorporated, in substance, in the similar appropriation act of 1893, cited above, which was amended to read as above set forth by the appropriation act of March 15, 1898, c. 68, § 7. The amendment by said act of 1898 consisted in restricting the power given by the previous acts to heads of Departments, "to extend or limit the hours of service," to authority to extend the hours only; in reducing the sick leave from the 60 days previously authorized to 30 days; and in adding provisions requiring reports as to the condition of business, and for bringing up arrears of business.

This section is not to be construed to prevent the granting of annual leave of absence to a clerk or employé who has had during the year leave on account of sickness, by a provision of Act July 7, 1898, c. 571, § 1, post, § 239.

The 30 days' annual leave is exclusive of Sundays and legal holidays, by a provision of Act Feb. 24, 1899, c. 187, § 4, post, § 240.

Provisions as to holidays and leaves of absence to officers and to clerks and other employés in the public service or in particular branches thereof other than the Executive Departments were made by Res. Jan. 6, 1885, No. 5, Res. Feb. 23, 1887, No. 6, Act June 28, 1894, c. 118, Act March 1, 1889, c. 324, § 49, Act Feb. 1, 1901, c. 190, post, §§ 3244–3248, and other acts referred to in the notes to those sections.

Previous provisions for monthly reports by chief clerks as to defects in arrangement or dispatch of business, and for amendment of such defects, were made by R. S. §§ 174, 175, post, §§ 256, 257.

Subsequent provisions making it the duty of each head of an Executive Department, etc., to submit to Congress in the annual Book of Estimates a statement as to the condition of business in his Department, etc., showing particulars as to arrears, etc., were made by Act March 2, 1895, c. 177, § 7, post, § 6680.

It was also made the duty of the heads of Executive Departments to report to Congress each year in the annual estimates the number and salaries of em-

ployés who are below a fair standard of efficiency, by a provision of Act July 11, 1890, c. 667, § 2, post, § 6679.

In connection with an appropriation for the Civil Service Commission for the establishment of a system of efficiency ratings, the Commission was required to investigate and report to the President as to the administrative needs of the service relating to personnel in the several Executive Departments, etc., by a provision of Act March 4, 1913, c. 142, § 1, post, § 3286.

Notes of Decisions

Departments and clerks, etc., within application of section.—This section is applicable to the Department of Agriculture. (1894) 20 Op. Atty. Gen. 728.

An Assistant Secretary of a department, appointed by the President, with the advice and consent of the Senate, is not a clerk or other employé within the meaning of the section. But it may apply to chiefs of divisions in a department. Id.

Even if the Bureau of Engraving and Printing is properly part of the Treasury Department, leaves of absence to employés of the Bureau are governed by Act July 6, 1892, post, § 511, which was not repealed by this section. (1896) 21 Op. Atty. Gen. 338.

This section does not apply to the Civil Service Commission, as the commission is not attached in any wise to any of the executive departments, or subject in any wise to the control of any of the heads of those departments. (1898) 22 Op. Atty. Gen. 62, 63.

Subordinate officers and employés of the customs service, wherever employed, and whether they receive an annual or per diem compensation, are entitled to the same privileges as to leaves of absence as clerks and employés in the executive departments at Washington, by virtue of Act Aug. 28, 1890, post, §§ 5374, 5375, with which this section is not inconsistent. (1898) 22 Op. Atty. Gen. 77, 79.

Clerks and employés at seat of government or elsewhere.—The operation of the provisions of Act March 3, 1893, with reference to leaves of absence in the Treasury Department, was confined to clerks and employés in the city of Washington. (1896) 21 Op. Atty. Gen. 338, 427.

A clerk or other employé of an Executive Department of the Government whose duties are performed at a place other than the seat of Government is as much entitled to the benefits of Act March 15, 1898, § 7, amending this section, with reference to leaves of absence, as one whose duties are performed in the city of Washington. (1898) 22 Op. Atty. Gen. 77.

The Extension of Hours Act of March 15, 1898, § 7, amending this section, applies only to employés in the departments at the seat of government. It does not apply to laborers employed at the various customs ports who are actually engaged in manual labor, and it did not repeal, as to such laborers, the provisions of the Eight Hour Law, Act Aug. 1, 1892, § 1, post, § 8918. (1912) 29 Op. Atty. Gen. 481.

Hours of labor.—There is no limit to the right of the head of a department to demand service of his subordinates. (1894) 20 Op. Atty. Gen. 728.

This section does not permit an allowance of half an hour for luncheon within the seven hours of labor required. (1898) 22 Op. Atty. Gen. 62.

"Every Saturday after 12 o'clock noon" is a holiday for all purposes within the District of Columbia, by Code D. C. § 1389, and is, therefore, one of the "days declared public holidays by law," within the meaning of this section, and consequently heads of departments are not obliged to require labor of such clerks, etc., after the hour of noon on Saturdays. (1903) 25 Op. Atty. Gen. 40.

Heads of departments must require at least seven hours' labor of all their clerks and other employés every day in the year except Sundays and days declared to be holidays by section 1389 of the Code of the District of Columbia, and during authorized leave; and, if the public service requires it, the hours of labor may be extended by special order and may include holidays as well as ordinary days. Id.

Leaves of absence under former laws.—Where the regulations of an executive department required the clerks therein to furnish a certificate of their attending physician in cases of absence caused by sickness, and there was no provision authorizing a stoppage of pay, the head of the department could not deprive a clerk of his pay whose absence was caused by sickness and who furnished his physician's certificate as required by the regulations. Ware v. U. S. (1871) 7 Ct. Cl. 565; Sleigh v. U. S. (1873) 9 Ct. Cl. 369.

The incumbent of an office is prima facie entitled to the lawful compensation thereof so long as he holds the office, though he may be disabled by disease or bodily injury from performing its duties. If it be an office held at the will of the appointing power, and that power does not see fit to have the compensation go on while the incumbent is so disabled, the only remedy, in the absence of express law or regulation authorizing the stoppage of the compensation during the disability, is to remove the incumbent. Sleigh v. U. S. (1873) 9 Ct. Cl. 369, 375.

Where a clerk in an executive department tendered his resignation on the 26th of September, to take effect on the 31st of October, with a request for leave of absence from the 1st of October, and the resignation was "accepted

accordingly" by the head of the department, it must be held that if he were absent during October he was absent with leave, and that, as he held the office until the end of October, he was entitled to the pay thereof during that month. Reinhard v. U. S. (1874) 10 Ct. Cl. 282.

Act March 3, 1883, c. 128, § 4, 22 Stat. 531, left undisturbed the principle that a clerk is entitled to the pay of the office so long as he holds it, if his absence is caused by sickness. Chisolm v. U. S. (1892) 27 Ct. Cl. 94.

Under that act, it was discretionary with the heads of departments to grant or refuse leave of absence; and their acts cannot be reviewed. All absence without the consent of the head of a department was without pay; and absence with the permission of the head of the department was subject to such conditions and limitations as might be imposed by the authority granting the leave. Hurlburt v. U. S. (1895) 30 Ct. Cl. 16.

The meaning of section 4 of Act March 3, 1883, was that an absence from the executive departments in excess of 30 days should be without pay except in cases of sickness; that in a case of sickness an absence in excess of 30 days should be with pay, so long as the department should retain upon its roll the sick employé; that after 30 days of absence in a case of sickness no leave of absence for a different cause could be granted with pay; that when 30 days' absence in any one year had been granted with pay, additional absence could be granted to the same party with pay in case of sickness. (1886) 18 Op. Atty. Gen. 352.

Section 4 of Act March 3, 1883, inhibited heads of departments and the Executive from granting leave of absence to department clerks with pay and without charging the time against the period of absence allowed annually by law, in every case except that of the sickness of the clerk concerned. (1892) 20 Op. Atty. Gen. 303.

Section 49 of Act March 1, 1889, in regard to leaves of absence of officers and employés of the United States who are members of the District of Columbia National Guard, was not repealed or modified by section 5 of Act March 3, 1893. The object of the former was to provide for the public defense and that of the latter to regulate leaves of absence for private reasons or purposes. (1896) 21 Op. Atty. Gen. 353.

Leaves of absence under this section.—This act applied to the current year, and absences prior to July 1, 1893, must be taken into account in computing the total leave to which an employé may be entitled during the calendar year ending December 31, 1893. (1893) 20 Op. Atty. Gen. 607, 670.

Heads of departments had no authority, under section 5 of Act March 3, 1893, to grant to clerks and employés sick leave with pay for more than 60 days in any one calendar year. (1893) 20 Op. Atty. Gen. 670.

In the phrase of the proviso to this section, "in exceptional and meritorious cases," the word "meritorious" is surplusage. and the phrase must be read as equivalent to "exceptional as well as meritorious;" and the word "exceptional," is not susceptible of precise definition as matter of law. (1894) 20 Op. Atty. Gen. 716.

In computing the annual leave and sick leave under this section, Sundays and holidays occurring during such absence should be charged against the absentee. (1894) 20 Op. Atty. Gen. 716; (1898) 22 Op. Atty. Gen. 77.

An employé not connected with the department during the entire calendar year is not entitled to full annual or sick leave, which should be prorated. (1894) 20 Op. Atty. Gen. 728.

The nature of the evidence required from applicants for leave and sufficiency of reasons for extending or limiting hours of labor are matters within the discretion of the Secretary, as to which the Attorney General cannot advise. Id.

Leaves of absence of employés of the government in the discharge of military duties are not to be charged to the 30 days allowed them annually for rest and recreation. (1896) 21 Op. Atty. Gen. 353.

But so much of this section as authorized sick leave, with pay, only in "exceptional and meritorious cases," etc., was nullified by Act July 7, 1898, § 1, post, § 239. (1898) 22 Op. Atty. Gen. 255.

The President is without authority to grant an extension of leave of absence with pay to members of the Grand Army of the Republic employed in the government service who attend the annual encampment of that order. (1907) 26 Op. Atty. Gen. 336.

But see § 239, post.

§ 239. (Act July 7, 1898, c. 571, § 1.) Annual leave of absence, notwithstanding leave on account of sickness.

Nothing contained in section seven of the Act making appropriations for legislative, executive, and judicial expenses of the Government for the fiscal year eighteen hundred and ninety-nine, approved March fifteenth, eighteen hundred and ninety-eight, shall be construed to prevent the head of any Executive Department from granting thirty days' annual leave with pay in any one year to a clerk

or employee, notwithstanding such clerk or employee may have had during such year not exceeding thirty days' leave with pay on account of sickness as provided in said section seven. (30 Stat. 653.)

This was a provision of the deficiency appropriation act for the fiscal year 1898, cited above.

Act March 15, 1898, c. 68, § 7, mentioned in this provision, amended Act March 3, 1893, c. 211, § 5, to read as said section is set forth ante, § 238.

Notes of Decisions

Effect of provision on previous law.—This provision nullified so much of Act March 15, 1898, § 7, ante, § 238, as provided that the 30 days' sick leave should only be granted with pay in exceptionally meritorious cases, and reestablished the law authorizing thirty days' annual leave with pay without any cause being given, and 30 days' additional leave on account of sickness. (1898) 22 Op. Atty. Gen. 255.

Under this provision, 60 days' leave of absence, with pay, may be granted employés in the Executive Departments, provided that as much as 30 days of it was made necessary by personal illness. Id.

§ 240. (Act Feb. 24, 1899, c. 187, § 4.) Annual leave of absence, exclusive of Sundays and legal holidays.

The thirty days' annual leave of absence with pay in any one year to clerks and employés in the several Executive Departments authorized by existing law shall be exclusive of Sundays and legal holidays. (30 Stat. 890.)

This was a proviso added to section 4 of the legislative, executive, and judicial appropriation act for the fiscal year 1900, cited above.

§ 241. (Act Feb. 24, 1899, c. 187, § 1.) Recording clocks not to be used.

No money appropriated by this Act shall be used for expense of repairing recording clocks used for recording time of clerks or other employees in any of the Executive Departments at Washington, nor shall there hereafter be used in any of the Executive Departments at Washington any such recording clocks. (30 Stat. 864.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1900, cited above.

A previous provision that no recording clocks should be purchased for use in any of the Executive Departments at Washington, D. C., except from moneys specifically appropriated therefor, contained in Act July 7, 1898, c. 571, § 1, 30 Stat. 655, was superseded by this provision.

§ 242. (R. S. § 163.) Classification of Department clerks.

The clerks in the Departments shall be arranged in four classes, distinguished as the first, second, third, and fourth classes.

Act March 3, 1853, c. 97, § 3, 10 Stat. 209. Act March 3, 1855, c. 175, § 4, 10 Stat. 669.

Provisions authorizing each head of a Department to alter the distribution of clerks among the various bureaus and offices, and to reduce the force employed, were made by R. S. § 166, post, § 244, and Act Aug. 15, 1876, c. 287, § 3, post, § 245.

Provisions for classification of other clerks and employés in the civil service were made by the Civil Service Act of Jan. 16, 1883, c. 27, § 6, post, § 3277.

Notes of Decisions

Effect of section on previous provisions.—Provisions of the act reorganizing the General Land Office, Act July 4, 1836, c. 352, §§ 2, 3, 8, 10, 5 Stat. 107, for the appointment by the President, with the advice and consent of the Senate, of three principal clerks, with specific designations of their positions, and prescribing their salaries, duties, etc., and further provisions for various employés other than clerks, were not repealed by implication by the provisions of Act March 3, 1853, § 3, incorporated in this section, for arranging clerks of the several departments into classes upon examinations. (1853) 6 Op. Atty. Gen. 42.

The limitation of the proviso annexed to said Act March 3, 1853, c. 97, § 3, that the clerks, when distributed and arranged according to that section, should constitute the whole of the clerical force of the departments named, was confined to such clerks as are arranged and distributed into the four classes. (1853) 6 Op. Atty. Gen. 42, 47.

Repeal of provisions of R. S. § 164, for appointments to classes on examinations.—R. S. § 164, which provided for

appointments to the classes designated in this section upon examination, was repealed by implication by the Civil Service Act of Jan. 16, 1883, post, §§ 3271–3282. (1885) 18 Op. Atty. Gen. 245.

Clerks included in classified service.—A soldier enlisted in the "general service" of the Army, for clerical duty at headquarters, and transferred to the Adjutant General's Office, was not in the classified service of the War Department, within a rule of that department allowing a person separated from the "classified service" thereof, through no delinquency or misconduct, to be certified for reinstatement. (1890) 19 Op. Atty. Gen. 552.

Oath of office of clerks.—Clerks in the executive departments were officers, within the requirement of Act July 2, 1862, c. 128, 12 Stat. 502, prescribing the oath to be taken by every person elected or appointed to any office of honor or profit, which was carried into R. S. § 1756. (1868) 12 Op. Atty. Gen. 521.

Cited without definite application, (1883) 17 Op. Atty. Gen. 621, 622, 623; (1890) 19 Op. Atty. Gen. 624, 626; (1896) 21 Op. Atty. Gen. 363.

(R. S. § 164. Superseded.)

This section provided that no clerk should be appointed in any Department in either of the four classes above designated, until he had been examined and found qualified by a board of three examiners, to be constituted as prescribed therein. Although not expressly repealed, it was practically superseded by the provisions for examinations, for the same purposes, of the Civil Service Act of Jan. 16, 1883, c. 27, post, §§ 3271–3282.

A system of efficiency ratings for the classified service in the several Executive Departments was required to be established by the Civil Service Commission, and all promotions, demotions, or dismissals were to be governed by provisions of the civil service rules, by Act Aug. 23, 1912, c. 350, § 4, post, § 3275.

§ 243. (R. S. § 165.) Clerkships open to women.

Women may, in the discretion of the head of any Department, be appointed to any of the clerkships therein authorized by law, upon the same requisites and conditions, and with the same compensations, as are prescribed for men.

Act July 12, 1870, c. 251, § 2, 16 Stat. 230, 250.

§ 244. (R. S. § 166, as amended, Act May 28, 1896, c. 252, § 3.) Distribution of clerks.

Each head of a Department may, from time to time, alter the distribution among the various bureaus and offices of his Department, of the clerks and other employees allowed by law, except such clerks or employees as may be required by law to be exclusively engaged upon some specific work, as he may find it necessary and proper to do, but all details hereunder shall be made by written order of the head of the Department, and in no case be for a period of time exceeding one hundred and twenty days. Provided, That details so made may, on expiration, be renewed from time to time by written order of the head of the Department, in each particular case, for periods of not exceeding one hundred and twenty days. All details heretofore made are hereby revoked, but may be renewed as provided herein.

Act March 3, 1853, c. 97, § 3, 10 Stat. 211. Act May 28, 1896, c. 252, § 3, 29 Stat. 179.

This section, as enacted in the Revised Statutes, authorized each head of a Department to alter the distribution, among the bureaus and offices of his Department, of the clerks allowed by law, "as he may find it necessary and proper to do." It was amended by Act May 28, 1896, c. 252, § 3, cited above, to read as set forth here.

The section, as it stood before the amendment of 1896, was not repealed or modified by Act Aug. 5, 1882, c. 389, § 4, post, § 249, which restricted employment of officers, clerks, etc., in the Departments to those specifically appropriated for each year.

Notes of Decisions

Power of head of department as dependent on appropriations.—It is competent for a head of a department to alter the disposition among the various bureaus and offices of his department of the clerks allowed by law, as he may find it necessary and proper to do, taking care that in no case shall any such clerk be paid from any appropriation made for contingent expenses, or for

any specific or general purpose, unless such payment is specifically provided for in the law granting the appropriation. (1894) 20 Op. Atty. Gen. 750.

Chiefs of divisions subject to provisions.—Chiefs of division in the Department of Agriculture are subject to the provisions of this section. (1894) 20 Op. Atty. Gen. 703.

Details to office of President.—Before the provision of Act Feb. 5, 1905, for detailing employés of the executive departments to the office of the President, the Postmaster General had no authority to detail a registry clerk from the Washington post office on detached service at the White House. (1904) 25 Op. Atty. Gen. 302.

§ 245. (Act Aug. 15, 1876, c. 287, § 3.) Diminution of number of clerks of higher, and increase of number of clerks of lower grades; preference, in making reduction of force, of discharged soldiers and sailors, etc.

Whenever, in the judgment of the head of any department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service: Provided, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors. (19 Stat. 169.)

This section was part of the sundry civil appropriation act for the fiscal year 1877, cited above.

Notes of Decisions

Power of head of department to reduce force.—This provision is not mandatory, and the Courts of Claims cannot review the action of the executive officers when they reduce the force of a department. Keim v. U. S. (1898) 33 Ct. Cl. 174; Medkirk v. U. S. (1909) 44 Ct. Cl. 469; Wheelock v. U. S. (1910) 46 Ct. Cl. 1.

Where a reduction of clerical force is required by law, removals may be made in a public office without the filing of charges against the officer. Medkirk v. U. S. (1909) 44 Ct. Cl. 469.

Whether a clerk removed was as well qualified as others not removed is a departmental question, which cannot be considered by the court. Medkirk v. U. S. (1910) 45 Ct. Cl. 395.

Where the head of a department may remove an employé, he may put him on furlough without pay when the exigencies of the service require it. Wheelock v. U. S. (1910) 46 Ct. Cl. 1.

Preference of honorably discharged soldiers, sailors, etc.—The preference of honorably discharged soldiers and sailors for appointments to civil offices under this section and the Civil Service Act of Jan. 16, 1883, § 7, post, § 3278, is limited to cases in which such persons are "equally qualified" and does not authorize the appointment of incompetent clerks. Keim v. U. S. (1900) 20 Sup. Ct. 574, 575, 177 U. S. 290, 44 L. Ed. 774; Id. (1898) 33 Ct. Cl. 174; Medkirk v. U. S. (1909) 44 Ct. Cl. 469.

The preference of ex-soldiers or ex-sailors, or the widows and orphans of deceased soldiers and sailors, given by R. S. § 1754, post, § 3214, and extended by this section and by the Civil Service Act of Jan. 16, 1883, § 7, post, § 3278, does not entitle them to preference over other persons, when reductions in salary and rank are to be made, even though their qualifications are equal. (1909) 27 Op. Atty. Gen. 490.

§ 246. (R. S. § 167.) Salaries of persons employed in the Departments.

The annual salaries of clerks and employés in the Departments, whose compensation is not otherwise prescribed, shall be as follows:

First. To clerks of the fourth class, eighteen hundred dollars.

Second. To clerks of the third class, sixteen hundred dollars.

Third. To clerks of the second class, fourteen hundred dollars.

Fourth. To clerks of the first class, twelve hundred dollars.

Fifth. To the women employed in duties of a clerical character, subordinate to those assigned to clerks of the first class, including copyists and counters, or temporarily employed to perform the duties of a clerk, nine hundred dollars.

Sixth. To messengers, eight hundred and forty dollars.

Seventh. To assistant messengers, seven hundred and twenty dollars.

Eighth. To laborers, seven hundred and twenty dollars.

Ninth. To watchmen, seven hundred and twenty dollars.

Act March 3, 1853, c. 97, § 3, 10 Stat. 209, 211. Act April 22, 1854, c. 52, § 1, 10 Stat. 276. Res. Aug. 18, 1856, No. 18, 11 Stat. 145. Act July 23, 1866, c. 208, § 6, 14 Stat. 207. Act July 12, 1870, c. 251, § 3, 16 Stat. 230, 250.

The rates of pay of various classes of employés other than clerks provided for in the legislative, executive, and judicial appropriation acts for recent fiscal years were fixed by similar provisions of section 2 of each of said acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 2, 39 Stat.

Rules for division of time and computation of pay for services rendered, where the compensation of any person in the service of the United States is annual or monthly, were prescribed by Act June 30, 1906, c. 3914, § 6, post, § 3243.

The appropriations made for the officers, clerks, and persons employed in the public service are not to be available for the compensation of any persons incapacitated, otherwise than temporarily, for performing such service, by a provision repeated in each annual legislative, executive, and judicial appropriation act. The provision for the fiscal year 1917 was by Act May 10, 1916. c. 117, § 3, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Clerks, etc., included.—The increase, by Act April 22, 1854, of the compensation of clerks of certain classes in the departments and in executive offices at the seat of government, did not extend to the clerks in the office of the navy agent at Washington. (1854) 6 Op. Atty. Gen. 527.

Effect of appropriation of less amount.—A laborer in an executive department held entitled to the increased compensation fixed by Res. Aug. 15, 1856, No. 18, 11 Stat. 145, and not limited to a less amount provided by the current appropriation. Graham v. U. S. (1865) 1 Ct. Cl. 380.

Effect of suspension.—A clerk illegally suspended is entitled to the salary of his office during the period of his suspension. Lellmann v. U. S. (1902) 37 Ct. Cl. 128.

A dismissal on charges preferred cannot be reviewed by the judiciary. Id.

An employé of the government cannot recover compensation, where the head of a department, having power to discharge, furloughed him without pay. Small v. U. S. (1909) 45 Ct. Cl. 13.

§ 247. (R. S. § 168.) Temporary clerks.

Except when a different compensation is expressly prescribed by law, any clerk temporarily employed to perform the same or similar duties with those belonging to clerks of either class, is entitled to the same salary as is allowed to clerks of that class.

Act April 22, 1854, c. 52, § 1, 10 Stat. 276.

The compensation of clerks temporarily employed in the Treasury Department was limited to the rate of $1,200 a year by R. S. § 242, post, § 376.

§ 248. (R. S. § 169.) Authority to employ clerks and other employés.

Each head of a Department is authorized to employ in his Department such number of clerks of the several classes recognized by law, and such messengers, assistant messengers, copyists, watchmen,

laborers, and other employés, and at such rates of compensation, respectively, as may be appropriated for by Congress from year to year.

See appropriation acts since 1856.

The clerks and other employés in the several Departments at the time of the enactment of the Revised Statutes were enumerated in the sections relating to each: In the State Department, R. S. § 201; the War Department, R. S. § 215; the Treasury Department, R. S. § 235; the Department of Justice, R. S. § 351; the Post Office Department, R. S. § 393; the Navy Department, R. S. § 416; the Department of the Interior, R. S. § 440. Special provision was made, also, for the appointment of clerks in the Bureau of the Comptroller of the Currency, by R. S. § 328, and for the Patent Office, by R. S. § 476.

But the officers, clerks, etc., actually appointed or employed are those for whom specific provision is made in the appropriation acts from year to year; the employment or payment of others being forbidden by Act Aug. 5, 1882, c. 389, § 4, post, § 249.

Provisions for apportionment of appointments among the several States and Territories and the District of Columbia were made, as to the Treasury Department, by Act March 3, 1875, c. 130, § 2, post, § 352, and as to all the Departments, by the Civil Service Act of Jan. 16, 1883, c. 27, § 2, post, § 3272.

Notes of Decisions

Authority to appoint and remove.—The word "employ," in this section, is regarded as the equivalent of "appoint." (1896) 21 Op. Atty. Gen. 355, 363.

Departmental clerks, messengers, and laborers are to be appointed and removed by the head of the department, when not otherwise provided by statute. This power, being discretionary in character, cannot be delegated, but must be exercised by the Secretary or Acting Secretary. (1897) 21 Op. Atty. Gen. 535.

Clerks, etc., who are to be appointed.—The words "clerks of the several classes recognized by law" did not include the new offices created, by Act March 3, 1875, § 2, post, § 352, in bureaus of the Treasury Department, with the designations "deputy comptroller," "deputy commissioner," etc., who were to perform the duties theretofore performed by the chief clerks of the several bureaus, the office of chief clerk therein being omitted in the reorganization of the department by that act; and this section gave no authority to the head of the department to appoint said new officers. But this section included the officers described in this section as "heads of divisions." (1875) 15 Op. Atty. Gen. 3, 5.

The words of this section, "clerks of the several classes recognized by law," are not to be confined in their effect to the four main classes of clerks mentioned in R. S. §§ 163, 167, ante, §§ 242, 246. Those sections were re-enactments of provisions of Act March 3, 1853, § 3, which statute also provided separately for chief clerks, and disbursing clerks of the various departments, who, by the uniform practice of the departments, have always been treated as clerks within the meaning of this section. (1896) 21 Op. Atty. Gen. 363.

The Secretary of the Treasury had no power, under this section, to appoint a person to fill the office of Second Deputy Comptroller of the Currency created by Act May 22, 1908, 35 Stat. 203; no such authority being expressly granted in the act creating that office. (1908) 26 Op. Atty. Gen. 627.

The positions of engraver and electrotyper or photographer in the Bureau of Coast and Geodetic Survey, and the positions of associate physicist, assistant physicist, assistant chemist, laboratory assistant, aid, and superintendent of mechanical plant, in the Bureau of Standards, fall within the provisions of this section, and should be filled by appointments by the Secretary of Commerce and Labor. (1911) 29 Op. Atty. Gen. 116.

The deputy commissioner of fisheries must be appointed by the President, by and with the advice and consent of the Senate, and where such appointment is made by the head of the department it is illegal, and the incumbent's status is that of a de facto officer. A new appointment is not made necessary, however, merely by reason of the increase of the salary of the office. Id.

The Chief of the Division of Alaska Fisheries, in the Bureau of Fisheries, the character of whose duties is not unlike that of the chiefs of divisions generally in the several executive departments, should be appointed by the Secretary of Commerce and Labor. Id.

The agents in the Alaska fur seal fisheries service, and the agents and inspector in the Alaska salmon fisheries service, whose positions were placed in the Division of Alaska Fisheries by Act March 4, 1911, need not be reappointed, since the mere creation of a new administrative division in which such positions are placed does not establish new offices. The new positions of agent, Alaska salmon fisheries, and of warden and deputy wardens, Alaska service, in the Division of Alaska Fisheries, should be filled by appointments made by the President, by and with the advice and consent of the Senate, as the duties of these officers are manifestly not clerical. Id.

The naturalist, fur seal fisheries, and the two physicians, Pribilof Islands,

placed in the Division of Alaska Fisheries by Act March 4, 1911, should be appointed by the Secretary of Commerce and Labor. Id.

The position of local agent, Seattle, Wash., in the Bureau of Fisheries, the duties of which are strictly clerical, is within the meaning of this section, and the appointment should be made by the Secretary of Commerce and Labor. Id.

Employment and compensation of agents and special officers.—The department charged with the execution of a particular authority, business, or duty, which, for its due execution, requires services and duties to be performed, not strictly appertaining to or devolved upon any particular officers, or which require agencies of a special discretionary nature, possesses the right to employ proper persons to perform the same, and also the right, when the service or duty is an extra service or duty, to allow the persons so employed a suitable compensation. U. S. v. Ripley (1833) 7 Pet. 18, 24, 8 L. Ed. 593; U. S. v. Fillebrown (1833) 7 Pet. 28, 44, 8 L. Ed. 596; Gratiot v. U. S. (1841) 15 Pet. 336, 370, 10 L. Ed. 759. See U. S. v. Macdaniel (1833) 7 Pet. 1, 11, 8 L. Ed. 587.

The head of a department is authorized, in the administration of the duties of his office, to employ agents, and to determine when an exigency arises demanding their employment. U. S. v. Potter (C. C. 1879) Fed. Cas. No. 16,076.

The compensation of special officers employed by the head of a department may be fixed by special agreement. U. S. v. Cadwalader (D. C. 1835) Fed. Cas. No. 14,706.

Where the accounts of a public officer employed by the head of a department under a special contract are settled, and a certain rate of compensation allowed, he continues to be entitled to the same rate of compensation until a new agreement is made. Id.

Liability of head of department for Act in reliance on subordinate.—The head of a department incurs no personal liability by executing an instrument which should not have been executed if he acts in reliance upon properly chosen subordinates whose ability and good faith he has no reason to question. (1893) 20 Op. Atty. Gen. 573.

§ 249. (Act Aug. 5, 1882, c. 389, § 4.) Officers, clerks, and other employés to be only as specifically appropriated for; repeal of inconsistent laws; details from places outside District of Columbia for duty within District prohibited; lapsed salaries and unused appropriations.

That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall after the first day of October next be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; and no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall hereafter be employed at the seat of government in any executive department or subordinate bureau or office thereof or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services, and after the first day of October next section one hundred and seventy-two of the Revised Statutes, and all other laws and parts of laws inconsistent with the provisions of this act, and all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers, or other employees at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress, be and they are hereby, repealed; and thereafter all details of civil officers, clerks, or other subordinate employees from places outside of the District of Columbia, for duty within the District of Columbia, except temporary details for duty connected with their respective offices, be, and are hereby, prohibited; and thereafter all moneys accruing from lapsed salaries,

or from unused appropriations for salaries, shall be covered into the Treasury: * * and nothing herein shall be construed to repeal or modify section one hundred and sixty-six of the Revised Statutes of the United States. (22 Stat. 255.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1883, cited above. The portion omitted here contained provisos for the adjustment, in accordance with the provisions of the act, of the clerical or other force theretofore paid for out of general or specific appropriations, such adjustment to be effected before October 1, 1882. They are omitted as temporary merely.

Previous provisions similar, to some extent, to those of this section, but relating to the War Department only, contained in Act June 20, 1874, c. 328, § 1, 18 Stat. 101, may be regarded as superseded by these provisions.

Violation of this section was made punishable by Act Aug. 23, 1912, c. 350, § 5, post, § 250.

Money appropriated for services in any executive department is not to be used in the distribution of any publication, except maps, weather reports, and weather cards issued by an executive department, but such work is required to be done at the Government Printing Office, by Act Aug. 23, 1912, c. 350, § 8, post, § 7171.

Payments for official or clerical compensation, from appropriations for contingent, incidental, or miscellaneous purposes, were also forbidden by R. S. § 3682, post, § 6783.

A general prohibition to the executive officers of the government, from employing any clerk, etc., or other employé, in any of the executive departments in Washington, or elsewhere, beyond provision made by law, was contained in Act Aug. 15, 1876, c. 287, § 5, post, § 3225.

The detail of employés of the Executive Departments and other Government establishments to the office of the President for temporary assistance, from time to time, was authorized by a provision of Act Feb. 3, 1905, c. 297, § 1, ante, § 229.

By provisions of section 1 of said Act Aug. 5, 1882, c. 389, and of subsequent statutes, nothing in this section was to be construed to prevent the detailing of certain specified officers for duty at the Treasury Department. Act Aug. 5, 1882, c. 389, § 1, post, § 365, Act June 6, 1900, c. 791, § 1, post, § 938, Act March 4, 1915, c. 147, § 1, post, § 939, and Act March 4, 1907, c. 2918, § 1, post, § 366.

The detail of clerks or other employés from any branch of the postal service, whether located at the seat of government or elsewhere, to any of the officers or bureaus of the Post Office Department at Washington, was forbidden by Act March 15, 1898, c. 68, § 9, post, § 579.

The employment in the Department of State of personal services other than those specifically authorized or appropriated for was forbidden by a provision of Act June 22, 1906, c. 3514, § 1, post, § 294.

The transfer of clerks or other employés in the classified service from one Department to another was restricted by Act June 22, 1906, c. 3514, § 5, post, § 251.

The detail of civil officers, clerks, or other subordinate employés in the public service outside the District of Columbia, for duty in any Executive Department in the District, was restricted by Act June 22, 1906, c. 3514, § 6, post, § 252.

The detail of persons in the classified service in the executive, legislative, and judicial departments at Washington for service outside of the District of Columbia, except for or in connection with work pertaining directly to the service at the seat of government of the department or other Government establishment from which the detail is made, is prohibited by § 5 of the legislative, executive, and judicial appropriation act for the fiscal year 1917, Act May 10, 1916, c. 117, § 5, post, § 252a.

A proviso that no clerk, messenger, or laborer at headquarters of tactical divisions, military departments, etc., shall be assigned to duty with any bureau in the War Department, is annexed to the appropriation for such clerks, etc., in recent Army appropriation acts. The provision for the fiscal year 1917 was by Act Aug. 29, 1916, c. 418, post, § 317.

A prohibition of the detail of clerks or other employés from the Executive Departments, etc., to the Civil Service Commission, for the performance of duty in the District of Columbia, accompanies the appropriations for the Commission in recent legislative, executive, and judicial appropriation acts, limited, in each such act, to the particular fiscal year. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

In addition to the specific appropriations in the annual legislative, executive, and judicial appropriation acts for compensation of the officers, clerks, and other employés enumerated therein, said acts make special provisions each year for the employment, in certain offices in the War Department and the

Navy Department, of services of skilled draftsmen and other services which the head of the particular department may deem necessary, to carry into effect appropriations for purposes specified, and to be paid from such appropriations, the entire expenditures by each of said offices for such purposes for the fiscal year not to exceed a specified sum; the terms of such provisions and the amounts limited varying from year to year. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Estimates for compensation of officers are to be founded on express provisions of law, and not upon authority of executive distribution, by R. S. § 3662, post, § 6678.

The legislative, executive, and judicial appropriation act of Feb. 24, 1899, c. 187, § 4, 30 Stat. 890, contained a provision that the appropriations for officers, clerks, and employés should not be available for the compensation of any persons permanently incapacitated, which is repeated in connection with the similar appropriations for subsequent years. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 3, 39 Stat.

A further provision of said Act Feb. 24, 1899, c. 187, § 4, prohibiting the establishment of a civil pension roll or an honorable service roll, or the exemption of any of the officers, clerks, and persons in the public service from the existing laws respecting employment in such service, is set forth post, § 3266.

Similar provisions relating to officers, clerks, and persons employed in the postal service were made by Act March 1, 1909, c. 232, post, § 7252.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Purpose of section.—The purpose of Congress in these provisions was to deprive the officers of the government of all authority to employ at the "seat of government" "civil officers, clerks, and other employés," except such as might be specifically appropriated for. Plummer v. U. S. (1889) 24 Ct. Cl. 517.

The purpose of this section was to prevent the expenditure of public money in the employment of subordinate persons at the seat of government out of appropriations made for general purposes, so as to insure the efficient control by Congress, not only over the amounts of money expended, but also over the number and character of subordinate officers and employés in the service of the United States employed at the seat of government. (1908) 26 Op. Atty. Gen. 522.

The section in no wise limits the discretion of the heads of the several Executive Departments as to the character of the work which shall be required of their several employés, but is intended to prevent the employment of subordinate officers or employés at the seat of government without specific appropriations for their payment. (1908) 26 Op. Atty. Gen. 522.

Approval of promotions and certifications for vacancies by Civil Service Commission.—There is nothing in the Civil Service Act of January 16, 1883, §§ 2, 6, 7, post, §§ 3272, 3277, 3278, nor in this section, which prohibits the Civil Service Commission from approving a promotion, otherwise unobjectionable, where it is informed that the appointing officer expects or intends to assign to the appointee duties not included within the designation given to his position in the specific appropriation providing for his compensation. (1908) 26 Op. Atty. Gen. 522.

Neither is there anything in either of those acts preventing the certification by the Commission of eligibles for a vacancy from registers not designating functions of the nature suggested by the title of the position given in the specific appropriation providing for the compensation of the employé. Id.

Employment of substitutes for clerks, etc.—The employment of substitutes for clerks, etc., in the departments, who are temporarily absent, from sickness or other unavoidable cause, would be unauthorized where an additional expenditure would be requisite for their employment, and there is no specific appropria-

tion therefor. (1890) 19 Op. Atty. Gen. 507, 508.

Rights of persons employed without specific appropriation.—These prohibitions against the employment of persons in Washington beyond specific appropriations therefor are binding on the heads of departments and persons employed therein alike. An innocent employé is not bound to know that his superior is properly disbursing a fund committed to his discretion, but is bound to know that his own employment is authorized by law and within the discretion of his superior. Plummer v. U. S. (1889) 24 Ct. Cl. 517.

A deputy auditor of the treasury detailed to disburse a fund under the administration of the Navy Department, and performing that service in Washington, is prohibited by this act, as well as by R. S. § 1765, post, § 3234, from receiving compensation additional to his salary. Whitaker v. U. S. (1892) 27 Ct. Cl. 524.

§ 250. (Act Aug. 23, 1912, c. 350, § 5.) Punishment for violation of prohibition of employment of services except as specifically appropriated for.

Any person violating section four of the legislative, executive, and judicial appropriation Act approved August fifth, eighteen hundred and eighty-two (Statutes at Large, volume twenty-two, page two hundred and fifty-five), shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year. (37 Stat. 414.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1913, cited above.

Act Aug. 5, 1882, c. 389, § 4, mentioned in this section, is set forth ante, § 249.

§ 251. (Act June 22, 1906, c. 3514, § 5.) Transfer of clerks or other employés from one Department to another.

It shall not be lawful hereafter for any clerk or other employee in the classified service in any of the Executive Departments to be transferred from one Department to another Department until such clerk or other employee shall have served for a term of three years in the Department from which he desires to be transferred. (34 Stat. 449.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1907, cited above.

The detail of employés of the Executive Departments to the office of the President, from time to time, was authorized by a provision of Act Feb. 3, 1905, c. 297, § 1, ante, § 229, which was repeated in the subsequent annual appropriation acts.

Notes of Decisions

Departments and offices, and clerks, etc., within provision.—This provision was not intended to apply to the entire classified service, for, if it were, the words "in any of the Executive Departments" would be altogether superfluous. Only the subordinates of the several departments enumerated in R. S. § 158, ante, § 232, were to be included. (1907) 26 Op. Atty. Gen. 209.

It is lawful therefore, for the Civil Service Commission to consent to the transfer of a classified employé from an independent office of the government to a department or another independent office or bureau, although such employé may not have served three years in the office or bureau from which he seeks transfer, as is required by this section, of clerks and employés of the Executive Departments. Id.

The "field force" of an Executive Department—that is, its classified employés under its immediate control, as inspectors, examiners, and agents, though employed usually or invariably away from the seat of government—are governed by this provision with regard to transfers. Id.

The provision is not applicable to the Philippine Commission or to the Isthmian Canal Commission. Id.

The three-year limitation as to transfers in the Executive Departments, prescribed by this section, does not apply to employés and subordinates in post offices, pension agencies, custom houses, ordinance establishments, subtreasuries, navy yards, and quartermaster's establishments. (1907) 26 Op. Atty. Gen. 254.

The language of that provision imports that the persons to which it applies are actually "in" the departments at the seat of government, or that the performance of duties away from such departments is by direct orders from and under supervision by those departments. Id.

Where a branch of the civil service of the government under the supervision of an Executive Department may prop-

erly be regarded as a distinct and independent office, it is not in the department within the meaning of this statute; but clerks and employés not in any such independent offices, and under the immediate control of the several departments, are covered by the statute, although usually or invariably away from the seat of government. (1909) 27 Op. Atty. Gen. 421, 425.

The rule laid down by Attorney General Devens in (1877) 15 Op. Atty. Gen. 262, 267, stated in note to section 232, ante, as to what bureaus and offices may be deemed bureaus and offices in any of the Executive Departments, approved and held applicable. (1907) 26 Op. Atty. Gen. 254.

Classified employés on the rolls of the Forest Service, Department of Agriculture, in Washington, are required by this section to serve three years before their transfer to other departments is permissible. (1909) 27 Op. Atty. Gen. 421. And see (1908) 27 Op. Atty. Gen. 100.

Extension of requirement to remainder of classified services.—The requirement of three years' service before transfer from one department to another was extended by the President, by Civil Service Rule X, § 8, clause (a), to transfers within the remainder of the classified service, with the proviso that in the case of a transfer not between one Executive Department and another at Washington, the Civil Service Commission may waive the three-year limit of time, under certain given conditions. (1908) 27 Op. Atty. Gen. 100.

Time when transfer becomes effective.—The transfer of a clerk's name from the roll of the Department of Agriculture, Forest Service, in Washington, to that of the field force of the same service, is effective from the date of the transfer, notwithstanding such employé may not actually have entered upon the discharge of her duties as a member of that force. (1908) 27 Op. Atty. Gen. 100.

§ 252. (Act June 22, 1906, c. 3514, § 6.) Detail of civil officers, clerks, or other employés in public service outside District of Columbia for duty in Department in the District.

Hereafter it shall be unlawful to detail civil officers, clerks, or other subordinate employees who are authorized or employed under or paid from appropriations made for the military or naval establishments, or any other branch of the public service outside of the District of Columbia, except those officers and employees whose details are now specially provided by law, for duty in any bureau, office, or other division of any Executive Department in the District of Columbia, except temporary details for duty connected with their respective offices. (34 Stat. 449.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1907, cited above.

By a proviso in section 1 of the same act, the detail of clerks or other employés from the Departments to the Civil Service Commission, for duty in the District of Columbia, for or during the fiscal year 1907, was forbidden. The prohibition was renewed, for and during the subsequent fiscal years, by a similar proviso in the legislative, executive and judicial appropriation act for each year. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 252a. (Act May 10, 1916, c. 117, § 5.) Details of persons in classified service at Washington for service outside District of Columbia.

That in expending appropriations made in this Act persons in the classified service at Washington, District of Columbia, shall not be detailed for service outside of the District of Columbia except for or in connection with work pertaining directly to the service at the seat of government of the department or other Government establishment from which the detail is made: Provided, That nothing in this section shall be deemed to apply to the investigation of any matter or the preparation, prosecution, or defense of any suit by the Department of Justice. (39 Stat.)

This section was a part of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above. The appropriations referred to are those made in said act for officers, etc., in the legislative, executive, and judicial departments.

§ 253. (R. S. § 170.) Extra compensation to clerks prohibited.

No money shall be paid to any clerk employed in either Department at an annual salary, as compensation for extra services, unless expressly authorized by law.

Act March 3, 1853, c. 97, § 3, 10 Stat. 209, 211. Act June 17, 1844, c. 105, § 1, 5 Stat. 681, 687. Res. Feb. 28, 1867, No. 30, § 2, 14 Stat. 569.

General prohibitions of compensation to officers, clerks, etc., for discharging duties of others or for extra services, and of additional pay or extra allowance or compensation, in any form, unless expressly authorized by law, were contained in R. S. §§ 1763–1765, post, §§ 3230–3234.

No officer, clerk, or employé of any Executive Department, who is authorized to administer oaths, is to charge or receive any compensation for administering oaths of office to employés of such Department, by a provision of Act Aug. 29, 1890, c. 820, post, § 3221.

Notes of Decisions

No extra compensation for acts within general duties.—The separate duties of the several clerks in the departments, except where they are specifically designated in particular cases by statute, are assigned to such clerks by the head of the department; and no posterior claim to extra compensation can be founded on the official acts done by a clerk, provided those acts constituted any part of the lawful general duties of the department. (1854) 6 Op. Atty. Gen. 583.

§ 254. (R. S. § 171.) Restriction on employing extra clerks.

No extra clerk shall be employed in any Department, Bureau, or office, at the seat of Government, except during the session of Congress, or when indispensably necessary in answering some call made by either House of Congress at one session to be answered at another; nor then, except by order of the head of the Department in which, or in some Bureau or office of which, such extra clerk shall be employed. And no extra clerk employed in either of the Departments shall receive compensation except for time actually and necessarily employed, nor any greater compensation than three dollars a day for copying, or four dollars a day for any other service.

Act Aug. 26, 1842, c. 202, § 15, 5 Stat. 526.

This section was to a great extent superseded by the more comprehensive provisions on the same subject of Act Aug. 5, 1882, c. 389, § 4, ante, § 249, but was not specifically repealed thereby, as was R. S. § 172.

Other provisions of similar nature are referred to in the notes to said section, ante, § 249.

(R. S. § 172. Repealed.)

This section merely prohibited the employment or payment of a messenger, etc., or other subordinate assistant, in any Department, etc., "unless such employment is authorized by law, or is necessary to carry into effect some object for which an appropriation has been specifically made." It was repealed by Act Aug. 5, 1882, c. 389, § 4, ante, § 249.

§ 255. (R. S. § 173.) Chief clerks to supervise subordinate clerks.

Each chief clerk in the several Departments, and Bureaus, and other offices connected with the Departments, shall supervise, under the direction of his immediate superior, the duties of the other clerks therein, and see that they are faithfully performed.

Act Aug. 26, 1842, c. 202, § 13, 5 Stat. 525.

§ 256. (R. S. § 174.) Chief clerks to distribute duties, etc.

Each chief clerk shall take care, from time to time, that the duties of the other clerks are distributed with equality and uniformity, according to the nature of the case. He shall revise such distribution from time to time, for the purpose of correcting any tendency to undue accumulation or reduction of duties, whether arising from individual negligence or incapacity, or from increase or diminution of particular kinds of business. And he shall report monthly to his superior officer any existing defect that he may be aware of in the arrangement or dispatch of business.

Act Aug. 26, 1842, c. 202, § 13, 5 Stat. 525.

§ 257. (R. S. § 175.) Duty of chief on receipt of report.

Each head of a Department, chief of a Bureau, or other superior officer, shall, upon receiving each monthly report of his chief clerk, rendered pursuant to the preceding section, examine the facts stated therein, and take such measures, in the exercise of the powers conferred upon him by law, as may be necessary and proper to amend any existing defects in the arrangement or dispatch of business disclosed by such report.

Act Aug. 26, 1842, c. 202, § 13, 5 Stat. 525.

Further provisions requiring monthly reports to the head of each Executive Department as to the condition of public business in the several bureaus and offices of his Department, and the bringing up of arrears disclosed by such reports, and also requiring quarterly reports by the head of each Executive Department, etc., to the President as to the condition of public business in his Department, etc., were made by Act March 15, 1898, c. 68, § 7, ante, § 238.

§ 258. (R. S. § 176.) Disbursing clerks.

The disbursing clerks authorized by law in the several Departments shall be appointed by the heads of the respective Departments, from clerks of the fourth class; and shall each give a bond to the United States for the faithful discharge of the duties of his office according to law in such amount as shall be directed by the Secretary of the Treasury, and with sureties to the satisfaction of the Solicitor of the Treasury; and shall from time to time renew, strengthen, and increase his official bond, as the Secretary of the Treasury may direct. Each disbursing clerk, except the disbursing clerk of the Treasury Department, must, when directed so to do by the head of the Department, superintend the building occupied by his Department. Each disbursing clerk is entitled to receive, in compensation for his services in disbursing, such sum in addition to his salary as a clerk of the fourth class as shall make his whole annual compensation two thousand dollars a year.

Act March 3, 1853, c. 97, § 3, 10 Stat. 209, 211. Act March 3, 1855, c. 175, § 4, 10 Stat. 669. Act March 3, 1873, c. 226, § 1, 17 Stat. 485, 492.

Provisions authorizing the appointment of disbursing clerks for the several Departments were contained in R. S. §§ 201, 215, 235, 351, 393, 416, 440, post, §§ 290, 314, 352, 526, 572, 614, 669.

The appointment, in case of sickness or unavoidable absence of a disbursing clerk, of another to act in his place, was provided for by Act March 4, 1909, c. 299, § 8, post, § 6614.

Duties and liabilities of disbursing officers were prescribed by R. S. §§ 3620–3623, and subsequent provisions, post, §§ 6612–6623.

Vouchers and pay rolls are to be prepared and examined for administrative audit by heads of divisions and bureaus, and not by disbursing clerks, by a provision of Act Aug. 23, 1912, c. 350, § 1, post, § 429.

Statements and receipts by disbursing officers of the Departments for all moneys expended by them were required by R. S. § 193, post, § 275.

Inspection of books, papers, etc., of disbursing officers of the Departments, etc., by the accounting officers of the Treasury Department, was provided for by Act Feb. 19, 1897, c. 265, § 1, post, § 410.

Notes of Decisions

Duties and liabilities of disbursing officers.—Vast sums of money are paid for salaries and on other accounts by disbursing officers before the claims have passed the treasury accounting, such officers being under bonds, and responsible for the legality and correctness of their payments. Their accounts are finally settled through the accounting officers, and every item charged therein is subject to examination and adjustment, as are all other demands, and only such are allowed as are found to be sufficiently vouched for and to have been legally and rightly paid. All others are rejected, and the disbursing officer and his bondsmen are held liable for any balances found against him on such settlement. McKnight v. U. S. (1877) 13 Ct. Cl. 292, 304.

Compensation of disbursing clerks.—Under the provision of Act July 1, 1879, c. 61, § 5, 21 Stat. 46, that the chief clerk of the National Board of Health should act as disbursing agent for the board, and should "give bond, conformably to" this section, and for such service should receive $300 per annum in addition to his salary, the Secretary of the Treasury had no authority, by reason of such reference to this section

to change the salary so allowed. Dunwoody v. U. S. (1887) 22 Ct. Cl. 269, 279.

Under the provisions of Act March 3, 1853, c. 97, § 3, 10 Stat. 211, and of Act March 3, 1855, c. 175, § 4, 10 Stat. 669, which were incorporated into this section, a clerk of the State Department, appointed disbursing officer of that department, was not entitled to commissions in addition to his salary for receiving, keeping, and disbursing to claimants, the indemnity fund paid by Great Britain under the Convention of Feb. 8, 1853, which was not required by law to be paid into the Treasury. (1861) 10 Op. Atty. Gen. 31.

Cited without definite application, Dunwoody v. U. S. (1892) 12 Sup. Ct. 465, 466, 143 U. S. 578, 36 L. Ed. 269; Id. (1887) 22 Ct. Cl. 269.

§ 259. (R. S. § 177.) Vacancies; how temporarily filled.

In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease.

Act July 23, 1868, c. 227, § 1, 15 Stat. 168.

A provision that the Secretary of War, when temporarily absent from the War Department, might authorize the chief clerk of the Department to sign requisitions on the Treasury Department and other papers, was made by Act March 4, 1874, c. 44, post, § 315.

The senior commissioned medical officer, detailed for duty in the Public Health Bureau at Washington, having charge of the administrative divisions thereof, is the "assistant," within the meaning of this section, by Act July 1, 1902, c. 1370, § 3, post, § 9136.

Notes of Decisions

Previous statutes.—In the acts for the organization of the Departments of State, War, and Treasury, provision was made for the appointment of a subordinate officer, by the head of the department, who should have the charge and custody of the records, books, and papers appertaining to the office, in case of vacancy in the office of the Secretary, and in the act establishing the Navy Department, provision was made likewise for the charge and custody of the books, records, and documents of that department, in case of vacancy in the office of Secretary of the Navy. In re Hennen (1839) 13 Pet. 230, 259, 10 L. Ed. 138.

Presumption of authority.—Lawful exercise of authority by the assistant under this section is presumed. John Shillito Co. v. McClung (1892) 51 Fed. 868, 871, 2 C. C. A. 526; Chadwick v. U. S. (C. C. 1880) 3 Fed. 750, 756; U. S. v. Adams (C. C. 1885) 24 Fed. 348, 350; In re Jem Yuen (D. C. 1910) 188 Fed. 350; Ex parte Tsuie Shee (D. C. 1914) 218 Fed. 256.

Signing instruments.—The signing of an instrument by the assistant of the head of a department, as acting secretary, implies that one of the conditions on which he was authorized to act in that capacity had arisen. Marsh v. Nichols, Shepherd & Co. (1888) 9 Sup. Ct. 168, 171, 128 U. S. 605, 32 L. Ed. 538.

When the secretary is absent or sick, if the assistant is in charge of the department, under this section, he should sign as acting secretary. (1888) 19 Op. Atty. Gen. 133.

Cited without definite application, U. S. v. Redfern (C. C. 1910) 180 Fed. 506, 508; (1903) 24 Op. Atty. Gen. 646, 648.

§ 260. (R. S. § 178.) Vacancies in subordinate offices.

In case of the death, resignation, absence, or sickness of the chief of any Bureau, or of any officer thereof, whose appointment is not vested in the head of the Department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such Bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such chief or of such officer until a successor is appointed or such absence or sickness shall cease.

Act July 23, 1868, c. 227, § 2, 15 Stat. 168.

In case of the death, resignation, absence, or sickness of the Chief of the Bureau of Navigation in the Navy Department, the officer of the Navy detailed as his assistant was authorized to perform the duties of such Chief, unless otherwise directed by the President under this section, by Act March 3, 1893, c. 212, § 1, post, § 631.

In case of the death, resignation, absence, or sickness of the Chief of the Bureau of Supplies and Accounts in the Navy Department, the officer of the

pay corps of the Navy detailed as his assistant was authorized to perform the duties of such Chief, unless otherwise directed by the President under this section, by Act July 26, 1894, c. 165, § 1, post, § 638.

In case of the death, resignation, absence, or sickness of the Chief of the Bureau of Ordnance in the Navy Department, the line officer of the Navy detailed as his assistant was authorized to perform the duties of such Chief, unless otherwise directed by the President under this section, by Act May 4, 1898, c. 234, § 1, post, § 632.

Notes of Decisions

Previous statute.—Act July 23, 1868, c. 227, to authorize the temporary supplying of vacancies in the executive departments, section 2 of which was incorporated into this section, applied to existing vacancies. American Wood Paper Co. v. Glen's Falls Paper Co. (C. C. 1871) Fed. Cas. No. 321a.

Assistant or deputy within section.—The phrase "assistant or deputy of such chief," etc., in this section, is to be construed as including an assistant or deputy only whose appointment is specifically provided for by statute. (1890) 19 Op. Atty. Gen. 503.

In the absence of any specific provision for the assignment of an officer of the Navy to duty as assistant to the chief of a bureau in the Navy Department, such an officer, so assigned by the Secretary of the Navy under his general powers, is not authorized by this section to perform the duties of such chief in case of his death, resignation, absence, or sickness. Id.

Authority of acting officer.—The officer authorized, under this section, to perform temporarily the duties of the chief of a bureau, succeeds to and is to perform, not simply the duties of the absent chief which relate to that particular bureau, but all the duties of that chief which devolve upon him as such chief of the bureau. (1901) 23 Op. Atty. Gen. 473.

Presumption of authority.—A certificate issuing from the office of the Comptroller of the Currency, and under the seal of that office, given by one as "Acting Comptroller," held good. Keyser v. Hitz (1890) 10 Sup. Ct. 290, 293, 133 U. S. 138, 33 L. Ed. 531.

Cited without definite application, Smith v. Whitney (1886) 6 Sup. Ct. 570, 576, 116 U. S. 167, 29 L. Ed. 601; Ryan v. U. S. (1890) 10 Sup. Ct. 913, 918, 136 U. S. 68, 34 L. Ed. 447; U. S. ex rel. Stapleton v. Duell (1901) 17 App. D. C. 575, 581.

§ 261. (R. S. § 179.) Discretionary authority of the President.

In any of the cases mentioned in the two preceding sections, except the death, resignation, absence, or sickness of the Attorney-General, the President may, in his discretion, authorize and direct the head of any other Department or any other officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease.

Act July 23, 1868, c. 227, § 3, 15 Stat. 168. Act June 22, 1870, c. 150, § 2, 16 Stat. 162.

The President was empowered to authorize and direct the commanding general of the Army or the chief of any military bureau of the War Department to perform the duties of the Secretary of War, under the provisions of this section, by Act Aug. 5, 1882, c. 389, § 1, post, § 313.

Notes of Decisions

Vacancies within section.—A vacancy in the office of Paymaster General, created by the retirement of the previous incumbent, may be filled by an ad interim appointment or assignment under the provisions of this section. Such retired officer may be said to be "absent" within the meaning of that section. (1890) 19 Op. Atty. Gen. 500.

No provision was made by R. S. §§ 178–181 (this compilation, §§ 260–263), for temporarily filling a vacancy caused by the retirement of the chief of a bureau. (1909) 27 Op. Atty. Gen. 337.

In case of such a vacancy, caused by death, resignation, absence, or sickness, of the chief of a bureau in the navy, the bureau remains without a head until the place is filled pursuant to R. S. § 421, post, § 628. Id.

Officers who may be designated to act.—Officers of the Navy designated by the Secretary of the Navy to act in an advisory capacity to him, but without executive authority over the other bureaus or officers of the Navy Department, cannot be legally designated by the President to act as Secretary of the Navy during the absence or sickness of the Secretary or Assistant Secretary. (1909) 28 Op. Atty. Gen. 95.

Such aids, although as rear admirals and captains and commanders they are officers in the public service of the government, are not "other officers" in the departments eligible for such temporary appointment, under this section. Id.

Officers of the Navy holding commissions issued by the President, by and with the advice and consent of the Sen-

ate, but who do not hold any office in the Navy Department or in a bureau thereof by appointment of the President, can not be legally designated by the President to act as chiefs of bureaus, in the absence of the appointed Chiefs of Bureaus of Equipment, Construction and Repair, and Yards and Docks. Id.

Such an officer, although assigned to act as an assistant to an officer in the department, did not thereby become an officer in the department within the meaning of this section. Id.

Authority of acting officer.—An executive order under this section, authorizing the performance of the duties of a vacant office by another officer, devolves upon him all the duties appertaining to the office, including the acting as one of a board of commissions of which the absent officer, as such, was a member. (1892) 20 Op. Atty. Gen. 483.

Presumption of authority.—Lawful exercise of powers under this section presumed. In re Jem Yuen (D. C. 1910) 188 Fed. 350.

Signing instruments.—When the Secretary is absent or sick, if the Assistant is in charge of the Department, in pursuance of this section, he should sign as Acting Secretary. (1888) 19 Op. Atty. Gen. 133.

§ 262. (R. S. § 180, as amended, Act Feb. 6, 1891, c. 113.) Temporary appointments limited to thirty days.

A vacancy occasioned by death or resignation must not be temporarily filled under the three preceding sections for a longer period than thirty days.

Act July 23, 1868, c. 227, § 3, 15 Stat. 168. Act Feb. 6, 1891, c. 113, 26 Stat. 733.

The amendment of this section by Act Feb. 6, 1891, c. 113, cited above, consisted in the change of the period for which such a vacancy may be filled from "ten days," as provided in the original section, to "thirty days."

Notes of Decisions

Vacancies to which limitation is applicable.—The limitation by this section of the period for which vacancies occasioned by death or resignation should be temporarily filled applies as well where they are filled, under R. S. §§ 177 or 178, ante, §§ 259, 260, without action by the President, as where they are filled, under R. S. § 179, ante, § 261, by his authority and direction. (1883) 17 Op. Atty. Gen. 535.

Computation of period of limitation.—The period of limitation imposed by this section upon the temporary filling of vacancies occasioned by death or resignation is to be computed from the date of the President's action. (1878) 15 Op. Atty. Gen. 458.

Successive temporary appointments or reappointments to same vacancy.—Under this section and the three preceding sections referred to in it, the President has power to fill temporarily (by an appointment ad interim, as there prescribed), a vacancy occasioned by the death or resignation of the head of a department, or of the chief of a bureau therein, for the prescribed period only. When the vacancy is thus temporarily filled once for that period, the power conferred by the statute is exhausted. It is not competent for the President to appoint either the same or another officer to thereafter perform the duties of the vacant office for an additional period. (1880) 16 Op. Atty. Gen. 596; (1883) 17 Op. Atty. Gen. 530; (1884) 18 Op. Atty. Gen. 50, 58.

A vacancy in the head of a department cannot be temporarily filled, either by operation of law or by designation of the President, for a longer period than that limited by this section. (1891) 20 Op. Atty. Gen. 8.

The view expressed in (1883) 17 Op. Atty. Gen. 535, that the discretionary power given the President by R. S. § 179, ante, § 261, might be exercised after the vacancy had already been supplied under the operation of either of the two preceding sections, and that the period of temporary occupancy might be lengthened by allowing the statutory occupation of the office, without designation, for the time allowed, followed by a designation by the President for an additional period, is not accepted. Id.

§ 263. (R. S. § 181.) Restriction on temporary appointments.

No temporary appointment, designation, or assignment of one officer to perform the duties of another, in the cases covered by sections one hundred and seventy-seven and one hundred and seventy-eight, shall be made otherwise than as provided by those sections, except to fill a vacancy happening during a recess of the Senate.

Act July 23, 1868, c. 227, § 2, 15 Stat. 168.

Sections 177 and 178, referred to in this section, are set forth ante, §§ 259, 260.

Notes of Decisions

Filling of vacancy during recess of Senate not limited as to period.—The President has the right under the Constitution, and impliedly under this section, to make a temporary appointment, designation, or assignment of one officer

to perform the duties of another in the case of a vacancy caused by death, disability, or otherwise, during the recess of the Senate, and such temporary appointment, designation, or assignment is not limited by law to any particular period. (1904) 25 Op. Atty. Gen. 258.

§ 264. (R. S. § 182.) Extra compensation disallowed.

An officer performing the duties of another office, during a vacancy, as authorized by sections one hundred and seventy-seven, one hundred and seventy-eight, and one hundred and seventy-nine, is not by reason thereof entitled to any other compensation than that attached to his proper office.

Act July 23, 1868, c. 227, § 3, 15 Stat. 168.

Sections 177, 178, and 179, referred to in this section, are set forth ante, §§ 259, 260, 261.

Notes of Decisions

Provision applicable to every officer performing duties of vacant office.— The prohibition of this section against extra compensation was designed to be general, and to apply to every officer performing the duties of an office temporarily vacant, whether such duties devolved upon him by force of the statute or by designation of the President in pursuance of its provisions. (1862) 13 Op. Atty. Gen. 7; (1871) 13 Op. Atty. Gen. 512, 514.

§ 265. (R. S. § 183, as amended, Act March 2, 1901, c. 809, § 3, Act Feb. 13, 1911, c. 43.) Oaths to witnesses, authority of officers, etc., to administer.

Any officer or clerk of any of the departments lawfully detailed to investigate frauds on, or attempts to defraud, the government, or any irregularity or misconduct of any officer or agent of the United States, and any officer of the Army, Navy, Marine Corps or Revenue-Cutter Service, detailed to conduct an investigation, and the recorder, and if there be none the presiding officer, of any military, naval, or Revenue-Cutter Service board appointed for such purpose, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation.

Res. April 10, 1869, No. 15, § 2, 16 Stat. 55. Act March 7, 1870, c. 23, 16 Stat. 75. Act March 2, 1901, c. 809, § 3, 31 Stat. 951. Act Feb. 13, 1911, c. 43, 36 Stat. 898.

This section, as enacted in the Revised Statutes, was amended by Act March 2, 1901, c. 809, § 3, cited above, the amendment consisting principally in the insertion of a clause adding to the officers or clerks authorized to administer oaths to witnesses, "and any officer of the Army detailed to conduct an investigation, and the recorder, and, if there be none, the presiding officer of any military board appointed for such purpose." The further amendment by Act Feb. 13, 1911, c. 43, also cited above, inserted in the clause so added, after the word "Army," the words "Navy, Marine Corps; or Revenue-Cutter Service," and between the words "military" and "board," the words "naval or Revenue-Cutter Service," making the section read as set forth here.

Authority to administer an oath to any witness, on investigation of a shipwreck attended with loss of life, was conferred on the officer or clerk of the Treasury Department detailed to conduct such investigation, by Act June 18, 1878, c. 265, § 9, post, § 8464.

Cited without definite application, U. S. v. Graff (C. C. 1878) Fed. Cas. No. 15,244; U. S. v. Law (D. C. 1892) 50 Fed. 915, 917.

§ 266. (R. S. § 184.) Subpœnas to witnesses.

Any head of a Department or Bureau in which a claim against the United States is properly pending may apply to any judge or clerk of any court of the United States, in any State, District, or Territory, to issue a subpœna for a witness being within the jurisdiction of such court, to appear at a time and place in the subpœna stated, before any officer authorized to take depositions to be used in the courts of the United States, there to give full and true answers to such written interrogatories and cross-interrogatories as may be submitted with the application, or to be orally examined and cross-examined upon the subject of such claim.

Act Feb. 14, 1871, c. 51, § 1, 16 Stat. 412.

In addition to the authority conferred by this section, like provision was made for the issue of subpœnas for witnesses, upon the application of the

Commissioner of Pensions, on investigation or examination into the merits of pension claims, by Act July 25, 1882, c. 349, § 3, post, § 9075.

Notes of Decisions

Authority to require witnesses in support of claims.—As to the power of Congress to invoke the aid of the courts in investigations or examinations, see Interstate Commerce Commission v. Brimson (1894) 14 Sup. Ct. 1125, 154 U. S. 447, 38 L. Ed. 1047, reversing In re Interstate Commerce Commission (C. C. 1892) 53 Fed. 476; In re Pacific Railway Commission (C. C. 1887) 32 Fed. 241; In re Gross (C. C. 1897) 78 Fed. 107, 108; U. S. v. Bell (C. C. 1897) 81 Fed. 830, 846; In re McLean (D. C. 1888) 37 Fed. 648; In re O'Shea (D. C. 1908) 166 Fed. 180.

It seems that, whenever the law imposes upon an officer the duty to examine, adjust, and settle claims against the government, it gives him authority to require that those claims shall be established, or supported at least, by the oaths of witnesses. (1874) 14 Op. Gen. Atty. 419, 422. See U. S. v. Bailey (1835) 9 Pet. 238, 253, 9 L. Ed. 113.

Act Feb. 14, 1871, c. 51, incorporated in this section and the three sections next following, assumed the existence of authority in heads of departments and bureaus to require oaths in cases of claims against the government, and provided them with a very efficient means for enforcing it. (1874) 14 Op. Atty. Gen. 420.

§ 267. (R. S. § 185.) Witnesses' fees.

Witnesses subpœnaed pursuant to the preceding section shall be allowed the same compensation as is allowed witnesses in the courts of the United States.

Act Feb. 14, 1871, c. 51, § 1, 16 Stat. 412.

Fees allowed witnesses in United States courts were prescribed by R. S. § 848, and Act May 27, 1908, c. 200, § 1, post, §§ 1452, 1453.

Notes of Decisions

Payment of fees from judiciary fund.—The fees of witnesses provided for by this section, who were subpœnaed on application of the Pension Bureau, to testify before a United States commissioner, and also the fees of the commissioner by whom their testimony is taken, may properly be allowed out of the judiciary fund, appropriated for expenses of the United States courts, etc., and should be paid by the marshal of the district on the certificate or order of the commissioner. (1881) 17 Op. Atty. Gen. 247.

§ 268. (R. S. § 186.) Compelling testimony.

If any witness, after being duly served with such subpœna, neglects or refuses to appear, or, appearing, refuses to testify, the judge of the district in which the subpœna issued may proceed, upon proper process, to enforce obedience to the subpœna, or to punish the disobedience, in like manner as any court of the United States may do in case of process of subpœna ad testificandum issued by such court.

Act Feb. 14, 1871, c. 51, § 1, 16 Stat. 412.

Cited without definite application,
U. S. v. Bell (C. C. 1897) 81 Fed. 830, 846. And see notes to § 266.

§ 269. (R. S. § 187.) Professional assistance; how obtained.

Whenever any head of a Department or Bureau having made application pursuant to section one hundred and eighty-four, for a subpœna to procure the attendance of a witness to be examined, is of opinion that the interests of the United States require the attendance of counsel at the examination, or require legal investigation of any claim pending in his Department or Bureau, he shall give notice thereof to the Attorney-General, and of all facts necessary to enable the Attorney-General to furnish proper professional service in attending such examination, or making such investigation, and it shall be the duty of the Attorney-General to provide for such service.

Act Feb. 14, 1871, c. 51, § 3, 16 Stat. 412.

R. S. § 184, mentioned in this section, is set forth ante, § 266.

A similar provision was made by R. S. § 364, post, § 539.

§ 270. (R. S. § 188.) Evidence to be furnished by the Departments in suits pending in the Court of Claims.

In all suits brought against the United States in the Court of

Claims founded upon any contract, agreement, or transaction with any Department, or any Bureau, officer, or agent of a Department, or where the matter or thing on which the claim is based has been passed upon and decided by any Department, Bureau, or officer authorized to adjust it, the Attorney-General shall transmit to such Department, Bureau, or officer, a printed copy of the petition filed by the claimant, with a request that the Department, Bureau, or officer, shall furnish to the Attorney-General all facts, circumstances, and evidence touching the claim in the possession or knowledge of the Department, Bureau, or officer. Such Department, Bureau, or officer shall, without delay, and within a reasonable time, furnish the Attorney-General with a full statement, in writing, of all such facts, information, and proofs. The statement shall contain a reference to or description of all such official documents or papers, if any, as may furnish proof of facts referred to in it, or may be necessary and proper for the defense of the United States against the claim, mentioning the Department, office, or place where the same is kept or may be procured. If the claim has been passed upon and decided by the Department, Bureau, or officer, the statement shall succinctly state the reasons and principles upon which such decision was based. In all cases where such decision was founded upon any act of Congress, or upon any section or clause of such act, the same shall be cited specifically; and if any previous interpretation or construction has been given to such act, section, or clause by the Department, Bureau, or officer, the same shall be set forth succinctly in the statement, and a copy of the opinion filed, if any, shall be annexed to it. Where any decision in the case has been based upon any regulation of a Department, or where such regulation has, in the opinion of the Department, Bureau, or officer transmitting such statement, any bearing upon the claim in suit, the same shall be distinctly quoted at length in the statement. But where more than one case, or a class of cases, is pending, the defense to which rests upon the same facts, circumstances, and proofs, the Department, Bureau, or officer shall only be required to certify and transmit one statement of the same, and such statement shall be held to apply to all such cases, as if made out, certified, and transmitted in each case respectively.

Act June 25, 1868, c. 71, § 6, 15 Stat. 76.

The heads of the several Executive Departments were required to cause to be rendered to the Commissioner of Fish and Fisheries all necessary and practicable aid in the prosecution of his investigations and inquiries, by R. S. § 4397, post, § 905.

§ 271. (R. S. § 189.) Employment of attorneys or counsel.

No head of a Department shall employ attorneys or counsel at the expense of the United States; but when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same.

Act June 22, 1870, c. 150, § 17, 16 Stat. 164.

The duties of the officers of the Department of Justice to render legal services to heads of Departments were prescribed by R. S. § 361, post, § 536.

Notes of Decisions

Practice and statutes before creation of Department of Justice.—Before the establishment of the Department of Justice by Act June 22, 1870, c. 150, part of section 17 of which was incorporated into this section, according to the traditional policy of the government, recognized by Act Feb. 26, 1853, c. 80, 10 Stat. 161, any head of department might, in his discretion, employ special counsel in behalf of the government. (1855) 7 Op. Atty. Gen. 141; (1857) 8 Op. Atty. Gen. 398; (1861) 10 Op. Atty. Gen. 41, 48; (1868) 12 Op. Atty. Gen. 368, 416.

Purpose and effect of act creating Department of Justice.—The provisions of Act June 22, 1870, c. 150, establishing the Department of Justice, which were incorporated into this and other sections of the Revised Statutes, indicate that Congress intended to gather into that department, under the supervision and control of the Attorney General, all the litigation and all the law

business in which the United States are interested, and which previously had been scattered among different public officers, departments, and branches of the government, and to break up the practice of frequently employing unofficial attorneys in the public service. Perry v. U. S. (1893) 28 Ct. Cl. 483, 489.

The provisions of Act June 22, 1870, § 17, had no application to a case of employment of special counsel before the passage of the act, notwithstanding the services were in part rendered subsequent thereto. (1871) 13 Op. Atty. Gen. 580; (1885) 18 Op. Atty. Gen. 124.

Employment of district attorneys for special services.—This section does not forbid compensation to district attorneys for special services. Weed v. U. S. (D. C. 1897) 82 Fed. 414, 420.

Compensation of district attorneys for special services, see, also, notes to § 1435.

Employment of counsel by particular departments.—Under the provisions of Act June 22, 1870, § 17, incorporated into this section, the head of the Navy Department is not at liberty to employ counsel to conduct proceedings before a naval court-martial, but should call upon the Department of Justice to furnish an officer for the service. (1871) 13 Op. Atty. Gen. 514; (1872) 14 Op. Atty. Gen. 13.

The Secretary of War has no authority to employ counsel to appear in court on behalf of the military authorities in habeas corpus cases. (1871) 13 Op. Atty. Gen. 580, 583.

Special counsel, other than officers of the Department of Justice, may be employed by the Attorney General, at the request of the Secretary of the Navy, to assist the judge advocate in a trial by a naval court-martial. (1885) 18 Op. Atty. Gen. 135, 137.

Under this section and R. S. §§ 362, 363, post, §§ 537, 538, the Secretary of Agriculture had no authority to employ counsel for defense of employés of the Bureau of Animal Industry for acts done by them in carrying out provisions of Act May 29, 1884, post, § 830, establishing that Bureau. (1889) 19 Op. Atty. Gen. 328.

The Secretary of the Navy is not authorized in view of this section to employ special counsel in foreign countries to institute suits in behalf of the United States for the recovery of damages caused to a war vessel of the United States, but should refer the matter to the Department of Justice for attention. (1895) 21 Op. Atty. Gen. 195.

§ 272. (R. S. § 190.) Persons formerly in the Departments not to prosecute claims in them.

It shall not be lawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employé in any of the Departments, to act as counsel, attorney, or agent for prosecuting any claim against the United States which was pending in either of said Departments while he was such officer, clerk, or employé, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employé.

Act June 1, 1872, c. 256, § 5, 17 Stat. 202.

As to the powers conferred on the Secretary of the Interior to make rules for the government of agents, attorneys, etc., representing claimants before his department by Act July 4, 1884, c. 181, § 5, post, § 684. As to similar powers conferred on the Secretary of the Treasury, by Act July 4, 1884, c. 334, § 3, post, § 385.

Notes of Decisions

Claims pending in any department included.—The section is not limited to claims which were pending in the same department, in which the ex-employé was employed, but, by the words "pending in either of said departments," it was made applicable to all claims which were pending in any of the Departments while the employé was employed in one of them. (1894) 20 Op. Atty. Gen. 695.

Departments and officers, etc., thereof within the section.—The section applies to examiners of the Department of Justice, being persons receiving regular employment who take oath of office and have power to administer oaths to witnesses, although they hold no office known to the statute law, but are employed and paid under a general appropriation for detection of crimes, etc. (1894) 20 Op. Atty. Gen. 696.

The Civil Service Commission is not an Executive Department within the meaning of this section, and its officers, clerks, etc., are not within the inhibitions contained therein. (1903) 25 Op. Atty. Gen. 6.

Counsel before departments not to act as notaries.—The proviso in Act June 29, 1906, 34 Stat. 622, amending section 558 of the Code of the District of Columbia, which provides that no notary public shall be authorized to take acknowledgments, etc., or perform any official act in connection with matters in which he is employed as counsel, etc., before any of the executive depart-

ments, applies not only to local attorneys, but to all notaries who practice before the departments. (1907) 26 Op. Atty. Gen. 236.

Collection of claims by any means prohibited.—This section prohibits not merely the prosecution of claims by lawsuit, but the collection of such claims in any manner. Van Metre v. Nunn (Minn. 1912) 133 N. W. 1012.

Suspension or disbarment of agents or attorneys prosecuting claims, etc., before department.—It is competent to the head of a department, as a measure for the protection of the public interests committed to his charge, to decline to recognize, or to suspend the transaction of business with, an agent or attorney for frauds and fraudulent practices attempted or committed by him in the prosecution of claims before the department, and whose character is such that a reasonable degree of confidence cannot be placed in his integrity and honesty in dealing with the government. (1869) 13 Op. Atty. Gen. 151; (1880) 16 Op. Atty. Gen. 488.

The head of a department, however, is not invested with any authority over the professional conduct of claim agents for the correction of mere private grievances, corresponding with that possessed by the courts of law over attorneys practicing before them. (1869) 13 Op. Atty. Gen. 151.

§ 272a. (Act April 27, 1916, c. 89, § 1.) Use of name of member of Congress or officer of Government in advertising practice before departments or office of Government unlawful.

It shall be unlawful for any person, firm, or corporation practicing before any department or office of the Government to use the name of any Member of either House of Congress or of any officer of the Government in advertising the said business. (39 Stat.)

This was section 1 of an act entitled "An act prohibiting the use of the name of any Member of either House of Congress or of any officer of the Government by any person, firm, or corporation practicing before any department or office of the Government," cited above. Section 2 of said act provided that it should take effect three months after its date.

(R. S. § 191. Repealed.)

This section made the balances stated and certified by the officers of the Treasury Department conclusive on the executive branch of the Government. Different provisions on the same subject form part of section 8 of the Dockery Act of July 31, 1894, c. 174, post, § 425, by which this section was repealed.

§ 273. (R. S. § 192, as amended, Act June 22, 1906, c. 3514, § 7.) Expenditures for newspapers.

The amount expended in any one year for newspapers, for any Department, except the Department of State, including all the Bureaus and offices connected therewith, shall not exceed one hundred dollars.

Act Aug. 26, 1842, c. 202, § 16, 5 Stat. 526. Act June 22, 1906, c. 3514, § 7, 34 Stat. 449.

This section, as enacted in the Revised Statutes, contained a further provision, "And all newspapers purchased with the public money for the use of either of the Departments must be preserved as files for such Department," which was repealed by Act June 22, 1906, c. 3514, § 7, cited above.

Expenditures for newspapers, etc., by executive officers, other than heads of Departments, were restricted by R. S. § 1779, post, § 3263.

Notes of Decisions

Application of section to purchase of newspapers outside of Washington.—The question whether a certain appropriation act authorizes the Secretary of the Treasury to purchase newspapers and other articles for use outside of Washington, in view of this section and R. S. § 3683, post, § 6784, should be submitted to the Comptroller of the Treasury under section 8 of the Dockery Act of July 31, 1894, post, § 425. (1895) 21 Op. Atty. Gen. 178.

§ 274. (Act June 7, 1897, c. 3, § 1.) Expenditures for transportation of remains of deceased employés.

Hereafter the heads of Departments shall not authorize any expenditure in connection with transportation of remains of deceased employees, except when otherwise specifically provided by law. (30 Stat. 86.)

This was a proviso to an appropriation for such expenditures in the Indian appropriation act for the fiscal year 1898, cited above.

§ 275. (R. S. § 193.) Annual reports of expenditure of contingent funds.

The head of each Department shall make an annual report to Congress, giving a detailed statement of the manner in which the contingent fund for his Department, and for the Bureaus and offices therein, has been expended, giving the names of every person to whom any portion thereof has been paid; and if for anything furnished, the quantity and price; and if for any service rendered, the nature of such service, and the time employed, and the particular occasion or cause, in brief, that rendered such service necessary; and the amount of all former appropriations in each case on hand, either in the Treasury or in the hands of any disbursing officer or agent. And he shall require of the disbursing officers, acting under his direction and authority, the return of precise and analytical statements and receipts for all the moneys which may have been from time to time during the next preceding year expended by them, and shall communicate the results of such returns and the sums total, annually, to Congress.

Act Aug. 26, 1842, c. 202, § 20, 5 Stat. 527.

The Attorney General was required to report, in detail, the items, amounts, and causes of expenditure of the contingent expenses of the Department of Justice, by Act June 20, 1874, c. 328, § 1, post, § 560.

A general requirement of distinct accounts of the application of public moneys according to the appropriation thereof was contained in R. S. § 3623, post, § 6618.

Estimates for compensation of officers are to be founded on express provisions of law, and not upon authority of executive distribution, by R. S. § 3662, post, § 6678.

Moneys appropriated for contingent, etc., expenses are not to be expended for official or clerical compensation, by R. S. § 3682, post, § 6783.

Restrictions on expenditures from the contingent fund appropriated to any department, bureau, or office were contained in R. S. § 3683, post, § 6784.

Law books, books of reference, and periodicals for the use of any department or other establishment at the seat of Government are not to be purchased from appropriations for contingent expenses, etc., unless specifically provided for in the law granting the appropriation, by Act March 15, 1898, c. 68, § 3, post, § 6786.

Advertisements for proposals for supplies were required by R. S. §§ 3709, 3710, and subsequent provisions, post, §§ 6832–6837.

Inspection of fuel purchased in the District of Columbia was provided for by R. S. §§ 3711–3713, as amended by Act March 15, 1898, c. 68, § 6, post, §§ 6838–6840.

Contracts for stationery or other supplies for the Executive Departments are not to be for a longer term than one year, by R. S. § 3735, post, § 6888.

Restrictions on renting buildings for the purposes of the Government in the District of Columbia imposed by Act March 3, 1877, c. 106, and Act Aug. 5, 1882, c. 389, § 1, post, §§ 6930, 6931.

A statement of the buildings rented within the District of Columbia for the use of the Government was required to be submitted by the Secretary of the Treasury to Congress each year in the Book of Estimates, by a provision of Act July 16, 1892, c. 196, § 1, post, § 6683.

Heads of Executive Departments were authorized to enter into contracts for the lease, for not exceeding six years, of modern fireproof storage accommodations within the District of Columbia for their respective Departments, by a provision of Act March 2, 1913, c. 93, post, § 6932.

Printing and binding for the Departments at the Government Printing Office were provided for by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 93, post, § 7172, and restrictions on printing reports, etc., of the Departments were imposed in section 73, pars. 1–28 of that act, post, §§ 7053–7076.

The Public Printer was authorized to furnish certain supplies to the Departments by provisions of Act June 28, 1902, c. 1301, § 1, post, § 6997.

Restrictions on the use of appropriations made for printing and binding, and on the printing of books and documents for the Executive Departments, contained in Acts March 3, 1905, c. 1483, § 1, and c. 1484, § 1, are set forth post, §§ 7175, 7176.

The Surgeon General of the Public Health Service was required to transmit annually to the Secretary of the Treasury for transmission to Congress a full and complete report of the transactions of the Service, including a de-

tailed statement of receipts and disbursements, by Act July 1, 1902, c. 1370, § 9, post, § 9148.

Restrictions on payments from appropriations of expenses of horses, carriages, etc., for personal use of officers, or for purchasing, maintaining, driving, or operating carriages or vehicles for the personal or official use of any officer or employé of any of the Executive Departments or other Government establishments at Washington, D. C., contained in Act March 18, 1904, c. 716, § 1, and Act Feb. 3, 1905, c. 297, § 1, are set forth post, §§ 3237, 3238.

§ 276. (Act March 3, 1877, c. 102, § 1.) Reports of expenditure for contingent expenses of sub-treasuries, and in government departments and bureaus.

Hereafter a detailed statement of the expenditure for the preceding fiscal year of all sums appropriated for contingent expenses of the Independent Treasury, or in any department or bureau of the Government shall be presented to Congress at the beginning of each regular session. (19 Stat. 306.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year, 1878, cited above, following an appropriation for the collection, safe-keeping, transfer, and disbursement of the public money, under the heading, "Independent Treasury."

§ 277. (Act May 22, 1908, c. 186, § 4.) Reports of traveling expenses of officers and employés at Washington.

It shall be the duty of the head of each Executive Department and other Government establishment at Washington to submit to Congress at the beginning of each regular session a statement showing in detail what officers or employees (other than special agents, inspectors, or employees, who in the discharge of their regular duties are required to constantly travel) of such Executive Department or other Government establishment have traveled on official business from Washington to points outside of the District of Columbia during the preceding fiscal year, giving in each case the full title of the official or employee, the destination or destinations of such travel, the business or work on account of which the same was made, and the total expense to the United States charged in each case. (35 Stat. 244.)

This was the last section of the legislative, executive, and judicial appropriation act for the fiscal year 1909, cited above.

(R. S. § 194. Repealed.)

This section required an annual report by the head of each Department as to the clerks, etc., employed in the Department. Statements as to such matters in the annual Book of Estimates were required by other provisions of the act repealing this section, Act March 2, 1895, c. 177, § 7, post, § 6680.

Reports by heads of departments in the annual estimates as to inefficient employés were also required by Act July 11, 1890, c. 667, § 2, post, § 6679.

§ 278. (R. S. § 195.) Time of making annual reports.

Except where a different time is expressly prescribed by law, the various annual reports required to be submitted to Congress by the heads of Departments shall be made at the commencement of each regular session, and shall embrace the transactions of the preceding year.

See all acts requiring reports.

The reports required to be made by each head of a Department are prescribed by provisions under the titles of the several Departments.

Provisions relating to annual estimates to be furnished by heads of Departments for appropriations, their requisites, contents, etc., the time for furnishing them, and the preparation of the Book of Estimates, are contained in Title XLI, "Appropriations."

§ 279. (R. S. § 196.) Department reports, when to be furnished to printer.

The head of each Department, except the Department of Justice, shall furnish to the Congressional Printer copies of the documents usually accompanying his annual report, on or before the first day of

November in each year, and a copy of his annual report on or before the third Monday of November in each year.

Act June 25, 1864, c. 155, §§ 1, 3, 13 Stat. 184, 185. Act June 22, 1870, c. 150, § 12, 16 Stat. 164.

This section may be regarded as superseded by Act July 1, 1916, c. 209, § 3, post, § 279a, prescribing the time within which the copy for annual reports and the accompanying documents must be furnished to the Public Printer.

Provisions for printing and distribution of the reports of the Departments and executive officers were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, and subsequent statutes, collected under Title XLV, "Public Printing, Advertisements, and Public Documents," §§ 7053–7143.

Provisions for furnishing public documents printed at the Government Printing Office to the Departments, and for the distribution and exchange thereof, were made by said Printing and Binding Act of Jan. 12, 1895, c. 23, §§ 90, 92, 95, post, §§ 7169, 7170, 7177.

§ 279a. (Act July 1, 1916, c. 209, § 3.) Copy for annual reports and accompanying documents; time for furnishing.

Appropriations herein and hereafter made for printing and binding shall not be used for any annual report or the accompanying documents unless the copy therefor is furnished to the Public Printer in the following manner: Copies of the documents accompanying such annual reports on or before the fifteenth day of October of each year; copies of the annual reports on or before the fifteenth day of November of each year; complete revised proofs of the accompanying documents and the annual reports on the tenth and twentieth days of November of each year, respectively; and all of said annual reports and accompanying documents shall be printed, made public, and available for distribution not later than within the first five days after the assembling of each regular session of Congress. The provisions of this section shall not apply to the annual reports of the Smithsonian Institution, the Commissioner of Patents, or the Comptroller of the Currency. (39 Stat.)

This section was § 3 of the sundry civil appropriation act for the fiscal year 1917, cited above. The appropriations referred to are those made in the sundry civil appropriation acts for printing and binding for the various Departments, Bureaus, Commissions, etc. It may be regarded as superseding the provisions of § 279, ante.

§ 280. (R. S. § 197, as amended, Act Feb. 27, 1877, c. 69, § 1.) Inventories of property.

The Secretary of State, the Secretary of the Treasury, the Secretary of the Interior, the Secretary of War, the Secretary of the Navy, the Postmaster-General, the Attorney-General, and Commissioner of Agriculture shall keep, in proper books, a complete inventory of all the property belonging to the United States in the buildings, rooms, offices, and grounds occupied by them, respectively, and under their charge, adding thereto, from time to time, an account of such property as may be procured subsequently to the taking of such inventory, as well as an account of the sale or other disposition of any of such property, except supplies of stationery and fuel in the public offices and books, pamphlets, and papers in the Library of Congress.

Act July 15, 1870, c. 300, § 1, 16 Stat. 364. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 241.

This section, as enacted in the Revised Statutes, was amended, by Act Feb. 27, 1877, c. 69, § 1, cited above, by the addition, at the end thereof, of the clause excepting supplies of stationery and fuel in public offices, and books, etc., in the Library of Congress.

A similar provision as to the Postmaster General, requiring also an annual report to Congress, was made by R. S. § 397, post, § 586.

The duties of the former Commissioner of Agriculture were to be performed by the Secretary of Agriculture, by provisions of the act creating the Department of Agriculture, Act Feb. 9, 1889, c. 122, post, §§ 789–792, and Act July 14, 1890, c. 707, post, § 819.

The Secretary of Commerce has charge, in the buildings or premises occupied by or appropriated to the Department of Commerce, of the library, furniture, fixtures, records, and other property of the Department, by provisions

of the act to establish the Department, Act Feb. 14, 1903, c. 552, § 9, post, § 861.

Provisions for accounts of public property in the possession of the officers of the Senate and House of Representatives were made by R. S. § 72, ante, § 105, and for inventories, etc., of public property in and about the Capitol, etc., and the Executive Mansion, by R. S. §§ 1832, 1833, post, §§ 3418, 3419, and Act June 25, 1910, c. 384, § 9, ante, § 231.

(R. S. § 198. Superseded.)

This section required the head of each Department, in each year in which a new Congress is to assemble, to cause to be filed in the Department of the Interior a list of all officers, agents, clerks, and employés employed in his Department, etc., including statistics required to enable the Secretary of the Interior to prepare the Biennial Register. The time to which the lists should be made up, and the time when they should be filed, were prescribed by Act Dec. 15, 1877, c. 4, § 2, 20 Stat. 13, amended by Act June 16, 1880, c. 235, § 1, 21 Stat. 275. All these provisions, and those of R. S. §§ 510, 511, relating to the preparation and distribution of the Biennial Register, were superseded by more specific provisions for the same purposes, contained in the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, pars. 63–68, post, § 7092.

In such subsequent provisions the Biennial Register was designated as the Official Register.

The Director of the Census was directed to edit, index, and publish the Official Register, and the provisions imposing that duty upon the Secretary of the Interior were repealed, by provisions of Act March 6, 1902, c. 139, § 7, as amended by Act June 7, 1906, c. 3048, post, § 912.

§ 281. (Act Feb. 25, 1903, c. 755, § 1.) Transfer of miscellaneous books not required for use of Departments, etc., to Public Library of District of Columbia.

Any books of a miscellaneous character no longer required for the use of such department, bureau, or commission, and not deemed an advisable addition to the Library of Congress, shall, if appropriate to the uses of the Free Public Library of the District of Columbia, be turned over to that library for general use as a part thereof. (32 Stat. 865.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1904, cited above. It followed a provision, set forth ante, § 149, which authorized "the head of any Executive Department or bureau or any commission of the Government" to turn over to the Librarian of Congress any books, etc., in the library of the department, bureau, or commission no longer needed for its use, and to which the words of this provision, "such department, bureau, or commission," refer.

§ 282. (Act Feb. 16, 1889, c. 171.) Disposition of useless papers in the Departments.

Whenever there shall be in any one of the Executive Departments of the Government an accumulation of files of papers, which are not needed or useful in the transaction of the current business of such Department and have no permanent value or historical interest, it shall be the duty of the head of such Department to submit to Congress a report of that fact, accompanied by a concise statement of the condition and character of such papers.

And upon the submission of such report, it shall be the duty of the presiding officer of the Senate to appoint two Senators, and of the Speaker of the House of Representatives to appoint two Representatives, and the Senators and Representatives so appointed shall constitute a joint committee, to which shall be referred such report, with the accompanying statement of the condition and character of such papers, and such joint committee shall meet and examine such report and statement and the papers therein described, and submit to the Senate and House, respectively, a report of such examination and their recommendation.

And if they report that such files of papers, or any part thereof, are not needed or useful in the transaction of the current business of such Department, and have no permanent value or historical interest, then it shall be the duty of such head of the Department to

sell as waste paper, or otherwise dispose of such files of papers upon the best obtainable terms after due publication of notice inviting proposals therefor, and receive and pay the proceeds thereof into the Treasury of the United States, and make report thereof to Congress. (25 Stat. 672.)

This was an act entitled "An act to authorize and provide for the disposition of useless papers in the Executive Departments." It was amended by a provision of Act March 2, 1895, c. 189, § 1, post, § 283.

It was further amended so that accumulations in the files of vessels of the Navy of papers not needed or useful, etc., might be disposed of, by a provision of Act Aug. 22, 1912, c. 335, post, § 2789.

§ 283. (Act March 2, 1895, c. 189, § 1.) Disposition of useless papers in buildings under control of the Departments.

That the Act entitled "An Act to authorize and provide for the disposition of useless papers in the Executive Department," approved February sixteenth, eighteen hundred and eighty-nine, be, and the same is hereby, amended so as to include in its provisions any accumulation of files of papers of a like character therein described now or hereafter in the various public buildings under the control of the several Executive Departments of the Government. (28 Stat. 933.)

This was a provision of the sundry civil appropriation act for the fiscal year 1896, cited above.

Act Feb. 16, 1889, c. 171, mentioned in this provision as amended thereby, is set forth ante, § 282.

Special provisions for disposition of accumulations of useless papers were as follows:

Documents in offices of Senate and House of Representatives, Act Aug. 7, 1882, c. 433, § 1, ante, § 116.

Papers in the Post Office Department and in the Office of the Auditor of the Treasury for the Post Office Department, Act March 3, 1881, c. 130, § 1, Act Aug. 5, 1882, c. 389, § 1, and Act May 27, 1908, c. 206, § 1, post, §§ 607–609.

Proposals for carrying the mail, reports of arrivals and departures of the mails, and certificates of oaths of carriers on mail routes, R. S. § 3948, as amended by Act June 13, 1898, c. 446, § 2, post, § 7435.

Papers in and publications of the Department of Agriculture, Act March 4, 1907, c. 2907, post, § 832.

Telegrams pertaining to business of the Weather Bureau, Act May 25, 1900, c. 555, post, § 849.

Records of courts-martial, Articles of War 34–36, post, § 2308a.

TITLE V

THE DEPARTMENT OF STATE

Sec.
284. Establishment of the Department of State.
285. Salary of Secretary of State.
286. Emoluments of office of Secretary of State.
287. Compensation of Secretary of State.
288. Assistant and Second Assistant Secretaries of State.
289. Third Assistant Secretary of State.
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291. Chief of Bureau of Accounts, disbursing clerk.
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293. Foreign trade relations; appropriations for expenses; statement of expenditures; estimates for further appropriations.
294. Assistant solicitors.
295. Law clerk, and assistant, to edit laws, etc.
296. Omitted.
297. Salaries of Secretary, Assistant Secretaries, and subordinate officers, etc.
298. Distribution of duties of officers, clerks, and other employés.
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300. Management of foreign affairs.
301. Custody of seals and property.
302. Promulgation of the laws.
303. Amendments to Constitution.
304. State statutes to be procured.
305. Report of returns of collectors and foreign agents.
306. Reports of foreign regulations of commerce, other commercial information, and consular fees.
307. Statement of expenditures from contingent fund.
308. Copies of acts and treaties furnished to printer.
309. Passports.
310. Fees for copies of records.

§ 284. (R. S. § 199.) Establishment of the Department of State.

There shall be at the seat of Government an Executive Department to be known as the Department of State, and a Secretary of State, who shall be the head thereof.

Act July 27, 1789, c. 4, § 1, 1 Stat. 28. Act Sept. 15, 1789, c. 14, § 1, 1 Stat. 68.

Notes of Decisions

Acts establishing department.—The "Department of Foreign Affairs," with a principal officer therein, to be called the "Secretary for the Department of Foreign Affairs," was established by Act July 27, 1789, c. 4, 1 Stat. 28, and was denominated the "Department of State," and the principal officer was to be called the "Secretary of State," by Act Sept. 15, 1789, c. 14, § 1, 1 Stat. 68. In re Hennen (1839) 13 Pet. 230, 259, 10 L. Ed. 138; (1854) 6 Op. Atty. Gen. 583, 587; (1855) 7 Op. Atty. Gen. 453, 460.

Nothing was said in the act establishing the department as to the method of appointing the Secretary; the matter was left to the provision of the Constitution, art 2, § 2, which vests the power of appointment in the President. (1884) 18 Op. Atty. Gen. 58.

Cited without definite application, U. S. ex rel. Boynton v. Blaine (1891) 11 Sup. Ct. 607, 612, 139 U. S. 306, 35 L. Ed. 183.

§ 285. (Act Feb. 17, 1909, c. 137, § 1.) Salary of Secretary of State.

That section four of the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and eight, and for other purposes," approved February twenty-sixth, nineteen hundred and seven, fixing the annual compensation of heads of executive departments, be, and the same is hereby, repealed in so far as the same relates to the annual compensation of the Secretary of State; and the annual compensation of

the Secretary of State shall be at the rate of eight thousand dollars. (35 Stat. 626.)

This section and the section next following were sections 1 and 2 of an act entitled "An act in relation to the salary of the Secretary of State," which, by section 3 thereof, was to take effect and be in force from and after March 4, 1909.

Section 4 of Act Feb. 26, 1907, c. 1635, which fixed the compensation of the heads of Executive Departments who are members of the President's Cabinet at the rate of $12,000 per annum each, and which was repealed in part by this act, is set forth ante, § 36.

An appropriation of $8,000 for compensation of the Secretary of State, was made for the fiscal year 1910, accompanied with provisions similar to those of this act, by Act March 4, 1909, c. 297, § 1, post, § 287, and a like appropriation was made for the fiscal year 1911, by Act June 17, 1910, c. 297, § 1, 36 Stat. 483. But the sum of $12,000 was appropriated for the Secretary of State for subsequent years. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, post, § 297.

See notes to said § 297, post.

§ 286. (Act Feb. 17, 1909, c. 137, § 2.) Emoluments of office of Secretary of State.

On and after March fourth, nineteen hundred and nine, there shall be no emoluments attached to the office of Secretary of State other than those which by the law in force on the first day of May, nineteen hundred and four, belonged and were then attached to said office. (35 Stat. 626.)

See notes to preceding section.

§ 287. (Act March 4, 1909, c. 297, § 1.) Compensation of Secretary of State.

For compensation of the Secretary of State, eight thousand dollars, and the annual compensation of the Secretary of State, including all emoluments or allowances fixed by law, except such as were fixed by law prior to the twenty-sixth day of February, nineteen hundred and seven, after the third day of March, nineteen hundred and nine, is hereby fixed at eight thousand dollars, and all laws or parts of laws providing different compensation, emoluments, or allowances, are hereby repealed, to take effect on the third day of March, nineteen hundred and nine. (35 Stat. 861.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1910, cited above. It was accompanied by a provision of a temporary nature making available the unexpended balance of the appropriation of $12,000 for the fiscal year 1909, to pay the salary at the rate of $8,000 per annum until June 30, 1909.

Previous provisions similar to those set forth here were made by Act Feb. 17, 1909, c. 137. See notes to section 1 of that act, ante, § 285.

See notes to § 297, post.

§ 288. (R. S. § 200.) Assistant and Second Assistant Secretaries of State.

There shall be in the Department of State an Assistant Secretary of State, and a Second Assistant Secretary of State, each of whom shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of [six thousand dollars] a year, to be paid monthly.

Act March 3, 1853, c. 97, § 6, 10 Stat. 212. Act July 25, 1866, c. 233, § 2, 14 Stat. 226. Act March 3, 1873, c. 226, § 1, 17 Stat. 486.

The salaries of the Assistant Secretary and Second Assistant Secretary, having been increased from $3,500 to $6,000 each by the provision of Act March 3, 1873, c. 226, § 1, incorporated into this section of the Revised Statutes and cited above, were reduced to $3,500 each, and the words of this section inclosed in brackets "six thousand dollars," were superseded, by the repeal of so much of that act as increased the amount, by Act Jan. 20, 1874, c. 11, 18 Stat. 4. The appointment of an additional Assistant Secretary, with like compensation, was authorized by Act June 20, 1874, c. 328, § 1, post, § 289. Subsequent appropriations were for increased amounts. The provisions for the fiscal year 1917 were for Assistant Secretary, $5,000, Second and

Third Assistant Secretaries, $4,500 each, by Act May 10, 1916, c. 117, § 1, post, § 297.

In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof is required, unless otherwise directed, to perform the duties of the head of such Department until a successor is appointed, or such absence or sickness shall cease, by R. S. § 177, set forth ante, § 259. In case of the death, resignation, absence, or sickness of the head of any Department, except where the Attorney General is concerned, the President may authorize and direct the head of any other Department or any officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease, by R. S. § 179, also set forth ante, § 261.

See notes to § 297, post.

Cited without definite application, McCollum v. U. S. (1881) 17 Ct. Cl. 92, 101.

§ 289. (Act June 20, 1874, c. 328, § 1.) Third Assistant Secretary of State.

For compensation of * * two Assistant Secretaries of State, at three thousand five hundred dollars each; and one additional Assistant Secretary of State, with like compensation, to be appointed by the President, by and with the advice and consent of the Senate, to be known as the Third Assistant Secretary of State. (18 Stat. 90.)

These were provisions of the legislative, executive, and judicial appropriation act for the fiscal year 1875, cited above.

The appointment of an Assistant Secretary and a Second Assistant Secretary, for whose compensation the appropriation in the first clause of this paragraph was made, was authorized by R. S. § 200, ante, § 288.

The compensation of the Assistant Secretaries was increased by subsequent appropriation acts. See notes to R. S. § 200, ante, § 288, post, § 297. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, post, § 297.

§ 290. (R. S. § 201.) Subordinate officers, etc.

There shall be in the Department of State:

One chief clerk, at a salary of two thousand five hundred dollars a year.

Two chiefs of the Diplomatic Bureaus, at a salary of two thousand four hundred dollars a year, each.

Two chiefs of the Consular Bureaus, at a salary of two thousand four hundred dollars a year, each.

Chief of the Bureau of Accounts, at a salary of two thousand four hundred dollars a year:

Chief of the Bureau of Indexes and Archives, at a salary of two thousand four hundred dollars a year.

One disbursing clerk.

Act March 3, 1855, c. 175, § 4, 10 Stat. 669. Act May 22, 1872, c. 194, 17 Stat. 145. Act March 3, 1873, c. 226, § 3, 17 Stat. 508.

This section enumerated the subordinate officers in the Department, and their salaries, at the time of the compilation of the Revised Statutes, as authorized by the then existing statutes, cited above. But the officers, clerks, and others actually appointed or employed, and their respective salaries and other compensation, depend on the specific provisions made in the annual appropriation acts, each providing for the fiscal year next following; the employment or payment of others being forbidden by Act Aug. 5, 1882, c. 389, § 4, ante, § 249. Subsequent appropriation acts provide for officers and clerks and for salaries different from those fixed by the above section. The appropriations for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, post, § 297.

For the chief clerk, recent appropriations are $3,000, accompanied by a provision that he "shall sign such official papers and documents as the Secretary of State may direct." The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, post, § 297.

The appointment of the chief of the Bureau of Accounts disbursing clerk of the Department was authorized by a provision of Act March 3, 1875, c. 129, § 1, post, § 291, and thereafter, instead of an appropriation for such clerk, an additional sum was appropriated for the chief of said Bureau as disbursing

clerk. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, post, § 297.

In addition to the bureaus mentioned in this section a Bureau of Statistics was established in the Department, the name of which was changed to Bureau of Foreign Commerce, pursuant to a provision of Act Feb. 20, 1897, c. 268, 29 Stat. 590. It was transferred to the Department of Commerce, and consolidated with the Bureau of Statistics, transferred from the Treasury Department, to constitute one bureau, to be called the Bureau of Statistics, in the Department of Commerce, by provisions of the act establishing that Department, Act Feb. 14, 1903, c. 552, § 4, post, § 857. Thereafter the Bureau of Manufactures in that Department and said Bureau of Statistics were consolidated into one Bureau, to be known as the Bureau of Foreign and Domestic Commerce, by a provision of Act Aug. 23, 1912, c. 350, § 1, post, § 873.

Besides said bureaus, also, the appointment of a person, to be designated by the Secretary of State, to prepare information for transmission to the Secretary of Commerce, such person to have the rank and salary of a chief of bureau, and to be furnished with clerical assistants, was authorized by Act Feb. 14, 1903, c. 552, § 11, post, § 292.

For chiefs of bureaus, recent appropriations are for two at $2,250 each and five at $2,100 each. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, post, § 297.

An Examiner of Claims for the Department of State, in the Department of Justice, was provided for by R. S. § 349, post, § 521. The designation of the office was changed to Solicitor for the Department of State by a provision of Act March 3, 1891, c. 541, § 1, post, § 523.

An assistant solicitor for the Department was authorized by appropriations in Act April 17, 1900, c. 192, § 1, 31 Stat. 97, and in subsequent similar acts. Two assistant solicitors were authorized by a provision of Act June 22, 1906, c. 3514, § 1, post, § 294, which was repeated in subsequent acts.

A law clerk, and assistant, to edit the laws of Congress and perform other duties, were authorized by provisions of Act Feb. 25, 1903, c. 755, § 1, post, § 295, and subsequent acts.

An appropriation for two clerks, to be employed by the Department of State, and to be charged with the distribution of information among the diplomatic missions, made by a provision of Act March 2, 1909, c. 235, 35 Stat. 675, was repeated, as a separate provision, in the subsequent legislative, executive and judicial appropriation acts, down to and including the act for the fiscal year 1914, Act March 4, 1913, c. 142, § 1, 37 Stat. 750. This appropriation was omitted in the subsequent legislative, executive, and judicial appropriation acts.

An appropriation for expenses in connection with foreign trade relations within the jurisdiction of the Department, and for the maintenance of a division of far eastern affairs in the Department, including the payment of necessary employés, was made by a provision of Act Aug. 5, 1909, c. 7, post, § 293. For the fiscal year next following, ending June 30, 1911, appropriations were made, in the legislative, executive, and judicial appropriation act for that year, Act June 17, 1910, c. 297, § 1, 36 Stat. 484, under a separate heading, "Advancement of Commercial and Other Interests as Provided in the Act Approved August 5, 1909," for a Director of the Consular Service, a Counselor for the Department of State and a Resident Diplomatic Officer, to be appointed by the Secretary of State in accordance with said Act of Aug. 5, 1909, eight officers to be appointed in like manner and to be employed as chief of division or otherwise in connection with foreign relations an assistant solicitor, a law clerk, clerks of various classes and other employés, and for expenses under the provisions of said Act of Aug. 5, 1909. Substantially the same provisions were made in the similar act for the fiscal year 1912, Act March 4, 1911, c. 237, § 1, 36 Stat. 1186. But these provisions for appointment of the officers, etc., mentioned were superseded by the provisions, similar to a great extent, accompanying the appropriations for subsequent years, which were not placed under a separate heading of the appropriation acts, but were incorporated with the appropriations for the officers, clerks, etc., of the Department generally. The provisions so made for the fiscal year 1913, by Act Aug. 23, 1912, c. 350, § 1, 37 Stat. 372, were repeated, with some changes, retaining the additional assistant solicitor and law clerk, in the appropriations for the fiscal year 1917, by Act May 10, 1916, c. 117, § 1, post, § 297.

Provisions applicable to all the Departments, as to the employment of clerks and others, are contained in R. S. § 169, and Act Aug. 5, 1882, c. 389, § 4, ante, §§ 248, 249.

Provisions applicable to all the Departments, as to the duties of chief clerks and disbursing clerks, are contained in R. S. §§ 173, 174, 176, ante, §§ 255, 256, 258.

No personal services are to be employed in the Department or in connection with it in the District of Columbia, other than those specifically authorized or appropriated for, by a provision of Act June 22, 1906, c. 3514, § 1, post, § 299.

All laws or parts of laws inconsisent with rates of salaries or compensation

appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Power to appoint chief clerk, chiefs of bureaus, etc.—The chief clerk and chiefs of bureaus, authorized by this section, and the translator in the State Department are all "clerks," within the meaning of R. S. § 169, ante, § 248, and are to be appointed by the Secretary of State. (1896) 21 Op. Atty. Gen. 363.

The chiefs of bureaus in the department, which were originally established by departmental regulations and presided over by persons who were nominally, as well as actually, department clerks, were not taken out of the operation of said section 169, ante, § 248, by being mentioned by Congress in appropriation acts, or otherwise, as chiefs of bureaus, nor are they chiefs of bureaus within the meaning of R. S. § 178, ante, § 260. Id.

§ 291. (Act March 3, 1875, c. 129, § 1.) Chief of Bureau of Accounts, disbursing clerk.

The chief of the Bureau of Accounts may be appointed by the head of the Department disbursing-clerk of the Department of State. (18 Stat. 349.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1876, cited above. An additional appropriation for the Chief of the Bureau of Accounts as disbursing clerk is made annually. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, post, § 297.

§ 292. (Act Feb. 14, 1903, c. 552, § 11.) Chief of Bureau and assistants to prepare information pertaining to work of Department of Commerce.

A person, to be designated by the Secretary of State, shall be appointed to formulate, under his direction, for the instruction of consular officers, the requests of the Secretary of Commerce and Labor; and to prepare from the dispatches of consular officers, for transmission to the Secretary of Commerce and Labor, such information as pertains to the work of the Department of Commerce and Labor; and such person shall have the rank and salary of a chief of bureau, and be furnished with such clerical assistants as may from time to time be authorized by law. (32 Stat. 830.)

This section was part of the act to establish the Department of Commerce, cited above, other provisions of which are set forth post, under Title XII A, "The Department of Commerce."

§ 293. (Act Aug. 5, 1909, c. 7.) Foreign trade relations; appropriations for expenses; statement of expenditures; estimates for further appropriations.

Foreign trade and treaty relations: For defraying the necessary expenses incurred in connection with foreign trade relations which come within the jurisdiction of the Department of State, under tariff legislation and otherwise, and in the negotiation and preparation of treaties, arrangements, and agreements for the advancement of commercial and other interests of the United States, and for the maintenance of a division of far eastern affairs in the Department of State, including the payment of necessary employees, at the seat of government or elsewhere, to be selected, and their compensation fixed, by

the Secretary of State and to be expended under his direction, fiscal year nineteen hundred and ten, one hundred thousand dollars. A detailed statement showing expenditures, including salaries or rates of compensation paid, under this appropriation shall be reported to Congress by the Secretary of State on the first day of each regular session; and estimates for further appropriations hereunder shall include in detail salaries for all persons to be employed and paid in the Department of State at Washington, District of Columbia. (36 Stat. 119.)

These were provisions of the urgent deficiency act for the fiscal year 1909, cited above. The appropriation was for that year only, but the further provisions accompanying it appear to be intended as permanent, and appropriations for various officers, clerks, etc., and for expenses for advancement of commercial and other interests as provided in this act were made by the legislative, executive, and judicial appropriation acts for the fiscal years 1911 and 1912, and were repeated, with some changes, in subsequent similar appropriation acts, although without specific mention of this provision. The provisions for such officers, etc., for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, post, § 297.

See notes to R. S. § 201, ante, § 290.

§ 294. (Act June 22, 1906, c. 3514, § 1.) Assistant Solicitors.

Two assistant solicitors of the Department of State, to be appointed by the Secretary of State, at three thousand dollars each. (34 Stat. 402.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1907, cited above. It was repeated in subsequent similar acts.

A provision for an Assistant Solicitor of the Department of State, to be appointed by the Secretary, was made by Act April 17, 1900, c. 192, § 1, 31 Stat. 97, and was repeated in subsequent similar acts preceding this provision.

The provision for Assistant Solicitors of the Department for the fiscal year 1917 was by a provision in Act May 10, 1916, c. 117, § 1, post, § 297.

The former Examiner of Claims for the Department of State, in the Department of Justice, was designated Solicitor for the Department of State, by a provision of Act March 3, 1891, c. 541, § 1, post, § 523.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 295. (Act Feb. 25, 1903, c. 755, § 1.) Law clerk, and assistant, to edit laws, etc.

Law clerk, and assistant, to be selected and appointed by the Secretary of State, to edit the laws of Congress and perform such other duties as may be required of them, at two thousand five hundred dollars and one thousand five hundred dollars, respectively. (32 Stat. 866.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year ending 1904, cited above. It was repeated in the subsequent similar acts for each fiscal year. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, post, § 297.

A provision for the appointment of a law clerk for the same purpose was made by the similar acts for the two years preceding this provision.

See notes to § 297, post.

§ 296. (Omitted.)

This section was a provision of the diplomatic and consular appropriation act for the fiscal year 1910, Act March 2, 1909, c. 235, 35 Stat. 675. It made an appropriation for two clerks to be employed by the Department of State, who were to be charged with the distribution of information among the diplomatic missions, one at $1,800 per annum, and one at $1,600 per annum. It was repeated in the subsequent legislative, executive, and judicial appropriation acts down to and including the fiscal year 1914. See Act March 4, 1913, c. 142, § 1, 37 Stat. 750. It was, however, omitted from the legislative, executive, and judicial appropriation acts for the fiscal years 1915, 1916, and 1917, and is therefore omitted here, as being no longer operative.

§ 297. (Act May 10, 1916, c. 117, § 1.) Salaries of Secretary, Assistant Secretaries, and subordinate officers, etc.

For Secretary of State, $12,000; Assistant Secretary, $5,000; Second and Third Assistant Secretaries, at $4,500 each; Director of the Consular Service, $4,500; Counselor for the department, to be appointed by the President, by and with the advice and consent of the Senate, $7,500; officers to aid in important drafting work—four at $4,500 each, four at $3,000 each, to be appointed by the Secretary, any one of whom may be employed as chief of division of far eastern, Latin American, near eastern, or European affairs, or upon other work in connection with foreign relations; assistant solicitors of the department, to be appointed by the Secretary—three at $3,000 each; chief clerk, who shall sign such official papers and documents as the Secretary may direct, $3,000; law clerk, $2,500; law clerk and assistant, to be selected and appointed by the Secretary, to edit the laws of Congress and perform such other duties as may be required of them, at $2,500 and $1,500, respectively; chiefs of bureaus—two at $2,250 each, five at $2,100 each; two translators, at $2,100 each; additional to Chief of Bureau of Accounts as disbursing clerk, $200; private secretary to the Secretary, $2,500; clerk to the Secretary, $1,800. * *

For the following additional force: Officer to aid in important drafting work, $2,500; assistant solicitor, $2,500; two law clerks, at $2,000 each. * *

For the following further additional force: Officers to aid in important drafting work—one $4,500, one $2,500, to be appointed by the Secretary; assistant solicitor of the department, to be appointed by the Secretary, $2,500; law clerks—two at $2,250 each, one $2,000, to be appointed by the Secretary. * * (39 Stat.)

These were part of the provisions under the heading "Department of State" in the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above.

The portions of this paragraph omitted here provided for clerks of various classes and other employés.

The provisions of this paragraph relating to the appointment and duties, etc., of officers and clerks provided for, were repeated from various previous acts set forth ante, §§ 291–295.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 298. (Act June 20, 1874, c. 328, § 1.) Distribution of duties of officers, clerks, and other employés.

That the Secretary of State may prescribe duties for the Assistant Secretaries, the Solicitor, not interfering with his duties as an officer of the Department of Justice, and the clerks of Bureaus, as well as for all the other employés in the Department, and may make changes and transfers therein when, in his judgment, it becomes necessary. (18 Stat. 90.)

This was a proviso annexed to the appropriation for the Department in the legislative, executive, and judicial appropriation act for the fiscal year 1875, cited above.

§ 299. (Act June 22, 1906, c. 3514, § 1.) Personal services other than those provided for not to be employed.

Hereafter there shall not be employed in the Department of State or in connection with said Department in the District of Columbia any personal services other than those which shall be specifically authorized or appropriated for. (34 Stat. 402.)

This was a proviso annexed to an appropriation for the Department in the legislative, executive, and judicial appropriation act for the fiscal year 1907, cited above.

§ 300. (R. S. § 202.) Management of foreign affairs.

The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department, and he shall conduct the business of the Department in such manner as the President shall direct.

Act July 27, 1789, c. 4, § 1, 1 Stat. 28. Act Sept. 15, 1789, c. 14, § 1, 1 Stat. 68.

Provisions relating to public ministers and consuls, etc., of the United States are contained in Title XVIII, "Diplomatic and Consular Officers"; and provisions relating to foreign public ministers, consuls, etc., and to relations with foreign countries, are contained in Title XLVII, "Foreign Relations."

The keeping and use of the seal of the United States by the Secretary of State were provided for by R. S. §§ 203, 1794, post, §§ 301, 3305.

General provisions relating to the submission by the heads of Departments to Congress of estimates of expenditures and appropriations are contained in Title XLI, "Appropriations."

Estimates by the Secretary of State for the annual expenditures of the diplomatic and consular service are required by a provision of Act July 1, 1882, c. 262, post, § 6697.

Notes of Decisions

General duties of department.—Reference is to be made to the Department of State for the official acts of the President in relation to those public measures which are not more immediately connected with the duties of some other department. Lockington v. Smith (C. C. 1817) Fed. Cas. No. 8,448.

Foreign relations.—A certificate by the Secretary of State, under seal of office, that a person has been recognized by the Department of State as minister from a foreign country, is full evidence that he has been authorized and received as such by the President. U. S. v. Benner (C. C. 1830) Fed. Cas. No. 14,568.

The application of a telegraphic cable company for leave to land in the United States its cable, connecting our territory with foreign territory, is within the jurisdiction and control of the Department of State, acting for the President. (1899) 22 Op. Atty. Gen. 408.

Claims of foreign subjects against Hawaii which accrued prior to annexation should be presented to the Department of State and thence transmitted to the government of Hawaii for adjustment. (1899) 22 Op. Atty. Gen. 583.

The Secretary of State cannot be compelled by the judiciary, by mandamus or otherwise, to present and urge a claim of a citizen of this country against a foreign government to redress a wrong committed against him in such foreign

country, the duty of righting such a wrong being a political one. U. S. ex rel. Holzendorf v. Hay (1902) 20 App. D. C. 576.

Cited without definite application, U. S. ex rel. Boynton v. Blaine (1891) 11 Sup. Ct. 607, 612, 139 U. S. 306, 35 L. Ed. 183.

§ 301. (R. S. § 203.) Custody of seals and property.

The Secretary of State shall have the custody and charge of the seal of the United States, and of the seal of the Department of State, and of all the books, records, papers, furniture, fixtures, and other property now remaining in and appertaining to the Department, or hereafter acquired for it.

Act July 27, 1789, c. 4, §§ 2, 4, 1 Stat. 29. Act Sept. 15, 1789, c. 14, § 7, 1 Stat. 69.

The affixing of the seal of the United States to civil commissions for officers of the United States appointed by the President was regulated by R. S. § 1794, post, § 3305.

The mode of affixing a seal, when necessary, was prescribed by R. S. § 6, ante, § 6.

Provisions for the disposition of moneys received by the Secretary from foreign governments and other sources, in trust for citizens of the United States or others, contained in Act Feb. 27, 1896, c. 34, are set forth post, § 6668.

Notes of Decisions

Seal of Department.—Congress provided, at a very early period, that the Secretary of State should cause a seal of office to be made of his department, and that all copies of records and papers in the office, authenticated under the said seal, should be evidence equally as the original. Act Sept. 15, 1789, c. 14, § 5, 1 Stat. 69. Chadwick v. U. S. (C. C. 1880) 3 Fed. 750, 753.

§ 302. (R. S. § 204, as amended, Act Dec. 28, 1874, c. 9, § 2.) Promulgation of the laws.

Whenever a bill, order, resolution or vote of the Senate and House of Representatives, having been approved by the President, or not having been returned by him with his objections, becomes a law or takes effect, it shall forthwith be received by the Secretary of State from the President; and whenever a bill, order, resolution or vote is returned by the President with his objections, and, on being reconsidered, is agreed to be passed, and is approved by two-thirds of both Houses of Congress, and thereby becomes a law or takes effect, it shall be received by the Secretary of State from the President of the Senate, or Speaker of the House of Representatives in whichsoever House it shall last have been so approved, and he shall carefully preserve the originals.

Act Sept. 15, 1789, c. 14, § 2, 1 Stat. 68. Act July 7, 1838, c. 187, 5 Stat. 302. Act Dec. 28, 1874, c. 9, § 2, 18 Stat. 294.

This section, as enacted in the Revised Statutes, read, in the first clause, "having been approved and signed by the President," instead of the words, "having been approved by the President"; and it contained a provision for the publication of the laws, etc., in newspapers, and the distribution of printed copies thereof by the Secretary of State, immediately preceding the concluding words of the section, "and he shall carefully preserve the originals." The amendment by Act Dec. 28, 1874, c. 9, § 2, cited above, consists in the omission of the words, "and signed," and of the provision for publication and distribution.

The publication of the laws in newspapers ceased, after March 4, 1875, pursuant to R. S. § 79, ante, § 112.

Notes of Decisions

Completion of authentication of acts.—When a duly enrolled bill, signed by the Speaker of the House of Representatives, the President of the Senate, and the President of the United States, is placed in the custody of the Secretary of State, its authentication as a law is complete, and no reference can be had to the journal of either house, to the reports of committees, or to any documents printed by authority of Congress, to show that a section of the bill, as it finally passed, does not appear in the act, as authenticated. Field v. Clark (1892) 12 Sup. Ct. 495, 496, 143 U. S. 649, 36 L. Ed. 294.

Determination of date and time of taking effect of acts.—The date of the President's approval of a bill is the date at which it becomes law. Gardner v. Barney (1867) 6 Wall. 499, 504, 18 L. Ed. 890.

Neither the Constitution nor any act of Congress imposes upon the President the duty of affixing a date to his signature to a bill. Gardner v. Barney (1867) 6 Wall. 499, 506, 18 L. Ed. 890.

When a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear answer to such question, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule. Gardner v. Barney (1867) 6 Wall. 499, 511, 18 L. Ed. 890.

Cited without definite application, Wright v. U. S. (1879) 15 Ct. Cl. 80, 86.

§ 303. (R. S. § 205.) Amendments to Constitution.

Whenever official notice is received at the Department of State that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Secretary of State shall forthwith cause the amendment to be published in the newspapers authorized to promulgate the laws, with his certificate, specifying the States by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Act April 20, 1818, c. 80, § 2, 3 Stat. 439.

See note to preceding section, as to publication of the laws in newspapers.

Notes of Decisions

Publication in newspapers.—The amendment of R. S. § 79, ante, § 112, by Act Feb. 18, 1875, by which publication of the laws in newspapers ceased after March 4, 1875, did not affect such publication of matters other than "laws," authorized to be so published. Wright v. U. S. (1879) 15 Ct. Cl. 80, 89.

See notes to article 5 of the Constitution.

§ 304. (R. S. § 206.) State statutes to be procured.

The Secretary of State shall procure from time to time such of the Statutes of the several States as may not be in his office.

Res. Sept. 23, 1789, No. 3, 1 Stat. 97.

§ 305. (R. S. § 207.) Report of returns of collectors and foreign agents.

The Secretary of State shall lay before Congress, within ten days after the commencement of each regular session, a statement containing an abstract of all the returns made to him pursuant to law, by the collectors of the different ports, of the seamen registered by them, together with an account of such impressments and detentions as shall appear by the protests of the masters to have taken place.

Act March 2, 1799, c. 41, § 2, 1 Stat. 731.

The returns by collectors, mentioned in this section, were required by R. S. § 4591, post, § 8376.

Provisions requiring masters to make protests upon impressment or detention of seamen, contained in R. S. §§ 4589, 4590, were repealed by Act March 3, 1897, c. 389, § 16, 29 Stat. 691, and thereby the provisions of this section became, to a great extent, inoperative.

§ 306. (R. S. § 208.) Reports of foreign regulations of commerce, other commercial information, and consular fees.

The Secretary of State shall annually lay before Congress:

First. A statement, in a compendious form, of all such changes and modifications in the commercial systems of other nations, whether by treaties, duties on imports and exports, or other regulations, as shall have been communicated to the Department, including all commercial information contained in the official publications of other governments, which he shall deem sufficiently important.

Second. A synopsis of so much of the information which may have been communicated to him by diplomatic and consular officers during the preceding year as he may deem valuable for public information;

specifying the names of any consuls or commercial agents who may have been remiss in transmitting commercial information.

Third. A full list of all consular officers.

Fourth. A report of any rates or tariffs of fees to be received by diplomatic or consular officers, which may have been prescribed by the President during the year preceding.

Fifth. A statement of such fees as may have been collected, accounted for, and reported by the various diplomatic and consular officers during the preceding year.

Sixth. A statement of the lists of passengers arriving in the United States from foreign places, returned to him quarter-yearly by the collectors of customs.

Seventh. A statement of the names of any consular officers, not citizens of the United States, to whom salaries have been paid during the year preceding, together with the circumstances under which they were appointed.

Act Aug. 16, 1842, c. 181, 5 Stat. 507. Act Aug. 18, 1856, c. 127, §§ 16, 18, 22, 11 Stat. 57, 58, 60. Act Aug. 18, 1856, c. 170, § 2, 11 Stat. 139. Act Feb. 22, 1873, c. 184, § 1, 17 Stat. 473.

The provisions of the first, second, and sixth subdivisions of this section, so far as they require reports from the Secretary of State, may be regarded as practically superseded by the establishment of the Department of Commerce, the transfer to that Department of duties, powers, etc., relating to the subjects of such reports, and the requirements of reports thereon by the Secretary of Commerce, by Act Feb. 14, 1903, c. 552, and subsequent acts, post, under Title XII A, "The Department of Commerce," §§ 859, 867-872.

Provisions applicable to all the Departments, as to the time of making annual reports, and the time of furnishing copies thereof to the printer, are contained in R. S. §§ 195, 196, ante, §§ 278, 279, and Act July 1, 1916, c. 209, § 3, ante, § 279a.

§ 307. (R. S. § 209.) Statement of expenditures from contingent fund.

The annual statement of expenditures from the contingent fund required to be made by the Secretary of State, must include all the contingent expenses of foreign intercourse and of all the missions abroad, except such expenditures as are settled upon the certificate of the President.

Act May 9, 1836, c. 59, § 2, 5 Stat. 25.

Provisions applicable to all the Departments, as to reports of expenditures of contingent funds, are contained in R. S. § 193, ante, § 275, and Act March 3, 1877, c. 102, § 1, ante, § 276.

Notes of Decisions

Expenditures for preserving neutrality.—Miscellaneous expenditures, incurred by order of the State Department for the purpose of preserving the neutrality of the United States, are chargeable to the funds of that Department. (1855) 7 Op. Atty. Gen. 398.

§ 308. (R. S. § 210.) Copies of acts and treaties furnished to printer.

The Secretary of State shall furnish to the Congressional Printer a correct copy of every act and joint resolution, as soon as possible after its approval by the President, or after it has become a law in accordance with the Constitution without such approval; also of every treaty between the United States and any foreign government as soon as possible after it has been duly ratified and has been proclaimed by the President; and also of every postal convention made between the Postmaster-General, by and with the advice and consent of the President, on the part of the United States and foreign countries, as soon as possible after copies of such conventions have been transmitted to him by the Postmaster-General.

Act March 9, 1868, c. 22, § 1, 15 Stat. 40. Act June 8, 1872, c. 335, § 20, 17 Stat. 287.

Provisions similar to those of this section, for furnishing to the printer copies of laws, treaties, etc., were made by R. S. § 3803, in connection with further

sections providing for the printing and distribution thereof, which were superseded by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 56, post, § 7029.

Copies of postal conventions were required to be transmitted by the Postmaster General to the Secretary of State for the purpose of being printed, by R. S. § 399, post, § 588.

Provisions for the printing and distribution of copies of the laws, treaties, etc., are contained in Title XLV, "Public Printing, Advertisements, and Public Documents."

Cited without definite application,
Field v. Clark (1892) 12 Sup. Ct. 495, 496, 143 U. S. 649, 36 L. Ed. 294.

(R. S. § 211. Transferred to Title XII A.)

This section, requiring the Secretary to publish official notifications of commercial information, communicated to him by diplomatic and consular officers, in newspapers, is placed, with subsequent provisions for the preparation, publication, and distribution by the Department of consular and other commercial reports, under Title XII A, "The Department of Commerce," post, § 862.

§ 309. (R. S. § 212.) Passports.

The clerk in the Department of State who may from time to time be assigned to the duty of examining applications for passports is authorized to receive and attest, but without charge to the affiant, all oaths or affidavits required by law or by the rules of the Department of State to be made before granting passports.

Res. Feb. 3, 1870, No. 8, 16 Stat. 368.

Provisions as to the issue of passports, and fees therefor, etc., are contained in R. S. §§ 4075–4078, and subsequent statutes, post, §§ 7623–7628.

The issue of passports to persons who have made declarations of intention to become citizens, and who have resided in the United States three years, was authorized by Act March 2, 1907, c. 2534, § 1, post, § 3958.

Duplicates of any evidence, registration, or other acts required by said Act March 2, 1907, c. 2534, relating to the expatriation of citizens and their protection abroad, are to be filed with the Department of State for record, by section 7 of said act, post, § 3964.

§ 310. (R. S. § 213.) Fees for copies of records.

For making out and authenticating copies of records in the Department of State, a fee of ten cents for each sheet containing one hundred words shall be paid by the person requesting such copies, except where they are requested by an officer of the United States in a matter relating to his office.

Act Sept. 15, 1789, c. 14, § 6, 1 Stat. 69.

TITLE VI

THE DEPARTMENT OF WAR

This title, as enacted in the Revised Statutes, was not divided into chapters. For convenience, the sections thereof remaining in force and subsequent provisions which relate to the Department, its officers, clerks, employés, etc., generally, are placed in chapter A; and provisions applicable only to the Adjutant-General's Office and to the Bureau of Insular Affairs, respectively, are placed in separate chapters, B and C.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

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CHAPTER A

The Department and the Secretary of War

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327. Power to administer oaths.
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334. Report of bids for works.
335. Adjustment and report of claims for damages to private property due to military operations.

§ 311. (R. S. § 214.) Establishment of the Department of War. There shall be at the seat of Government an Executive Department to be known as the Department of War, and a Secretary of War, who shall be the head thereof.

Act Aug. 7, 1789, c. 7, § 1, 1 Stat. 49.

The President is authorized to appoint as members of the Advisory Committee of Aeronautics two members of the War Department, from the office in charge of military aeronautics, by a provision in Act March 31, 1915, c. 83, post, under Title XVII A, "The Council of National Defense, and the Advisory Committee on Aeronautics."

A Council of National Defense, composed of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor, was created by Act Aug. 29, 1916, c. 418, § 2, set forth post, under Title XVII A, "The Council of National Defense, and the Advisory Committee on Aeronautics."

Notes of Decisions

Acts establishing department.—The Department of War was created, with "a principal officer therein, to be called the Secretary for the Department of War," by Act Aug. 7, 1789, c. 7, 1 Stat. 49. In re Hennen (1839) 13 Pet. 230, 259, 10 L. Ed. 138; (1855) 7 Op. Atty. Gen. 453, 461.

Nothing was said in the act creating the department as to the method of appointing the Secretary; the matter was left to the provision of the Constitution, art. 2, § 2, which vests the power of appointment in the President. (1884) 18 Op. Atty. Gen. 58.

Powers and duties of secretary.—The powers and duties of all officers of the United States are limited and defined by the Constitution and laws of Congress, and on the question of the authority of the Secretary of War, the court must look mainly to the acts of Congress. Pierce v. U. S. (1868) 7 Wall. 666, 677, 19 L. Ed. 169.

§ 312. (Act March 5, 1890, c. 26.) Assistant Secretary of War. There shall be in the Department of War an Assistant Secretary of War, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of four thousand five hundred dollars a year, payable monthly, and who shall perform such duties in the Department of War as shall be prescribed by the Secretary or may be required by law. (26 Stat. 17.)

This act was entitled "An Act providing for an Assistant Secretary of War."

A previous provision for the appointment of an Assistant Secretary, made by Act Aug. 5, 1882, c. 389, § 1, 22 Stat. 237, was repealed by Act July 7, 1884, c. 331, § 1, 23 Stat. 179.

The appropriation for the Assistant Secretary for the fiscal year 1917 was $5,000, by Act May 10, 1916, c. 117, § 1, 39 Stat.

In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof is required, unless otherwise directed, to perform the duties of the head of such Department until a successor is appointed, or such absence or sickness shall cease, by R. S. § 177, set forth ante, § 259. In case of the death, resignation, absence, or sickness of the head of any Department, except where the Attorney General is concerned, the President may authorize and direct the head of any other Department or any officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease, by R. S. § 179, also set forth ante, § 261.

See notes at the beginning of this title.

Notes of Decisions

Effect of act upon previous provision for conferring powers on chief clerk.—This act, by providing for an Assistant Secretary, required by R. S. § 177, ante, § 259, to perform the duties of the Secretary during his temporary absence, did not wholly supersede the provision of Act March 4, 1874, post, § 315, for

authorizing the chief clerk during such absence of the Secretary to sign requisitions, etc., and the chief clerk may still be authorized, during the temporary absence of both the Secretary and the Assistant Secretary, to sign requisitions, etc., as provided by said act. (1903) 24 Op. Atty. Gen. 646.

§ 313. (Act Aug. 5, 1882, c. 389, § 1.) Commanding general of Army or chief of bureau may be designated to perform, temporarily, duties of Secretary of War.

The President may authorize and direct the commanding general of the Army or the chief of any military bureau of the War Department to perform the duties of the Secretary of War under the provisions of section one hundred and seventy-nine of the Revised Statutes, and section twelve hundred and twenty-two of the Revised Statutes shall not be held or taken to apply to the officer so designated by reason of his temporarily performing such duties. (22 Stat. 238.)

This was a proviso annexed to an appropriation for the Department in the legislative, executive, and judicial appropriation act for the fiscal year 1883, cited above.

R. S. § 179, ante, § 261, referred to in this section, empowered the President, in case of the death, resignation, absence, or sickness of the head of any Department, except the Attorney-General, to authorize the head of any other Department, or any other officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform temporarily the duties of the vacant office.

R. S. § 1222, post, § 1993, also referred to in this section, provided that no officer of the Army on the active list should hold any civil office.

§ 314. (R. S. § 215, as amended, Act Feb. 27, 1877, c. 69, § 1.) Subordinate officers.

There shall be in the Department of War:

One chief clerk of the Department, at a salary of two thousand five hundred dollars a year.

One disbursing clerk.

* * * * * * * * *

In the office of the Adjutant-General:

One chief clerk, at a salary of two thousand dollars a year.

In the office of the Quartermaster-General:

One chief clerk, at a salary of two thousand dollars a year.

* * * * * * * * *

In the office of the Paymaster-General:

One chief clerk, at a salary of two thousand dollars a year.

* * * * * * * * *

In the office of the Commissary-General:

One chief clerk, at a salary of two thousand dollars a year.

* * * * * * * * *

In the office of the Surgeon-General:

One chief clerk, at a salary of two thousand dollars a year.

In the office of the Chief of Engineers:

One chief clerk, at a salary of two thousand dollars a year.

In the office of the Chief of Ordnance:

One chief clerk, at a salary of two thousand dollars a year.

In the office of Military Justice:

One chief clerk, at a salary of two thousand dollars a year.

There shall be in the said Department an inferior officer, to be appointed by the said principal officer to be employed therein as he shall deem proper, and to be called the chief clerk in the Department of War, and who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy, have the charge and custody of all records, books, and papers, appertaining to the said Department.

Act March 3, 1853, c. 97, § 3, 10 Stat. 211. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 241.

This section enumerated the subordinate officers in the Department, and

their salaries, at the time of the compilation of the Revised Statutes, as authorized by the then existing statutes, cited above. But the officers, clerks, and others actually appointed or employed, and their respective salaries and other compensation, depend on the specific provisions made in the annual appropriation acts, each providing for the fiscal year next following; the employment or payment of others being forbidden by Act Aug. 5, 1882, c. 389, § 4, ante, § 249. Subsequent appropriation acts provided for officers and clerks and for salaries different from those fixed by the above section. The appropriations for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

The section as originally enacted in the Revised Statutes was amended by Act Feb. 27, 1877, c. 69, § 1, cited above, by adding, at the end of the section, the last paragraph thereof as set forth here, relating to the chief clerk in the Department and his duties in case of vacancy in the office of head of the Department. Previous to said amendment authority had been conferred on the chief clerk, in the absence of the Secretary, to sign papers requiring the Secretary's signature, by Act March 4, 1874, c. 44, post, § 315. These provisions are practically superseded, to a great extent, by the subsequent provisions for such a vacancy of Act Aug. 5, 1882, c. 389, § 1, ante, § 313, and for the appointment of an Assistant Secretary of War. Act March 5, 1890, c. 26, ante, § 312. In addition to the above provisions, the legislative, executive, and judicial appropriation act for the fiscal year 1917 contains a provision for an assistant and chief clerk, at $4,000, "who shall sign such official papers and documents as the Secretary may direct." See Act May 10, 1916, c. 117, § 1, post, § 315a.

The Record and Pension Office of the War Department, to have charge of the military and hospital records of the volunteer armies and the pension and other business of the War Department connected therewith, was established by Act May 9, 1892, c. 62, post, § 336. Thereafter said office and the Adjutant-General's Office, as bureaus of the War Department, were constituted a consolidated Bureau, known as the Adjutant-General's Office. See notes to said section 336, post.

A Bureau of Insular Affairs was established in the Department by Act July 1, 1902, c. 1369, § 87, post, § 345. See notes to said section.

A provision of this section for "one superintendent of the War Department Building," and other provisions for superintendents of buildings occupied by the Department or particular officers, were superseded by the provision for a superintendent of the State, War, and Navy Department Building, contained in Act March 3, 1883, c. 128, § 1, post, § 3328, and are omitted. The recent executive, legislative, and judicial appropriation acts contain, in addition to the appropriation for the superintendent of the State, War, and Navy building, an appropriation for a "superintendent of buildings outside of State, War, and Navy Department Building, in addition to compensation as chief of division, $500." The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

The superintendent of the State, War, and Navy building is also to act as superintendent of certain annex buildings, by a provision of Act May 22, 1908, c. 186, § 1, post, § 3329.

A provision of the army appropriation act of June 23, 1879, c. 35, § 3, 21 Stat. 34, as to the pay, etc., of the Examiner of State Claims in the Office of the Secretary of War, was repealed by Act June 30, 1882, c. 254, § 1, 22 Stat. 118.

A provision accompanying appropriations for compensation of officers, clerks, and other employés in the Department, in Act June 20, 1874, c. 328, § 1, 18 Stat. 101, making it unlawful to allow or pay to any of the persons designated in the act any additional compensation, or to employ in the Department any persons other than those therein authorized, except in the Signal Office and the Engineer Corps, and except such commissioned officers as the Secretary might assign to special duties, may be regarded as superseded by subsequent appropriations varying as to the numbers and salaries of officers, clerks, etc., and by the provisions relating to the same subject contained in Act Aug. 5, 1882, c. 389, § 4, ante, § 249.

In addition to the specific appropriations in the annual legislative, executive, and judicial appropriation acts for compensation of the officers, clerks, and other employés enumerated therein, said acts make special provisions each year for the employment of services of skilled draftsmen and other services which the Secretary may deem necessary, in the Signal Office, in the Office of the Chief of Ordnance, and in the Office of the Chief of Engineers, to carry into effect appropriations for purposes specified, and to be paid from such appropriations, the entire expenditures by each of said offices for such purpose for the fiscal year not to exceed a specified sum; the terms of such provisions and the amounts limited varying from year to year. The provisions for the fiscal year 1917, including, in the Signal Office, the services of one radio engineer and radio assistants, and in the office of the Chief of Engineers, civil engineers, were made by Act May 10, 1916, c. 117, § 1, 39 Stat.

A provision of Act July 25, 1912, c. 253, 37 Stat. 233, which authorized

the Chief of Engineers in case of emergency to employ such additional office force as he may find necessary for preparation for and consideration of river and harbor estimates and bills, was repealed by Act March 4, 1913, c. 142, § 1, 37 Stat. 765.

A General Staff Corps of the Army, to be composed of officers detailed from the Army at large, was established by Act Feb. 14, 1903, c. 553, set forth post, under Title XIV, "The Army," c. 1. Subsequent provisions forbidding the detail to or assignment to duty with any office or bureau of the War Department of clerks or other employés at headquarters of divisions, departments, or the office of the Chief of Staff, or such detail from the Department to the office of the General Staff, contained in Act June 22, 1906, c. 3514, § 1, and Act Aug. 29, 1916, c. 418, § 1, are also set forth post, §§ 316, 317.

Provisions relating to a Division of Militia Affairs, in the office of the Chief of Staff, in the War Department, are set forth or referred to post, under Title XVI, "The Militia."

Provisions applicable to all the Departments, relating to the employment of clerks and others, were made R. S. § 169, and Act Aug. 5, 1882, c. 389, § 4, ante, §§ 248, 249.

Provisions applicable to all the Departments, relating to the duties of chief clerks and disbursing clerks, were made by R. S. §§ 173, 174, 176, ante, §§ 255, 256, 258, and other statutes collected under those sections.

See notes at the beginning of this title.

Notes of Decisions

Authority to establish bureau to supervise state militia.—The nature and extent of the relations sustained by the national government to the State militia, before they are called into the actual service of the United States, are not such as to render proper the establishment of a separate bureau in the War Department to supervise and control them; and the President has no power to establish such a bureau without authority of an act of Congress therefor. (1861) 10 Op. Atty. Gen. 11.

Status of employés.—An employé in the Surgeon General's office in Washington is an employé of an Executive Department. Schaeffer v. U. S. (1875) 11 Ct. Cl. 730.

§ 315. (Act March 4, 1874, c. 44.) Chief clerk may be authorized to sign papers instead of Secretary of War.

When, from illness or other cause, the Secretary of War is temporarily absent from the War Department, he may authorize the chief clerk of the Department to sign requisitions upon the Treasury Department, and other papers requiring the signature of said Secretary; the same, when signed by the chief clerk during such temporary absence, to be of the same force and effect as if signed by the Secretary of War himself. (18 Stat. 19.)

This act was entitled "An act authorizing the chief clerk of the War Department to sign requisitions on the Treasury during the temporary absence of the Secretary of War." It may be regarded as superseded, to some extent, by Act March 5, 1890, c. 26, ante, § 312, providing for an Assistant Secretary of War, who, by R. S. § 177, ante, § 259, was authorized, in the absence of the head of the Department, to perform the duties of the office. See, also, notes to § 314, ante, and § 315a, post.

Requisitions on the Treasury for the use of the War Department were provided for by R. S. § 3673, post, § 6746.

Notes of Decisions

Effect of creation of office of Assistant Secretary.—This act was not wholly superseded by Act March 5, 1890, ante, § 312, which provided for an Assistant Secretary of War, authorized by law to perform the duties of the Secretary during his temporary absence; and during the temporary absence from the Department of both the Secretary and the assistant, the Secretary is empowered to authorize the chief clerk to sign requisitions, etc., this act being still in force, at least within the limited scope stated. 24 Op. Atty. Gen. 646.

§ 315a. (Act May 10, 1916, c. 117, § 1.) Chief clerk; designation to sign official papers, etc.

Office of the Secretary: * * Assistant and chief clerk, who shall sign such official papers and documents as the Secretary may direct, $4,000. * * (39 Stat.)

This was a provision in the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above.

See, also, notes to §§ 314, 315, ante.

§ 316. (Act June 22, 1906, c. 3514, § 1.) Clerks and employés in office of General Staff; detail to or from War Department forbidden.

It shall not hereafter be lawful to detail clerks or other civilian employees authorized for the Office of the General Staff for duty, temporary or otherwise, in any office or bureau of the War Department at Washington, District of Columbia, or to detail clerks or other employees from the War Department for service in the Office of the General Staff. (34 Stat. 418.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1907, cited above. Provisions in the same language, except the word "hereafter," were contained in the similar appropriation acts for the two fiscal years immediately preceding.

The General Staff Corps was established by Act Feb. 14, 1903, c. 553, post, §§ 1759–1763.

A similar provision forbidding the assignment to duty with any bureau in the War Department of clerks or other employés at the office of the Chief of Staff, of Act Aug. 29, 1916, c. 418, § 1, is set forth post, § 317.

§ 317. (Act Aug. 29, 1916, c. 418, § 1.) Clerks and employés at headquarters of tactical divisions, military departments, etc., and office of chief of staff; assignment to duty in War Department forbidden.

No clerk, messenger, or laborer at headquarters of tactical divisions, military departments, brigades, service schools, and office of the Chief of Staff shall be assigned to duty with any bureau in the War Department. (39 Stat.)

These are provisions accompanying appropriations for specified numbers of clerks, messengers, and laborers, in the Army appropriation act for the fiscal year 1917, cited above. Provisions similar to these, to a greater or less extent, accompanied the appropriations for the same purposes in previous years.

A similar provision relating to the office of the General Staff, contained in Act June 22, 1906, c. 3514, § 1, ante, § 316.

§ 318. (R. S. § 216.) Management of military affairs.

The Secretary of War shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to military commissions, the military forces, the warlike stores of the United States, or to other matters respecting military affairs; and he shall conduct the business of the Department in such manner as the President shall direct.

Act Aug. 7, 1789, c. 7, § 1, 1 Stat. 49.

Provisions applicable to the War Department with other Departments, requiring commissions of all officers under direction and control of the Secretary to be made out and recorded in the Department, and the Department seal affixed thereto, were made by Act March 28, 1896, c. 73, § 1, post, § 3250.

Provisions for inspection of disbursements by officers of the Army were made by Act April 20, 1874, c. 117, post, §§ 330, 331.

General provisions for the submission by the heads of Departments to Congress of estimates of expenditures and appropriations were made by R. S. §§ 3660–3666, 3669, and other statutes, post, §§ 6671–6705, 6732.

The Secretary of War was authorized to lease property under his control, not required for public use, by a provision of Act July 28, 1892, c. 316, post, § 6944.

The powers and duties of the Secretary of War in regard to the acquisition of sites for fortifications and coast defenses were prescribed by provisions of Act Aug. 18, 1890, c. 797, § 1, post, § 6911.

A provision requiring the Secretary to cause an inspection of the National Home for Disabled Volunteer Soldiers to be made, yearly, and a report thereon, was made by Act Aug. 18, 1894, c. 301, § 1, post, § 9280.

Notes of Decisions

Previous provisions.—Before the passage of Act May 8, 1792, c. 37, 1 Stat. 279, section 5 of which provided that contracts and purchases for supplying the Army, etc., should be made by or under the direction of the Treasury Department, it would seem that the Secretary of War had a general supervision of such purchases and contracts, under the direction of the President, as properly falling within the scope of the duties devolving upon him by section 1 of

Act Aug. 7, 1789, c. 8, 1 Stat. 49, creating the Department of War. (1870) 13 Op. Atty. Gen. 314, 318.

Secretary representative of President.—The orders of the Secretary, in the business of the department, are presumed to have been issued in the manner directed by the President, except when subject to special regulations of statute law, or where duties of a personal or judicial nature are intrusted to the President. In re Billings (1888) 23 Ct. Cl. 166, 176; Truitt v. U. S. (1903) 38 Ct. Cl. 398; (1855) 7 Op. Atty. Gen. 453; (1862) 10 Op. Atty. Gen. 171, 182. And see Wilcox v. Jackson (1839) 13 Pet. 498, 512, 10 L. Ed. 264.

The Secretary of War is the regularly constituted organ of the President for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority. U. S. v. Eliason (1842) 16 Pet. 291, 301, 10 L. Ed. 968; Maxwell v. U. S. (1914) 49 Ct. Cl. 262; (1881) 17 Op. Atty. Gen. 13, 19.

The action of the President in approving the proceedings and confirming the sentence of a court-martial, as required by the Articles of War, although judicial in its nature, need not be attested by his sign manual; an order authenticated by the Secretary of War is sufficient. U. S. v. Page (1891) 11 Sup. Ct. 219, 137 U. S. 673, 34 L. Ed. 828; U. S. v. Fletcher (1893) 13 Sup. Ct. 552, 148 U. S. 84, 37 L. Ed. 378 (distinguishing Runkle v. U. S. [1887] 7 Sup. Ct. 1141, 122 U. S. 543, 30 L. Ed. 1167); Runkle v. U. S. (1884) 19 Ct. Cl. 396.

The Secretary of War, under general authority from the President, may exercise a discretionary power given to the President to allow additional rations to officers having a separate command. Parker v. U. S. (1828) 1 Pet. 293, 296, 7 L. Ed. 150.

A reservation of public lands, made at the request of the Secretary, for military purposes, must be considered as made by the President. Wilcox v. Jackson ex dem. McConnel (1839) 13 Pet. 498, 513, 10 L. Ed. 264.

An order issued, "by direction of the Secretary of War," by the Major General of the Army, assigning an officer to staff duty, could not be regarded as the order of the President, under Act April 22, 1898, c. 187, § 10, 30 Stat. 362, which provided that the President might assign officers to staff duty "in his discretion." Truitt v. U. S. (1903) 38 Ct. Cl. 398.

The expenditure of money appropriated by congress to purchase a site for and construct defenses for a city is directly embraced within the President's executive functions, and such expenditure can only be made by the Secretary of War as the agent of the President. The President's deliberate and recorded disapproval of a particular purchase at a certain price effectually arrested and abrogated any proceedings for such purchase, even though they had approached a complete contract. (1862) 10 Op. Atty. Gen. 171, 182.

The action of the President, in matters relating to the Army, which require his approval and direction, may in general be signified through and authenticated by the head of the Department of War; and where the latter acts in such matters, he, in contemplation of law, acts under the direction of the President, and is to be regarded as the mere organ of the executive will. (1877) 15 Op. Atty. Gen. 290.

An order issued by the Secretary by direction of the President need not be authenticated by the President's sign manual, where his signature is not required by statute or army regulation; especially where the order, instead of resting upon the implication of authority from their official relations, expressly recites that it is issued by direction of the President. (1881) 17 Op. Atty. Gen. 13, 19.

Military commissions.—There being no statutory provision requiring a specified form of military commission, a letter of appointment from the Secretary of War may constitute such a commission and be conclusive evidence of appointment by the President. O'Shea v. U. S. (1893) 28 Ct. Cl. 392, 400.

Rules for administration of military establishment.—Rules and orders publicly promulgated through the Secretary of War, as the regularly constituted organ of the President for the administration of the military establishment of the nation, must be received as the acts of the executive, and as such be binding upon all within the sphere of his legal and constitutional authority. Such regulations cannot be questioned or denied because they may be thought unwise or mistaken. U. S. v. Eliason (1842) 16 Pet. 291, 301, 10 L. Ed. 968.

The power of the Secretary of War, under the President, to establish rules for the government of the army is necessarily limited, and does not extend to the repeal or contradiction of existing statutes, nor to the making of provisions of a legislative nature. (1906) 26 Op. Atty. Gen. 6.

Employment of agents, etc., and their compensation.—The Secretary of War, in the execution of his public duties, cannot, in view of the provisions of Act Aug. 23, 1842 (incorporated in R. S. § 1765, post, § 3234), against extra compensation to public officers, employ and compensate collectors, etc., in the revenue service, for disbursing moneys appropriated for topographical purposes. (1845) 4 Op. Atty. Gen. 401.

But he was vested with a discretion which authorized him to allow to the subagent for the Indians west of the Rocky Mountains, for such expendi-

tures, not previously authorized, as he might have previously authorized as proper. (1846) 4 Op. Atty. Gen. 477.

It was within the discretion of the Secretary of War to fix 30 days as the limit of the temporary duty to which a civilian clerk was assigned. Maxwell v. United States (1914) 49 Ct. Cl. 262.

Obligations and expenditures.—The Secretary of War has no general or unlimited power to bind the government by indorsing or accepting negotiable paper. Peirce v. U. S. (1865) 1 Ct. Cl. 270.

The War Department had authority to send a surgeon to the International Medical Congress, at London, at the expense of the government. It was a military service which the surgeon could be required to render. In re Billings (1888) 23 Ct. Cl. 166. But see Preston v. U. S. (1901) 37 Ct. Cl. 39.

Personal military services of Secretary, and expenses thereof.—The Secretary of War is not required to perform duties in the field. He does not compose any part of the Army, and has no service to perform that may not be done at the seat of government. If he leaves the seat of government for the seat of war, by order of the President, for military purposes, he may be paid the expenses of the tour; otherwise not. (1821) 1 Op. Atty. Gen. 457.

It is immaterial who proposed such service; if the President adopted the measure the Secretary should be paid the expenses. (1821) 1 Op. Atty. Gen. 493.

§ 319. (R. S. § 217.) Custody of the departmental records and property.

The Secretary of War shall have the custody and charge of all the books, records, papers, furniture, fixtures, and other property appertaining to the Department.

Act Aug. 7, 1789, c. 7, §§ 2, 4, 1 Stat. 50.

The transfer of military rolls and records of the Civil War and prior wars from other Departments to the War Department was provided for by Act July 27, 1892, c. 267, Act Aug. 18, 1894, c. 301, § 1, Res. April 28, 1904, No. 35, and Act March 2, 1913, c. 94, post, §§ 337, 339–341.

Notes of Decisions

Funds involved in controversy.—Where funds in the hands of the Secretary of War are involved in a controversy between parties, pending under different forms of procedure in different jurisdictions, they should be retained by him until a final adjudication of the whole matter by the tribunal to which the parties may last resort. (1896) 21 Op. Atty. Gen. 447.

Military reservations and property thereon.—The Secretary's long-continued exercise of power to grant licenses to use government reservations without legislative objection implies the tacit assent of Congress to this custom, but it cannot be maintained upon any ground except that of benefit to the public interests. (1890) 19 Op. Atty. Gen. 628; (1898) 22 Op. Atty. Gen. 240.

This section and R. S. § 161, ante, § 235, do not authorize the granting of licenses for the occupation of parts of military reservations for the erection of hotels, church edifices, etc. (1897) 21 Op. Atty. Gen. 537.

The Secretary of War has no power to accept, for the government a donation of property, as a church edifice, for use in perpetuity of Roman Catholics. Id.

§ 320. (R. S. § 218.) Collecting flags, etc.

The Secretary of War shall from time to time cause to be collected and transmitted to him, at the seat of Government, all such flags, standards, and colors as are taken by the Army from the enemies of the United States.

Act April 18, 1814, c. 78, § 1, 3 Stat. 133.

A similar requirement of the Secretary of the Navy, as to flags, etc., taken by the Navy, was made by R. S. § 428, post, § 644.

Provisions for the disposition of certain Union and Confederate battle flags, in the custody of the Department, were made by Res. Feb. 28, 1905, No. 22, 33 Stat. 1284, and Res. June 29, 1906, No. 43, 34 Stat. 837, but are omitted as temporary merely, and executed.

§ 321. (R. S. § 219.) Purchase and transportation of supplies.

The Secretary of War shall from time to time define and prescribe the kinds as well as the amount of supplies to be purchased by the Subsistence and Quartermaster Departments of the Army, and the duties and powers thereof respecting such purchases; and shall prescribe general regulations for the transportation of the articles of supply from the places of purchase to the several armies, garrisons, posts, and recruiting places, for the safe-keeping of such

articles, and for the distribution of an adequate and timely supply of the same to the regimental quartermasters, and to such other officers as may by virtue of such regulations be intrusted with the same; and shall fix and make reasonable allowances for the store-rent and storage necessary for the safe-keeping of all military stores and supplies.

Act March 3, 1813, c. 48, § 5, 2 Stat. 817.

Contracts for supplies or services for the military service were required to be made by or under the direction of the chief officers of the War Department, and accounts were to be rendered for settlement to the accountant of the Department, by R. S. § 3714, post, § 6842. See note to that section.

The Secretary of War was to prescribe regulations for bids for contracts under the War Department, by provisions of Act April 10, 1878, c. 58, amended by Act March 3, 1883, c. 120, post, § 6843.

Provisions for inspection of disbursements by officers of the Army were made by Act April 20, 1874, c. 117, post, §§ 330, 331.

Notes of Decisions

Performance of contracts.—The Secretary of War, subject to the authority of the President, must see that contracts which belong to his office are properly and faithfully executed, whether he made the contracts himself or conferred authority on others to make them, and where the contracts are being fraudulently executed, he must protect the government. U. S. v. Adams (1868) 7 Wall. 463, 477, 19 L. Ed. 249.

§ 322. (R. S. § 220.) Transportation of troops, etc.

The transportation of troops, munitions of war, equipments, military property, and stores, throughout the United States, shall be under the immediate control and supervision of the Secretary of War and such agents as he may appoint.

Act Jan. 31, 1862, c. 15, § 4, 12 Stat. 334.

(R. S. §§ 221–223. Superseded.)

These sections required the Secretary of War to provide for meteorological observations, for giving notice of storms, for signal stations and telegraph lines connecting them, etc. They were superseded by the transfer of the Weather Service to the Department of Agriculture by Act Oct. 1, 1890, c. 1266, and subsequent statutes, collected under Title XII, "The Department of Agriculture," c. B.

Provisions relating to the Signal Corps of the Army, as part of the military establishment, are collected under Title XIV, "The Army," c. 1.

§ 323. (R. S. § 224.) Loss of certificate of discharge.

Whenever satisfactory proof is furnished to the War Department that any non-commissioned officer or private soldier who served in the Army of the United States in the late war against the rebellion has lost his certificate of discharge, or the same has been destroyed without his privity or procurement, the Secretary of War shall be authorized to furnish, on request, to such non-commissioned officer or private a duplicate of such certificate of discharge, to be indelibly marked, so that it may be known as a duplicate; but such certificate shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty, or other allowance, or as evidence in any other case.

Act March 3, 1873, c. 248, § 1, 17 Stat. 582.

Further provisions for the issue of a certificate in lieu of a lost certificate, to any officer or enlisted man honorably discharged from the military service, as well as to those who served in the War of the Rebellion, as provided by this section, were made by Act July 1, 1902, c. 1353, post, § 324.

Similar provisions for furnishing duplicates of lost or destroyed certificates of discharge to officers or men who served in the Navy or the Marine Corps in the War of 1812, the Mexican War, or the War of the Rebellion, were made by Act Feb. 7, 1890, c. 8, post, § 620.

Provisions for the issue of certificates of discharge or orders of acceptance of resignation in the true names of persons who enlisted or served under assumed names in the Army or Navy during the war of the Rebellion, or during any war between the United States and any other nation or people, were made by Act April 14, 1890, c. 80, and Act Aug. 22, 1912, c. 329, post, §§ 325, 326.

Provisions for the return to officers and enlisted men of their evidence of

honorable discharge, filed to secure the settlement of their accounts, were made by R. S. § 282, post, § 452.

§ 324. (Act July 1, 1902, c. 1353.) Certificate of discharge in lieu of lost or destroyed certificate.

Whenever satisfactory proof shall be furnished to the War Department that any officer or enlisted man who has been or shall hereafter be honorably discharged from the military service of the United States has lost his certificate of discharge, or the same has been destroyed without his privity or procurement, the Secretary of War shall be authorized to furnish to such officer or enlisted man, or to the widow of such officer or enlisted man, a certificate of such discharge, to be indelibly marked, so that it may be known as a certificate in lieu of a lost or destroyed discharge: Provided, That such certificate shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty, or other allowance, or as evidence in any other case. (32 Stat. 629.)

This act was entitled "An act to authorize the Secretary of War to furnish certificates in lieu of lost or destroyed discharges."

§ 325. (Act April 14, 1890, c. 80, as amended, Act June 25, 1910, c. 393.) Certificates of discharge and orders of acceptance of resignation in true names of persons who enlisted or served under assumed names in Army or Navy during war of the Rebellion, war with Spain, or Philippine insurrection.

The Secretary of War and the Secretary of the Navy be, and they are hereby, authorized and required to issue certificates of discharge or orders of acceptance of resignation, upon application and proof of identity, in the true name of such persons as enlisted or served under assumed names, while minors or otherwise, in the army and navy during the war of the rebellion, the war with Spain, or the Philippine insurrection, and were honorably discharged therefrom. Applications for said certificates of discharge or amended orders of acceptance of resignation may be made by, or on behalf of, persons entitled to them; but no such certificate or order shall be issued where a name was assumed to cover a crime or to avoid its consequence. (26 Stat. 55. 36 Stat. 824.)

This act, as originally enacted, was entitled "An act for the relief of soldiers and sailors who enlisted or served under assumed names, while minors or otherwise, in the Army or Navy during the war of the Rebellion," and its provisions related only to persons who enlisted or served during that war. It was amended by adding to said title, at the end thereof, the words "the war with Spain, or the Philippine insurrection," and also by inserting in the text of the act, after the words "war of the Rebellion," the same words, "the war with Spain, or the Philippine insurrection," making the act read as set forth here, by Act June 25, 1910, c. 393, cited above.

Similar provisions for relief of soldiers and sailors who enlisted or served under assumed names during any war with any foreign nation or people, were made by Act Aug. 22, 1912, c. 329, post, § 326.

Provisions for the issue of duplicates of certificates of discharge lost or destroyed were made by R. S. § 224, ante, § 323.

§ 326. (Act Aug. 22, 1912, c. 329.) Certificates of discharge and orders of acceptance of resignation in true names of persons who enlisted or served under assumed names in Army or Navy during war between United States and any other nation or people.

That the Secretary of War and the Secretary of the Navy be, and they are hereby, authorized and required to issue certificates of discharge or orders of acceptance of resignation, upon application and proof of identity, in the true name of such persons as enlisted or served under assumed names, while minors or otherwise, in the Army or Navy during any war between the United States and any other nation or people and were honorably discharged there-

from. Applications for said certificates of discharge or amended orders of resignation may be made by or on behalf of persons entitled to them, but no such certificate or order shall be issued where a name was assumed to cover a crime or to avoid its consequence. (37 Stat. 324.)

This act was entitled "An act for the relief of soldiers and sailors who enlisted or served under assumed names, while minors or otherwise, in the Army or Navy of the United States during any war with any foreign nation or people."

Similar provisions for relief of soldiers and sailors who enlisted or served under assumed names during the war of the Rebellion were made by Act April 14, 1890, c. 80, ante, § 325.

§ 327. (R. S. § 225, as amended, Act Feb. 27, 1877, c. 69, § 1.) Power to administer oaths.

The Secretary of War is authorized to detail one or more of the employés of the War Department for the purpose of administering the oaths required by law in the settlement of officers' accounts for clothing, camp and garrison equipage, quartermaster's stores, and ordnance, which oaths shall be administered without expense to the parties taking them. In settling the accounts of the commanding officer of a company for clothing and other military supplies, the affidavit of any such officer may be received to show the loss of vouchers or company books, or any matter or circumstance tending to prove that any apparent deficiency was occasioned by unavoidable accident or lost in actual service, without any fault on his part, or that the whole or any part of such clothing and supplies had been properly and legally used and appropriated; and such affidavit may be considered as evidence to establish the facts set forth, with or without other evidence, as may seem to the Secretary of War just and proper under the circumstances of the case.

Act March 3, 1865, c. 79, § 25, 13 Stat. 491. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 241.

The amendment of this section by Act Feb. 27, 1877, c. 69, § 1, cited above, consisted in the addition of all the provisions as to affidavits of commanding officers of companies, which follow the words "parties taking them," at the end of the first clause of the section.

Provisions applicable to all the Departments, as to administration of oaths by officers and clerks, were made by R. S. § 183, and the statutes referred to under that section, ante, § 265.

§ 328. (R. S. § 226.) Surplus charts may be sold.

Any surplus charts of the northwestern lakes may be sold to navigators upon such terms as the Secretary of War may prescribe.

Act March 3, 1869, c. 122, § 1, 15 Stat. 301.

§ 329. (R. S. § 227.) Surplus maps and publications of Signal-Office.

The Chief Signal-Officer may cause to be sold any surplus maps or publications of the Signal-Office, the money received therefor to be applied toward defraying the expenses of the signal-service; and an account of the same shall be rendered in each annual report of the Chief of the Signal-Service.

Act March 3, 1873, c. 227, 17 Stat. 527.

This section was practically superseded by the transfer of the Weather Service to the Department of Agriculture, by Act Oct. 1, 1890, c. 1266, post, §§ 840–842; the maps, etc., mentioned being those issued by the Weather Bureau in that Department.

The sale by the Secretary of Agriculture of any surplus maps or publications of the Weather Bureau, the money received to be deposited in the Treasury of the United States, notwithstanding this section, was authorized by a provision of Act March 4, 1907, c. 2907, post, § 848.

§ 330. (Act April 20, 1874, c. 117, § 1.) Inquiries as to disbursements by disbursing officers of Army.

It shall be the duty of the Secretary of War to cause frequent inquiries to be made as to the necessity, economy, and propriety

of all disbursements made by disbursing officers of the Army, and as to their strict conformity to the law appropriating the money; also to ascertain whether the disbursing officers of the Army comply with the law in keeping their accounts and making their deposits; such inquiries to be made by officers of the inspection department of the Army, or others detailed for that purpose: Provided, That no officer so detailed shall be in any way connected with the department or corps making the disbursement. (18 Stat. 33.)

This section and the section next following were an act entitled "An act to provide for the inspection of the disbursements of appropriations made by officers of the Army."

§ 331. (Act April 20, 1874, c. 117, § 2.) Reports of inspections of disbursements.

The reports of such inspections shall be made out and forwarded to Congress with the annual report of the Secretary of War. (18 Stat. 33.)

See note to preceding section.

Provisions applicable to all the Departments as to reports of expenditures by disbursing officers are contained in R. S. § 193, and Act March 3, 1877, c. 102, § 1, ante, §§ 275, 276.

§ 332. (R. S. § 228.) Report of unexpended balances to Congress.

The Secretary of War shall make an annual report to Congress containing a statement of the appropriations of the preceding fiscal year for the Department of War, showing the amount appropriated under each specific head of appropriation, the amount expended under each head, and the balance which, on the thirtieth day of June preceding such report, remained unexpended. Such reports shall be accompanied by estimates of the probable demands which may remain on each appropriation.

Act May 1, 1820, c. 52, § 2, 3 Stat. 567.

Reports of inspections of disbursements by disbursing officers of the Army were required to be made with the annual report of the Secretary of War, by Act April 20, 1874, c. 117, § 2, ante, § 331.

Provisions applicable to all the Departments, relating to the time of making annual reports, and the time of furnishing copies thereof to the printer, are contained in R. S. §§ 195, 196, ante, §§ 278, 279.

General provisions relating to the submission by the heads of Departments to Congress of estimates of expenditures and appropriations are contained in Title XLI, "Appropriations."

§ 333. (R. S. § 229, as amended, Act March 2, 1895, c. 177, § 1.) Annual statement of expenditures for contingent expenses.

The Secretary of War shall lay before Congress, at the commencement of each regular session, a statement of the expenditure of the moneys appropriated for the contingent expenses of the military establishment.

Act March 3, 1809, c. 28, § 5, 2 Stat. 536. Act March 2, 1895, c. 177, § 1, 28 Stat. 787.

This section, as enacted in the Revised Statutes, required the Secretary to lay before Congress, at the commencement of each regular session, "a statement of all contracts for supplies or services which have been made by him or under his direction during the year preceding." The Army appropriation act of July 5, 1884, c. 217, § 1, 23 Stat. 109, also required the Quartermaster-General and the Commissary-General of Subsistence to report all purchases of supplies made by their Departments to the Secretary of War, for transmission to Congress annually. These requirements were expressly repealed by the legislative, executive, and judicial appropriation act of 1895, cited above.

The powers and duties of the Secretary as to the purchase and transportation of supplies were prescribed by R. S. § 219, ante, § 321.

Provisions applicable to all the Departments, as to reports of expenditure of contingent funds, were made by R. S. § 193, and Act March 3, 1877, c. 102, § 1, ante, §§ 275, 276.

The Secretary was directed to submit to Congress annually a report of expenditures made by him in the execution of the requirements as to issue of arms, etc., to the militia, of Act Jan. 21, 1903, c. 196, § 13, as amended by

Act May 27, 1908, c. 204, § 8, by a proviso annexed to that section as so amended, set forth post, § 3059.

Notes of Decisions

Purposes of expenditures.—The contingent fund of the War Department cannot be applied to meet the expense attending the employment of a detective to discover and furnish evidence necessary to convict the persons concerned in setting fire to certain quartermaster's buildings, erected on ground, which was rented to the United States, but jurisdiction over which had never been ceded by the state. (1879) 16 Op. Atty. Gen. 412.

§ 334. (R. S. § 230.) Report of bids for works.

Whenever the Secretary of War invites proposals for any works, or for any materials or labor for any work, he shall report to Congress, at its next session, all bids therefor, with the names of the bidders.

Act June 23, 1866, c. 138, § 3, 14 Stat. 73.

The duties of the Secretary of War in regard to contracts for works, or for material or labor therefor, or material for public improvements, were prescribed by R. S. § 3717, and Act March 3, 1875, c. 133, § 2, post, §§ 6858, 6859.

(R. S. § 231. Transferred to Title LXIII.)

This section required the Secretary to cause to be prepared and submitted to Congress, in connection with reports of examinations and surveys of rivers and harbors, statements showing the effect of the improvements contemplated. It is placed, with other provisions relating to the subject, under Title LXIII, "Rivers and Harbors and Canals," Chapter B, post, § 9871.

Estimates by the Secretary of War for river and harbor improvements were required by provisions of Act June 4, 1897, c. 2, § 1, post, § 6699.

Provisions authorizing the Secretary of War to sell land or other property acquired for river and harbor improvements when no longer needed or when no longer serviceable were made by Act June 13, 1902, c. 1079, § 5, post, § 9882.

Provisions authorizing the Secretary of War to complete works for river and harbor improvements by contract or otherwise were made by Act March 2, 1907, c. 2509, § 1, post, § 9885.

(R. S. § 232. Repealed.)

This section required the Secretary to lay before Congress, each year, an abstract of the returns of the adjutants-general of the several states, of the militia thereof. It was repealed by the act to promote the efficiency of the militia, and for other purposes, which contained more comprehensive provisions of the same nature. Act Jan. 21, 1903, c. 196, § 12, post, § 3053.

§ 335. (Act Aug. 24, 1912, c. 391, § 1.) Adjustment and report of claims for damages to private property due to military operations.

Hereafter the Secretary of War is authorized to consider, ascertain, adjust, and determine the amounts due on all claims for damages to and loss of private property when the amount of the claim does not exceed the sum of one thousand dollars, occasioned by heavy gun fire and target practice of troops, and for damages to vessels, wharves, and other private property, found to be due to maneuvers or other military operations for which the Government is responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. (37 Stat. 586.)

This was a proviso annexed to an appropriation for settlement of claims for damages to private property, in the Army appropriation act for the fiscal year 1913, cited above.

A similar provision for adjustment and report by the Secretary of the Navy of claims not exceeding $500 for damages by collision for which vessels of the Navy shall be found responsible, was made by Act June 24, 1910, c. 378, post, § 652.

CHAPTER B

The Adjutant-General's Office

The Adjutant-General's Office and the Record and Pension Office, which previously had been separate bureaus of the War Department, were constituted a consolidated bureau, to be known as the Military Secretary's Office of the War Department, and the officers of the Adjutant-General's Department, except the Adjutant-General, and the officers of the Record and Pension Office were constituted one department of the Army, to be known as the Military Secretary's Department, by provisions of Act April 23, 1904, c. 1485, post, §§ 1766, 1767. But said department of the Army is to be known as the Adjutant-General's Department, and said office of the War Department is to be known as the Adjutant-General's Office, by a provision of Act March 2, 1907, c. 2511, also set forth post, § 1769.

This chapter includes other provisions relating to said former Record and Pension Office, as well as those relating to the former Adjutant-General's Office, applicable to said consolidated Bureau of the War Department.

Sec.
336. Military records of volunteer armies and pension, etc., business connected therewith.
337. Military records of Revolution and of War of 1812.
338. Military records of Revolution and of War of 1812.
339. Military and naval records of Revolutionary War to be collected with a view to publication.
340. Military and naval records of Revolutionary War to be transferred from possession of any official of United States.
341. Military records of wars prior to civil war.
342. Records of volunteer army and of militia while in service of United States.
343. Transcript of military history of any regiment or company of a State to be furnished to the Governor.
344. Roster of Union and Confederate armies.

§ 336. (Act May 9, 1892, c. 62.) Military records of volunteer armies and pension, etc., business connected therewith.

The division organized by the Secretary of War in his office for the preservation and custody of the records of the volunteer armies under the name of the record and pension division is hereby established as now organized, and shall hereafter be known as the Record and Pension Office of the War Department; and the President is hereby authorized to select an officer of the Army whom he may consider to be especially well qualified for the performance of the duties hereinafter specified and, by and with the advice and consent of the Senate, to appoint him in the Army to be chief of said office, who shall have the rank, pay, and allowances of a colonel, and shall, under the Secretary of War, have charge of the military and hospital records of the volunteer armies and the pension and other business of the War Department connected therewith; and all laws or parts of laws inconsistent with the terms of this act are hereby repealed. (27 Stat. 27.)

This act was entitled "An act to provide for the permanent preservation and custody of the records of the volunteer armies and for other purposes."

A previous provision, authorizing the Secretary of the Treasury to deliver to the Secretary of War the pay rolls of the volunteer forces during the civil war, to enable the Secretary of War to have the records of said forces made complete, said rolls to be returned to the Treasury Department, which was made by Act March 2, 1889, c. 410, § 1, 25 Stat. 912, is omitted as temporary and executed.

Subsequent provisions for the collection and preservation of other similar military records are set forth post, §§ 337–342.

The compilation from the records of a complete roster of the Union and Confederate armies was authorized by a provision of Act Feb. 25, 1903, c. 755, § 1, post, § 344.

Further provisions relating to the rank, pay, etc., of the chief of the Record and Pension Office, and for an assistant chief, were made by Act March 2, 1899, c. 352, § 8, 30 Stat. 979, and those officers were continued as part of the Army by section 1 of that act, and were excepted from its requirements

relative to the reduction of the Army on July 1, 1901, by a provision of Act March 3, 1899, c. 423, § 1, 30 Stat. 1067. All these provisions relating to the rank, etc., of these officers were superseded by Act Feb. 2, 1901, c. 192, § 25, 31 Stat. 754, which provided that the officers of the Record and Pension Office should be a chief, with the rank of brigadier general, and an assistant chief, with the rank of major, any person afterwards appointed chief to have the rank of colonel.

In connection with the establishment of a department of the Army, to be known as the Military Secretary's Department, constituted of the officers of the Adjutant-General's Department, except the Adjutant-General, and the officers of the Record and Pension Office, by provisions of Act April 23, 1904, c. 1485, post, § 1766, accompanying provisions of the same act, also set forth post, § 1767, constituted the Adjutant-General's Office and the Record and Pension Office, previously bureaus of the War Department, a consolidated bureau to be known as the Military Secretary's Office of the War Department; and provisions for the transfer of employés and of appropriations from either of said offices to said consolidated bureau were made by said Act April 27, 1904, c. 1630, § 1. The Military Secretary's Department is to be known as the Adjutant-General's Department, and the Military Secretary's Office of the War Department is to be known as the Adjutant-General's Office, by provisions of Act March 2, 1907, c. 2511, post, § 1769.

Provisions relating to vacancies in the office of Assistant Chief of the Record and Pension Office, and to changes of the titles of that officer and other officers, were made by Act April 23, 1904, c. 1485, 33 Stat. 262, Act March 2, 1905, c. 1307, 33 Stat. 830, and Act March 2, 1907, c. 2511, 34 Stat. 1158.

The appropriations for the Adjutant-General's Office for the fiscal year 1917 were made by Act May 10, 1916, c. 117, § 1, 39 Stat.

Notes of Decisions

Former Volunteer Pension Branch not within classified service.—The Volunteer Pension Branch of the War Department was not within the classified service, and after its merger in the Record and Pension Division, which was under the civil service rules, former positions therein could not be classified. (1897) 22 Op. Atty. Gen. 6.

Office of Chief of Record and Pension Office.—The acceptance, by a surgeon of the Army, of an appointment under this act as Chief of the Record and Pension Office, with the rank, pay, and allowances of a colonel, created a vacancy in the former office. (1892) 20 Op. Atty. Gen. 427.

The provision of Act March 2, 1899, c. 352, § 8, 30 Stat. 979, that the Chief of the Record and Pension Office should have the rank, pay, and allowances of a brigadier general, did not create a new office. The office remained the same as when established, to be filled in the same manner and with the same duties and obligations. (1899) 22 Op. Atty. Gen. 480.

Upon the approval of the act the chief became entitled to the increased rank and pay without the necessity of a nomination by the President and confirmation by the Senate. Id.

The acceptance or nonacceptance by the chief of the new commission, with the added rank, did not change his official status or in any manner affect him. Id.

§ 337. (Act July 27, 1892, c. 267.) Military records of Revolution and of War of 1812.

That the military records of the American Revolution and of the war of eighteen hundred and twelve, now preserved in the Treasury and Interior Departments, be transferred to the War Department, to be preserved in the Record and Pension division of that Department, and that they shall be properly indexed and arranged for use. (27 Stat. 275.)

This act was entitled "An Act to provide for the collection, custody, and arrangement of the military records of the American Revolution and the War of 1812."

A preamble, preceded the enacting clause, as follows:

"Whereas the military records of the American Revolution and of the war of eighteen hundred and twelve are now preserved in different Executive Departments of the Government and are not easily accessible; and

"Whereas it is important that they should be collected in one Department, where they could be easily consulted and properly indexed and arranged for use: Therefore,

"Be it enacted," etc.

Further provision for the transfer of such records from any of the Departments was made by Act Aug. 18, 1894, c. 301, § 1, post, § 338.

Provisions for the collection of the military and naval records of the Revolutionary War with a view to their publication, and the transfer of all such records in the possession of any official of the United States, the military rec-

ords to the War Department and the naval records to the Naval Department, were made by Act March 2, 1913, c. 94, §§ 1, 2, post, §§ 339, 340.

§ 338. (Act Aug. 18, 1894, c. 301, § 1.) Military records of Revolution and of War of 1812.

All military records, such as muster and pay rolls, orders, and reports relating to the personnel or the operations of the armies of the Revolutionary war and of the war of eighteen hundred and twelve, now in any of the Executive Departments, shall be transferred to the Secretary of War to be preserved, indexed and prepared for publication. (28 Stat. 403.)

This was a provision of the sundry civil appropriation act for the fiscal year 1895, cited above.

The transfer of military rolls and records of wars prior to the civil war, from other Departments to the War Department, was provided for by Res. April 28, 1904, No. 35, post, § 341.

The transfer of military and naval records of the Revolutionary War in the possession of any official of the United States, the military records to the War Department and the naval records to the Navy Department, was provided for by Act March 2, 1913, c. 94, § 2, post, § 341.

§ 339. (Act March 2, 1913, c. 94, § 1.) Military and naval records of Revolutionary War to be collected with a view to publication.

Within the limits of the appropriation herein made, the Secretary of War is hereby authorized and directed to collect or copy and classify, with a view to publication, the scattered military records of the Revolutionary War, including all troops acting under State authority, and the Secretary of the Navy is hereby authorized and directed to collect or copy and classify, with a view to publication, the scattered naval records of the Revolutionary War. (37 Stat. 723.)

This section and the section next following were sections 1 and 2 of an act entitled "An Act to authorize the collection of the military and naval records of the Revolutionary War with a view to their publication."

The appropriation mentioned in this section, which was made by section 3 of the act, was $25,000 for the War Department and $7,000 for the Navy Department, to be expended respectively under the direction of the Secretary of War and the Secretary of the Navy, who were required to make to Congress each year detailed statements of the expenditures thereof; no part of the sum appropriated to be used in the purchase of records in the hands of private owners or in public depositories. Said section 3 is omitted as temporary only. Previous provisions for the collection of military records of the Revolution were made by Act July 27, 1892, c. 267, and Act Aug. 18, 1894, c. 301, § 1, ante, §§ 337, 338.

§ 340. (Act March 2, 1913, c. 94, § 2.) Military and naval records of Revolutionary War to be transferred from possession of any official of United States.

All such records in the possession or custody of any official of the United States shall be transferred, the military records to the War Department and the naval records to the Navy Department. (37 Stat. 723.)

See notes to preceding section.

§ 341. (Res. April 28, 1904, No. 35.) Military records of wars prior to civil war.

That the military rolls and records of the Indian wars or any other wars prior to the civil war, now preserved in the interior or other Departments, be transferred to the War Department, to be preserved in the Record and Pension Office of that Department, and that they shall be properly indexed and arranged for use. (33 Stat. 591.)

This was a joint resolution, entitled "Joint resolution providing for the transfer of certain military rolls and records from the Interior and other Departments to the War Department."

A similar provision for the transfer to the Navy Department of naval records, rolls, etc., of wars, down to the War of the Rebellion, was made by Act April 27, 1904, c. 1630, § 1, post, § 618.

§ 342. (Act April 25, 1914, c. 71, § 9.) Returns and muster rolls of volunteer forces, and records on muster out; daily record of soldiers reported sick or wounded.

All returns and muster rolls of organizations of the volunteer forces and of militia organizations while in the service of the United States shall be rendered to The Adjutant General of the Army, and upon the muster out of such organizations the records pertaining to them shall be transferred to and filed in The Adjutant General's Office. And regimental and all other medical officers serving with volunteer troops, or with militia organizations in the service of the United States, in the field or elsewhere, shall keep a daily record of all soldiers reported sick or wounded, as shown by the morning calls or reports, and shall deposit such reports, with other reports provided for in this section, in The Adjutant General's Office, as provided for herein for other reports, returns, and muster rolls. (39 Stat. 350.)

This provision supersedes Act April 22, 1898, c. 187, § 8, which required that the records named should be transferred to and filed in the Record and Pension Office of the War Department.

§ 343. (Act March 2, 1895, c. 177, § 1.) Transcript of military history of any regiment or company of a State to be furnished to the Governor.

The Secretary of War shall, upon the application of the Governor of any State, furnish to such Governor a transcript of the military history of any regiment or company of his State, under such regulations as the Secretary of War may prescribe, at the expense of such State. (28 Stat. 788.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above. It was repeated in the similar act for the following year. Act May 28, 1896, c. 252, § 1, 29 Stat. 161.

§ 344. (Act Feb. 25, 1903, c. 755, § 1.) Roster of Union and Confederate armies.

Under the direction of the Secretary of War the Chief of the Record and Pension Office shall compile, from such official records as are in the possession of the United States and from such other authentic records as may be obtained by loan from the various States and other official sources, a complete roster of the officers and enlisted men of the Union and Confederate armies. (32 Stat. 884.)

This was a proviso annexed to an appropriation for the Record and Pension Office in the legislative, executive, and judicial appropriation act for the fiscal year 1904, cited above.

CHAPTER C

The Bureau of Insular Affairs

The Bureau of Insular Affairs, organized by the Secretary of War, was continued, to be known thereafter as the Bureau of Insular Affairs of the War Department, by provisions of Act July 1, 1902, c. 1369, § 87, post, § 345.

Other provisions relating to the organization, officers, etc., of said Bureau are included in this chapter.

Sec.
345. Bureau of Insular Affairs continued.
345a. Bureau of Insular Affairs of War Department [not affected].
346. Chief of Bureau.
347. Assistant to Chief of Bureau.
348. Additional assistant to Chief of Bureau.

§ 345. (Act July 1, 1902, c. 1369, § 87.) Bureau of Insular Affairs continued.

The Division of Insular Affairs of the War Department, organized by the Secretary of War, is hereby continued until otherwise provided, and shall hereafter be known as the Bureau of Insular

Affairs of the War Department. The business assigned to said Bureau shall embrace all matters pertaining to civil government in the island possessions of the United States subject to the jurisdiction of the War Department. (32 Stat. 712.)

This section was part of the act to provide temporarily for the civil government of the Philippine Islands, cited above.

The section further authorized the Secretary of War to detail an officer of the Army to act as Chief of the Bureau, said officer while acting under said detail to have the rank, pay, and allowances of a colonel. This part of the section was superseded by the provisions for the appointment of a Chief of the Bureau, by Act June 25, 1906, c. 3528, and for the detail of officers of the Army to act as assistants to the Chief of the Bureau, by Act March 2, 1907, c. 2511, and Act March 23, 1910, c. 115, post, §§ 347, 348.

The appropriations for the Bureau of Insular Affairs for the fiscal year 1917 were made by Act May 10, 1916, c. 117, § 1, 39 Stat.

Notes of Decisions

Bureau part of Department.—Under the instructions of the President to the Philippine Commission of April 7, 1900, and the executive order of June 21, 1901, the powers and duties thereby conferred upon the Commission and the civil governor were to be exercised under the direction and control of the Secretary of War, and this act, in ratifying and approving the instructions and order referred to, continued this relation. The reasonable inference is therefore that, until otherwise provided, Congress intended that the government for the Philippine Islands should be regarded as a branch of the War Department. (1902) 24 Op. Atty. Gen. 534.

The Bureau of Insular Affairs is an integral part of the War Department. (1907) 26 Op. Atty. Gen. 209.

§ 345a. (Act June 3, 1916, c. 134, § 14.) Bureau of Insular Affairs of War Department [not affected].

Nothing in this Act shall be construed to repeal existing laws relating to the organization of the Bureau of Insular Affairs of the War Department. (39 Stat.)

This is section 14 of the act entitled "An act for making further and more effectual provision for the national defense, and for other purposes," Act June 3, 1916, c. 134, the other sections of which are set forth post, under Title XIV, The Army, and Title XVI, The Militia.

§ 346. (Act June 25, 1906, c. 3528.) Chief of Bureau.

The Chief of the Bureau of Insular Affairs of the War Department shall hereafter be appointed by the President for the period of four years, unless sooner relieved, with the advice and consent of the Senate, and while holding that office he shall have the rank, pay, and allowances of a brigadier-general. (34 Stat. 456.)

This act was entitled "An act to increase the efficiency of the Bureau of Insular Affairs of the War Department."

§ 347. (Act March 2, 1907, c. 2511.) Assistant to Chief of Bureau.

The Secretary of War is hereby authorized to detail an officer of the Army, whom he may consider especially well qualified, to act as principal assistant to the Chief of the Bureau of Insular Affairs of the War Department, and said principal assistant while acting under said detail shall have the rank, pay, and allowances of a major: And provided further, That the provisions of section twenty-seven of the Act of February second, nineteen hundred and one, with reference to the transfer of officers of the line to the departments of the staff for tours of service, shall apply to the vacancy created by this Act and to the return of the officer so detailed to the line of the Army. (34 Stat. 1162.)

This was a provision following appropriations for officers of the Bureau in the Army appropriation act for the fiscal year 1908, cited above.

Act Feb. 2, 1901, c. 192, § 27, mentioned in this section, is set forth post, § 1908.

The appointment of an additional officer of the Army as assistant to the Chief of the Bureau was authorized by a provision of Act March 23, 1910, c. 115, post, § 348.

§ 348. (Act March 23, 1910, c. 115.) Additional assistant to Chief of Bureau.

The Secretary of War is hereby authorized to detail one additional officer of the army as assistant to the Chief of the Bureau of Insular Affairs, under the same provisions of law in regard to the vacancy in the line thus created and return to the line as govern in the case of the assistant authorized by the Act of March second, nineteen hundred and seven; and the assistant herein authorized while serving in this capacity shall have the rank, pay, and allowances of colonel; and both officers detailed in the Bureau of Insular Affairs shall hereafter be designated, while on this duty, as assistants to the chief of the bureau. (36 Stat. 248.)

This was a provision following appropriations for pay of the staff corps, etc., in the Army appropriation act for the fiscal year 1912, cited above.

The provision of Act March 2, 1907, c. 2511, mentioned in this section, is set forth ante, § 347.

No officer holding a permanent commission in the Army with rank below that of major shall be detailed as assistant to the Chief of the Bureau with rank of colonel, by a provision of Act Aug. 24, 1912, c. 391, § 1, post, § 1999.

TITLE VII

THE DEPARTMENT OF THE TREASURY

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CHAPTER ONE

The Department

Sec.

349. Establishment of the Department of the Treasury.
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351. Additional Assistant Secretary.
352. Organization of Department, offices, and salaries.
353. Chief clerk to be chief executive officer of Department; designation to sign official papers, etc.
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364a. Additional chiefs of divisions, clerks, etc., supplies, etc., in office of Commissioner of Internal Revenue, for collection of income tax.
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Sec.
374. Purchase of stationery for internal revenue service.
375. Accounts of expenditures for furniture and repairs.
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377. Restrictions upon officers of the Department.
378. Restrictions upon clerks in the Department.
378a. Enforcement of laws relating to Treasury Department; employment of persons paid from certain appropriations for.

§ 349. (R. S. § 233.) Establishment of the Department of the Treasury.

There shall be at the seat of Government an Executive Department to be known as the Department of the Treasury, and a Secretary of the Treasury, who shall be the head thereof.

Act Sept. 2, 1789, c. 12, § 1, 1 Stat. 65.

Notes of Decisions

Act establishing department.—The Department of the Treasury was established, with a "Secretary of the Treasury" to be deemed the head of the Department," by Act Sept. 2, 1789, c. 12, 1 Stat. 65. In re Hennen (1839) 13 Pet. 230, 259, 10 L. Ed. 138; (1855) 7 Op. Atty. Gen. 453, 461.

Nothing was said in the act establishing the department as to the method of appointing the Secretary; the matter was left to the provision of Const. art. 2, § 2, which vests the power of appointment in the President. (1884) 18 Op. Atty. Gen. 58.

Treasury not local to District of Columbia.—The Treasury of the United States has no locality, and credits upon it are not bona notabilia confined to the District of Columbia. (1854) 6 Op. Atty. Gen. 557.

Cited without definite application, Cooke v. U. S. (1875) 91 U. S. 389, 398, 23 L. Ed. 237; Price v. Abbott (C. C. 1883) 17 Fed. 506, 507; Stanton v. Wilkeson (D. C. 1876) Fed. Cas. No. 13,-299; Frelinghuysen v. Baldwin (D. C. 1882) 12 Fed. 395, 396.

§ 350. (R. S. § 234.) Assistant Secretaries.

There shall be in the Department of the Treasury two Assistant Secretaries of the Treasury, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall each be entitled to a salary of [six thousand dollars] a year, to be paid monthly.

Act March 3, 1849, c. 108, § 13, 9 Stat. 396. Act March 3, 1857, c. 107, § 5, 11 Stat. 220. Act March 14, 1864, c. 30, § 3, 13 Stat. 26. Act March 3, 1873, c. 226, 17 Stat. 486.

A subsequent provision for two Assistant Secretaries was made by Act March 3, 1875, c. 130, § 2, post, § 352.

The appointment of an additional Assistant Secretary was authorized by a provision of Act July 11, 1890, c. 667, § 1, post, § 351.

The salaries of the Assistant Secretaries, having been increased from $4,500 to $6,000 each by the provision of Act March 3, 1873, c. 326, § 1, incorporated into this section of the Revised Statutes and cited above, were reduced to $4,500 each, and the words of this section inclosed in brackets, "six thousand dollars," were superseded, by the repeal of so much of that act as increased the amount, by Act Jan. 20, 1874, c. 11, 18 Stat. 4. And their salaries were fixed at $4,500 by the provisions of Act March 3, 1875, c. 130, § 2, relating to the organization of the Department and offices and salaries therein, post, § 352. Recent annual appropriations for the Assistant Secretaries were for $5,000 each. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

As to the general powers and duties of the Assistant Secretaries, see § 379, post, and notes thereto.

In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof is required, unless otherwise directed, to perform the duties of the head of such Department until a successor is appointed, or such absence or sickness shall cease, by R. S. § 177, set forth ante, § 259. In case of the death, resignation, absence, or sickness of the head of any Department, except where the Attorney General is concerned the President may authorize and direct the head of any other Department or any officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease, by R. S. § 179, also set forth ante, § 261.

All laws or parts of laws inconsistent with rates of salaries or compensa-

tion appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Creation of office.—The act establishing the department, Act Sept. 2, 1789, c. 12, 1 Stat. 65, provided for an Assistant to the Secretary of the Treasury, to be appointed by the Secretary, who, in case of vacancy in the office of Secretary, should have the charge and custody of the records, books, and papers appertaining to the office. In re Hennen (1839) 13 Pet. 230, 259, 10 L. Ed. 138.

By Act March 3, 1849, c. 108, § 13, 9 Stat. 396, the provision for the appointment of an Assistant Secretary was repeated, with provisions as to his powers and duties. By Act March 3, 1857, c. 107, § 5, 11 Stat. 220, the appointment of the Assistant Secretary was given to the President. By Act March 14, 1864, c. 30, § 3, 13 Stat. 26, an additional Assistant Secretary was authorized, to be appointed by the President, with similar provisions, as to his powers and duties. U. S. v. Adams (C. C. 1885) 24 Fed. 348, 350.

Cited without definite application. McCollum v. U. S. (1881) 17 Ct. Cl. 92, 101.

§ 351. (Act July 11, 1890, c. 667, § 1.) Additional Assistant Secretary.

For an additional Assistant Secretary of the Treasury to be appointed by the President, by and with the advice and consent of the Senate, who shall receive a compensation at the rate of four thousand five hundred dollars per annum, four thousand five hundred dollars. (26 Stat. 236.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1891, cited above.

Previous provisions for two Assistant Secretaries were made by R. S. § 234, ante, § 350, and Act March 3, 1875, § 2, post, § 352.

Recent annual appropriations for the Assistant Secretaries are $5,000 for each. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 350, ante.

(R. S. § 235. Superseded.)

This section enumerated the subordinate officers in the Department and their salaries at the time of the enactment of the Revised Statutes, as authorized by the statutes then existing. The organization of the Department, the officers thereof, and salaries therein, were provided for more comprehensively, and additional officers, deputies, etc., authorized, by provisions of Act March 3, 1875, c. 130, § 2, post, § 352.

§ 352. (Act March 3, 1875, c. 130, § 2.) Organization of Department, offices, and salaries.

On and after July first, eighteen hundred and seventy-five, the organization of the Treasury Department, and the several offices thereof, and the annual salaries paid to the persons therein, shall be as follows, to wit:

In the office of the Secretary of the Treasury:

The Secretary [eight thousand dollars]; two assistant secretaries, at four thousand five hundred dollars each; * *

In the Construction Branch of the Treasury:—

Supervising Architect, four thousand five hundred dollars; * *

In the Office of the First Comptroller:—

The First Comptroller of the Treasury, five thousand dollars;

* * * * * * * * *

In the Office of the First Auditor:—

The First Auditor of the Treasury, four thousand dollars; * *

In the Office of the Second Auditor:—

The Second Auditor of the Treasury, four thousand dollars; * *

In the Office of the Third Auditor:—

The Third Auditor of the Treasury, four thousand dollars; * *

In the Office of the Fourth Auditor:—

The Fourth Auditor of the Treasury, four thousand dollars; * *

In the Office of the Fifth Auditor:—

The Fifth Auditor of the Treasury, four thousand dollars; * *

In the Office of the Auditor of the Treasury for the Post Office Department:

The Auditor of the Treasury for the Post Office Department, four thousand dollars: * *

In the Office of the Register:

The Register of the Treasury, four thousand five hundred dollars; one assistant register * * at two thousand five hundred dollars; * *

In the Office of the Treasurer:

The Treasurer of the United States, six thousand five hundred dollars; assistant treasurer, three thousand eight hundred dollars;

* * * * * * * * *

In the Office of the Comptroller of the Currency:

The Comptroller of the Currency, five thousand dollars; deputy comptroller, three thousand dollars; * *

In the Office of the Commissioner of Internal Revenue:

The Commissioner of Internal Revenue, six thousand dollars; deputy commissioner, three thousand five hundred dollars; one deputy Commissioner, at three thousand dollars; * *

In the Office of the Secretary of the Treasury:

That there shall be in the Office of the Secretary of the Treasury a Division of Loans and a Division of Currency, * * (18 Stat. 396.)

This section was part of the sundry civil appropriation act for the fiscal year 1876, cited above.

Portions of the section which related to the Deputy Comptroller in the Office of the First Comptroller, and to the Office of the Second Comptroller and the Office of the Commissioner of Customs, are omitted, said offices having been abolished, and the duties thereof transferred to other officers, by provisions of the Dockery Act of July 31, 1894, § 4, post, § 402.

Other portions of this section, which provided for a deputy auditor in each of the offices of the several auditors, are also omitted, the positions of said deputy auditors having been abolished by a provision of Act March 4, 1911, c. 237, § 1, post, § 418.

A clause, under the heading "In the Office of the Register," following the words "one assistant register," which provided for "one deputy register," is also omitted, the office of deputy register having been abolished by a provision of Act Aug. 15, 1876, c. 287, § 1, post, § 363.

A further portion of this section relating to the Office of the Light House Board is also omitted, all employés of or in said Board having been transferred to the Bureau of Light Houses established in the Department of Commerce by Act June 17, 1910, c. 301, §§ 4, 5, post, §§ 896, 897.

A further provision of this section, "that the duties heretofore prescribed by law and performed by the chief clerks in the several Bureaus named shall hereafter devolve upon, and be performed by, the several deputy comptrollers, deputy auditors, deputy register, and deputy commissioner herein named," is also omitted as having become inoperative by the abolition of said offices of deputy comptrollers, deputy auditors, and deputy commissioner of customs, as stated above, and by the failure of Congress to make any appropriation for a deputy register.

And a proviso annexed to the section, that after January 1, 1876, "the appointments of this Department shall be so arranged as to be equally dis-

tributed between the several States of the United States, Territories, and the District of Columbia, according to population," is omitted, as superseded by a similar provision, applicable to all the Departments, contained in the Civil Service Act of Jan. 16, 1883, c. 27, § 2, post, § 3272.

Besides the officers specified in this section, provision was made, in other clauses which are omitted here, for chief clerks, chiefs of division, disbursing clerks, and other clerks of different classes and other employés. But the officers, clerks, and others, actually appointed or employed, and their respective salaries and other compensation, depend on the specific provisions made in the annual appropriation acts, each providing for the fiscal year next following; the employment or payment of others being forbidden by Act Aug. 5, 1882, c. 389, § 4, ante, § 249. Subsequent appropriation acts provided for officers, clerks, and employés, and for salaries different from those fixed by this section. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Subsequent provisions greatly affecting the organization of the Department, and the offices and salaries therein, changing the designations of offices, and adding to and modifying their duties and powers, abolishing certain offices, and transferring their duties and powers to others, and changing the system of accounting, were made by the Dockery Act of July 31, 1894, c. 174, §§ 3–23, post, §§ 402–404, 408, 412, 413, 417, 420, 425–428, 433, 435–438, 443.

The salary of the Secretary of the Treasury, having been increased from $8,000 to $10,000 by a provision of Act March 3, 1873, c. 226, § 1, incorporated into R. S. § 160, ante, § 234, was reduced to $8,000 by the repeal of so much of that act as increased the amount, by Act Jan. 20, 1874, c. 11, 18 Stat. 4. But the words of this section, fixing his salary at that sum, which are inclosed in brackets here, "eight thousand dollars," were superseded by the provision that the compensation of the heads of Executive Departments who are members of the President's Cabinet shall be at the rate of $12,000 per annum each, made by Act Feb. 26, 1907, c. 1635, § 4, ante, § 36. For the Secretary, recent appropriations are $12,000. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Besides the two Assistant Secretaries provided for by this section, an additional Assistant Secretary was authorized by a provision of Act July 11, 1890, c. 667, § 1, ante, § 351. Recent annual appropriations are for three Assistant Secretaries, at $5,000 each. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

The chief clerk, whose salary was fixed at $3,000 by this section, was to act as superintendent of the Treasury Building, and to be entitled therefor to an additional salary of $300 a year, by a provision of R. S. § 235, and a further provision thereof for clerks to assist him in superintending the building was repeated in this section. Recent appropriations for his compensation, including $300 as superintendent of Treasury Building, are $4,000, and, instead of said clerks, provision is made for an assistant superintendent of the building, at $2,500. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, set forth post, § 353.

Subsequent provisions relating to the Divisions of Loans and of Currency established by the above section, and other divisions, etc., in the Department, are set forth, post, §§ 355, 356.

The detail of a captain of the Revenue-Cutter Service, to be chief of the Division of Revenue-Cutter Service, was directed by a provision of Act July 31, 1894, c. 174, § 1, which was superseded by a provision for the appointment of a captain commandant, who shall act as chief of the Division of Revenue-Cutter Service, made by Act April 16, 1908, c. 145, § 1, post, § 5405.

The Coast Guard was organized in lieu of the existing Revenue-Cutter Service, to be composed of the two existing organizations, with the existing officers and positions and the incumbent officers and men of the two services, by Act Jan. 28, 1915, c. 20, set forth post, under Title XXXIV, "Collection of Duties Upon Imports," Chapter Three, "The Coast Guard."

For the Supervising Architect, recent appropriations are $5,000, and also provide for numerous officers, clerks, and employés in his office. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat. And in addition to the authorizations and appropriations for that office otherwise made, the employment of an architectural designer, a structural engineering expert, and a heating, lighting and ventilating engineering expert, to serve in said office, to assist the Supervising Architect in connection with various matters described, was authorized by the public buildings act for said fiscal year 1914, Act March, 1913, c. 147, § 28, post, § 358. Appropriations are also made, in recent sundry civil appropriation acts, under the heading, "General Expenses of Public Buildings," for an additional salary of $1,000 for the Supervising Architect for the fiscal year. The provision therefor for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

Provisions for employment of certain technical experts to assist the Supervising Architect were made by the public buildings act for the fiscal year

1914, Act March 4, 1913, c. 147, § 28, post, § 358. A further provision, of a somewhat special and temporary nature, for the employment, in the office of the Supervising Architect, of technical services, in connection with the plans, specifications, and construction of the central heating and power plant provided for by the sundry civil appropriation act for the fiscal year 1914, was made by that act, Act June 23, 1913, c. 3, § 1, 38 Stat. 26; and the urgent deficiencies appropriation act for the fiscal year 1916, Act Feb. 28, 1916, c. 37, § 1, 39 Stat., increased the appropriation made by said Act June 23, 1916, c. 3, § 1, from $35,000 to not exceeding $60,000.

Besides the specific appropriations in the annual legislative, executive, and judicial appropriation acts for officers, clerks and other employés in the office of the Supervising Architect, said acts made special provisions for each fiscal year from 1882 to 1909 for the employment of services of skilled draftsmen, civil engineers, etc., and such other services as the Secretary might deem necessary, in that office, to carry into effect the various appropriations for public buildings, and to be paid from such appropriations, the entire expenditures on that account for the fiscal year not to exceed a specified sum; the terms of such provisions and the amounts so limited varying from year to year. For each fiscal year from 1909 to 1912 appropriations for such services were made by the sundry civil appropriation acts, under the head "General Expenses of Public Buildings," to give effect to the provisions relating to appropriations for public buildings of Act May 30, 1908, c. 228, § 6, post, § 6795. But for the fiscal year 1913 specific appropriations for various technical and other officers, clerks, and employés, to be paid out of said appropriation in the sundry civil act for that year, were again included in the appropriations for the office of Supervising Architect by the legislative, executive, and judicial appropriation act for said year 1913, Act Aug. 23, 1912, c. 350, 37 Stat. 374, with a provision requiring for the fiscal year 1914 and thereafter specific estimates for salaries for such personal services, and forbidding employment of such services except as appropriations might be made therefor, set forth post, § 357. The appropriation for such services for the fiscal year 1914, including officers, clerks, etc., transferred from the salary roll, sundry civil act, was by Act March 4, 1913, c. 142, § 1, 37 Stat. 752. The appropriation for such services in the legislative, executive, and judicial appropriation act for the fiscal year 1917, was by Act May 10, 1916, c. 117, § 1, 39 Stat., and was as follows: "Office of Supervising Architect: Supervising Architect, $5,000; executive officer, $3,250; technical officer, $3,000; drafting division—superintendent $3,000, assistant superintendent $2,750; mechanical engineering division—superintendent $2,750, assistant superintendent $2,400; structural division—superintendent $2,750, assistant superintendent $2,400; superintendents—computing division $2,750, repairs division $2,400, accounts division $2,500, maintenance division $2,500; files and records division—chief $2,500, assistant chief $2,250; head draftsman $2,500; administrative clerks—eight at $2,000 each; technical clerks—four at $1,800 each; clerks—nine of class four, additional to one of class four as bookkeeper $100, four at $1,700 each, fourteen of class three, six at $1,500 each, thirteen of class two, eight at $1,300 each, twenty-one of class one, four at $1,100 each, seven at $1,000 each, three at $900 each, two at $840 each; photographer, $2,000; foreman, duplicating galley, $1,800; two duplicating paper chemists at $1,200 each; foreman, vault, safe, and lock shop, $1,200; five messengers; two assistant messengers; messenger boys—one at $600, two at $480 each, two at $360 each; skilled laborers—four at $1,000 each, seven at $960 each, one $900, one $840; laborers—one $660, one $600; in all, $221,020." In addition to such appropriation, made by said Act May 10, 1916, c. 117, § 1, 39 Stat., above referred to, the sundry civil appropriation act for the fiscal year 1917, Act July 1, 1916, c. 209, § 1, 39 Stat., contained a further appropriation to enable the Secretary of the Treasury to execute and give effect to said Act May 30, 1908, c. 228, § 6, post, § 6795, similar to those contained in the sundry civil appropriation acts for the fiscal years from 1909 to 1912, as above stated, as follows: "For additional salary of $1,000 for the Supervising Architect of the Treasury for the fiscal year nineteen hundred and seventeen; architectural designer, at $6,000 per annum; foremen draftsmen, architectural draftsmen, and apprentice draftsmen, at rates of pay from $480 to $2,500 per annum; structural engineers and draftsmen, at rates of pay from $840 to $2,200 per annum; mechanical, sanitary, electrical, heating and ventilating, and illuminating engineers and draftsmen, at rates of pay from $1,200 to $2,400 per annum; computers and estimators, at rates of pay from $1,600 to $2,500 per annum, the expenditures under all the foregoing classes for which a minimum and maximum rate of compensation is stated, not to exceed $168,450; supervising superintendents, superintendents, and junior superintendents of construction and inspectors, at rates of pay from $1,600 to $2,900 per annum, not to exceed $278,960."

The designation of the First Comptroller was changed to Comptroller of the Treasury and his salary was made $5,500, by provisions of the Dockery Act

of July 31, 1894, c. 174, § 4, post, § 402. Recent appropriations for his compensation are $6,000. The provision for the fiscal year 1917, was by Act May 10, 1916, c. 117, § 1, 39 Stat.

The designations of the Auditors were changed by the Dockery Act of July 31, 1894, c. 174, § 3, post, § 417.

Provisions for clerks, etc., in the office of the Auditor for the Post-Office Department, to audit the accounts of the Postal Savings System, and in the office of the Treasurer, to transact the business of said system, were made by Act Aug. 22, 1912, c. 350, § 1, post, §§ 360, 361.

For the Register, recent appropriations are $4,000, and for the Assistant Register, $2,500. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

For the Treasurer, recent appropriations are $8,000, and for the Assistant Treasurer, $3,600. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

In the office of the Commissioner of Internal Revenue, R. S. § 235 provided for "two Deputy Commissioners," at $3,000 a year each, "to be employed under the direction of the Secretary of the Treasury," and R. S. § 322 provided for "a Deputy Commissioner of Internal Revenue, who shall be appointed by the President, by and with the consent of the Senate," at $3,500 a year; the appropriations for several years preceding the enactment of the Revised Statutes having made provisions for three Deputy Commissioners, one at $3,500 and two at $3,000. But Act Jan. 29, 1874, c. 18, 18 Stat. 6, entitled "An Act to Abolish the Office of Deputy Commissioner of Internal Revenue," enacted "that the office of Deputy Commissioner of Internal Revenue, made vacant by the death of General B. J. Sweet, be, and the same is hereby, abolished; and that the Secretary of the Treasury may, upon the recommendation of the Commissioner of Internal Revenue, designate one of the two remaining deputy commissioners as First Deputy Commissioner, who shall perform the duties and be paid only the salary prescribed for the office of Deputy Commissioner hereby abolished." The appropriations for the two subsequent years provided for one Deputy Commissioner at $3,500 and one at $3,000, not designating either as First Deputy Commissioner, Act June 20, 1874, c. 328, § 1, 18 Stat. 92, and Act March 3, 1875, c. 129, § 1, 18 Stat. 351. The section set forth above, which may be regarded as superseding all these provisions as well as those of the Revised Statutes, provided for a "Deputy Commissioner," $3,500, and "one Deputy Commissioner," at $3,000. But the appropriation by Act Aug. 15, 1876, c. 287, § 1, 19 Stat. 151, was for but one Deputy Commissioner, $3,200, and this continued unchanged, except increase of salary, until 1900. In 1900 and 1901 the appropriations were for a Deputy Commissioner, $4,000, and an additional Deputy Commissioner during the fiscal year, $3,600. The appropriations for subsequent years were for the same amounts, and those since 1904 omitted the limitation to the fiscal year. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

The appointment of one additional Deputy Commissioner, two heads of divisions, and such other clerks, etc., as may be necessary, was authorized, in connection with other provisions to carry into effect section II, relating to income tax, of the Underwood Tariff Act of 1913, by a provision of said section, Act Oct. 3, 1913, c. 16, § II, N, post, § 364, which said provision was amended by a provision in the legislative, executive, and judicial appropriation act for the fiscal year 1915, Act July 1, 1914, c. 141, § 1, post, § 364a, principally by authorizing the employment of two chiefs of division at $3,500 and $2,500 per annum, respectively, in lieu of two chiefs of division at $2,500 each.

The appointment, by transfer from a clerkship of class one, of a librarian for the Department, at a salary of $1,200 per annum, was provided for by Act June 4, 1897, c. 2, § 1, 30 Stat. 26, but the appropriation therefor was not continued in subsequent years.

Provisions for compensation on a piece-rate basis, of the number of employés necessary to tabulate, by the use of mechanical devices, the accounts and vouchers of the postal service, during the fiscal year 1914, were made by Act March 4, 1913, c. 142, § 1, 37 Stat. 754, which provisions were continued in subsequent acts; the provisions for the fiscal year 1917 being by Act May 10, 1916, c. 117, § 1, 39 Stat. And leaves of absence for such piece-rate employés in the Office of the Auditor for the Post-Office Department were authorized by further provisions of said Act March 4, 1913, c. 142, § 1, post, § 362.

In addition to the specific appropriations made annually in the legislative, executive, and judicial appropriation acts for the Division of Revenue-Cutter Service, special provisions for the fiscal year 1914, for the employment of services of skilled draftsmen and such other technical services as the Secretary might deem necessary, in that Division, in connection with the construction and repair of revenue cutters, to be paid from the appropriation for such repairs, the expenditures on that account not to exceed $3,400, and a statement there-

of to be made to Congress each year in the annual estimates, were made by Act March 4, 1913, c. 142, § 1, 37 Stat. 752. These provisions were continued in subsequent acts, the provisions for the fiscal year 1917 by Act May 10, 1916, c. 117, § 1, 39 Stat., being the same as for previous years, except that the appropriation was for the office of the Coast Guard, this change being necessitated by the establishment of a Coast Guard in lieu of the Revenue Cutter Service and the Life Saving Service, by Act Jan. 28, 1915, c. 20, post, under Title XXXIV, "Collection of Duties upon Imports," Chapter Three, "The Coast Guard."

Provisions for the detail of officers and persons employed in various branches of the public service under the Treasury Department, for duty at the Department, were made by Act Aug. 5, 1882, c. 389, § 1, Act March 4, 1907, c. 2918, § 1, Act June 23, 1913, c. 3, § 1, post, §§ 365–367.

The detail until June 30, 1914, of employés in the offices of Assistant Treasurers, for duty in the office of the Treasurer, was authorized by a provision of Act March 4, 1913, c. 142, § 1, 37 Stat. 755.

A Solicitor of the Treasury and Assistant Solicitor of the Treasury, in the Department of Justice, were provided for by R. S. § 349, post, § 521; and the powers, functions, and duties of the Solicitor of the Treasury were prescribed by R. S. §§ 372–380, post, §§ 548–566.

Provisions applicable to all the Departments, as to the employment of clerks and others were made by R. S. § 169, and Act Aug. 5, 1882, c. 389, § 4, ante, §§ 248, 249.

Provisions applicable to all the Departments, as to the duties of chief clerks and disbursing clerks, were made by R. S. §§ 173, 174, 176, ante, §§ 255, 256, 258.

Other special provisions relating to the clerks and employés in the Department are set forth below.

See notes to § 350, ante.

Notes of Decisions

Chief clerk as superintendent of Treasury building.—The provision of R. S. § 235, for a chief clerk, at a certain salary, "who shall act as superintendent of the Treasury building, and shall be entitled therefor to an additional salary" of specified amount, did not establish a distinct office of superintendent of the building at a separate salary, which would not be affected by the provision of this section for a chief clerk at a salary of the amount allowed by contemporaneous appropriations, or by such appropriations, but made the position of superintendent of the building an addendum to the office of chief clerk, for which additional compensation was allowed. Upton v. U. S. (1884) 19 Ct. Cl. 46.

To determine whether Congress intended to create one office or two, the test is to ascertain whether the incumbent could have declined the office of superintendent and accepted the office of chief clerk, or whether he could have resigned the one and retained the other. Id.

A statute which establishes a salary or prescribes a rate of remuneration expresses the intent of both parties, as a written agreement does in the cases of private employers and employés. Id.

Supervising Architect.—The Supervising Architect of the Treasury is precluded, by R. S. §§ 1763–1765, post, §§ 3230, 3233, 3234, from recovering extra compensation, not expressly authorized by law, for professional services rendered the government not strictly appertaining to his office, but of the same general character, and performed at the same place, in the absence of any express authority for such extra compensation. Mullett v. U. S. (1893) 14 Sup. Ct. 190, 150 U. S. 566, 37 L. Ed. 1184.

A superintendent of construction of a public building, temporarily performing the duties of the Supervising Architect of the Treasury, during the suspension of that officer from duty, who continues to receive his own pay as superintendent, and at the same time certifies payrolls bearing the name of the suspended officer, thereby enabling him to draw the salary of the office, cannot himself claim to have held the office and to be entitled to the salary thereof for the time during which he performed its duties. Fraser v. U. S. (1880) 16 Ct. Cl. 507, 514.

The Supervising Architect of the Treasury has no power to bind the government by contract. Schneider v. U. S. (1884) 19 Ct. Cl. 547.

Disbursing clerks.—The right of a disbursing clerk of the department to extra compensation for services performed by him, under direction of the Secretary, as disbursing agent of funds appropriated for a post office building in Washington, does not depend on the general powers of the Secretary, but solely on congressional legislation on that subject. Bartlett v. U. S. (1905) 25 Sup. Ct. 433, 434, 197 U. S. 230, 49 L. Ed. 735.

Appointments to new offices created by this section.—The new officers created by this section, designated as deputy comptrollers, deputy auditors, etc., upon whom the duties theretofore performed by the chief clerks in the several bureaus named were devolved, no provision for their appointment having been made by the act, must be appoint-

ed by the President, with the advice and consent of the Senate. R. S. § 169, ante, § 248, did not authorize their appointment by the head of the Treasury Department. (1875) 15 Op. Atty. Gen. 3.

§ 353. (Act May 10, 1916, c. 117, § 1.) Chief clerk to be chief executive officer of Department; designation to sign official papers, etc.

Office of chief clerk and superintendent: Chief clerk, including $300 as superintendent of Treasury Building, who shall be the chief executive officer of the department and who may be designated by the Secretary of the Treasury to sign official papers and documents during the temporary absence of the Secretary and the Assistant Secretaries of the department, $4,000. (39 Stat.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above. Provisions in the same language were made by previous similar acts.

See notes to §§ 350, 352, ante.

§ 354. (Act June 17, 1910, c. 297, § 1.) Deputy disbursing clerk.

Offices of disbursing clerks: Disbursing clerk, three thousand dollars; deputy disbursing clerk, two thousand seven hundred and fifty dollars; * * The deputy disbursing clerk herein provided for shall have authority to sign checks in the name of the disbursing clerk; he shall give bond to the disbursing clerk in such sum as the said disbursing clerk may require, and when so acting for the disbursing clerk shall be subject to all the liabilities and penalties prescribed by law for the official misconduct in like cases of the disbursing clerk for whom he acts, and the official bond of the disbursing clerk executed hereunder shall be made to cover and apply to the acts of the deputy disbursing clerk. (36 Stat. 487.)

These were provisions of the legislative, executive, and judicial appropriation act for the fiscal year 1911, cited above. An appropriation for such deputy disbursing clerk is made annually. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 350, ante.

§ 355. (Act Aug. 15, 1876, c. 287, § 1.) Divisions of Loans and of Currency consolidated.

The Secretary of the Treasury is hereby directed to consolidate the division of loans and the division of currency into one division; and all work now done in either division shall be done in the consolidated division. (19 Stat. 149.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1877, cited above.

The legislative, executive, and judicial appropriation acts contain appropriations for a chief of the division of loans and currency, for an assistant chief, and for other officers, clerks, and employés of the division. The appropriation for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat. In addition to the appropriations for the division of loans and currency said appropriation acts contain provisions, under the head "Treasury Department," for a General Supply Committee, a Division of Bookkeeping and Warrants, a Division of Customs, a Division of Appointments, a Division of Public Moneys, a Division of Printing and Stationery, a Division of Mail and Files, and a Section of Surety Bonds, each item providing for chiefs of the divisions and other officers, clerks, and employés. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 350, ante.

§ 356. (Act July 31, 1894, c. 174, § 10.) Division of Bookkeeping and Warrants.

The Division of Warrants, Estimates, and Appropriations in the office of the Secretary of the Treasury is hereby recognized and established as the Division of Bookkeeping and Warrants. It shall be under the direction of the Secretary of the Treasury as heretofore. Upon the books of this division shall be kept all accounts of receipts and expenditures of public money except those relating to the postal

revenues and expenditures therefrom; and section three hundred and thirteen and so much of sections two hundred and eighty-three and thirty-six hundred and seventy-five of the Revised Statutes as require those accounts to be kept by certain Auditors and the Register of the Treasury are repealed. (28 Stat. 208.)

These provisions were part of section 10 of the Dockery Act, cited above, which made other changes in the organization and offices and methods of transacting business of the Department. See notes to section 3 of the act, post, § 417.

R. S. § 313, repealed by this section, prescribed the duties of the Register; R. S. § 283, repealed in part thereby, related to the keeping by the Auditors of accounts of receipts and expenditures in regard to the Departments of War and of the Navy; and R. S. § 3675, likewise repealed in part, provided for the charging of warrants on the books of the Secretary, First Comptroller, and Register.

The concluding provision of this section relating to the remaining duties of the Register, is set forth post, § 486.

An appropriation to enable the Secretary to effect a change in the methods of bookkeeping in the Department, and to install a double-entry system of bookkeeping, was made by Act March 4, 1907, c. 2919, § 1, 34 Stat. 1372.

See notes to §§ 350, 355, ante.

§ 357. (Act Aug. 23, 1912, c. 350, § 1.) Office of Supervising Architect; officers, clerks, etc.; estimates for salaries of employés previously paid from appropriation for expenses of public buildings, and appropriations therefor.

Office of the Supervising Architect: Supervising Architect, $5,000; executive officer, $3,250; chief constructor (formerly superintendent of drafting and constructing division), $3,000; chief computer (formerly superintendent of computing division), $2,750; chief of files and records division (formerly chief of law and records division), $2,500; chief of accounts division, $2,500; chief of maintenance division (formerly chief of inspection division), $2,500; chief mechanical and electrical engineer, $2,750; four technical clerks, at $1,800 each; clerks—seven of class four, additional to one clerk of class four as bookkeeper, $100, nine of class three, five of class two, one of class one; foreman of duplicating gallery, $1,800; four messengers; assistant messenger; one laborer; four inspectors, at $2,190 each; inspector, $1,800; in all, $83,850.

For the following now authorized and payable from general appropriations, namely: For chief of technical division, $3,000; assistant constructor, $2,750; assistant chief of files and record division, $2,250; chief structural engineer, $2,750; assistant chief structural engineer, $2,400; inspectors of supplies—one at $2,300, one at $1,800; inspectors—five at $2,300 each, three at $2,000 each, one at $1,800; photographer, $2,000; six administrative clerks, at $2,000 each; clerks—one of class four, four at $1,700 each, four of class three, six at $1,500 each, eight of class two, eight at $1,300 each, thirteen of class one, four at $1,100 each, six at $1,000 each, three at $900 each, two at $840 each; duplicating paper chemist, $1,200; foreman vault, safe and lock shop, $1,100; assistant messenger; messenger boys—three at $480 each, two at $360 each; skilled laborers—four at $1,000 each, seven at $960 each, one at $900, one at $840; laborer, $600; in all, $144,770, which shall be paid out of the appropriation made in the sundry civil appropriation act for the fiscal year nineteen hundred and thirteen for "General Expenses of Public Buildings."

For the fiscal year nineteen hundred and fourteen and annually thereafter specific estimates shall be submitted for salaries for all personal services of the foregoing character required in the office of the Supervising Architect of the Treasury, and except as appropriations may be made thereunder no such personal services

shall be employed in said office at Washington, District of Columbia. (37 Stat. 374.)

These were provisions of the legislative, executive, and judicial appropriation act for the fiscal year 1913, cited above.

Appropriations for the Office of the Supervising Architect for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat. See notes to §§ 350, 352, ante.

§ 358. (Act March 4, 1913, c. 147, § 28.) Technical experts in office of Supervising Architect for standardizing construction and equipment of public buildings.

The employment is hereby authorized of an architectural designer at a compensation of $6,000 per annum, a structural engineering expert at $5,000 per annum, and a heating, lighting, and ventilating engineering expert at $5,000 per annum, to serve in the office of the Supervising Architect of the Treasury Department. to assist the Supervising Architect in connection with the designing and standardizing of public buildings authorized to be erected under the control of the Treasury Department and the mechanical equipment thereof, and in connection with architectural and engineering work of said office of unusual magnitude or complication: Provided, That such services may be employed without regard to civil-service laws, rules, or regulations, and no person now in the employ of the Supervising Architect's office shall be eligible to such employment: And provided further, That the foregoing authorization for the employment of technical experts to assist the Supervising Architect shall be in addition to and independent of the authorizations and appropriations for personal services for the office of the Supervising Architect otherwise made. (37 Stat. 888.)

This section was part of the public buildings act for the fiscal year 1914, cited above.

See notes to §§ 350, 352, ante.

§ 359. (Act July 31, 1894, c. 174, § 1.) Law clerks in offices of Comptroller and Auditors.

The law clerks provided for in the offices of the Comptroller of the Treasury and of the several Auditors of the Treasury shall be skilled in the law, and shall be appointed in the same manner as chiefs of divisions are now appointed by the Secretary of the Treasury. (28 Stat. 173.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1895, cited above.

The performance by such law clerks of such clerical duties as may be required was prescribed by a provision of Act March 2, 1895, c. 177, § 1, post, § 415.

Appropriations are made in the legislative, executive, and judicial appropriation acts for the law clerks in the offices of Comptroller of the Treasury and the Auditors. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 350, ante.

Notes of Decisions

Appointment of law clerks.—Appointments to the offices of the law clerks provided for by this act were not made subject to competitive examination by the provisions for performance by them of clerical duties of Act March 2, 1895, § 1, post, § 415. (1895) 21 Op. Atty. Gen. 187.

§ 360. (Act Aug. 23, 1912, c. 350, § 1.) Clerks, etc., in office of Auditor for Post Office Department, to audit accounts of Postal Savings System.

The Secretary of the Treasury may employ such number of clerks and employees of the several classes and at the several rates of compensation recognized by law, and expend such sums for contingent and miscellaneous items, as may be necessary, in his judgment, to audit the accounts of the postal savings system in the

Office of the Auditor for the Post Office Department: Provided, That the money required to pay such clerks and employees, and contingent and miscellaneous items, not exceeding $50,000 for the fiscal year nineteen hundred and thirteen, shall be advanced to the Secretary of the Treasury at regular intervals out of any available appropriation for the establishment, maintenance, and extension of postal-savings depositories: Provided further, That estimates hereunder shall be submitted in detail for the fiscal year nineteen hundred and fourteen and annually thereafter. (37 Stat. 376.)

These were provisions of the legislative, executive, and judicial appropriation act for the fiscal year 1913, cited above.

Similar provisions of the same act for clerks, etc., in the Office of the Treasurer, to transact the business of the Postal Savings System are set forth post, § 361.

Subsequent appropriations for the same purposes, for the fiscal year 1914, and subsequent years were made by the legislative, executive, and judicial appropriation acts. Those for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

The recent legislative, executive, and judicial appropriation acts, in addition to the appropriations for the office of the Auditor for the Post Office Department, have authorized the Secretary of the Treasury, during each fiscal year, to diminish from time to time, as vacancies occur by death, resignation or otherwise, the number of positions of the several grades below the grade of chief of division in the office of the Auditor for the Post Office Department, and to use the unexpended balances of the appropriations for the positions so diminished as a fund to pay the compensation, as fixed by him, of such number of employés as may be necessary to audit the accounts and vouchers of the Postal Service by the use of labor saving devices. Such provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 350, ante.

§ 361. (Act Aug. 23, 1912, c. 350, § 1.) Clerks, etc., in office of Treasurer, to transact business of Postal Savings System.

Salaries, force employed on work of the Postal Savings System in the office of the Treasurer of the United States (reimbursable): The Secretary of the Treasury may employ such number of clerks and employees of the several classes and at the several rates of compensation recognized by law, and expend such sums for contingent and miscellaneous items, as may be necessary, in his judgment, to transact the business of the Postal Savings System in the office of the Treasurer of the United States: Provided, That the money required to pay such clerks and employees, and contingent and miscellaneous items, not exceeding $18,000 for the fiscal year nineteen hundred and thirteen, shall be advanced to the Secretary of the Treasury at regular intervals out of any available appropriation for the establishment, maintenance, and extension of postal savings depositories: Provided further, That estimates hereunder shall be submitted in detail for the fiscal year nineteen hundred and fourteen, and annually thereafter. (37 Stat. 377.)

See notes to preceding provisions of this act, ante, § 360.

§ 362. (Act March 4, 1913, c. 142, § 1.) Leaves of absence for piece-rate employés in the Office of the Auditor for Post Office Department.

Under such rules and regulations as the Secretary of the Treasury may prescribe, piece-rate employees in the Office of the Auditor for the Post Office Department shall be entitled, from and after the approval of this Act, to the same leave of absence with pay as is provided for clerks and employees in the Executive Departments by section five of the Act approved March third, eighteen hundred and ninety-three; section seven of the Act approved March fifteenth, eighteen hundred and ninety-eight; section one of the Act approved July seventh, eighteen hundred and ninety-eight, and section four of the Act approved February twenty-fourth,

eighteen hundred and ninety-nine. The pay of any piece-rate employee during such leave shall be determined by the average quantity of work done by such employee and the pay therefor. (37 Stat. 754.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1914, cited above.

The provisions mentioned in this paragraph, for leave of absence for clerks and employés in the executive departments, of Act March 3, 1893, c. 211, § 5, as amended by Act March 15, 1898, c. 68, § 7, and of Act July 7, 1898, c. 571, § 1, and Act Feb. 24, 1899, c. 187, § 4, are set forth ante, §§ 238–240.

Provisions for compensation, on a piece-rate basis, in the Office of the Auditor for the Post Office Department, of such number of employés as might be necessary to tabulate, by the use of mechanical devices, the accounts and vouchers of the Postal Service, were made for the fiscal year 1913 by Act Aug. 23, 1912, c. 350, § 1, 37 Stat. 376, for the fiscal year 1914 by Act March 4, 1913, c. 142, § 1, 37 Stat. 754. For the subsequent years the appropriation was for "compensation to be fixed by the Secretary of the Treasury, of such number of employés as may be necessary to audit the accounts and vouchers of the Postal Service by the use of labor-saving devices," with a proviso that not to exceed a certain amount of the appropriation might be used for the payment of compensation to said employés absent on leave. See Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 363. (Act Aug. 15, 1876, c. 287, § 1.) Office of Deputy Register abolished.

The office of Deputy Register of the Treasury is hereby abolished. (19 Stat. 151.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1877, cited above. A Deputy Register, as well as an Assistant Register, in the office of the Register of the Treasury, was authorized by a provision of Act March 3, 1875, c. 130, § 2, ante, § 352.

Recent appropriations for the office of Register of the Treasury are: Register, $4,000, Assistant Register, $2,500, chief of division, $2,000, and clerks, messengers, and laborers. See Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 364. (Act Oct. 3, 1913, c. 16, § II, N.) Additional Deputy Commissioner, heads of divisions, clerks, etc., in office of Commissioner of Internal Revenue.

In the office of the Commissioner of Internal Revenue at Washington, District of Columbia, there shall be appointed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury one additional deputy commissioner, at a salary of $4,000 per annum; two heads of divisions, whose compensation shall not exceed $2,500 per annum; and such other clerks, messengers, and employees, and to rent such quarters and to purchase such supplies as may be necessary. (38 Stat. 180.)

This was a provision of section II, relating to income tax, of the Underwood Tariff Act of 1913, cited above, accompanying other provisions making an appropriation for the fiscal year 1914 to carry said section into effect, and authorizing the appointment and payment from said appropriation of all necessary officers, agents, inspectors, deputy collectors, clerks, etc., with a proviso limiting the rates of compensation of such agents, inspectors, deputy collectors, clerks, etc., which are set forth post, § 6336.

A proviso, annexed to this provision, prescribing the mode of appointment and of fixing the compensation of "the force of agents, deputy collectors, inspectors, and other employés not including the clerical force below the grade of chief of division employed in the Bureau of Internal Revenue," is set forth post, § 6336.

A further proviso, annexed to this provision, that the force authorized to carry out the provisions of said section II, "when not employed as herein provided, shall be employed on general internal-revenue work," applicable to the force authorized by this provision in the office of the Commissioner of Internal Revenue as well as to the force of agents, inspectors, deputy collectors, etc., is also set forth post, § 6336.

This section was amended by a provision in the legislative, executive, and judicial appropriation act for the fiscal year 1915, Act July 1, 1914, c. 141, § 1, post, § 364a.

See notes to § 350, ante.

§ 364a. (Act July 16, 1914, c. 141, § 1.) Additional chiefs of divisions, clerks, etc., supplies, etc., in office of Commissioner of Internal Revenue, for collection of income tax.

For expenses of assessing and collecting the income tax as provided in paragraph N, section two, of an Act entitled "An Act to reduce tariff duties, and to provide revenue for the Government, and for other purposes," approved October third, nineteen hundred and thirteen, which Act is hereby amended to authorize two chiefs of division at $3,500 and $2,500 per annum, respectively, in lieu of two chiefs of division at $2,500 each, including the employment in the District of Columbia, of necessary clerical and other personal services, and the purchase of such supplies, equipment, mechanical devices, and other articles as may be necessary for use in the District of Columbia and the several collection districts, $1,500,000. (38 Stat. 475.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1915, cited above. The section referred to therein is set forth ante, § 364.

§ 365. (Act Aug. 5, 1882, c. 389, § 1.) Detail of officers for duty at Department.

Nothing in section four of this act shall be construed to prevent the Secretary of the Treasury from detailing one officer of the Revenue Marine Service for duty in the Office of the Life-Saving Service, and one officer from the Special Agency Service, and one from the Customs Service, respectively, for duty at the Treasury Department at Washington, nor to prevent the Commissioner of Internal Revenue from detailing one revenue agent for duty in his office. (22 Stat. 229.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1883, cited above.

Section 4 of the same act, referred to in the above provision, restricted the employment of clerks and others in the Departments to those for whom specific provision is made in the appropriation acts. It is set forth ante, § 249.

A subsequent provision authorizing such detailing of not exceeding ten officers of the Revenue Marine Service is set forth, post, § 366.

The detail of a captain of the Revenue-Cutter Service to be chief of the Division of Revenue-Cutter Service was directed by provisions of Act July 31, 1894, c. 174, § 1, 28 Stat. 172, but that provision was superseded by a provision for the appointment of a captain commandant who shall act as chief of the Division of Revenue-Cutter Service, made by Act April 16, 1908, c. 884, § 1, post, § 5405.

The Coast Guard was established in lieu of the Revenue Cutter Service and the Life Saving Service by Act Jan. 28, 1915, c. 20, post, under Title XXXIV, "Collection of Duties upon Imports," Chapter Three, "The Coast Guard."

Similar provisions authorizing the Secretary of the Treasury to detail officers employed in the enforcement of the Chinese exclusion acts and the alien contract-labor laws for duty at the Treasury Department, made by Act June 6, 1900, c. 791, § 1, and Act March 3, 1901, c. 853, § 1, superseded by Act March 4, 1915, c. 147, § 1, having become inapplicable to that Department by the transfer of the Immigration Bureau and the Immigration Service to the Department of Commerce and Labor, by Act Feb. 14, 1903, c. 552, § 4, post, § 857, and their subsequent transfer to the Department of Labor, on the creation of that department, by Act March 4, 1913, c. 141, § 3, post, § 934, are set forth under Title XII B, "The Department of Labor," post, §§ 938, 939.

Provisions of the annual sundry civil appropriation acts authorized the Secretary of the Treasury to use, for the enforcement of the laws relating to the Department and the branches of the public service under its control, certain specified numbers of persons paid from the appropriations for collection of customs, for salaries and expenses of internal revenue agents or for punishment of violations of internal revenue laws, and for suppressing counterfeiting and other crimes. The provisions for the fiscal year 1917 were by Act July 1, 1916, c. 209, § 1, post, § 378a.

§ 366. (Act March 4, 1907, c. 2918, § 1.) Detail of officers of Revenue-Cutter Service for duty in District of Columbia.

Nothing in the Acts approved August fifth, eighteen hundred and eighty-two, and June twenty-second, nineteen hundred and six,

making appropriations for the legislative, executive, and judicial expenses of the Government, shall be construed to prohibit the detailing of officers of the Revenue-Cutter Service in the District of Columbia for such periods as the Secretary of the Treasury may deem necessary, but the number of officers so detailed shall not exceed ten. (34 Stat. 1309.)

This was a provision of the sundry civil appropriation act for the fiscal year 1908, cited above. The provisions of Act Aug. 5, 1882, c. 389, § 4, and of Act June 22, 1906, c. 3514, § 6, mentioned therein, are set forth ante, §§ 249, 252.

This provision supersedes a similar provision contained in Act Feb. 26, 1889, c. 279, § 1, 25 Stat. 719.

The Coast Guard was established in lieu of the Revenue-Cutter Service. See notes to § 365, ante.

§ 367. (Act June 23, 1913, c. 3, § 1.) Detail of members of field force of Public Buildings Service for duty in Office of Supervising Architect.

Hereafter members of the field force of the public-building service, such as supervising superintendents, superintendents, junior superintendents, and inspectors of the several classes, may be detailed to the District of Columbia, in the discretion of the Secretary of the Treasury, for temporary duty for periods not exceeding thirty days in any one case, in the Office of the Supervising Architect, but no subsistence or other expenses of like character shall be allowed such employees while on duty in Washington serving under such details. (38 Stat. 17.)

This was a provision of the sundry civil appropriation act for the fiscal year 1914, cited above.

§ 367a. (Act July 16, 1914, c. 141, § 1.) Transfer and appointment in office of Treasurer of employés detailed thereto.

The Secretary of the Treasury is hereby authorized to transfer and appoint in the office of the Treasurer of the United States such of the employees, in his discretion, as are now employed in said office under details authorized by the Act of March fourth, nineteen hundred and thirteen. (38 Stat. 471.)

This was a provision in the legislative, executive, and judicial appropriation act for the fiscal year 1915, cited above. The act referred to in this section is Act March 4, 1913, c. 142, § 1, 37 Stat. 755, authorizing the Secretary of the Treasury, for a limited time, to detail such employés in the offices of the Assistant Treasurer as may be necessary for duty in the District of Columbia in the office of the Treasurer of the United States.

§ 368. (R. S. § 236.) Public accounts to be settled in the Department of the Treasury.

All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury.

Act March 3, 1817, c. 45, § 2, 3 Stat. 366.

As to the necessity of the audit and allowance of accounts by the accounting officers of the Treasury Department, the effect of decisions or actions of heads of departments upon the audit and allowance of claims by the accounting officers of the Treasury Department, the power and duty of the accounting officers of the Treasury Department to set off claims, and the powers and duties of the accounting officers of the Treasury Department as to pension claims, see § 419, post, and notes thereunder.

Notes of Decisions

Necessity of settlement and adjustment of claims and accounts.—In a suit by the United States against a depositary of public money for a balance thereof, credits to him for clerk hire cannot be allowed without evidence from the books of the Treasury that a claim for such credits had been presented to the proper officers of the Treasury, and disallowed by them, in whole or in part. U. S. v. Gilmore (1868) 7 Wall. 491, 493, 19 L. Ed. 282.

No claim or demand can be paid on presentation at the Treasury, nor un-

til it has been audited and allowed by the accounting officers, and then only in pursuance of an appropriation made by law. Ravesies v. U. S. (1886) 21 Ct. Cl. 243.

Under the requirement of Act March 3, 1817, § 2, re-enacted in this section, the Secretary of War could not be called on to order payment on a claim arising from a contract with the War Department, until a settlement of the account at the Treasury by the proper officer. (1832) 2 Op. Atty. Gen. 518.

Under the appropriation by Act Sept. 22, 1888, c. 1027, 25 Stat. 485, for payment for Army transportation to land-grant railroads, "to be adjusted in accordance with the decisions of the Supreme Court," etc., omitting, after the word "adjusted," the words "by the accounting officers," contained in previous similar appropriations, accounts for such transportation could be lawfully paid by an Army quartermaster without previous action thereon by the accounting officers of the Treasury. (1889) 19 Op. Atty. Gen. 264.

Previous action of heads of Departments as to claims.—The entire administration of the system devised by Congress for the collection, during the civil war, of captured and abandoned property within the insurrectionary districts, and its sale thereafter, having been committed to the Secretary of the Treasury, subject to no other restriction than that the expenses charged upon the proceeds of sales be "proper and necessary," and be approved by him, the Secretary's approval of an agent's account including expenses incurred on account of a particular lot of such property, made before the passage of Res. March 31, 1868, 15 Stat. 251, requiring moneys received from such sales to be paid into the Treasury, was conclusive that said expenses were proper and necessary, in the absence of fraud, positive violation of statute, or contravention of public policy. U. S. v. Johnston (1888) 8 Sup. Ct. 446, 454, 124 U. S. 236, 31 L. Ed. 389.

The Secretary of the Treasury had no authority to increase an allowance made by the Secretary of the Navy to certain citizens under Act April 26, 1822, c. 36, by adding interest thereto or otherwise. (1823) 1 Op. Atty. Gen. 605.

The Secretary of the Treasury was not authorized, under this section, nor by a resolution of one house of Congress, to re-examine and audit a claim which under a special act relating thereto, had been examined and settled by the head of another department. (1889) 19 Op. Atty. Gen. 385.

Claims under pension laws.—The power to audit and adjust accounts for expenses of the last sickness and burial of deceased pensioners, under R. S. § 4718, belonged solely to the proper accounting officers of the Treasury, by virtue of this section, which was not restricted or qualified by said section 4718, and the Commissioner of Pensions had no authority to audit such accounts. (1882) 17 Op. Atty. Gen. 339, 440.

Authority as to judgments against United States.—This section does not apply to judgments of the Court of Claims. U. S. v. Jones (1886) 7 Sup. Ct. 283, 284, 119 U. S. 477, 30 L. Ed. 440.

Authority as to conflicting claims.—The officers of the Treasury cannot arbitrarily select between contending claimants. People's Trust Co. v. U. S. (1903) 38 Ct. Cl. 359.

It is not the duty of the Treasury Department to investigate the facts and circumstances alleged to exist by a surety to a bond given to the United States, and by him paid, concerning a certain trust fund, in which he claims an interest, created by an assignment of the principal debtor, and which he avers has been applied by the United States to the payment of other bonds of the same debtor. The question belongs to the judiciary. (1831) 2 Op. Atty. Gen. 457, 473.

Authority to set off claims.—A claim allowed in the Treasury Department cannot be set off by a federal court against a judgment for the United States in an action therein, as the authority to set off of claims due to and from the United States is committed by Act March 3, 1875, post, § 6407, to the Secretary of the Treasury. U. S. v. Griswold (D. C. 1887) 30 Fed. 604.

The right of set-off, where the government is both debtor and creditor, is founded upon this section, and exists independently of the special enactments of R. S. § 1766, post, § 3239, and Act March 3, 1875, post, § 6407. Taggart v. U. S. (1881) 17 Ct. Cl. 322, 327.

The Treasury has authority to set off an indebtedness due from a claimant to the government against a judgment recovered by him. Labadie v. U. S. (1898) 33 Ct. Cl. 476.

The Treasury Department has power to protect the United States in judgment or claims where a set-off exists. The Henry (1900) 35 Ct. Cl. 393.

Methods of settlement of accounts.—The methods of settling accounts and claims against the government stated and explained. McKnight v. U. S. (1877) 13 Ct. Cl. 292, 299–306.

Cited without definite application, Cooke v. U. S. (1875) 91 U. S. 389, 398, 23 L. Ed. 237; U. S. v. Lynch (1890) 11 Sup. Ct. 114, 115, 137 U. S. 280, 34 L. Ed. 700; U. S. v. Bailey (D. C. 1913) 207 Fed. 782, 784; Wood v. U. S. (1889) 25 Ct. Cl. 98, 109; Campbell v. U. S. (1909) 44 Ct. Cl. 488, 493; Hayes v. U. S. (1909) 44 Ct. Cl. 493, 496.

§ 369. (R. S. § 237, as amended, Act Oct. 1, 1890, c. 1256, § 9.) Commencement of the fiscal year.

The fiscal year of the Treasury of the United States in all matters of accounts, receipts, expenditures, estimates, and appropriations, except accounts of the Secretary of the Senate for compensation and traveling expenses of Senators, and accounts of the Sergeant-at-Arms of the House of Representatives for compensation and mileage of members and delegates, shall commence on the first day of July in each year; and all accounts of receipts and expenditures required by law to be published annually shall be prepared and published for the fiscal year, as thus established. The fiscal year for the adjustment of the accounts of Secretary of the Senate for compensation and traveling expenses of Senators, and of the Sergeant-at-Arms of the House of Representatives for compensation and mileage of members and delegates shall extend to and include the third day of July.

Act Aug. 26, 1842, c. 207, §§ 1, 2, 5 Stat. 536, 537. Act May 8, 1872, c. 139, § 1, 17 Stat. 61. Act March 3, 1873, c. 226, § 1, 17 Stat. 486. Act Oct. 1, 1890, c. 1256, § 9, 26 Stat. 646.

This section, as enacted in the Revised Statutes, excepted from its general provision and provided specially for accounts of the Secretary of the Senate for compensation and traveling expenses of Senators, only. It was amended to include in such exception and special provision accounts of the Sergeant-at-Arms of the House of Representatives for compensation and mileage of members and delegates, also, as set forth here, by Act Oct. 1, 1890, c. 1256, § 9, last cited above.

Notes of Decisions

Previous practice and statutes.—Before the passage of Act Aug. 26, 1842, c. 207, provisions of which and of subsequent acts were carried into this section, the fiscal year commenced with and ended with the calendar year, but for the convenience of the public service in the administration of the expense, accounts, and estimates of the government, Congress changed the law so as to make the 1st day of July the commencement of the fiscal year. Bachelor v. U. S. (1872) 8 Ct. Cl. 235, 238; Sweet v. U. S. (1899) 34 Ct. Cl. 377, 387.

The necessity of the situation requires that the government have a fixed time in the form of a fiscal year. Whether it be with the commencement of the calendar year or at some other fixed period is not material, but that there should be a limit to accounts and expenses into distinct sections of time is an absolute necessity. Sweet v. U. S. (1899) 34 Ct. Cl. 377, 386.

Adjustment of compensation and accounts of officers.—Where the compensation to which an officer is entitled is an annual compensation, as it is derived from his official acts within each fiscal year, it becomes due at the end of each year. If not paid, a right of action then accrues, and the statute of limitations then begins to run. The same principle applies to compensation which consists of commissions upon deposits. Bachelor v. U. S. (1872) 8 Ct. Cl. 235; Ellsworth v. U. S. (1878) 14 Ct. Cl. 382, 395.

This section and R. S. § 257, post, § 386, do not forbid United States commissioners to demand payment at any time of their accounts for fees. Patterson v. U. S. (1886) 21 Ct. Cl. 322.

The fiscal year is the basis on which the compensation of registers and receivers of land offices must be estimated, under R. S. § 2240, post, § 4476, limiting their maximum compensation to $3,000 "a year"; the word "calendar," qualifying "year" in previous statutory provisions on the subject having been omitted from that section of the revision. Sweet v. U. S. (1899) 34 Ct. Cl. 377, 387.

The fiscal year established by this section is the year referred to in the requirement of R. S. § 3146, post, § 5852, that in adjusting the accounts of internal revenue collectors the fiscal year of the Treasury shall be observed. (1899) 22 Op. Atty. Gen. 320, 323.

(R. S. § 238. Superseded.)

This section provided that the commissions of all officers employed in levying or collecting the public revenue should be made out and recorded in the Department of the Treasury, and the seal of the Department affixed thereto. It was superseded by similar provisions as to commissions of all officers under the direction and control of the Secretary of the Treasury and of certain other heads of Executive Departments, contained in Act March 28, 1896, c. 73, post, § 3250.

§ 370. (R. S. § 239, as amended Act Feb. 18, 1875, c. 80.) Accounts of receipts of internal revenue.

Separate accounts shall be kept at the Department of the Treasury of all moneys received from internal duties or taxes in each of the respective States, Territories, and collection-districts, and of the amount of each species of duty and tax that shall accrue; so as to exhibit, as far as may be, the amount collected from each source of revenue, with the moneys paid as compensation and for allowances to the collectors and deputy collectors, inspectors, and other officers employed in each of the respective States, Territories, and collection-districts.

Act June 30, 1864, c. 173, § 43, 13 Stat. 239. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 317.

This section, as enacted in the Revised Statutes, contained, after the words "collectors and deputy collectors," the further words, "assessors and assistant assessors," which were stricken out by amendment by Act Feb. 18, 1875, c. 80, § 1, cited above, the offices of assessor and assistant assessor having ceased to exist, under Act Dec. 24, 1872, c. 13, 17 Stat. 401.

An abstract of the accounts to be kept under this section was required to be furnished by the Secretary of the Treasury to Congress, by R. S. § 261, post, § 396.

§ 371. (R. S. § 240.) Accounts of expenditures for contingent expenses.

No account for contingent expenses at any of the Bureaus of the Department of the Treasury shall be allowed, except on the certificate of the superintendent of the Treasury buildings that such expenses are necessary and proper, and that the prices paid are just and reasonable; and the superintendent shall keep a full, just, and accurate account in detail of all amounts expended under the head of contingent expenses for the several Bureaus of the Department of the Treasury.

Act March 3, 1869, c. 123, 15 Stat. 311.

Appropriations for expenditures of the Bureau of Engraving and Printing are not to be subject to the provisions of this section, under the provision of Act June 4, 1897, c. 2, § 1, post, § 372.

Provisions for reports to Congress of the accounts of the superintendent of the Treasury buildings, of contingent expenses for the several Bureaus, were contained in R. S. § 262, post, § 397.

The provisions of this section and of R. S. § 241, post, § 375, are applicable to the officer or officers under whom the control and expenditure of appropriations for contingent expenses of the department may be placed, by a provision of Act June 25, 1910, c. 385, post, § 373.

Appropriations for the fiscal year 1914 and subsequent years for certain specified expenses in the office of the Auditor for the Post Office Department, to operate as a specific exception of said office from the appropriation for contingent expenses, were made by the legislative, executive, and judicial appropriation acts for such years. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 372. (Act June 4, 1897, c. 2, § 1.) Appropriations for Bureau of Engraving and Printing not to be held as for contingent expenses.

Hereafter the appropriations made for all expenditures of the Bureau of Engraving and Printing shall be used in the manner in which appropriations for said Bureau have heretofore been used, and no part of said appropriations shall be held to be contingent expenses of the Treasury Department, nor be subject to the provisions of sections two hundred and forty and thirty-six hundred and eighty-three of the Revised Statutes. (30 Stat. 18.)

This was a provision of the sundry civil appropriation act for the fiscal year 1898, cited above.

A similar provision, but applying only to the appropriation for the year, was made by the sundry civil appropriation act of June 11, 1896, c. 420, § 1, 29 Stat. 421.

R. S. § 3683, mentioned in this provision, containing general restrictions on the application of contingent funds, is set forth post, § 6784.

§ 373. (Act June 25, 1910, c. 385.) Control and expenditure of appropriations for contingent expenses, under designated officers.

The Secretary of the Treasury is authorized to place the control and expenditure of the various appropriations made for contingent expenses of the Treasury Department at Washington, District of Columbia, under such officer or officers of the Treasury Department as he may from time to time determine proper or necessary, and the requirements and authority imposed by sections two hundred and forty and two hundred and forty-one of the Revised Statutes of the United States shall hereafter be applicable to the person or persons designated hereunder as fully as they have heretofore applied to the superintendent of the Treasury building with reference to said appropriations. (36 Stat. 776.)

This was a provision of the deficiency appropriation act for the fiscal year 1910, cited above.

R. S. §§ 240, 241, mentioned in this paragraph, are set forth ante, § 371, and post, § 375.

§ 374. (Act March 4, 1911, c. 237, § 1.) Purchase of stationery for internal revenue service.

Hereafter the purchase of stationery for the Internal-Revenue Service shall be made under the direction of the Secretary of the Treasury as in the case of other branches of the public service under the Treasury Department. (36 Stat. 1195.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1912, cited above.

§ 375. (R. S. § 241.) Accounts of expenditures for furniture and repairs.

The expenditure for furniture and repairs for the Bureaus of the Department of the Treasury shall be made by the superintendent of the Treasury buildings, subject to the approval of the Secretary of the Treasury; and it shall be the duty of the superintendent to keep a just and accurate account in detail of all the amounts paid for the purchase of furniture, and also for the repairs thereof, as well as a full statement of the disposal of the old furniture.

Act March 3, 1869, c. 123, 15 Stat. 311.

The provisions of this section, as well as those of R. S. § 240, ante, § 371, were made applicable to the officer or officers under whom the control and expenditure of appropriations for contingent expenses of the department may be placed, by a provision of Act June 25, 1910, c. 385, ante, § 373.

Provisions for reports to Congress of the accounts of the Superintendent of the Treasury buildings relating to furniture are contained in R. S. § 262, post, § 397.

§ 376. (R. S. § 242.) Temporary clerks.

No clerk temporarily employed in the Department of the Treasury shall receive a greater compensation than at the rate of twelve hundred dollars a year for the time actually employed.

Act July 12, 1870, c. 251, § 1, 16 Stat. 238. Act March 3, 1871, c. 113, § 1, 16 Stat. 483.

A provision applicable to all the Departments, as to the compensation of temporary clerks, was made by R. S. § 168, ante, § 247.

§ 377. (R. S. § 243.) Restrictions upon officers of the Department.

No person appointed to the office of Secretary of the Treasury, or First Comptroller, or First Auditor, or Treasurer, or Register, shall directly or indirectly be concerned or interested in carrying on the business of trade or commerce, or be owner in whole or in part of any sea-vessel, or purchase by himself, or another in trust for him, any public lands or other public property, or be concerned in the purchase or disposal of any public securities of any State, or of the United States, or take or apply to his own use any emolument or gain for negotiating or transacting any business in the Treasury

Department, other than what shall be allowed by law; and every person who offends against any of the prohibitions of this section shall be deemed guilty of a high misdemeanor and forfeit to the United States the penalty of three thousand dollars, and shall upon conviction be removed from office, and forever thereafter be incapable of holding any office under the United States; and if any other person than a public prosecutor shall give information of any such offense, upon which a prosecution and conviction shall be had, one-half the aforesaid penalty of three thousand dollars, when recovered, shall be for the use of the person giving such information.

Act Sept. 2, 1789, c. 12, § 8, 1 Stat. 67.

The designations of the offices of First Comptroller and First Auditor were changed, by Act July 31, 1894, c. 174, §§ 3, 4, post, §§ 402, 417.

Similar restrictions were imposed on officers in the General Land Office, as to purchase of public lands, by R. S. § 452, post, § 698.

Customs officers were forbidden to own vessels, or to act as agents, etc., for owners of vessels or cargo, or to engage in importation, by R. S. § 2638, post, § 5379.

Notes of Decisions

Purpose of provisions.—The evident purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power. Ex parte Curtis (1882) 1 Sup. Ct. 381, 384, 106 U. S. 371, 27 L. Ed. 232.

One of the principal objects of the restriction was to withdraw from the accounting officers every motive of private interest in the performance of their public duties. (1847) 4 Op. Atty. Gen. 555.

Officers to whom restriction applies.—The restriction imposed by section 8 of the act creating the Treasury Department, Act Sept. 2, 1879, c. 12, which were carried into this section, applied to the additional comptroller and auditors authorized in the department by Act March 3, 1817, c. 45. § 3, 3 Stat. 366, as well as to the officers provided for in the original act. (1847) 4 Op. Atty. Gen. 555.

Purchase of public lands, etc.—The prohibition Act Sept. 2, 1789, § 8, incorporated into this section, of the purchase by certain officers of "public lands or other public property," according to its terms, would seem to apply only to the purchase of such property as belongs to, or is in the ownership of, the United States; and, being highly penal, it should be taken strictly and not extended by construction. It should not be applied to lands sold for taxes under the direct tax law, on which the United States had a lien merely for the amount assessed. (1873) 14 Op. Atty. Gen. 352.

§ 378. (R. S. § 244.) Restrictions upon clerks in the Department.

Every clerk employed in the Treasury Department who carries on any trade or business in the funds or debts of the United States, or of any State, or in any kind of public property, or who takes or applies to his own use any emolument or gain for negotiating or transacting any business in the Department, shall be deemed guilty of a misdemeanor, and punished by a fine of five hundred dollars and removal from office.

Act March 3, 1791, c. 18, § 1, 1 Stat. 215. Act May 8, 1792, c. 37, § 12, 1 Stat. 281.

Similar restrictions were imposed on clerks and employés in the General Land Office, as to purchase of public lands, by R. S. § 452, post, § 698.

See, also, notes to § 377, ante.

Cited without definite application,
Ex parte Curtis (1882) 1 Sup. Ct. 381, 383, 106 U. S. 371, 27 L. Ed. 232.

§ 378a. (Act July 1, 1916, c. 209, § 1.) Enforcement of laws relating to Treasury Department; employment of persons paid from certain appropriations for.

The Secretary of the Treasury is authorized to use for, and in connection with, the enforcement of the laws relating to the Treasury Department and the several branches of the public service under its control, not exceeding at any one time four persons paid from the appropriation for the collection of customs, four persons paid

from the appropriation for salaries and expenses of internal-revenue agents or from the appropriation for the foregoing purpose, and four persons paid from the appropriation for suppressing counterfeiting and other crimes, but not exceeding six persons so detailed shall be employed at any one time hereunder: Provided, That nothing herein contained shall be construed to deprive the Secretary of the Treasury from making any detail now otherwise authorized by existing law. (39 Stat.)

This section was a part of the sundry civil appropriation act for the fiscal year 1917. The appropriation referred to as "the appropriation for the foregoing purpose" was an appropriation for punishment for violations of the internal revenue laws, made by another paragraph in the same act.

See notes to § 365, ante.

CHAPTER TWO

The Secretary of the Treasury

Sec.
379. Duties of Assistant Secretaries.
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399. Quarterly publication of statement of receipts and expenditures.
400. Monthly publication of weekly statement of the Treasurer, etc.

§ 379. (R. S. § 245.) Duties of Assistant Secretaries.

The Assistant Secretaries of the Treasury shall examine letters, contracts, and warrants prepared for the signature of the Secretary of the Treasury, and perform such other duties in the office of the Secretary of the Treasury as may be prescribed by the Secretary or by law.

Act March 3, 1849, c. 108, § 13, 9 Stat. 396. Act March 14, 1864, c. 30, § 3, 13 Stat. 26.

The Assistant Secretaries of the Treasury are ineligible, during the time they are in office, and for two years thereafter, to hold any office, etc., in any bank which is a member of a Federal reserve bank, by a provision of section 10 of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 10, post, § 9793.

Provisions applicable to all the Departments, that, in case of the death, resignation, absence, or sickness of the head of the Department, the duties of the office may be performed, temporarily, by the assistant, were made by R. S. § 177, ante, § 259.

Notes of Decisions

Nature and scope of authority.—This section does not confine the powers of the assistants to the duties of a like nature with those here enumerated, especially when read in connection with R. S. §§ 161, 177, ante, §§ 235, 259, which impose more enlarged duties in certain contingencies. The John Shilli-

to Co. v. McClung (1892) 51 Fed. 868, 2 C. C. A. 526, affirming judgment (C. C. 1891) 45 Fed. 778.

The Assistant Secretary of the Treasury is not the deputy of the Secretary, but only his aid, and his acts are not valid unless specially authorized by law, or prescribed by the Secretary, as provided by R. S. § 161, ante, § 235, and this section. U. S. v. Adams (C. C. 1885) 24 Fed. 348.

Presumption of authority.—An act of the Assistant Secretary, within the authority and power of the department, must, be presumed, nothing appearing to the contrary, to have been done in pursuance of a lawful authority. The John Shillito Co. v. McClung (1892) 51 Fed. 868, 872, 2 C. C. A. 526; Chadwick v. U. S. (C. C. 1880) 3 Fed. 750, 756; U. S. v. Adams (C. C. 1885) 24 Fed. 348, 350.

—— **Particular acts.**—Under this section and R. S. §§ 161, 177, 236, ante, §§ 235, 259, 368, the Secretary of the Treasury could assign to the Assistant Secretary or secretaries the duty of deciding appeals from assessments made by collectors of customs duties, or, in his absence, they could have lawfully performed his duties in respect to such matters; and, when such an appeal is decided by an Assistant Secretary, his authority to decide it will be presumed. The John Shillito Co. v. McClung (1892) 51 Fed. 868, 872, 2 C. C. A. 526. And see In re Way Tai (C. C. 1899) 96 Fed. 484, 486.

As an Assistant Secretary might have been duly authorized, under this section, to authenticate the quarterly returns of an internal revenue collector, where returns so certified were offered in evidence, it would be presumed that the certificate was made in pursuance of a lawful authority. Chadwick v. U. S. (C. C. 1880) 3 Fed. 750, 756.

A letter written by an Assistant Secretary to a collector of customs concerning the deposit of money in the custody of the collector will be presumed to have been written by authority of the Secretary. U. S. v. Adams (C. C. 1885) 24 Fed. 348, 350, 351.

Under this section and R. S. § 161, ante, § 235, the Secretary of the Treasury could require an Assistant Secretary to "ascertain, determine, and declare" the amount of foreign sugar bounties, that duty having been assigned to the Secretary by Tariff Act July 24, 1897, c. 11, § 5, 30 Stat. 205; and where an Assistant Secretary has issued a declaration under said section it will be presumed, in the absence of evidence to the contrary, that he was performing a duty in accordance with law, and that the declaration was properly issued. Franklin Sugar Refining Co. v. U. S. (C. C. 1910) 178 Fed. 743.

§ 380. (R. S. § 246, as amended, Act March 2, 1910, c. 71, § 1.) Signing warrants.

The Secretary of the Treasury may, by an appointment under his hand and official seal, delegate authority to the Assistant Secretaries of the Treasury to sign in his stead, and he may in like manner delegate such authority to a clerk in his office to sign in his name, all warrants for the payment of money into the Public Treasury and all warrants for the disbursement from the Public Treasury of money certified by the proper accounting officers of the Treasury to be due upon accounts duly audited and settled by them; also all accountable warrants placing money in the Treasury to the credit of disbursing and other fiscal officers, and all appropriations, repay, and transfer warrants. The warrants so signed by either of the Assistant Secretaries of the Treasury or by the designated clerk shall be in all cases of the same validity as if they had been signed by the Secretary of the Treasury himself.

Act March 2, 1867, c. 163, § 1, 14 Stat. 439. Act March 2, 1910, c. 71, § 1, 36 Stat. 231.

This section of the Revised Statutes provided for the delegation "to one of the Assistant Secretaries" of authority to sign warrants for payment of money into and for disbursement from the Treasury. The amendment by Act March 2, 1910, c. 71, § 1, cited above, authorizes such delegation to the Assistant Secretaries and to a clerk, and includes the additional warrants described in the clause beginning with the words "also all accountable warrants," etc. The last sentence, also added by said amendment, includes the provision contained in R. S. § 247, which was repealed by section 2 of said amendatory act.

The designation by the Secretary of employés in the office of the Auditor for the Post-Office Department to countersign warrants and drafts in the name of the Auditor was authorized by a provision of Act March 4, 1909, c. 297, § 1, post, § 445.

(R. S. § 247. Repealed.)

The provision of this section, that warrants signed by either of the Assistant Secretaries, as authorized by R. S. § 246, should be of the same validity

as if signed by the Secretary, having been incorporated in said section by amendment thereof by Act March 2, 1910, c. 71, § 1, to read as set forth ante, § 380, this section was repealed by section 2 of said amendatory act.

§ 381. (R. S. § 248.) General duties of the Secretary.

The Secretary of the Treasury shall, from time to time, digest and prepare plans for the improvement and management of the revenue, and for the support of the public credit; shall superintend the collection of the revenue; shall, from time to time, prescribe the forms of keeping and rendering all public accounts and making returns; shall grant, under the limitations herein established, or to be hereafter provided, all warrants for moneys to be issued from the Treasury in pursuance of appropriations by law; shall make report, and give information to either branch of the legislature in person or in writing, as may be required, respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office; and generally shall perform all such services relative to the finances as he shall be directed to perform.

Act Sept. 2, 1789, c. 12, § 2, 1 Stat. 65. Act May 8, 1792, c. 37, § 9, 1 Stat. 281. Act March 3, 1849, c. 108, § 3, 9 Stat. 395.

The purchase or redemption of bonds with surplus money in the Treasury was authorized by Act March 3, 1881, c. 133, § 2, post, § 6823, and the issue of refunding bonds was authorized by Act July 12, 1882, c. 290, § 11, 22 Stat. 165, and Act March 14, 1900, c. 41, § 11, post, § 6825.

The payment and anticipation of interest on the public debt were authorized by R. S. §§ 3698, 3699, post, §§ 6813, 6814.

The purchase of coin with bonds or notes of the United States was authorized by R. S. § 3700, post, § 6815.

The Secretary of the Treasury was authorized to compromise claims against the United States, by R. S. § 3469, post, § 6375; and he was authorized to prescribe rules governing agents representing claimants before his department, and to suspend or disbar such agents, by Act July 7, 1884, c. 334, § 3, post, § 385.

The Secretary of the Treasury was authorized to discharge poor debtors imprisoned under execution issuing from a United States court for a debt due the United States, by R. S. § 3471, post, § 6377.

Provisions relating to the powers and duties of the Secretary of the Treasury in regard to public buildings are collected under Title XLIII A, "Public Buildings and Works."

The Secretary of the Treasury was authorized to lease unproductive property by a provision of Act March 3, 1879, c. 182, § 1, post, § 6943; and he may sell lands acquired by the United States by devise, by a provision of Act March 3, 1903, c. 1007, § 1, post, § 6948.

The duties, powers, etc., of the head of the Department in and over the bureaus, offices, etc., transferred to the Department of Commerce, by Act Feb. 14, 1903, c. 552, were vested in the head of that Department, and the duties, powers, etc., of the Secretary of the Treasury as to shipping, seamen, etc., were transferred to the Secretary of Commerce, by Act Feb. 14, 1903, c. 552, § 10, post, § 859.

The Secretary of the Treasury was directed to prepare regulations governing enlistments in the Revenue-Cutter Service, and for the general government of the service, and various powers in regard to punishment of offenses against the discipline of the service were conferred on him, by Act May 26, 1906, c. 2556, post, §§ 5432, 5455–5461.

The Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor, were directed to make regulations for carrying out the provisions of the Pure Food and Drugs Act of June 30, 1906, c. 3915, by section 3 of that act, post, § 8719, and also for carrying out the provisions of the Insecticide Act of April 26, 1910, c. 191, by section 3 of said act, post, § 8767.

Further provisions for the enforcement by the Secretary of the Treasury and the Secretary of Agriculture, of the provisions of the Pure Food and Drugs Act and of the Insecticide Act as to imported articles were contained in section 11 of each of said acts, post, §§ 8727, 8775.

The Secretary of the Treasury, on request of the Governor of Alaska or the Secretary of Agriculture, is to aid in carrying out the provisions of Act June 7, 1902, c. 1037, 32 Stat. 327, as amended by Act May 11, 1908, c. 162, 35 Stat. 102, by section 7 of said amended act, post, § 3621.

The Secretary of the Treasury is to obtain and furnish to the national banks information as to the securities to be accepted for additional circulating notes, authorized by Act May 30, 1908, c. 229, by section 8 of said act, post, § 9736,

and the acts and orders of the Comptroller of the Currency and the Treasurer under the act are to have the approval of the Secretary, and he is to make regulations and control the organization and management of national currency associations to carry out the purposes of the act, by section 13 of said act, post, § 9737.

The Secretary of the Treasury, the Secretary of Agriculture, and the Comptroller of the Currency were constituted "The Reserve Bank Organization Committee," and the duties and powers of said Committee were defined, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 2, post, § 9786. And the Secretary of the Treasury and the Comptroller of the Currency were made members ex officio of the Federal Reserve Board created by section 10 of said act, post, § 9793.

The Secretary of the Treasury is ineligible, during the time he is in office and for two years thereafter, to hold any office, etc., in any bank which is a member of a Federal reserve bank, by a provision of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 10, post, § 9793. He is also prohibited, as a member of the Federal Reserve Board, from being an officer or director of any bank, etc., and from holding stock in any bank, etc., by a further provision of said section, post, § 9793.

The powers vested by law in the Secretary of the Treasury relative to the supervision, management, and control of the Treasury Department and the bureaus under such Department, were not taken away by the Federal Reserve Act of Dec. 23, 1913, c. 6, and whenever any power vested by said act in the Federal Reserve Board appears to conflict with the powers of the Secretary, such powers are to be exercised subject to the supervision and control of the Secretary, by a provision of section 10 of said act, post, § 9793.

General provisions as to the submission by the heads of Departments to Congress of estimates of expenditures and appropriations, and the duties of the Secretary of the Treasury in regard thereto, are contained in Title XLI, "Appropriations."

For other provisions relating to the powers and duties of the Secretary of the Treasury as to particular matters, see the specific Titles and Chapters.

Notes of Decisions

1. Superintendence of collection of the revenue.
2. Mode of settlement of accounts.
3. Allowance of claims, accounts, etc.
4. Review of decisions of predecessors as to claims or accounts.
5. Granting and issuance of warrants.
6. Payments from treasury.
7. Miscellaneous matters relative to the finances.
8. Form and requisites of decisions.
9. Judicial notice of decisions.
10. Mode of affixing signature to and authenticating public documents.

1. Superintendence of collection of the revenue.—The grant of power to the Secretary of the Treasury, by Act Sept. 17, 1789, § 2, incorporated into this section, to "superintend the collection of the revenue," embraced such powers, not prohibited by law, as are incidental to the general right of sovereignty relative to the subject-matter of the grant. Neilson v. Lagow (1851) 12 How. 98, 107, 13 L. Ed. 909; (1857) 11 Op. Atty. Gen. 532.

Under this section and the provision of section 3 of said act, incorporated into R. S. § 269, making it the duty of the Comptroller to provide for the regular and punctual payment of all moneys which may be collected and direct prosecutions for all debts due to the United States, the Secretary and the Comptroller had power to take security upon land, for a debt already due, on account of the United States, according to the usual methods provided by law for that end. Neilson v. Lagow (1851) 12 How. 98, 107, 13 L. Ed. 909.

A contract by the Secretary of the Treasury, as authorized by Act May 8, 1872, c. 140, § 1, 17 Stat. 69, to pay a certain per cent. on all taxes collected of the persons named in the contract, did not entitle the person agreeing to make the collection to his per cent. on taxes collected by the government officers. Sanborn v. U. S. (1890) 10 Sup. Ct. 812, 135 U. S. 271, 34 L. Ed. 112.

The Secretary of the Treasury has no power to compromise criminal proceedings pending in court. U. S. v. George (C. C. 1869) Fed. Cas. No. 15,198.

However extensive may be the general powers of the Secretary in his superintendence and collection of the revenue under this section and R. S. §§ 249, 251, 2652, post, §§ 382, 384, 5392, they could not authorize any acts conflicting with the particular provisions of R. S. § 2931, or with the binding effect of his decision on appeal, as prescribed by that section and the general rules of law. U. S. v. Leng (D. C. 1883) 18 Fed. 15, 21.

The Secretary of the Treasury has no power to remit a fine imposed by a collector for violation of the revenue laws, after it has been paid to and distributed by the collector. (1837) 3 Op. Atty. Gen. 237.

The Secretary of the Treasury, as superintendent of the agencies and officers engaged in the collection of the revenue, is invested with authority to allow amendment, not prohibited by law, of an entry of goods upon an invoice believed by the importer to state the actual value of the goods, by substituting another invoice giving a less value, being the actual market value, which

was not given in the original invoice by reason of mistake. (1866) 11 Op. Atty. Gen. 532.

There is no statute giving the Secretary of the Treasury any direct control over suits instituted for the collection of unpaid duties. (1881) 17 Op. Atty. Gen. 142.

Under this section and R. S. § 251, post, § 384, the Secretary of the Treasury has power to instruct collectors to decline to recognize as valid any protest against an assessment of duties on merchandise entered for consumption where the duties and charges were not paid in full within ten days after their liquidation. (1891) 20 Op. Atty. Gen. 183, 193.

2. Mode of settlement of accounts.—The Secretary of the Treasury cannot legally, by departmental order, change a practice or course of office procedure prescribed by statute for the settlement of accounts. (1888) 19 Op. Atty. Gen. 177.

3. Allowance of claims, accounts, etc.—The Secretary of the Treasury, to carry into effect authority given him to liquidate and pay claims, may establish a regulation authorizing the making of affidavits before any justice of the peace of a state, and an affidavit made before a justice of the peace in support of a claim against the United States, if false, might be made the basis for a prosecution for false swearing under Act March 1, 1823, c. 165. U. S. v. Bailey (1835) 9 Pet. 238, 254, 9 L. Ed. 113.

The rules prescribed by the treasury department for the adjustment of claims against the government will, if reasonable, be respected; otherwise if they go to a complete denial of justice. U. S. v. Mann (C. C. 1822) Fed. Cas. No. 15,716.

The Secretary of the Treasury is not authorized by law to award the payment of an attorney's fee out of moneys remaining in the Treasury due to his client. Benjamin v. U. S. (1894) 29 Ct. Cl. 417.

The Secretary of the Treasury has no power to correct an alleged error of a court of the United States and to refund a sum of money said to have been improperly paid in consequence of such alleged error. (1820) 1 Op. Atty. Gen. 405.

4. Review of decisions of predecessors as to claims or accounts.—The final decision of the Secretary of the Treasury upon a claim is binding upon his successor, when the case is not susceptible of new evidence; it being purely a question of the construction of a statute. Jackson v. U. S. (1884) 19 Ct. Cl. 504.

It is not competent for the Secretary of the Treasury to review the decisions of a predecessor on claims or accounts, except where mistakes have occurred in matters of fact, and where material new evidence has been discovered. (1852) 5 Op. Atty. Gen. 664.

The decision of preceding Secretaries of the Treasury that interest was not allowable on certain claims held to be considered as res judicata, and binding on the present Secretary. (1854) 6 Op. Atty. Gen. 533.

As to conclusiveness of decisions of departments generally upon their successors, see notes to § 232.

5. Granting and issuance of warrants.—The Secretary of the Treasury is not bound to grant warrants for issuing money from the Treasury for whatever balances the Auditors and Comptrollers may state and certify; but, as the head of the accounting officers, as the Secretary of the Treasury and the head of the department, he has the rightful authority to cause accounts to be reformed, readjusted, and settled according to his judgment of the right and justice of the case. (1852) 5 Op. Atty. Gen. 630, 656.

The Comptroller has no revisory power over the decisions of the Secretary of the Treasury respecting the issuance of warrants; such decisions are binding upon the Comptroller. (1881) 17 Op. Atty. Gen. 233. And see (1852) 5 Op. Atty. Gen. 630.

The Secretary of the Treasury may recall his action in delivering a warrant to an attorney not entitled under the law to receive it, and may take necessary measures, by issuing a new warrant or otherwise, to pay the money involved to the party for whom it was appropriated by Congress. The government does not become liable to the attorney for the amount of his fee for recovering the claim. (1904) 25 Op. Atty. Gen. 279.

6. Payments from treasury.—The Secretary of the Treasury in making payments can only bind the government by acts which come within a just exercise of his official power. Hunter v. U. S. (1831) 5 Pet. 173, 187, 8 L. Ed. 86.

The Secretary of the Treasury alone has power to represent and bind the government in his department by adjusting and paying its debts or claims against it. The acts of the assistant treasurer in that respect are subject to the approval of the Secretary as matter of law. Cooke v. U. S. (1875) 91 U. S. 389, 399, 23 L. Ed. 237.

Where Congress enacted that the surplus above $5,000,000 which should be in the treasury January 1, 1836, should be deposited with the states in four installments, subject to withdrawal, and three installments were paid, while the fourth was postponed until January 1, 1839, and at that date there was not a surplus in the treasury sufficient to pay the installment, the Secretary of the Treasury was not required to pay the fourth installment without subsequent legislation. Ex parte Virginia (1884) 4

Sup. Ct. 333, 334, 111 U. S. 43, 28 L. Ed. 346.

An assistant treasurer cannot bind the United States by a payment of money upon a bond which had been stolen from the true owner, to whom a duplicate had been issued. U. S. v. Pinover (D. C. 1880) 3 Fed. 305, 311.

7. Miscellaneous matters relative to the finances.—The Secretary of the Treasury had no legal authority to investigate the condition of the banks of Wisconsin Territory without their consent. (1839) 3 Op. Atty. Gen. 404.

In virtue of the Acts of March 3, 1823, c. 35, and June 26, 1834, c. 87, providing for the execution of the ninth article of the treaty of 1819 between the United States and Spain for the cession of Florida, which awarded damages in certain cases to inhabitants of Florida, the Secretary of the Treasury had lawful authority to determine whether the awards of the judge of the District Court of Florida were "just and equitable" or not, and to allow or disallow the same accordingly, at his discretion. (1854) 6 Op. Atty. Gen. 533. And see (1841) 3 Op. Atty. Gen. 635.

The Secretary of the Treasury had no authority to make distribution of the diplomas and medals directly to the exhibitors of the World's Columbian Exposition. (1895) 21 Op. Atty. Gen. 216.

As a recourse to law on the part of the Secretary of the Treasury for the settlement and collection of certain bonds made and issued by certain States and owned by the United States would involve the very grave act of suing states, and as Congress has had this question repeatedly before it and has not directed such a course, the Secretary of the Treasury should not institute any suit. (1897) 21 Op. Atty. Gen. 478.

There is no legal objection to the Treasurer of the United States receiving the principal and interest of the Philippine land-purchase bonds from the Philippine government, and distributing the same to the holders of the securities, nor to the Register of the Treasury of the United States registering and recording said bonds, provided the officers in question are willing and the Secretary of the Treasury consents and approves; but there is no specific provision of law authorizing the performance of such services. (1903) 25 Op. Atty. Gen. 98.

8. Form and requisites of decisions—The law prescribes no form for the decisions of the Secretary of the Treasury on the current business of his department, and they may be rendered in writing or orally. (1852) 5 Op. Atty. Gen. 664.

Where certain facts are presented, tending to show that a decision was once given by a Secretary, the Attorney General will not undertake to decide whether they are sufficient evidence of such a decision. Id.

9. Judicial notice of decisions.—The court takes judicial notice of the Synopses of Treasury Decisions. Dominici v. U. S. (C. C. 1896) 72 Fed. 46, judgment reversed U. S. v. Dominici (1897) 78 Fed. 334, 24 C. C. A. 116.

10. Mode of affixing signature to and authenticating public documents.—In cases in which the law requires that public documents shall be signed by the Secretary of the Treasury, but he has been rendered by sickness unable to write his name in the usual manner, if he is capable of seeing what he does, so that one paper cannot be passed upon him for another, he may impress his name with a stamp or copper-plate instead of a pen, provided he keep the stamp or copper-plate in his own possession and apply it himself, or cause it to be applied in his presence. (1854) 1 Op. Atty. Gen. 670.

The seal of the Treasury Department, and the signature of the Secretary, are sufficient evidence to authenticate the official acts of the Secretary in a state court. White v. St. Guirons (Ala. 1824) Minor, 331.

§ 382. (R. S. § 249.) Collection of duties.

The Secretary of the Treasury shall direct the superintendence of the collection of the duties on imports [and tonnage], as he shall judge best.

Act May 8, 1792, c. 37, § 6, 1 Stat. 280.

The words of this section inclosed in brackets, "and tonnage," were superseded by the provision charging the Commissioner of Navigation with the execution of the laws relating to the collection of tonnage tax, of Act July 5, 1884, c. 221, § 3, post, § 892, and by the transfer of the Bureau of Navigation to the Department of Commerce, by Act Feb. 14, 1903, c. 552, §§ 4, 10, post, §§ 857, 859.

Customs officers were required to execute instructions of the Secretary relative to the revenue laws, and his decision as to the construction of those laws was made conclusive and binding on customs officers, by R. S. § 2652, post, § 5392.

Restrictions on the reversal or modification of rulings or decisions by the Secretary, construing laws imposing customs duties, were imposed by Act March 3, 1875, c. 136, § 2, post, § 383.

Notes of Decisions

Appraisal of goods.—The Secretary of the Treasury has no power to fix a chemical analysis of Peruvian bark as the only test of dutiable value. Bartlett

v. Kane (C. C. 1852) Fed. Cas. No. 1,077.

The Secretary of the Treasury has no legal power to direct the judgment of the appraisers in valuing goods, or in adding to or subtracting from the charges in invoices, for the purpose of determining market values. Gray v. Lawrence (C. C. 1853) Fed. Cas. No. 5,722.

Under the provision of the Customs Administrative Act of June 10, 1890, c. 407, § 13, re-enacted in the Underwood Tariff Act of Oct. 3, 1913, c. 16, § III, M, post, § 5594, making a reappraisement by a general appraiser final and conclusive "unless the collector shall deem the appraisement of the merchandise too low," if the collector does not, in fact, deem such an appraisement too low, the Secretary of the Treasury is not authorized by this section to direct him to appeal therefrom. U. S. v. Loeb (C. C. 1900) 99 Fed. 723, 727, 733.

However extensive may be the general powers of the Secretary, in his superintendence of the collection of the revenue, this section and R. S. §§ 248, 251, 2652, ante, § 381, and post, §§ 384, 5392, they could not authorize any acts in conflict with the particular provisions of R. S. § 2931, or with the binding effect of his decision on appeal, as prescribed by that section and the general rules of law. U. S. v. Leng (D. C. 1883) 18 Fed. 15, 21.

Certificates to importers required by law.—The Secretary of the Treasury had no power to suspend the issue, to importers of distilled spirits, of certificates of the legal importation thereof, required to accompany each cask, by the Collection Act of March 2, 1799, c. 22, § 41, 1 Stat. 659. Foster v. Peaslee (C. C. 1856) Fed. Cas. No. 4,979.

Contracts for removal of passengers' baggage.—The Secretary of the Treasury has implied authority to make necessary contracts for the removal and examination of passengers' baggage arriving in ports of the United States. Starin v. U. S. (1896) 31 Ct. Cl. 65.

Collection of duties.—The Secretary of the Treasury is bound by the law, and, though in the exercise of his discretion he may adopt necessary forms and modes of giving effect to the law, he cannot dispense with any of its provisions. Tracy v. Swartwout (1836) 10 Pet. 80, 95, 9 L. Ed. 354.

The instructions of the Treasury Department to the collector of customs duties cannot change the law nor affect the rights of an importer paying duties. Elliott v. Swartwout (1836) 10 Pet. 137, 153, 9 L. Ed. 373.

There is no statute giving the Secretary of the Treasury any direct control over suits instituted for the collection of unpaid duties. (1881) 17 Op. Atty. Gen. 142.

The "collection of the revenue" under the superintendence of the Secretary of the Treasury within the meaning of section 249, Revised Statutes, relates to the proceedings of the collectors and their subordinates, and not to those of district attorneys. (1894) 20 Op. Atty. Gen. 714. And see (1823) 1 Op. Atty. Gen. 608.

The Secretary of the Treasury has power, under this section, to prescribe reasonable rules necessary to secure the collection of duties on imports and to protect the United States from irregular or fraudulent proceedings. (1903) 24 Op. Atty. Gen. 571.

Cited without definite application, Johnston v. U. S. (1902) 37 Ct. Cl. 309, 323.

§ 383. (Act March 3, 1875, c. 136, § 2.) Decisions construing laws imposing customs duties.

No ruling or decision once made by the Secretary of the Treasury, giving construction to any law imposing customs duties, shall be reversed or modified adversely to the United States, by the same or a succeeding Secretary, except in concurrence with an opinion of the Attorney-General recommending the same, or a judicial decision of a circuit or district court of the United States conflicting with such ruling or decision, and from which the Attorney-General shall certify that no appeal or writ of error will be taken by the United States: Provided, That the Secretary of the Treasury may in his discretion, decline to acquiesce in the judgment, decision, or ruling of an inferior court upon any question affecting the interests of the United States, when, in his opinion, such interests require a final adjudication of such question by the court of last resort. (18 Stat. 469.)

This section was part of an act entitled "An act restricting the refunding of customs duties and prescribing certain regulations of the Treasury Department." Other sections of said act are set forth post, §§ 5715–5717.

Notes of Decisions

Effect of section as to previous decisions.—Under this section, a decision favorable to the United States, which was unreversed and in force at the date of the act, must stand and be recognized by the Secretary of the Treasury

as the rule to be followed upon the question involved therein, until it is reversed or modified as provided in the section. But any decision, ruling, or direction which was not favorable to the United States, made by any Secretary of the Treasury prior to the date of the act, may be overruled thereafter by the Secretary of the Treasury, if in his judgment it is not a correct exposition of the law. (1875) 14 Op. Atty. Gen. 560.

Decisions not subject to reversal or modification.—The Secretary of the Treasury cannot of himself, and without an opinion of the Attorney General upon the subject, as required by this section, reverse a decision of his predecessor, holding certain meats imported into this country after prior exportations to be dutiable. (1885) 18 Op. Atty. Gen. 139, 140. See, also, (1903) 25 Op. Atty. Gen. 81.

Refund of duties collected.—Although this section authorizes the Secretary of the Treasury, with the concurrence of the Attorney General, to modify adversely to the United States any construction of the tariff previously adopted, no refund can be made by him of duties which have been collected under such construction, except in pursuance of a judicial decision. (1876) 15 Op. Atty. Gen. 126.

(R. S. § 250. Repealed.)

This section required the Secretary of the Treasury to cause all accounts of the expenditure of public money to be settled within each fiscal year, with certain exceptions. Its provisions were superseded and it was repealed by Act July 31, 1894, c. 174, § 12, post, § 428.

§ 384. (R. S. § 251.) Rules, regulations, and forms.

The Secretary of the Treasury shall make and issue from time to time such instructions and regulations to the several collectors, receivers, depositaries, officers, and others who may receive Treasury notes, United States notes, or other securities of the United States, or who may be in any way engaged or employed in the preparation and issue of the same, as he shall deem best calculated to promote the public convenience and security, and to protect the United States, as well as individuals, from fraud and loss; he shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws, or in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing; he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law.

Act Feb. 10, 1820, c. 11, §§ 14, 15, 3 Stat. 543. Act Aug. 6, 1846, c. 84, § 5, 9 Stat. 55. Act June 30, 1864, c. 172, § 8, 13 Stat. 221. Act July 14, 1870, c. 255, § 34, 16 Stat. 271.

This section of the Revised Statutes contained a further provision, as follows:

"He shall also prescribe the forms of the annual statements to be submitted to Congress by him showing the actual state of commerce and navigation between the United States and foreign countries, or coastwise between the collection districts of the United States, in each year."

This provision may be regarded as applicable to the Secretary of Commerce, by the vesting in him of the duties, powers, etc., of the Secretary of the Treasury in regard to the statements mentioned therein by provisions of Act Feb. 14, 1903, c. 522, §§ 4, 10, post, §§ 857, 859. It is therefore placed post, under Title XII A, "Department of Commerce," c. A, § 870.

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it, by R. S. § 161, ante, § 235.

Notes of Decisions

Nature and scope of authority.—The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. Morrill v. Jones (1882) 1 Sup. Ct. 423, 424, 106 U. S. 466, 27 L. Ed. 267; U. S. v. Eaton (1892) 12 Sup. Ct. 764, 767; 144 U. S. 677, 36 L. Ed. 591; U. S. v. 11,150 Pounds of Butter (1912) 195 Fed. 657, 665, 115 C. C. A. 463; (1899) 22 Op. Atty. Gen. 405.

Regulations made by the Secretary of the Treasury, under authority conferred by statute, must be reasonable,

and if, although proper to guard against frauds, or to facilitate the due administration of the law, they defeat the right granted by Congress, or impose restrictions not authorized by law, the courts will hold them invalid as altogether unreasonable. Campbell v. U. S. (1882) 2 Sup. Ct. 759, 762, 107 U. S. 407, 410, 27 L. Ed. 592; Pascal v. Sullivan (C. C. 1884) 21 Fed. 496.

The Secretary of the Treasury, both as the superior officer and under the express provision of this section, has power to make regulations not inconsistent with law to be observed in carrying out the laws for the collection of the customs duties. The Egypt (D. C. 1885) 25 Fed. 320, 332.

The Secretary of the Treasury cannot, by his regulation, alter or amend a revenue law, so as to insert into the body of the statute a limitation which Congress did not think it necessary to prescribe. (1899) 22 Op. Atty. Gen. 405.

The regulation of commerce and navigation being entirely within the control of Congress, there is no authority for an Executive Department to make or enforce rules or regulations relative to the registry of vessels or kindred matters connected with such subjects. (1899) 22 Op. Atty. Gen. 566.

There is no statute authorizing the Secretary of the Treasury to formulate rules and regulations for the enforcement of a general criminal statute, which has no relation to the collection of revenue. (1909) 28 Op. Atty. Gen. 99.

Distinction between regulations and instructions.—A "regulation" affects a class or classes of officers; an "instruction" is a direction to govern the conduct of the particular officer to whom it is addressed. Landram v. U. S. (1880) 16 Ct. Cl. 74.

Implied legislative recognition.—Where, for a period of years covering the operation of several tariff acts, the Secretary has made regulations for carrying out their provisions, it is to be presumed that subsequent legislation by Congress was enacted with reference to such regulations. U. S. v. Bartram Bros. (1904) 131 Fed. 833, 836, 65 C. C. A. 557, certiorari denied (1904) 25 Sup. Ct. 792, 195 U. S. 635, 49 L. Ed. 354.

Transmission of money to treasury.—A regulation and circular making it the duty of collectors to transmit money to the treasurer or assistant treasurer by a designated express company and in such transmission to use the forms of voucher and waybill prepared by the department, were authorized under this section. U. S. v. Brendel (1905) 136 Fed. 737, 740, 69 C. C. A. 389.

Execution of internal revenue laws.—Under R. S. § 161, ante, § 235, and this section, and R. S. § 321, post, § 492, a regulation promulgated by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, prohibiting collectors from producing the records of their offices, or furnishing copies thereof, for the use of third persons, or for use as evidence in behalf of litigants in any court, is valid and binding. In re Hirsch (C. C. 1896) 74 Fed. 928, affirmed (1898) 87 Fed. 1005, 31 C. C. A. 350; In re Weeks (D. C. 1897) 82 Fed. 729; In re Comingore (D. C. 1899) 96 Fed. 552, judgment affirmed Boske v. Comingore (1900) 20 Sup. Ct. 701, 177 U. S. 459, 44 L. Ed. 846; In re Lamberton (D. C. 1903) 124 Fed. 446. And see Re Huttman (D. C. 1895) 70 Fed. 699, 701.

Execution of laws relating to revenue from imports, duties thereon, or warehousing, etc.—Under the general power of the Secretary of the Treasury to make customs regulations not inconsistent with law, granted by this section, he could prescribe the method of "testing by the polariscope" the sugars dutiable according to such test under Tariff Act July 24, 1897, c. 11, § 1, Schedule E, par. 209, 30 Stat. 168; and so long as he acts in good faith, and it does not appear that his regulations operate to make the polariscopic test less accurate than when Congress adopted it, the courts should not interfere with the administrative details confided to him. U. S. v. Bartram Bros. (1904) 131 Fed. 833, 65 C. C. A. 557, reversing judgment Bartram Bros. v. U. S. (C. C. 1903) 123 Fed. 327, and writ of certiorari denied Bartram v. Same (1904) 25 Sup. Ct. 792, 195 U. S. 635, 49 L. Ed. 354. See, also, U. S. v. Lueder (1907) 154 Fed. 1, 83 C. C. A. 131.

A right to a drawback, on exportation of imported goods, of the duty paid on the material thereof, conferred by act of Congress, cannot be defeated by the failure of the Secretary of the Treasury to make proper regulations for ascertaining the amount of drawback, as required by the act, or by the refusal of the collector, under order of the Secretary, to execute the regulations made. Campbell v. U. S. (1882) 2 Sup. Ct. 759, 762, 107 U. S. 407, 410, 27 L. Ed. 592.

Under the power given him by this section and R. S. § 2989, post, § 5682, the Secretary is vested with a certain discretion as to the allowance of a certain time between the unlading of goods and their removal to a bonded warehouse. Constable v. National S. S. Co. (1894) 14 Sup. Ct. 1062, 1072, 154 U. S. 51, 38 L. Ed. 903.

Under this section and R. S. § 2903, post, § 5603, the Secretary may prescribe that the value of foreign coin shall be taken according to the estimate established by the director of the mint at the date of exportation, in estimating the value of imported merchandise, instead of at the date of en-

try. Wood v. U. S. (1896) 72 Fed. 254, 256, 18 C. C. A. 553.

A collector is not justified by instructions of the Treasury Department in imposing duties on imported goods not warranted by law. Lennig v. Maxwell (C. C. 1853) Fed. Cas. No. 8,243.

A collector had no authority, even under instructions from the Treasury Department, in the appraisal of goods, to make up their dutiable value, to add an arbitrary rate of commissions, where the law, Act Aug. 30, 1842, c. 270, § 16, 5 Stat. 563, required "a charge for commissions at the usual rates." Munsell v. Maxwell (C. C. 1855) Fed. Cas. No. 9,932.

This section does not authorize a regulation that duties shall be collected according to the invoice, unless the importer accounts, by proofs, for the discrepancy between the amount shown thereby and the actual weight at time of importation. Balfour v. Sullivan (C. C. 1883) 17 Fed. 231, 233.

A regulation requiring that, on importation of natural mineral waters, entitled by law to admission free of duty, the invoice should be accompanied by a certificate made by the owner or manager of the spring, instead of the shipper, as theretofore, if made conclusive on the rights of the importer, is unreasonable. Pascal v. Sullivan (C. C. 1884) 21 Fed. 496.

This section authorizes a regulation providing that, for the free entry of "physiological and scientific instruments imported for the use of a society incorporated for scientific purposes," an affidavit must be made within seven days before their arrival that such articles were imported by order of such institution, and not for sale or distribution. Eimer v. U. S. (C. C. 1888) 87 Fed. 202.

The Secretary's regulations in respect to an inspection of customhouse books and papers does not make it unlawful for the collector to produce them in court under subpœna, or at the request of the district attorney. U. S. v. Hutton (D. C. 1879) Fed. Cas. No. 15,433.

However extensive may be the general powers of the Secretary in his superintendence of the collection of the revenue under this section and R. S. §§ 248, 249, 2652, post, §§ 382, 384, 5392, they could not authorize any acts in conflict with the particular provisions of R. S. § 2931, or with the binding effect of his decision on appeal, as prescribed by that section and the general rules of law. U. S. v. Leng (D. C. 1883) 18 Fed. 15, 21.

The provisions of this section comprehend the making of rules and regulations for the transportation of appraised merchandise in bond from one collection district to another. (1876) 15 Op. Atty. Gen. 128, 132.

It is not within the province of the Secretary of the Treasury to prescribe regulations governing the marking of imported liquors to conform to Cr. Code, § 240, post, § 10410, that section being a criminal statute, with no reference to the collection of internal revenue or duties on imports. (1909) 28 Op. Atty. Gen. 99.

The Treasury Department may, however, instruct collectors of customs that when a package, shipped from a foreign country or a place subject to the jurisdiction of the United States, but noncontiguous thereto, into the United States, containing intoxicating liquors, and clearly not labeled as required by that section, comes within the observation of a customs officer, he should seize the same and have it declared forfeited by like proceedings as those provided to enforce forfeitures for violation of the customs laws. Id.

Force and effect of regulations as law.—A regulation of the Treasury Department made pursuant to an act of Congress is of the same force as if incorporated in the body of the act itself. U. S. v. Barrows (D. C. 1869) Fed. Cas. No. 14,529; (1899) 22 Op. Atty. Gen. 568.

Regulations of the Secretary of the Treasury adopting different forms for use on applications to his office for the abatement of an assessment of internal revenue taxes and for the return of moneys alleged to have been wrongfully collected as such have the force of law. Hastings v. Herold (C. C. 1910) 184 Fed. 759.

The allowance for leakage in the case of oil shipped under a transportation bond is regulated by a rule of the Treasury Department, and the courts cannot depart therefrom, though there has been a greater actual loss by solar heat or the action of the elements. Int. Rev. Laws July 13, 1866, § 94, and March 3, 1865, § 61. U. S. v. Barrows (D. C. 1869) Fed. Cas. No. 14,529.

Regulations made by the Secretary of the Treasury under authority of this section, when fairly within its scope, and not infringing legal rights of individuals, have the force of law. U. S. v. Hutton (D. C. 1879) Fed. Cas. No. 15,-433.

Regulations issued by the Secretary of the Treasury with reference to the internal revenue and for the government of the officers of the revenue department have the force and effect of law. Stegall v. Thurman (D. C. 1910) 175 Fed. 813.

Regulations as evidence.—The federal courts take judicial notice of the General Regulations prescribed by the Treasury Department. Dominici v. U. S. (C. C. 1896) 72 Fed. 46, judgment reversed U. S. v. Dominici (1897) 78 Fed. 334, 24 C. C. A. 116; Hastings v. Herold (C. C. 1910) 184 Fed. 759.

Internal revenue rules and regulations prescribed and promulgated by the Treasury Department are only for the guidance of officers in the administration of the internal revenue laws, and

have not the force of rules of evidence in an action by the United States to collect a revenue assessment. U. S. v. Cole (D. C. 1904) 134 Fed. 697.

Violations of regulations.—Neglect to do a thing required by a regulation made by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, as authorized by a statute, for the purpose of carrying it into effect, is not necessarily a criminal offense, in the absence of a statute distinctly making it so. U. S. v. Eaton (1892) 12 Sup. Ct. 764, 767, 144 U. S. 677, 36 L. Ed. 591.

Cited without definite application, American Sugar Refining Co. v. U. S. (1908) 29 Sup. Ct. 89, 90, 211 U. S. 155, 53 L. Ed. 129; Coopersville Cooperative Creamery Co. v. Lemon (1908) 163 Fed. 145, 147, 89 C. C. A. 595; Von Cotzhausen v. Nazro (C. C. 1879) 15 Fed. 891, 895; U. S. v. Cutajar (D. C. 1894) 59 Fed. 1000, 1001.

(R. S. § 252. Stricken out.)

This section provided for the establishment, by the Secretary of the Treasury, under direction of the President, of regulations for appraisal of imports. It was stricken out as one of the corrections made by the act to perfect the revision of the statutes, Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 241.

Provisions as to the mode of appraisal of imports are contained in Title XXXIV, "Collection of Duties upon Imports," c. 6.

(R. S. § 253. Superseded.)

This section empowered the Secretary to discontinue all ports of delivery, the revenue received at which did not amount to $10,000 a year. It was superseded by the abolition of all ports of delivery as part of the reorganization of the customs service pursuant to provisions of Act Aug. 24, 1912, c. 355, § 1, post, § 5327.

(R. S. § 254. Transferred to Title XXXVIII.)

This section, authorizing the Secretary to receive deposits of gold coin and bullion with the Treasurer or any assistant treasurer, and to issue certificates therefor, and certificates representing coin in the Treasury, is placed under Title XXXVIII, "The Currency," post, § 6564.

(R. S. § 255. Transferred to Title XLIII A.)

This section, providing for the designation of any officer who had given bond to be disbursing agent of moneys appropriated for construction of public buildings within his district. It is placed, with provisions of Act March 4, 1911, c. 285, § 1, relating to the same subject, under Title XLIII A, "Public Buildings and Works," post, §§ 6926, 6927.

(R. S. § 256. Repealed.)

This section empowered the Secretary of the Treasury to employ not more than three persons to assist in discovering and collecting money belonging to the United States, and regulated the employment of such persons, their compensation and proceedings. These provisions were originally enacted as part of the legislative, executive, and judicial appropriation act of May 8, 1872, c. 140, § 1, 17 Stat. 69, and were incorporated therefrom in this section of the Revised Statutes. But so much of that act as provided for the employment of persons for such purpose was repealed, and the Secretary of the Treasury was directed to revoke and annul all contracts made under the act, by Act June 22, 1874, c. 393, 18 Stat. 192. This repealing act, though passed on the same day as the Revised Statutes, took effect, by virtue of R. S. § 5601, post, § 10598, as a subsequent statute, repealing any portion of the revision inconsistent therewith. The provisions of this section may therefore be regarded as repealed or rendered inoperative by Act June 22, 1874, c. 393, cited above. Section 2 of that act provided that the Court of Claims should have "no authority to consider or decide upon any claims for damages by reason of the discontinuance of the contracts aforesaid, or for any profits or percentages under them."

§ 385. (Act July 7, 1884, c. 334, § 3.) Rules for government of agents, attorneys, etc., representing claimants before Department; suspension or disbarment.

The Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such

claimants in the presentation of their cases. And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice before his Department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement. (23 Stat. 258.)

This was a proviso of the deficiency appropriation act for the fiscal year 1884, cited above.

Notes of Decisions

Powers of heads of departments generally as to agents or attorneys.—As to the power of the head of a department, independent of statutory provision therefor, to suspend or disbar an agent or attorney from prosecuting claims, etc., before the department, see notes to § 272.

§ 386. (R. S. § 257.) Reports of the Secretary.

The Secretary of the Treasury shall make the following annual reports to Congress:

First. A report on the subject of finance, containing estimates of the public revenue and public expenditures for the fiscal year then current, and plans for improving and increasing the revenues from time to time, for the purpose of giving information to Congress in adopting modes of raising the money requisite to meet the public expenditures.

Second. A report containing a statement of all contracts for supplies or services which have been made by him or under his direction during the year preceding, and also a statement of the expenditure of the moneys appropriated for the discharge of miscellaneous claims not otherwise provided for, paid at the Treasury.

* * * * * * * * *

Act Sept. 2, 1789, c. 12, 1 Stat. 65. Act May 10, 1800, c. 58, 2 Stat. 79. Act Aug. 26, 1842, c. 207, § 1, 5 Stat. 536. Act March 3, 1809, c. 28, § 5, 2 Stat. 536. Act May 19, 1828, c. 55, § 10, 4 Stat. 274. Act July 20, 1868, c. 177, § 1, 15 Stat. 110, 111.

The requirement of the first subdivision of this section, that the report should contain estimates of the public revenue and the public expenditures for the current fiscal year, was re-enacted and extended to such estimates for the fiscal year next ensuing, by a provision of Act Feb. 26, 1907, c. 1635, § 1, post, § 389.

Postal revenues and expenditures were to be included in the annual report, in the statements of receipts and expenditures, by provisions of Act Sept. 30, 1890, c. 1126, § 1, and Act July 31, 1894, c. 174, § 15, post, §§ 387, 388.

In addition to the requirement, in the second subdivision of this section, of a report of contracts for supplies or services, special reports as to certain public contracts are required by various provisions set forth post, under Title XLIII, "Public Contracts."

A third subdivision of this section, which required a report of the regulations established by the Secretary for appraisal of imports, became inoperative on the striking out of R. S. § 252, authorizing him to establish such regulations, by Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 241, and is omitted.

A fourth subdivision of this section, which required a report of the amounts collected and expended under authority of the laws creating and administering a hospital tax for the benefit of sick and disabled seamen, became inoperative on the repeal of said laws by Act June 26, 1884, c. 121, § 15, 23 Stat. 57, and is also omitted.

An annual report of expenditures for the Revenue-Cutter Service was required by a provision of Act Oct. 2, 1888, c. 1069, post, § 392.

A provision requiring a report each year of delinquencies of officers in rendering accounts or in payment of balances, contained in the Dockery Act of July 31, 1894, c. 174, § 12, as amended by Act May 28, 1896, c. 252, § 4, is set forth post, § 390.

General provisions relating to the submission by the heads of Departments to Congress of estimates of expenditures and appropriations, and reports by the Secretary of the Treasury in regard thereto, are contained in Title XLI, "Appropriations."

Besides the reports mentioned in this and the sections immediately following, or referred to in this note, various special reports by the Secretary of the

Treasury, in relation to numerous other matters, are required by statutes cited above, and other provisions, incidental to particular subjects, and incorporated in the sections or clauses relating thereto under other titles.

Provisions relating to estimates of appropriations and expenditures by the heads of Departments are also contained in Title XLI, "Appropriations"; and the submission of such estimates to Congress through the Secretary of the Treasury, and the preparation, under his direction, of the Book of Estimates, are provided for by R. S. § 3669, post, § 6732.

Provisions applicable to all the Departments, as to the time of making annual reports, and the time of furnishing copies thereof to the printer, are contained in R. S. §§ 195, 196, and Act July 1, 1916, c. 209, § 3, ante, §§ 278, 279, 279a.

The printing at the Government Printing Office and distribution of the reports of the Secretary were provided for by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, pars. 27, 37, post, §§ 7075, 7084.

§ 387. (Act Sept. 30, 1890, c. 1126, § 1.) Reports to include postal revenues and expenditures.

Hereafter the Secretary of the Treasury shall include in his annual report, in the statements of actual and estimated receipts and expenditures of the Government, the revenues from and expenditures on account of the postal service. (26 Stat. 511.)

This was a provision of the deficiency appropriation act for the fiscal year 1890, cited above.

A subsequent provision requiring an annual statement of receipts and expenditures of public moneys, including those of the Post-Office Department, was contained in the Dockery Act of July 31, 1894, c. 174, § 15, post, § 388.

§ 388. (Act July 31, 1894, c. 174, § 15.) Reports of receipts and expenditures of all public moneys.

It shall be the duty of the Secretary of the Treasury annually to lay before Congress, on the first day of the regular session thereof, an accurate, combined statement of the receipts and expenditures during the last preceding fiscal year of all public moneys, including those of the Post-Office Department, designating the amount of the receipts, whenever practicable, by ports, districts, and States, and the expenditures, by each separate head of appropriation. (28 Stat. 210.)

This section was part of the Dockery Act, cited above.

A subsequent provision, that the Secretary shall prepare and submit, in his annual report, estimates of the public revenue and the public expenditures, with a statement of the receipts and expenditures of the Government for the preceding fiscal year was made by Act Feb. 26, 1907, c. 1635, § 1, post, § 389.

See notes to section 3 of that act, post, § 417.

§ 389. (Act Feb. 26, 1907, c. 1635, § 1.) Reports to include estimates of revenue and expenditures, with statement of receipts and expenditures.

The Secretary of the Treasury shall each year prepare and submit in his annual report to Congress estimates of the public revenue and the public expenditures for the fiscal year current, and also for the fiscal year next ensuing at the time said report is submitted, together with a statement of the receipts and expenditures of the Government for the preceding completed fiscal year. (34 Stat. 949.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1908, cited above.

Previous provisions as to similar reports and statements were contained in Rev. St. § 257, subd. 1, and in Act July 31, 1894, c. 174, § 15, ante, §§ 386, 388.

In the annual estimates by the Secretary of the Treasury, he was required to include a statement of the officers and employés, with the rate of compensation to each, necessary to collect the revenue at each port of entry, and estimates of contingent and additional expenses, by Act Aug. 5, 1882, c. 389, § 5, post, § 6689.

§ 390. (Act July 31, 1894, c. 174, § 12, as amended, Act May 28, 1896, c. 252, § 4.) Reports of officers delinquent in rendering accounts.

The Secretary of the Treasury shall, on the first Monday of Jan-

uary in each year, make report to Congress of such officers and administrative departments and offices of the Government as were, respectively, at any time during the last preceding fiscal year delinquent in rendering or transmitting accounts to the proper offices in Washington and the cause therefor, and in each case indicating whether the delinquency was waived, together with such officers, including postmasters and officers of the Post-Office Department, as were found upon final settlement of their accounts to have been indebted to the Government, with the amount of such indebtedness in each case, and who, at the date of making report, had failed to pay the same into the Treasury of the United States. (28 Stat. 209. 29 Stat. 179.)

This provision was a part of section 12 of the Dockery Act, first cited above, which, as originally enacted in that section, was as follows:

"The Secretary of the Treasury shall, on the first Monday of January in each year, make report to Congress of such officers as are then delinquent in the rendering of their accounts or in the payment of balances found due from them for the last preceding fiscal year."

It was amended to read as set forth here by Act May 28, 1896, c. 252, § 4, also cited above.

R. S. § 250, which empowered the Secretary of the Treasury to require settlements of accounts of public money within the fiscal year or other fixed period, and R. S. § 272, which required a report to Congress by the First Comptroller of officers failing to make settlement, were repealed by this section.

Other provisions of this section, requiring the rendition of current accounts for administrative examination, and their transmission to the Auditors, are set forth post, § 428.

Notes of Decisions

Reports of balances due on postal accounts.—This provision, as originally enacted as part of section 12 of the Dockery Act, did not require the Secretary of the Treasury to report to Congress annually the balances due on postal accounts for the prior fiscal year. (1896) 21 Op. Atty. Gen. 296.

§ 391. (R. S. § 258.) Reports of expenditures at custom-houses.

The Secretary of the Treasury shall lay before Congress at the commencement of each regular session a statement of the amount of money expended at each custom-house during the preceding fiscal year, and of the number of persons employed, and the occupation and salary of each person at each custom-house during the same period.

Act March 3, 1849, c. 110, § 6, 9 Stat. 399.

§ 392. (Act Oct. 2, 1888, c. 1069.) Reports of expenditures for Revenue-Cutter Service.

The Secretary of the Treasury shall submit to Congress at its next session a detailed statement of the expenditures for the fiscal year eighteen hundred and eighty-eight under the appropriation for the Revenue-Cutter Service, and annually thereafter a detailed statement of expenditures under said appropriation shall be submitted to Congress at the beginning of each regular session thereof. (25 Stat. 511.)

This was a provision of the sundry civil appropriation act for the fiscal year ending June 30, 1889, cited above.

Provisions relating to the estimates for the Revenue Cutter Service, contained in Act March 2, 1889, c. 410, § 1, are set forth post, § 6693.

The Revenue Cutter Service is now the Coast Guard, by Act Jan. 28, 1915, c. 20, set forth post, §§ 5461a–5461f.

(R. S. § 259. Transferred to Title XII A, c. A.)

This section, requiring the Secretary to report to Congress each year the results of information collected by the Bureau of Statistics, and R. S. § 263, relating to the printing of the annual report on statistics of commerce and navigation required from the Chief of that Bureau, and R. S. § 265, relating to the printing of an annual statement of exports and imports, became inapplicable to the Secretary of the Treasury by the transfer of the Bureau of Statistics to the Department of Commerce, and the vesting in the head of that department of the powers, duties, etc., of the head of the Treasury Department in and over the Bureau, by Act Feb. 14, 1903, c. 552, §§ 4, 10, post, §§ 857, 859.

As these sections may be regarded as applicable to the Secretary of Commerce, they are placed, post, under Title XII A, "Department of Commerce," c. A, §§ 868, 869, 871.

§ 393. (R. S. § 260.) Reports upon appropriations for Departments of War and Navy.

The Secretary of the Treasury shall lay before Congress at the commencement of each regular session, accompanying his annual statement of the public expenditure, the reports which may be made to him by the Auditors charged with the examination of the accounts of the Department of War and the Department of the Navy, respectively, showing the application of the money appropriated for those Departments for the preceding year.

Act March 3, 1817, c. 45, § 6, 3 Stat. 367.

Moneys appropriated for the War and Navy Departments are to be drawn from the Treasury, by warrants of the Secretary of the Treasury, upon requisitions of the Secretaries of those Departments, by R. S. § 3673, post, § 6746. Subsequent provisions relating to requisitions and warrants for the payment of money were made by the Dockery Act of July 31, 1894, c. 174, § 11, post, § 427.

The transmission to Congress, annually, of a tabular statement showing the receipts and expenditures in the Naval service under each appropriation, with an account of balances in the hands of disbursing agents at the close of each fiscal year, and a report of any amounts lost, etc., was required by Act June 19, 1878, c. 311, post, §§ 394, 395.

§ 394. (Act June 19, 1878, c. 311, § 1.) Tabular statement of receipts and expenditures in Naval service.

From and after the passage of this act, it shall be the duty of the Secretary of the Treasury to transmit to Congress, annually, a tabular statement showing in detail the receipts and expenditures in the Naval service under each appropriation, as made up and determined by the proper officers of the Treasury Department, upon the accounts of disbursing-officers rendered for settlement. (20 Stat. 167.)

This section and the section next following are an act entitled "An act to regulate expenditures in the Navy."

The Secretary of the Navy is required to send to Congress at the beginning of its next regular session a complete schedule or list showing the amount of money of all pay and for all allowances for each grade of officers in the Navy, including retired officers, and for all officers included in this Act and for all enlisted men so included by a provision in the navy appropriation act for the fiscal year 1917, Act Aug. 29, 1916, c. 417, 39 Stat.

§ 395. (Act June 19, 1878, c. 311, § 2.) Account of balances in hands of disbursing agents.

There shall be appended to this statement an account of balances in the hands of disbursing agents at the close of each fiscal year, and a report of any amounts lost or unaccounted for by voucher. (20 Stat. 167.)

§ 396. (R. S. § 261.) Abstract of receipts from internal taxes.

The Secretary of the Treasury shall annually, in the month of December, lay before Congress an abstract, in tabular form, of the separate accounts of moneys received from internal duties or taxes in each of the respective States, Territories, and collection-districts, required by section two hundred and thirty-nine to be kept at the Treasury.

Act June 30, 1864, c. 173, § 43, 13 Stat. 239.

§ 397. (R. S. § 262.) Accounts of superintendent of Treasury buildings.

The Secretary of the Treasury shall transmit to Congress, at the commencement of each regular session, a copy of each of the accounts kept by the superintendent of the Treasury buildings of all amounts expended under the head of contingent expenses for the several Bureaus of the Department of the Treasury, and of all

amounts paid for furniture and repairs of furniture, and of the disposal of old furniture.

Act March 3, 1869, c. 123, 15 Stat. 311.

The keeping by the superintendent of the Treasury buildings of accounts of contingent expenses and relating to furniture was required by R. S. §§ 240, 241, ante, §§ 371, 375.

Statements by the Secretary of the Treasury, in the annual estimates, of buildings rented in the District of Columbia for the use of the Government, were required by a provision of Act July 16, 1892, c. 196, § 1, post, § 6083.

(R. S. § 263. Transferred to Title XII A, c. A.)

See note to R. S. § 259, ante.

(R. S. § 264. Transferred to Title XII A, c. A.)

This section, requiring the Secretary to report to Congress annually the persons employed upon the Coast Survey, their compensation, and all other expenditures made under the direction of the Superintendent of the Coast Survey, became inapplicable to the Secretary of the Treasury by the transfer of the Coast Survey to the Department of Commerce, and the vesting in the head of that Department of the powers, duties, etc., of the head of the Treasury Department in and over the Survey, by Act Feb. 14, 1903, c. 552, §§ 4, 10, post, §§ 857, 859. As this section may be regarded as applicable to the Secretary of Commerce, it is placed, post, under Title XII A, "Department of Commerce," c. A, § 872.

(R. S. § 265. Transferred to Title XII A, c. A.)

See note to R. S. § 259, ante.

§ 398. (Act July 7, 1884, c. 334, § 1.) Reports of claims allowed. The Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration. (23 Stat. 254.)

This was a provision of the deficiency appropriation act for the fiscal year 1884, cited above.

§ 398a. (Act May 18, 1916, c. 125, § 27.) Estimates of amounts of receipts to and expenditures from tribal funds of Indians; contents; transmission to Speaker of House of Representatives.

On the first Monday in December, nineteen hundred and seventeen, and annually thereafter, the Secretary of the Treasury shall transmit to the Speaker of the House of Representatives estimates of the amounts of the receipts to, and expenditures which the Secretary of the Interior recommends to be made for the benefit of the Indians from, all tribal funds of Indians for the ensuing fiscal year; and such statement shall show (first) the total amounts estimated to be received from any and all sources whatsoever, which will be placed to the credit of each tribe of Indians, in trust or otherwise, at the close of the ensuing fiscal year, (second) an analysis showing the amounts which the Federal Government is directed and required by treaty stipulations and agreements to expend from each of said funds or from the Federal Treasury, giving references to the existing treaty or agreement or statute, (third) the amounts which the Secretary of the Interior recommends to be spent from each of the tribal funds held in trust or otherwise, and the purpose for which said amounts are to be expended, and said statement shall show the amounts which he recommends to be disbursed (a) for per capita payments in money to the Indians, (b) for salaries or compensation of officers and employees, (c) for compensation of counsel and attorney fees, and (d) for support and civilization. (39 Stat.)

This section was part of § 27 of the Indian appropriation act for the fiscal year 1917, cited above. The remaining portion provides that no money shall

be expended from Indian tribal funds without specific appropriation by Congress, with certain enumerated exceptions, and is set forth post, § 4077a.

The Secretary of the Interior is required to annually transmit to the Speaker of the House of Representatives a statement of all the fiscal affairs of all Indian tribes for whose benefit expenditures from either public or tribal funds shall have been made by any officer, etc., in the Interior Department during the preceding fiscal year, by Act March 3, 1911, c. 210, § 27, post, § 689.

§ 399. (R. S. § 266.) Quarterly publication of statement of receipts and expenditures.

The Secretary of the Treasury, at the expiration of thirty days from the end of each quarter, shall cause to be published in some newspaper at the seat of government a statement of the whole receipts of such quarter, specifying the amount received from customs, from public lands, and from miscellaneous sources, and, also, the whole amount of payments made during the said quarter, specifying the general head of appropriation, whether for the civil list, the Army, the Navy, Indian Affairs, fortifications, or pensions.

Act June 17, 1844, c. 105, § 6, 5 Stat. 696.

§ 400. (R. S. § 267.) Monthly publication of weekly statement of the Treasurer, etc.

The Secretary of the Treasury shall cause to be published in some newspaper at the seat of Government, on the first day of each month, the last preceding weekly statement of the Treasurer of the United States, showing the amount to his credit in the different banks, in the mint, or other depositories, the amount for which drafts have been given, and those remaining unpaid, and the balance remaining subject to his draft; and he shall also specially note any changes that have been made in the depositories of the Treasury during the preceding month, and report to Congress, at the commencement of its next session, the reasons for such changes.

Act June 17, 1844, c. 105, § 5, 5 Stat. 696.

CHAPTER THREE

The Comptroller

Sec.
401. Comptroller.
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412. Duties of Assistant Comptroller.
413. Duties of chief clerk.
414. Power of chief clerk to sign letters and papers.
415. Law clerks in offices of Comptroller and Auditors to perform clerical duties.

§ 401. (R. S. § 268.) Comptroller.

There shall be in the Department of the Treasury a First Comptroller and a Second Comptroller, each of whom shall be appointed

by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of five thousand dollars a year.

Act Sept. 2, 1789, c. 12, § 1, 1 Stat. 65. Act March 3, 1817, c. 45, § 3, 3 Stat. 366. Act May 18, 1872, c. 172, § 1, 17 Stat. 127.

The designation of the First Comptroller was changed to Comptroller of the Treasury, and the office of Second Comptroller was abolished, and its duties, powers, etc., transferred to the Comptroller, in connection with other changes in the organization of the Department and the officers therein and the system of accounting, by provisions of the Dockery Act of July 31, 1894, c. 174, post, §§ 402, 404, 408, 412, 413.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Acts establishing office.—The office of Comptroller was established by the act creating the Treasury Department, Act Sept. 2, 1789, c. 12, § 1, 1 Stat. 65, which provided for a Secretary of the Treasury, to be deemed head of the Department, a Comptroller, an Auditor, etc.; and Act March 3, 1817, c. 45, 3 Stat. 366, added to these officers four Auditors and one Comptroller, and divided the duties of the office of Comptroller between the First Comptroller and the Second Comptroller. (1852) 5 Op. Atty. Gen. 630, 632.

Duty to countersign warrants.—The duty of the Comptrollers, under Act March 3, 1817, c. 45, 3 Stat. 366, and of the Commissioner of Customs, under Act March 3, 1849, c. 108, § 12, 9 Stat. 396, to countersign warrants drawn by the Secretary of the Treasury, "which shall be warranted by law," did not authorize those subordinate officers of the Treasury to supervise or revise the decision of the Secretary in granting warrants. (1852) 5 Op. Atty. Gen. 630, 639.

The duty to countersign warrants did not authorize a refusal to countersign because the Comptroller or the Commissioner of Customs differed in opinion from the Secretary as to the sum proper to be allowed, or was of opinion that the warrant ought not to issue for any sum. (1852) 5 Op. Atty. Gen. 630, 656, 657.

Under R. S. § 233 (ante, § 349), and section 269, the First Comptroller had no revisory power over the decisions of the Secretary of the Treasury respecting the issuance of warrants; such decisions were binding upon the Comptroller. (1881) 17 Op. Atty. Gen. 233.

Advice to Secretary of the Treasury on legal questions.—The First and Second Comptrollers and the Commissioner of Customs had no legal status as advisers of the Secretary of the Treasury upon legal questions. In form the Comptroller was asked for legal advice; in fact, what was desired was information as to his future action. Their opinions on points of law not anticipatory of future decisions by themselves were purely extraofficial and rendered by courtesy only. (1893) 20 Op. Atty. Gen. 654.

Duty under previous acts, as to recovery of debts.—Under the provision of Act Sept. 2, 1789, § 2, incorporated into R. S. § 248, ante, § 381, making it the duty of the Secretary of the Treasury to superintend the collection of the revenue, and the provision of section 3 of that act, incorporated into R. S. § 269, making it the duty of the Comptroller to provide for the regular and punctual payment of all moneys which may be collected, and direct prosecutions for all debts due to the United States, the Secretary and the Comptroller had power to take security upon lands, for a debt already due on account of the United States, according to the usual methods provided by law for that end. Neilson v. Lagow (1851) 12 How. 98, 107, 13 L. Ed. 909.

The similar provision, as to the duties of the First Comptroller, of Act March 3, 1817, § 10, also incorporated into R. S. § 269, could not be construed to make the bringing of a suit by direction of the Treasury Department, as for goods sold and delivered, an affirmance of an unauthorized sale of property of the United States by an officer who was

merely an agent for safe-keeping thereof. U. S. v. Nicoll (C. C. 1826) Fed. Cas. No. 15,879.

Restrictions upon carrying on trade, etc.—The additional Comptroller and Auditors whose appointments were authorized by Act March 3, 1817, c. 45, § 3, 3 Stat. 366, were embraced in the prohibitions against carrying on trade, etc., which had been imposed by Act Sept. 2, 1879, c. 12, § 8, incorporated in R. S. § 243, ante, § 377, on persons appointed to any office instituted by said act of 1789. (1847) 4 Op. Atty. Gen. 555.

§ 402. (Act July 31, 1894, c. 174, § 4.) Offices of Commissioner of Customs and Deputy Commissioner, Second Comptroller and Deputy Second Comptroller, and Deputy First Comptroller, abolished; First Comptroller to be known as Comptroller; salary of Comptroller.

The offices of Commissioner of Customs, Deputy Commissioner of Customs, Second Comptroller, Deputy Second Comptroller, and Deputy First Comptroller of the Treasury are abolished, and the First Comptroller of the Treasury shall hereafter be known as Comptroller of the Treasury. He shall perform the same duties and have the same powers and responsibilities (except as modified by this Act) as those now performed by or appertaining to the First and Second Comptrollers of the Treasury and the Commissioner of Customs; and all provisions of law not inconsistent with this Act, in any way relating to them or either of them, shall hereafter be construed and held as relating to the Comptroller of the Treasury. His salary shall be five thousand five hundred dollars per annum. (28 Stat. 205.)

These provisions were part of section 4 of the Dockery Act, which made many changes in the organization of the Department and the offices, etc., therein, and in the system of accounting.

See notes to section 3 of the act, post, § 417.

Further provisions of this section, for an Assistant Comptroller and a chief clerk in the office of the Comptroller, are set forth post, § 404.

A further provision relating to the duties of the Auditors is set forth post, § 443.

This section also amended R. S. §§ 3625, 3633, as stated in the notes to said sections respectively, post, §§ 6624, 6632.

Other sections of the act, relating to the Auditors and the system of accounting, are set forth post, §§ 417, 420, 433, 435–438, 443.

So far as this act related to the First Comptroller, it operated merely as changing his designation and as adding to and modifying his duties and powers, and not as creating a new office; the act so providing by section 9, post, § 403.

The powers and duties of the First Comptroller, at the time of the passage of this act, were prescribed by R. S. §§ 269–272, all which were expressly repealed or amended by this act; and by special provisions of R. S. §§ 57–59, 243, 456, amended by this act, §§ 1660, 3143, 3144, 3217, 3218, 3624, 3625, amended by this act, § 3633, amended by this act, § 3675, repealed in part by this act, §§ 3712, 3743, amended by this act, §§ 4579, 5218; also by Act March 1, 1879, c. 125, § 2, amending R. S. §§ 3143, 3144.

The powers and duties of the Second Comptroller, at the time of the passage of this act, were prescribed by R. S. §§ 273–275, which, except § 274, were repealed by this act; and by special provisions of R. S. § 3633, amended by this act, §§ 3673, 3743, amended by this act; also by Act Aug. 15, 1876, c. 289, § 3, 19 Stat. 199; Act Aug. 30, 1890, c. 837, § 1, 26 Stat. 399; Act July 16, 1892, c. 196, § 1, 27 Stat. 194.

The powers and duties of the Commissioner of Customs, at the time of the passage of this act, were prescribed by R. S. §§ 316, 317, amended by Act Feb. 27, 1877, c. 69, § 1, §§ 318, 2618, 2620, 2639, amended by this act, § 3625, amended by this act, and § 3743, amended by this act.

The duties of the Commissioner of Customs which, under this act, were to be performed by the Comptroller, were prescribed in part by R. S. § 317, as amended by Act Feb. 27, 1877, c. 69, § 1, as follows:

"Sec. 317. The Commissioner of Customs shall examine all accounts settled by the First Auditor relating to the receipts from customs, including accounts of collectors and other officers of the customs, and certify the balances arising thereon to the Register. And shall perform all the acts and exercise all the powers, relating to the receipts from customs and the accounts of collectors and the other officers of the customs or connected therewith, devolved by

section two hundred and sixty-nine upon the First Comptroller in regard to other receipts and other accounts."

These provisions of R. S. § 317, were superseded by the general provisions of this section as to the powers and duties of the Comptroller, and the further provisions prescribing his powers and duties in regard to the decisions of the Auditors and accounts adjusted by them of sections 8 and 11 of this act, post, §§ 425, 427, and by the repeal of R. S. § 269, referred to in R. S. § 317, by section 11 of this act, post, § 427.

Further duties of the Commissioner of Customs, which, under this act, were to be performed by the Comptroller, were prescribed by R. S. § 318, set forth post, § 409.

The powers and duties of the Comptroller in regard to decisions of the Auditors and accounts adjusted by them, as prescribed by this act, were contained in other sections, relating to the duties of the Auditors and the system of accounting, which are set forth post, §§ 425, 427.

Recent appropriations for the salary of the Comptroller, which by this section was to be $5,500, are $6,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 401, ante.

§ 403. (Act July 31, 1894, c. 174, § 9.) Effect of changes in designations and in duties and powers of First Comptroller and Auditors.

This Act, so far as it relates to the First Comptroller of the Treasury and the several Auditors and Deputy Auditors of the Treasury, shall be held and construed to operate merely as changing their designations and as adding to and modifying their duties and powers, and not as creating new officers. (28 Stat. 208.)

This provision was part of section 9 of the Dockery Act, cited above.

See notes to section 3 of the Act, post, § 415.

The changes of designations of the officers mentioned therein were made by provisions of section 4 of the act, ante, § 402.

The remainder of this section, relating to the Auditors, is set forth post, § 426.

§ 404. (Act July 31, 1894, c. 174, § 4.) Assistant Comptroller; chief clerk in office of Comptroller.

There shall also be an Assistant Comptroller of the Treasury, to be appointed by the President, with the advice and consent of the Senate, who shall receive a salary of [five thousand dollars] per annum, and a chief clerk in the office of the Comptroller of the Treasury, who shall receive a salary of two thousand five hundred dollars per annum. (28 Stat. 205.)

These provisions were part of section 4 of the Dockery Act, cited above.

See notes to section 3 of the act, post, § 417.

The words of the provision for the salary of the Assistant Comptroller, included in brackets, "five thousand dollars," were superseded by a provision, fixing his salary at $4,500, of Act March 15, 1898, c. 68, § 1, post, § 405.

Further provisions of this section, relating to the duties and powers of the Assistant Comptroller and the chief clerk, are set forth post, §§ 412, 413.

Previous provisions for a Deputy First Comptroller and a Deputy Second Comptroller, made by Act March 3, 1875, c. 130, § 2, 18 Stat. 396, and a provision authorizing such Deputy First Comptroller to countersign warrants and other papers, made by Act March 3, 1883, c. 128, § 1, 22 Stat. 539, were superseded by the provisions of this section.

See notes to § 401, ante.

§ 405. (Act March 15, 1898, c. 68, § 1.) Salary of Assistant Comptroller.

That hereafter the salary of the Assistant Comptroller shall be four thousand five hundred dollars. (30 Stat. 288.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1899, cited above.

The salary of the Assistant Comptroller was to be $5,000 per annum, by a provision of the act which established the office, Act July 31, 1894, c. 174, § 4, ante, § 402; but the annual appropriations subsequent thereto were $4,500.

(R. S. § 269. Repealed.)

This section prescribed the duties of the First Comptroller in regard to accounts settled by the First and Fifth Auditors and the Commissioner of the General Land Office, the countersigning of warrants, and superintending re-

covery of debts due to the United States. It was repealed by the Dockery Act of July 31, 1894, c. 174, § 11, 28 Stat. 209, which made other provisions as to such matters, set forth post, §§ 425, 427.

(R. S. § 270. Repealed.)

This section authorized appeals to the First Comptroller from settlements of accounts by the Sixth Auditor. It was repealed by the Dockery Act of July 31, 1894, c. 174, § 8, 28 Stat. 207, which made different provisions for revision of such settlements, set forth post, § 425.

See notes to § 401, ante.

§ 406. (R. S. § 271, as amended, Act July 31, 1894, c. 174, § 6.) Power of Comptroller to direct settlement of particular accounts.

The Comptroller of the Treasury, in any case where, in his opinion, the interests of the Government require it, shall direct any of the Auditors forthwith to audit and settle any particular account which such Auditor is authorized to audit and settle.

Act March 3, 1809, c. 28, § 2, 2 Stat. 536. Act July 31, 1894, c. 174, § 6, 28 Stat. 206.

This section was amended by section 6 of the Dockery Act, cited above. The material changes made by the amendment, consisted in the substitution of the designation, "Comptroller of the Treasury," instead of "First Comptroller"; and the extension of his power to direct immediate settlement, to cases where "the interests of the Government require it," instead of cases where "further delays would be injurious to the United States," and to directions to "any of the Auditors," instead of to the "First and Fifth Auditors," only, as originally provided.

Notes of Decisions

Authority of former Second Comptroller.—In this section of the Revised Statutes, as originally enacted, in reproducing the provisions of Act March 3, 1809, c. 28, § 2, the fact that, subsequently to that act, the Second Comptroller had been provided for, to whom was transferred part of the duties of the original Comptroller, was overlooked. Cotton v. U. S. (1894) 29 Ct. Cl. 207.

The power originally given by Act March 3, 1809, § 2, incorporated into this section, to "the Comptroller of the Treasury," could be exercised also by the Second Comptroller, subsequently provided for by Act March 3, 1817, c. 45, § 3, 3 Stat. 366, and he was authorized, in every case where, in his opinion, further delays would be injurious to the United States, to direct the Auditors, whose duties were to pass upon accounts confided to his revision, to audit and report the same to him, that he might revise and finally decide thereon. (1834) 2 Op. Atty. Gen. 625.

Provisions not applicable to Commissioner of General Land Office.—Under this section as enacted in the Revised Statutes, the First Comptroller had no power to direct the Commissioner of the General Land Office forthwith to audit any particular account relating to the public lands, where in his opinion further delay would be injurious to the government. The Commissioner, with respect to the discharge of his duties in such matters, is subject only to the direction of the Secretary of the Interior. (1886) 18 Op. Atty. Gen. 450.

Accounts previously settled.—This section does not apply to an account which the auditor has no authority to settle it having been previously allowed and paid under an act of Congress making such action a final determination of the claim. U. S. v. Olmsted (C. C. 1900) 106 Fed. 286, 288.

(R. S. § 272. Repealed.)

This section required the First Comptroller to report to Congress officers failing to make settlement of their accounts. It was repealed by section 12 of the Dockery Act, which required such reports to be made by the Secretary of the Treasury, in a provision set forth ante, § 390.

(R. S. § 273. Repealed.)

This section prescribed the duties of the Second Comptroller in regard to accounts settled by the Second, Third, and Fourth Auditors, the countersigning of warrants, and forms for disbursing public money in the War and Navy Departments, and keeping and stating accounts therein. The office of Second Comptroller was abolished, and its duties and powers were transferred to the Comptroller, by section 4 of the Dockery Act, ante, § 402, and this section was repealed by section 7 of that act, Act July 31, 1894, c. 174, § 7, subd. 3, 28 Stat. 206.

§ 407. (R. S. § 274.) Power of Comptroller to regulate payment of arrears of pay.

The [Second Comptroller] may prescribe rules to govern the payment of arrears of pay due to any petty officer, seaman, or other person not an officer, on board any vessel in the employ of the United States, which has been sunk or destroyed, in case of the death of such petty officer, seaman, or person, to the person designated by law to receive the same.

Act July 4, 1864, c. 248, § 3, 13 Stat. 390.

The words of this section, "Second Comptroller," enclosed in brackets, were superseded by the abolition of the office of Second Comptroller and the transfer of the duties and powers thereof to the Comptroller of the Treasury, by the provisions of the Dockery Act of July 31, 1894, c. 174, § 4, ante, § 402.

(R. S. § 275. Repealed.)

This section authorized the Second Comptroller to detail one clerk to sign certificates and papers relating to bounties. The office of Second Comptroller was abolished, and its duties and powers transferred to the Comptroller, by section 4 of the Dockery Act, ante, § 402, and this section was repealed by section 7 of that act, Act July 31, 1894, c. 174, § 7, subd. 3, 28 Stat. 206.

§ 408. (Act July 31, 1894, c. 174, § 5.) Comptroller to prescribe forms of keeping and rendering public accounts.

The Comptroller of the Treasury shall, under the direction of the Secretary of the Treasury, prescribe the forms of keeping and rendering all public accounts, except those relating to the postal revenues and expenditures therefrom.

The returns of fees mentioned in section seventeen hundred and twenty-five of the Revised Statutes shall be made as prescribed by the Comptroller of the Treasury. (28 Stat. 206.)

This section was part of the Dockery Act, cited above.

See notes to section 3 of the act, post, § 417.

Previous to this enactment, it was the duty of the Second Comptroller to report forms of keeping and stating accounts in the War and Navy Departments, under R. S. § 273, which was repealed by section 7 of this act, Act July 31, 1894, c. 174, § 7, subd. 3, 28 Stat. 206.

The fees mentioned in R. S. § 1725, referred to in this section, were the fees of consular officers, of which, by said section 1725, post, § 3183, they were required to make returns, "in such manner as the Secretary of State shall prescribe."

§ 409. (R. S. § 318.) Comptroller to prescribe forms for use in offices for collecting customs.

The Commissioner of Customs shall report to the Secretary of the Treasury official forms to be used in the different offices for collecting the public receipts from customs, and all the manner and form of keeping and stating the accounts of the persons employed therein.

Act March 3, 1817, c. 45, § 8, 3 Stat. 367. Act March 3, 1849, c. 108, § 12, 9 Stat. 396.

The office of Commissioner of Customs was abolished, and its duties and powers were transferred to the Comptroller of the Treasury, by the Dockery Act of July 31, 1894, c. 174, § 4, ante, § 402.

§ 410. (Act Feb. 19, 1897, c. 265, § 1.) Powers of Comptroller and Auditors as to inspection of accounts of disbursing officers of Departments, and of commissions, etc., in District of Columbia.

All books, papers, and other matters relating to the office or accounts of disbursing officers of the Executive Departments, and commissions, boards, and establishments of the Government in the District of Columbia shall at all times be subject to inspection and examination by the Comptroller of the Treasury and the Auditor

of the Treasury authorized to settle such accounts, or by the duly authorized agents of either of said officials. (29 Stat. 550.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1898, cited above.

A provision of the same nature in the similar appropriation act for the year next following, Act March 15, 1898, c. 68, § 5, is set forth post, § 411.

§ 411. (Act March 15, 1898, c. 68, § 5.) Powers of Comptroller and Auditors as to inspection of accounts of officers in the District of Columbia.

All books, papers, and other matters relating to the accounts of officers of the government in the District of Columbia shall at all times be subject to inspection and examination by the Comptroller of the Treasury and the Auditor of the Treasury authorized to settle such accounts, or by the duly authorized agents of said officials. (30 Stat. 316.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1899, cited above.

A provision of the same nature in the similar appropriation act for the year next preceding, Act Feb. 19, 1897, c. 265, § 1, is set forth ante, § 410.

§ 412. (Act July 31, 1894, c. 174, § 4.) Duties of Assistant Comptroller.

The Assistant Comptroller of the Treasury shall perform such duties as may be prescribed by the Comptroller of the Treasury and shall have the power, under the direction of the Comptroller of the Treasury, to countersign all warrants and sign all other papers. (28 Stat. 205.)

This was a provision of section 4 of the Dockery Act, cited above.

Preceding provisions of the section, relating to the office of Assistant Comptroller, are set forth ante, § 402.

See notes to section 3 of the act, post, § 417.

§ 413. (Act July 31, 1894, c. 174, § 4.) Duties of chief clerk.

The chief clerk shall perform such duties as may be assigned to him by the Comptroller of the Treasury, and shall have the power, in the name of the Comptroller of the Treasury, to countersign all warrants except accountable warrants. (28 Stat. 206.)

This was a further provision of section 4 of the Dockery Act, cited above.

See notes to section 3 of the act, post, § 417.

The chief clerk was authorized to sign letters and papers in the name of the Comptroller, by a provision of Act March 2, 1895, c. 177, § 1, post, § 414.

§ 414. (Act March 2, 1895, c. 177, § 1.) Power of chief clerk to sign letters and papers.

The chief clerk in the office of the Comptroller of the Treasury shall have power in the name of the Comptroller of the Treasury to sign such letters and papers as the Comptroller may direct. (28 Stat. 776.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above.

§ 415. (Act March 2, 1895, c. 177, § 1.) Law clerks in offices of Comptroller and Auditors to perform clerical duties.

The law clerks in the office of the Comptroller of the Treasury, and in the offices of the Auditors of the Treasury, shall perform such clerical duties as the heads of their respective offices may require of them. (28 Stat. 777.)

This was a further provision of the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above.

Provisions relating to the appointment of the law clerks mentioned in this provision, contained in section 1 of the Dockery Act, are set forth ante, § 359.

Notes of Decisions

Mode of appointment of law clerks not affected.—This provision is not to be construed as subjecting the positions of law clerk in the offices of the Comptroller of the Treasury and of the Auditors of the Treasury to competitive examinations. It leaves the mode of their appointment as fixed by the Dockery Act of July 31, 1894, § 1, ante, § 359. (1895) 21 Op. Atty. Gen. 187.

CHAPTER FOUR

The Auditors

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§ 416. (R. S. § 276.) Auditors.

There shall be connected with the Department of the Treasury six auditors of accounts, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be known as the First, Second, Third, Fourth, Fifth, and Sixth Auditors, respectively. Each Auditor is entitled to a salary of four thousand dollars a year.

Act Sept. 2, 1789, c. 12, § 1, 1 Stat. 65. Act March 3, 1817, c. 45, §§ 3, 15, 3 Stat. 366, 368. Act July 2, 1836, c. 270, § 8, 5 Stat. 81. Act July 2, 1836, c. 270, § 44, 5 Stat. 89. Act June 8, 1872, c. 335, § 21, 17 Stat. 287. Act March 2, 1799, c. 38, § 1, 1 Stat. 729. Act March 3, 1873, c. 226, § 3, 17 Stat. 508.

Six Deputy Auditors, one in the office of each Auditor, were authorized by the provisions of the sundry civil appropriation act of 1875, relating to the organization of the Treasury Department, Act March 3, 1875, c. 130, § 2, 18 Stat. 396. The Sixth Auditor was designated therein as the Auditor of the Treasury for the Post-Office Department. And authority was given to designate his Deputy, in the name of said Auditor, to sign letters and papers, by a provision of Act March 3, 1891, c. 541, § 1, 26 Stat. 920.

But these provisions were to some extent superseded or rendered inoperative by the subsequent changes in the organization of the Department and the offices therein, and in the system of accounting, by provisions of the Dockery Act of July 31, 1894, c. 174, §§ 3, 7, 8, 9, 11, 12, 13, 14, 20, 22, 23, post, §§ 417, 420, 425–428, 433, 435–438.

The designations of the Auditors and Deputy Auditors were changed by section 3 of said Dockery Act, post, § 417.

Two Deputy Auditors in the office of the Auditor for the Post-Office Department were provided for by the legislative, executive and judicial appropriation act for the fiscal year 1902, Act March 3, 1901, c. 830, § 1, 31 Stat. 977, and by subsequent similar appropriations until 1911.

But the position of Deputy Auditor was abolished, and the duties and powers thereof are to be exercised by other officers specified, by a provision of Act March 4, 1911, c. 237, § 1, post, § 418.

For the Auditor for the Post-Office Department, appropriations for recent years are $5,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specifically authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Acts establishing office.—The accounting officers of the Treasury, created by the act establishing the Department, Act Sept. 2, 1789, c. 12, 1 Stat. 65, were an Auditor and a Comptroller. Act March 3, 1817, c. 45, 3 Stat. 366, created four additional auditors and one additional comptroller. U. S. v. Gilmore (1868) 7 Wall. 491, 493, 19 L. Ed. 282; (1852) 5 Op. Atty. Gen. 630, 632; (1893) 20 Op. Atty. Gen. 677, 679.

History of the office of Auditor since 1789 reviewed. (1893) 20 Op. Atty. Gen. 677.

Act July 2, 1836, c. 270, § 8, 5 Stat. 81, created "an Auditor of the Treasury for the Post Office Department," who was directed to report both to the

Secretary of the Treasury and the Postmaster General. (1893) 20 Op. Atty. Gen. 677, 680.

Restrictions upon carrying on trade, etc.—The additional Auditors whose appointments were authorized by Act March 3, 1817, c. 45, § 3, 3 Stat. 366, were embraced in the prohibitions against carrying on trade, etc., which had been imposed by Act Sept. 2, 1789, c. 12, § 8, incorporated in R. S. § 243, ante, § 377, on persons appointed, to any office instituted by said act of 1789. (1847) 4 Op. Atty. Gen. 555.

§ 417. (Act July 31, 1894, c. 174, § 3.) Designations of Auditors, Deputy Auditors, and other subordinates.

The Auditors of the Treasury shall hereafter be designated as follows: The First Auditor as Auditor for the Treasury Department; the Second Auditor as Auditor for the War Department; the Third Auditor as Auditor for the Interior Department; the Fourth Auditor as Auditor for the Navy Department; the Fifth Auditor as Auditor for the State and other Departments; the Sixth Auditor as Auditor for the Post-Office Department. The designations of the deputy auditors and other subordinates shall correspond with those of the Auditors. And each deputy auditor, in addition to the duties now required to be performed by him, shall sign, in the name of the Auditor, such letters and papers as the Auditor may direct. (28 Stat. 205.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1895, cited above.

Sections 3 to 23 of said act, known as the Dockery Act, contained a series of provisions relating to the organization of the Department and the system of accounting therein, which changed the designations of offices and added to and modified their duties and powers, abolished certain offices and transferred their duties and powers to others, and altered the methods of rendering and settling accounts. These provisions were an important part of the enactments suggested by the Joint Commission of Congress to inquire into and examine the status of the laws organizing the Executive Departments, authorized by Act March 3, 1893, c. 211, 27 Stat. 681. Such of these sections as affect particular officers of the Department are set forth under the chapters and sections of this Title which relate to those officers. Provisions of sections 4, 5, 6, and 9, which relate to the office of the Comptroller, are under the preceding chapter, ante, §§ 400–402, 406, 410, 411. Section 7 and subsequent sections which relate to the settlement of accounts by the Auditors, the rendering of accounts for that purpose, the revision of accounts so settled, and further proceedings thereon, are set forth in this chapter, post, § 417. Provisions of section 10, establishing the Division of Bookkeeping and Warrants, are under chapter 1, ante, § 356. Section 15, requiring the Secretary of the Treasury to make annual reports to Congress of the receipts and expenditures of all public moneys, is under chapter 2, ante, § 388. Section 16, amending R. S. § 307, is incorporated in that section as set forth post, § 481. Section 17, relating to the certification of transcripts from the records, etc., of the Department, as provided by R. S. § 886, is set forth in connection with that section, post, § 1498. Section 18 amended R. S. § 3743 to read as set forth post, § 6894. Section 19, amending R. S. § 2639, is incorporated in that section as set forth post, § 5380. Section 21, relating to accounts pending for settlement at the time of the change in the system of accounting, being temporary only, is omitted. Section 24 provided that sections 3 to 23 should be in force on and after October 1, 1894, and section 25 repealed all inconsistent laws.

So far as this act related to the Auditors and Deputy Auditors, it operated merely as changing their designations and as adding to and modifying their duties and powers, and not as creating new offices; the act so providing by section 9, ante, § 403.

The position of Deputy Auditor, mentioned in this section, was abolished, and the duties and powers thereof are to be exercised by other officers specified, by a provision of Act March 4, 1911, c. 237, § 1, post, § 418.

§ 418. (Act March 4, 1911, c. 237, § 1.) Position of deputy auditor abolished, and duties and powers transferred.

The position of deputy auditor authorized in the offices of the six auditors of the Treasury for the several executive departments and other Government establishments are hereby abolished to take effect on and after July first, nineteen hundred and eleven, and on and after said date the duties and powers theretofore exercised by law by said deputy auditors shall be exercised by the chief clerk and chief of

division in each of said auditor's offices except in the office of the Auditor for the Post Office Department, where such duties and powers shall be exercised by the assistant and chief clerk. (36 Stat. 1190.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1912, cited above.

§ 419. (R. S. § 277.) Duties of the Auditors.

The duties of the Auditors shall be as follows:

First. The First Auditor shall receive and examine all accounts accruing in the Treasury Department, all accounts relating to the receipts from customs, including accounts of collectors and other officers of the customs, all accounts accruing on account of salaries in the Patent-Office, all accounts of the judges, marshals, clerks, and other officers, of all the courts of the United States, all accounts of the officer in charge of the public buildings and grounds in the District of Columbia, all accounts of the expenditures of the Department of Agriculture, all accounts relating to prisoners convicted in any court of the United States; and, after examination of such accounts relating to the receipts from customs, including the accounts of collectors and other officers of the customs, he shall certify the balances and transmit the same, with the vouchers and certificates, to the Commissioner of Customs for his decision thereon, and he shall certify the balances of all other accounts, and transmit the same, in like manner, to the First Comptroller for his decision thereon.

Second. The Second Auditor shall receive and examine all accounts relating to the pay and clothing of the Army, the subsistence of officers, bounties, and premiums, military and hospital stores, and the contingent expenses of the War Department, all accounts relating to Indian affairs, and to agents of lead and other mines of the United States; and, after examination of such accounts, he shall certify the balances, and transmit such accounts, with the vouchers and certificate, to the Second Comptroller for his decision thereon.

Third. The Third Auditor shall receive and examine all accounts relative to the subsistence of the Army, the Quartermaster's Department, and generally all accounts of the War Department other than those provided for; all accounts relating to pensions for the Army, and all accounts for compensation for the loss of horses and equipments of officers and enlisted men in the military service of the United States, and for the loss of horses and equipments, or of steamboats, and all other means of transportation, in the service of the United States by contract or impressment; and, after the examination of such accounts, he shall certify the balances and shall transmit such accounts, with all the vouchers and papers and the certificate, to the Second Comptroller for his decision thereon.

Fourth. The President may assign to either the Second or the Third Auditor the settlement of the accounts in the War Department existing at the conclusion of the war of eighteen hundred and twelve.

Fifth. The Fourth Auditor shall receive and examine all accounts accruing in the Navy Department or relative thereto, and all accounts relating to Navy pensions; and, after examination of such accounts, he shall certify the balances, and shall transmit such accounts, with the vouchers and certificate, to the Second Comptroller for his decision thereon.

Sixth. The Fifth Auditor shall receive and examine all accounts accruing in or relative to the Department of State, all accounts of the Commissioner of Internal Revenue, all accounts relating to the contingent expenses of the Patent-Office, and all accounts relating to the census.

Seventh. The Sixth Auditor shall receive all accounts arising in

the Post-Office Department, or relative thereto, with the vouchers necessary to a correct adjustment thereof, and shall audit and settle the same and certify the balances thereon to the Postmaster-General. He shall keep and preserve all accounts and vouchers after settlement. He shall close the account of the Department quarterly, and transmit to the Secretary of the Treasury quarterly statements of its receipts and expenditures. He shall report to the Postmaster-General, when required to do so, the manner and form of keeping and stating the accounts of the Department, and the official forms of papers to be used in connection with its receipts and expenditures. He shall report to the Postmaster-General all delinquencies of postmasters in rendering their accounts and returns, or in paying over money-order funds and other receipts at their offices. He shall register, charge, and countersign all warrants upon the Treasury for receipts or payments issued by the Postmaster-General, when warranted by law. He shall perform such other duties in relation to the financial concerns of the Department as may be assigned to him by the Secretary of the Treasury, and make to the Secretary or to the Postmaster-General such reports respecting the same as either of them may require.

Act March 3, 1817, c. 45, § 4, 3 Stat. 366. Act March 3, 1849, c. 108, 9 Stat. 395. Act July 20, 1868, c. 176, § 1, 15 Stat. 106. Act March 3, 1849, c. 129, § 3, 9 Stat. 415. Act July 28, 1866, c. 297, § 8, 14 Stat. 327. Act June 30, 1864, c. 173, § 2, 13 Stat. 223. Act June 8, 1872, c. 335, § 22, 17 Stat. 287.

The system of accounting in the Department prescribed by the Revised Statutes was greatly changed by several statutes relating thereto, particularly as to the mode of rendering accounts to the officers of the Department, the distribution of accounts among the Auditors and their duties in regard thereto as prescribed by this section, and the further proceedings after settlement of accounts by the Auditors. The provisions of this section were, to a great extent, superseded or modified by the subsequent enactments set forth below; particularly by Act March 29, 1894, c. 49, post, §§ 439–442, and various sections of the Dockery Act of July 31, 1894, c. 174, post, §§ 420, 425–428, 433, 435–438.

A direction to the Commissioner of Agriculture to account and report to the proper accounting officers of the Treasury, in the same manner and at the same times as the heads of executive departments, contained in Act June 16, 1880, c. 252, § 2, 21 Stat. 296, and repeated in Act March 3, 1881, c. 129, § 2, 21 Stat. 385, may be regarded as superseded by the change of the Department of Agriculture to an executive department, by Act Feb. 9, 1889, c. 122, post, §§ 789–792, and the provision for examination of accounts of the Secretary and of the Department by the Auditor for the State and other Departments, in the Dockery Act of July 31, 1894, c. 174, § 7, post, § 420.

A provision as to the construction of subdivision second of the above section, as to claims for arrears of pay and bounty, made by Act July 16, 1892, c. 196, § 1, is set forth post, § 450.

Provisions for compensation for loss of horses and equipments and of steamboats and other means of transportation, accounts for which are provided for by subdivision 3 of this section, were made by R. S. §§ 3482–3488, post, §§ 6390–6401.

Notes of Decisions

1. Nature of authority of accounting officers.
2. Accounts.
3. Unliquidated damages.
4. Matters specially referred by acts of Congress.
5. Effect of decisions or action of heads of departments or other executive officers.
6. Effect of vouchers given or taken by officers.
7. Deductions and credits.
8. Set-off.
9. Limitation of time of presentation.
10. Course of office procedure in general.
11. Second Auditor.
12. Third Auditor.
13. Fourth Auditor.
14. Fifth Auditor.
15. Sixth Auditor.
16. Powers and duties of Comptrollers as to accounts transmitted by Auditors under this section.
17. Effect of decision of Comptroller upon other accounting officers.
18. Scope of duties of Auditors under this section.
19. Effect of settlement of account upon rights of parties.
20. Opening and re-examination by accounting officers of accounts and claims settled by them.
21. Conclusiveness of balances certified by accounting officers on executive branch government.
22. Statement of account not an award of arbitrators.
23. Recovery back of money paid on settlement of account.

1. Nature of authority of accounting officers.—The acts of agents of the treasury department in stating and settling accounts of officers and issuing warrants for balances found due are ministerial acts, and the authority given by law must be strictly and literally pursued. Ex parte Randolph (C. C. 1833) Fed. Cas. No. 11,558.

2. Accounts.—The laws regulating the payment of money from the Treasury in the current business of the government, provide only for the settlement and payment of accounts. An account is something which may be adjusted and liquidated by an arithmetical computation. No law authorizes Treasury officials to allow and pass in accounts a number not the result of arithmetical computation upon a subject within the operation of the mutual part of a contract. Power v. U. S. (1883) 18 Ct. Cl. 263, 275. And see McKee v. U. S. (1876) 12 Ct. Cl. 504, 555, dissenting opinion of Richardson, J.

It is the general duty of the accounting officers of the Treasury, by standing laws, to deal with accounts only, in doing which they are subject to the supervision of some proper head of Department. (1857) 8 Op. Atty. Gen. 293.

3. Unliquidated damages.—Claims for unliquidated damages for breach of contract must frequently be sustained by extraneous proof, having no relation to the subjects of the contract, which are common to both parties, and often involve a broad field of investigation, and require the application of judgment and discretion upon the measure of damages and the weight of conflicting evidence. The results to be reached in such cases can in no just sense be called an account, and are not committed by law to the control and decision of Treasury accounting officers. Power v. U. S. (1883) 18 Ct. Cl. 263, 275; McClure v. U. S. (1884) 19 Ct. Cl. 173, 179; Dennis v. U. S. (1885) 20 Ct. Cl. 119, 121; Brannen v. U. S. (1885) 20 Ct. Cl. 219, 223; Dennis v. U. S. (1888) 23 Ct. Cl. 324. And see McKee v. U. S. (1876) 12 Ct. Cl. 504, 555, dissenting opinion of Richardson, J.

The officers of the Executive Departments have no authority to settle and pay claims for unliquidated damages. Power v. U. S. (1883) 18 Ct. Cl. 263, 275; Dunbar v. U. S. (1884) 19 Ct. Cl. 489, 493; Brannen v. U. S. (1885) 20 Ct. Cl. 219, 223; State of Pennsylvania v. U. S. (1901) 36 Ct. Cl. 131, 135.

The accounting officers have jurisdiction of claims for money due on contracts, though the exact amount be not fixed thereby, but not of claims founded on neglect or breach of obligations contrary to the terms of a contract. Dennis v. U. S. (1885) 20 Ct. Cl. 119.

Executive officers have no jurisdiction of claims for unliquidated damages founded on breach of contract; nor have they authority to submit them to arbitration. Brannen v. U. S. (1885) 20 Ct. Cl. 219.

The accounting officers have no authority to adjust the claims of contractors with the government for damages without the special authority of Congress. (1844) 4 Op. Atty. Gen. 327; (1847) 4 Op. Atty. Gen. 627, 630; (1872) 14 Op. Atty. Gen. 24.

In case a contract for services be rescinded by the United States, without malfeasance of the other party, and after the services have been partly performed by him, if he claim unliquidated damages as for breach of contract, the case is beyond the powers of the accounting officers of the Treasury; but if he waive all other claims and elect to take payment as for part performance in discharge of the contract, it is a mere question of account to be passed by the proper Auditor and Comptroller. (1854) 6 Op. Atty. Gen. 496.

The Comptrollers and Auditors of the Treasury have no general authority to award damages as for tort, on contract broken; their jurisdiction is confined to matters of account arising ex contractu or by operation of law. (1854) 6 Op. Atty. Gen. 516.

The authority of the Third Auditor and Second Comptroller to settle claims or accounts of any kind against the United States was derivable solely from legislative enactment. The statutory provisions conferring upon them authority in that regard reviewed, and held that the authority so conferred did not extend to the settlement of any claims or accounts for compensation for damages (whether the damages were sustained by the loss of property or otherwise) other than such as were of the classes specifically described in those provisions. (1875) 15 Op. Atty. Gen. 39.

4. Matters specially referred by act of Congress.—The accounting officers may adopt the report of a committee of Congress upon which a given law was reported and passed for the principles which are to govern in the settlement of accounts under the law. The passage of a bill accompanying a written report may be considered the adoption of that report. (1823) 1 Op. Atty. Gen. 597.

Acts of Congress granting relief in special cases, and referring claims to a specified Auditor, confer upon him a jurisdiction exclusive of any other Department; and where said Auditor settles such accounts, his successors are bound by his decisions. (1849) 5 Op. Atty. Gen. 97.

When by special law, or in reference to any special matter, the authority of the accounting officers of the Treasury is extended beyond the question of accounts to one of unliquidated damages, such officers are not thereby converted into independent courts of law, but still remain executive or administrative offi-

cers of a Department. (1857) 8 Op. Atty. Gen. 293.

A provision of an act of Congress for payment to a State of an amount specified, on account of the 5 per centum fund arising from the sale of public lands in said state, precludes all inquiry on the part of the accounting officers of the Treasury as to the legality and justness of the claim. It is their duty to allow and certify the claim for that amount. (1889) 19 Op. Atty. Gen. 362.

The claim of the state of Massachusetts for reimbursement of expenses incurred in the payment of state militia called out by the governor, at the request of the military authorities of the United States, to aid in suppressing the "draft riots" in the city of Boston was within the scope of the act of July 27, 1861, 12 Stat. 276, and the supplemental resolution of March 8, 1862, No. 16, 12 Stat. 615, providing for the indemnification of states for expenses incurred in the defense of the United States, and might properly be examined and adjusted by the accounting officers of the Treasury under the provisions thereof. (1890) 19 Op. Atty. Gen. 537.

5. Effect of decisions or action of heads of departments or other executive officers.—The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments. U. S. v. Jones (1855) 18 How. 92, 96, 15 L. Ed. 274; U. S. v. Johnston (1888) 8 Sup. Ct. 446, 454, 124 U. S. 236, 31 L. Ed. 389; Barnett v. U. S. (1880) 16 Ct. Cl. 515.

Where a navy officer was detached on special duty in France, and a sum of money was transmitted to him by the Secretary of the Navy, to be disbursed for medical attendance, upon himself, and was disbursed according to the orders of the Secretary, the propriety of this act was peculiarly within the Secretary's jurisdiction and discretion, and such officer could not be charged with the amount by the accounting officers of the Treasury Department. U. S. v. Jones (1855) 18 How. 92, 94, 15 L. Ed. 274; U. S. v. Jones (C. C. 1824) Fed. Cas. No. 15,493a.

In the administration of statutes relating to the muster and pay of officers, the decisions of the War Department should be regarded by the Treasury Department as establishing matters of fact concerning the military relations which existed between the government and the officers. But all questions of law involving financial relations and obligations must be determined by the accounting officers of the Treasury. Parkhurst v. U. S. (1894) 29 Ct. Cl. 399.

The claims of mail contractors for one month's extra pay, in cases where their contracts have been annulled and the service discontinued, are to be decided by the Postmaster General, or by the Auditor of the Treasury for the Post Office Department, as prescribed by Act July 2, 1836, incorporated into subdivision 7 of this section. (1850) 5 Op. Atty. Gen. 246.

The Postmaster General may obtain the opinion of the Attorney General on such claims, yet his decision is equally conclusive, whether it shall be in accordance with or against such opinion, where one has been obtained. Id.

The heads of Departments have a rightful authority to direct allowances to be made, or to reject claims for allowances, in settling and adjusting accounts relating to the business of their respective Departments; and such directions and rejections ought to be conformed to by the Auditors and Comptrollers respectively. (1852) 5 Op. Atty. Gen. 630, 656.

If an accounting officer refuse to comply with the lawful instructions of the head of the proper Department in respect to the settlement of an account, the appropriate ultimate remedy is his removal. (1864) 11 Op. Atty. Gen. 109.

While the Secretary of the Interior was invested by law with exclusive supervisory power over the accounts of United States marshals, his decision of questions connected with the settlement of such accounts was the law of such settlement for the executive department of the government. (1864) 11 Op. Atty. Gen. 129.

The regulations of the Navy concerning payments to administrators of balances due deceased seamen and marines, payments of arrearages claimed under wills, etc., are not applicable to or binding upon the accounting officers of the Treasury Department in the settlement of naval accounts. They extend to and govern only those persons who are in the naval service. (1880) 16 Op. Atty. Gen. 494.

It is not within the province of the accounting officers of the Treasury to construe the pension laws and give instructions to pension agents as to the payment of pensions. This properly belongs to the Commissioner of Pensions, whose duty it is, under the direction of the Secretary of the Interior, to administer these laws. The certificate and his orders as to its payment are binding upon the Comptroller and Auditor. (1882) 17 Op. Atty. Gen. 339, 340; (1888) 19 Op. Atty. Gen. 214.

The power to audit and adjust accounts for the last sickness and burial of deceased pensioners arising under R. S. § 4718, post, § 9015, belongs solely to the proper accounting officers of the Treasury, by virtue of R. S. § 236, ante, § 368. (1882) 17 Op. Atty. Gen. 440.

A resolution of one House of Congress cannot empower the head of a Department to re-examine and audit a claim which by statute is required to be examined and settled by the head of

another Department. (1889) 19 Op. Atty. Gen. 385.

The Treasury Department is bound by the rulings of the Department of the Interior in construing pension appropriation acts. (1891) 20 Op. Atty. Gen. 178.

The allotment of the Public Printer's appropriation among the different departments is not within the jurisdiction of the accounting officers of the Treasury. (1894) 21 Op. Atty. Gen. 4.

6. Effect of vouchers given or taken by officers.—When an act of Congress directs the accounting officers of the treasury to credit a military officer "with any sum or sums of money paid by him" for certain purposes, "and also the sums of money advanced by him" for certain other purposes, on his producing the proper vouchers, an auditor cannot reject certain items for which vouchers are produced, on the ground that they were improperly or erroneously paid. The necessity or propriety of the advances covered by the vouchers is not open to discussion; they were prejudged and determined by Congress. Riley v. U. S. (1865) 1 Ct. Cl. 299.

A voucher given by a public officer, in the regular and ordinary course of his business, for services performed by his order within the scope of his authority and the line of his duty unimpeached, is prima facie evidence of indebtedness on the part of the United States as therein stated. In that respect such vouchers differ from the certified balances made by accounting officers which are not evidence either for or against the Government. McCann v. U. S. (1883) 18 Ct. Cl. 445. And see Salomon v. U. S. (1873) 19 Wall. 17, 20, 22 L. Ed. 46; Parish v. U. S. (1866) 2 Ct. Cl. 341, 344.

A proper voucher is prima facie evidence for the claimant, though the officer was indicted for fraudulently issuing it. Countryman v. U. S. (1886) 21 Ct. Cl. 474.

7. Deductions and credits.—Marshals are liable to account to the United States for moneys paid to their deputies on execution, even though the return day of the execution may have passed; and defendants in such execution who shall have paid money on the same after the return day are entitled to be credited at the Treasury for such payments. (1836) 3 Op. Atty. Gen. 78.

The accounting officers cannot allow credits to pursers for public stores destroyed by inevitable accident whilst in their possession, Congress only being competent to grant relief in such cases. (1845) 4 Op. Atty. Gen. 355.

A settlement was made by the accounting officers of the Treasury with F., as assignee of certain parties, for the use and occupation of some buildings by the military authorities, whereupon he was paid the amount allowed. Subsequently another settlement was made with him, as assignee of certain other parties, for the use and occupation of other buildings by the same authorities, wherein, it having in the mean time been ascertained that the allowance on the first settlement was improper, and made in ignorance of a fact which, had the accounting officers been cognizant thereof at the time, would have precluded such allowance, the amount paid as aforesaid was deducted, and only the balance remaining after the deduction allowed. Held that, notwithstanding the claims originally belonged to and were derived by assignment from different persons, it was competent to the accounting officers, under the circumstances, to make such deduction. (1874) 14 Op. Atty. Gen. 412.

8. Set-Off.—From an early day the accounting officers have been accustomed, in the course of settling ordinary accounts in the Treasury Department, to set off one debt against another when a claimant is both debtor and creditor, and that practice has been sustained by judicial determination as legal and proper, without any express statute on the subject. McKnight v. U. S. (1877) 13 Ct. Cl. 292, 306; Bonnafon v. U. S. (1878) 14 Ct. Cl. 484, 489. See Gratiot v. U. S. (1841) 15 Pet. 336, 370, 10 L. Ed. 759.

The accounting officers are not authorized to enforce payment in whole or in part, by set-off or otherwise, of a canceled and discharged indebtedness. When Congress has released a collector of internal revenue from liability for a balance due from him as collector, the accounting officers cannot set it off against a balance due to him as disbursing officer. Sauner v. U. S. (1881) 17 Ct. Cl. 39.

The duty of the accounting officers in the matter of set-off does not extend beyond the interest of the United States in the matters involved in the settlement. Taggart v. U. S. (1881) 17 Ct. Cl. 322, 327.

Where a debtor assigned to the government as collateral security for his debt of $1,119.90 a judgment for $2,000 against a third person to whom the government was indebted in a larger amount, the accounting officers were not bound to collect the whole amount of the judgment and pay the balance to the claimant. Taggart v. U. S. (1881) 17 Ct. Cl. 322.

It is the duty of the accounting officers in proper cases to set off one demand against another where the Government is both debtor and creditor of the same party. George Howes & Co. v. U. S. (1889) 24 Ct. Cl. 170.

Where a firm is creditor of and a member debtor to the government, and all the partners acquiesce, the accounting officers may set off the individual

indebtedness of the one partner against his share of the claim. Id.

9. Limitation of time of presentation.—The provision of Act March 3, 1845, c. 71, § 4, 5 Stat. 764, which was repealed by Act Aug. 10, 1846, c. 175, § 5, 9 Stat. 97, that no account should be acted upon at the Treasury unless presented within six years from the date of the claim, did not affect applications under a general law for pensions. (1838) 4 Op. Atty. Gen. 366.

Pensions are gratuities, not claims or accounts, within the meaning of the statute; yet when these had been once placed on the pension roll they became claims to semiannual payments, which, if not asserted within six years, could not be audited without the authority of Congress. Id.

10. Course of office procedure in general.—The manner in which accounts and claims against the Government were settled, through the several processes of settlement, examination, and certification, stated. McKnight v. U. S. (1877) 13 Ct. Cl. 292, 299.

Where, by a private act, the Postmaster General is required to cause to be re-examined the transportation account of a mail contractor, it is to be intended that the same shall be done in the statute routine of the accounting of the Department. (1855) 7 Op. Atty. Gen. 439.

The Secretary of the Treasury cannot legally, by departmental order, change a practice or course of office procedure prescribed by statute for the settlement of accounts. (1888) 19 Op. Atty. Gen. 177.

11. Second Auditor.—The Second Auditor, not the Commissioner of Pensions, had authority to adjudicate claims for bounties under Act July 22, 1861, c. 9, §§ 5, 6, 12 Stat. 269. (1879) 16 Op. Atty. Gen. 371.

12. Third Auditor.—The provision of the third subdivision of this section, that the Third Auditor "shall receive and examine" "all accounts for compensation for the loss of horses," etc., conferred power upon him simply as an accounting officer. Thomas v. U. S. (1880) 16 Ct. Cl. 522.

The Third Auditor has exclusive jurisdiction over the accounts and claims for horses and other property destroyed in the military service, under Act Jan. 18, 1837, c. 5. (1842) 4 Op. Atty. Gen. 16.

The Third Auditor, in adjusting, under Act March 3, 1849, c. 129, a claim for the value of a horse lost in the service of the United States, has the right to go behind the settlement of the paymaster after the Second Comptroller's approval thereof. (1858) 9 Op. Atty. Gen. 151.

The act does not confer upon the Auditor a general power of revision over all the accounts of the claimant, and over all payments allowed to him for forage, for other horses than the one dead, lost, or abandoned. Id.

The laws, regulations, and departmental practice concerning settlement of war accounts generally, but more especially of property accounts relating to the Army, from the commencement of the government down to 1871, reviewed. (1871) 13 Op. Atty. Gen. 483.

Act March 3, 1849, § 3, incorporated into this section, placed all claims for horses and other property lost or destroyed in military service, presented under the act, within the exclusive jurisdiction of the Third Auditor. It made him the sole tribunal, and his awards, called judgments, final. (1882) 17 Op. Atty. Gen. 352. But see (1868) 12 Op. Atty. Gen. 362.

Act July 28, 1866, c. 297, § 8, 14 Stat. 327, modifying said act of 1849, did not affect claims adjudicated by the Auditor before its passage. (1882) 17 Op. Atty. Gen. 352.

13. Fourth Auditor.—In a suit on the bond of a purser in the Navy, a transcript of the books of the Treasury Department, certified by the Fourth Auditor, and with a certificate annexed, signed by the Secretary of the Treasury, and sealed with the department seal, attesting the official character of the said auditor, was sufficient for all purposes of evidence. U. S. v. Bell (1884) 4 Sup. Ct. 498, 499, 111 U. S. 477, 28 L. Ed. 477.

The Fourth Auditor was authorized, by this section and other statutes to examine accounts accruing in the Navy Department, compare the items with the vouchers, allow or reject charges, and state the balance; and the Second Comptroller has authority to revise the action of the Auditor and certify the balances finally found by him. U. S. v. Lynch (1890) 11 Sup. Ct. 114, 116, 137 U. S. 280, 34 L. Ed. 700.

It was not incumbent on the Second Comptroller to pass the amount of the claim of a purser in the Navy to his credit, unless the same had been settled by the Fourth Auditor and the balance certified by that officer for his decision. (1830) 2 Op. Atty. Gen. 352.

14. Fifth Auditor.—Under Act June 30, 1864, § 2 (13 Stat. 223), and this section, the Fifth Auditor was the proper officer to audit accounts of collectors of internal revenue. Soule v. U. S. (1879) 100 U. S. 8, 10, 25 L. Ed. 536.

15. Sixth auditor.—The Sixth Auditor, being a comptroller in fact though not in name, had authority to decide upon claims and accounts, and to reject, in whole or in part, all claims which he had reasonable cause to suspect to be tainted with fraud, or to which he believed there might be substantial defenses in law, or as to the validity of

which he was in doubt. Longwill v. U. S. (1881) 17 Ct. Cl. 288, 291.

Under the requirement of this section that the Auditor should close the accounts of the Post Office Department quarterly, and the regulations of the Department as to the time of making payments thereon, included in mail contracts, claim for mail transportation pay did not accrue when the service was rendered, but when payment was to be made, and a claim for the one month's extra pay allowed in post office contracts for a discontinued service came under the same provision. Salisbury v. U. S. (1893) 28 Ct. Cl. 404.

Claims of mail contractors for one month's extra pay, in cases where their contracts have annulled and the service discontinued, might be decided by the Postmaster General, or, when he does not decide then, were subject to adjudication and settlement by the Auditor for the Post Office Department. (1850) 5 Op. Atty. Gen. 246.

The Sixth Auditor, designated by Act July 2, 1836, c. 270, § 8, 5 Stat. 81, "Auditor of the Treasury for the Post Office Department," had direct official relation to both the Treasury and Post Office Departments. (1855) 7 Op. Atty. Gen. 439.

All accounts of the post offices, in common with other public accounts, are to be adjusted quarterly, with such vouchers as the Postmaster General may prescribe. (1856) 8 Op. Atty. Gen. 125.

The accounts which the Sixth Auditor was required to audit under this section were of a fiduciary character, dependent upon the discretion of the Postmaster General under authority of law, and generally referred to the postal service. (1887) 19 Op. Atty. Gen. 30.

The adjustment of accounts for expenditures of the Post Office Department under the legislative, executive, and judicial appropriation acts might be performed by such accounting officers in the Treasury Department as the Secretary of the Treasury may assign to that duty. It was not required by statute that this duty shall be performed by the Sixth Auditor. Id.

The Sixth Auditor, originally designated "Auditor of the Treasury for the Post Office Department," occupied an entirely anomalous position, being to a large extent a comptroller as well as an auditor, and being in part the subordinate of the Postmaster General as well as of the Secretary of the Treasury, reporting to both, as provided by statute, and reporting, further, to either, as either may require. (1893) 20 Op. Atty. Gen. 677.

The Sixth Auditor was to be regarded as an officer of the Treasury Department, and the accounts in his possession which by this section he was directed to keep and preserve, are to be regarded as in the Treasury Department, for the purpose of a call for information by the Court of Claims, under R. S. § 1076, incorporated in Jud. Code, § 164, post, § 1155. Id.

16. Powers and duties of Comptrollers as to accounts transmitted by Auditors under this section.—The Comptrollers of the Treasury (including the Sixth Auditor and Commissioner of Customs) alone of the accounting officers had authority to reject claims; and it was their duty to exercise this power in cases which they believed to be tainted with fraud, or to which in their judgment a substantial defense at law might be set up. Longwill v. U. S. (1881) 17 Ct. Cl. 288.

An accounting officer has undoubted power to disallow a fee charged by a person who is not an officer and who had no right to perform the services for which he seeks to be paid. (1859) 9 Op. Atty. Gen. 268.

Under the provisions of R. S. § 273, before its repeal by the Dockery Act of July 31, 1894, c. 174, § 7, subd. 3, 28 Stat. 206, and those of this section, with reference to the relative duties of the Second Comptroller and the Auditor in the settlement of accounts, every account falling within the scope of this section must undergo, successively, an examination by the Auditor and an examination by the Comptroller; the action of the Auditor being primary altogether, and not definitive, while the action of the Comptroller was wholly revisory, and final. (1876) 15 Op. Atty. Gen. 140.

Where the Comptroller, on revision, did not concur in the action of the Auditor disallowing an account, but found and admitted a balance arising thereon; or where he disagreed with the Auditor in allowing an account, and rejected it, or increased or diminished the balance reported by the Auditor in such account—in any of these cases the account was by the action of the Comptroller finally adjusted, and further action by the Auditor was not required. Id.

Accordingly, where an account against the government was disallowed by the Auditor, who in consequence reported no balance due thereon, but transmitted the account with his action to the Comptroller for revision, and the latter officer, upon examination, found and admitted a balance due the claimant, assuming the action of the Auditor and of the Comptroller to appear in due form, nothing more remained to be done by either officer to complete the settlement of the account and the Comptroller should certify the balance which he had found and admitted, accompanying his certificate with evidence of the action of the Auditor in the same matter. Id.

Where the Comptroller's certificate was unaccompanied by the Auditor's action, or did not affirmatively (by recital or otherwise) show that the account

had been acted upon by the latter, the head of Department to whom the balance is certified should withhold his requisition for payment until satisfactory evidence on that point should be produced. Id.

The action of the Auditor need not be incorporated in the certificate of the Comptroller, nor form part of the same document. Id.

17. Effect of decision of Comptroller upon other accounting officers.—If the disallowance of a claim by a Comptroller is not opened for fraud, mistake in calculation, or the filing of material new evidence, the decision is final, and the case is res judicata in the Department. Armstrong v. U. S. (1894) 29 Ct. Cl. 148.

A decision by a Comptroller upon a claim properly before him cannot be questioned by any other of the accounting officers. A demand after passing him ceases to be a matter of account, and becomes a liquidated and adjusted demand. (1829) 2 Op. Atty. Gen. 303; (1882) 17 Op. Atty. Gen. 353.

18. Scope of duties of Auditors under this section.—Considering the accepted definition of an "auditor" with the language used in the provisions of this section and other statutes, the Fourth Auditor was authorized to examine accounts accruing in the Navy Department, compare the items with the vouchers, allow or reject charges, and state the balance, and the Comptroller had authority to revise the Auditor's action and certify the balances finally found by him. U. S. v. Lynch (1890) 11 Sup. Ct. 114, 115, 116, 137 U. S. 280, 34 L. Ed. 700.

It was no part of the duties of the Auditors (except the Sixth Auditor) to make decisions binding in any way upon anybody, and their opinions and decisions upon controverted questions, if they chose to give them, had no official determining force. They were only to examine accounts, certify balances, and transmit them to the proper Comptroller for his decision thereon. Ridgway v. U. S. (1883) 18 Ct. Cl. 707; Waters v. U. S. (1886) 21 Ct. Cl. 30; Cotton v. U. S. (1894) 29 Ct. Cl. 207. And see McKnight v. U. S. (1877) 13 Ct. Cl. 292, 299; Thomas v. U. S. (1880) 16 Ct. Cl. 522, 526.

Every account falling within the scope of this section must undergo, successively, an examination by the Auditor and an examination by the Comptroller. The action of the Auditor is primary altogether, and not definitive; while that of the Comptroller is wholly revisory, and final. (1876) 15 Op. Atty. Gen. 139, 142.

It is not within the province of the accounting officers of the Treasury, upon learning of any order made by the Commissioner of Pensions to a pension agent for the payment of pensions, to notify such agent of what their decision will be upon his account when rendered. (1888) 19 Op. Atty. Gen. 214.

The order of the Commissioner of Pensions directing a pension agent to withhold from payment installments of a pension, when the pensioner had been drawing two pensions, was within the general jurisdiction of the Commissioner, and is obligatory on the pension agent, and the accounting officers of the Treasury have no power to disallow payments made by the agent pursuant thereto. Id.

19. Effect of settlement of account upon rights of parties.—After a credit has been given by the United States, and the account settled, they cannot open the account and revoke the credit, unless originally given by fraud, imposition, or mistake. U. S. v. Kuhn (C. C. 1833) Fed. Cas. No. 15,545. And see Ex parte Randolph (C. C. 1833) Fed. Cas. No. 11,558, opinion of Barbour, J.

The allowance of a credit to the assistant quartermaster of the army, for a sum of money turned over by him to an acting regimental quartermaster, for which the latter failed to account, and the settlement of his accounts, did not operate to release the regimental quartermaster from his liability to account for such money. U. S. v. Wade (C. C. 1896) 75 Fed. 261.

An adjustment of a claim for back rent and waste by the War Department, disallowed by the auditing officers of the Treasury, binds neither the government nor the party. Lovett v. U. S. (1873) 9 Ct. Cl. 479.

Certificates and orders made previous to the issue of drafts for the payment of claims by the Treasury are mere departmental proceedings, from which parties acquire no new rights. McKnight v. U. S. (1877) 13 Ct. Cl. 292.

Accounts and balances stated and certified by the accounting officers are neither conclusive nor prima facie evidence of the indebtedness of the government, nor can an action be brought upon them. Id.

A suit may be maintained against the government on a Treasury draft issued in payment of an account audited and certified, though the original cause of action is barred. Buffalo Bayou B. & C. R. Co. v. U. S. (1880) 16 Ct. Cl. 238.

The rejection of a claim in whole or in part by the accounting officers leaves the party free to pursue his remedy at law, viz. an action in the Court of Claims, although he may have accepted the portion allowed. Longwill v. U. S. (1881) 17 Ct. Cl. 288.

The only practical effect of the decisions of the accounting officers is to authorize the issue of Treasury warrants when the decisions are in favor of the claimants, and to prevent the issue of warrants when the decisions are adverse to them. Id.

For the purpose of rectifying mis-

takes, the balances certified by the Sixth Auditor for carrying the mails may be regarded as running accounts. Duval v. U. S. (1889) 25 Ct. Cl. 46.

When the accounting officers of the Treasury, in settling the accounts of a disbursing officer of the United States, have allowed an alleged payment upon the genuine receipt of the party to which the money purports to have been paid, the latter cannot be suffered to claim the money of the government in his own name on the pretense that he gave the receipt without actually receiving the money; and if he be aggrieved his remedy is against the disbursing agent of the government. (1854) 7 Op. Atty. Gen. 40.

Where the accounts of a mail contractor have been fully settled, and no attempt has been made to disturb them for many years, they are conclusive, and no charge can now be made against him which ought to have been settled then. (1858) 9 Op. Atty. Gen. 198.

20. Opening and re-examination by accounting officers of accounts and claims settled by them.—The accounting officers could not open and re-examine cases decided by their predecessors except for fraud, errors of calculation, or newly discovered evidence. Waddell v. U. S. (1890) 25 Ct. Cl. 323; Patterson v. U. S. (1893) 28 Ct. Cl. 321; Cotton v. U. S. (1894) 29 Ct. Cl. 207; State of Maine v. U. S. (1901) 36 Ct. Cl. 531, 553.

The refusal of the Treasury Department to reopen a claim is a final disposition of it. Cotton v. U. S. (1894) 29 Ct. Cl. 207.

Items of account had once been presented to the accounting officers and rejected, and afterwards to Congress and rejected by that body in part, and the rejected items were again presented to the accounting officers on new proof. Held, that they could not reopen the account nor take any new testimony in respect to those items. (1832) 2 Op. Atty. Gen. 515.

Where Congress directs an account to be opened for a specific purpose, that purpose only can be subserved by so doing. Id.

The accounting officers may make rests and settlements in accounts which are not final settlements, and which may be reviewed and corrected whenever errors or false items are found therein; not, however, by reopening or restating previous adjustments, but by making such new entries as shall produce the proper correction. (1834) 2 Op. Atty. Gen. 625.

Even after accounts are finally closed, so far as the Auditors are concerned, there may be cases in which the Comptroller or head of the Department may be authorized to interfere for the purpose of correcting errors or frauds which may have been discovered after the action of the Auditor. And still further, although the matter may have passed beyond the reach of all the executive officers, the government may yet be entitled to surcharge and falsify by an appeal to the appropriate remedies furnished by the judicial tribunals. But accounts of claimants presented for settlement in the ordinary course and under the general laws, and long since examined and finally settled, cannot be reopened and further evidence received in respect to them. Id.

Accounts once closed and settled cannot be opened, except on the principles governing courts of equity in opening decrees. (1836) 3 Op. Atty. Gen. 148.

It is inexpedient for accounting officers in any case, unless thereunto specially directed by act of Congress, to readjudicate upon the items of an account once considered and settled in their offices. (1839) 3 Op. Atty. Gen. 461.

Although it is doubted whether an account which has been finally adjusted, settled, and closed ought to be reopened, a claim which had not been closed, or even finally adjusted, may be settled without violating such a rule. (1840) 3 Op. Atty. Gen. 521.

The provision of Act March 3, 1845, c. 71, § 4, 5 Stat. 764, afterwards repealed by Act Aug. 10, 1846, c. 175, § 5, 9 Stat. 71, that no accounts adjusted by the accounting officers of the Treasury should be reopened without authority of law, with a proviso excepting cases where special acts had been or should be passed for the relief of individuals, established a general rule that adjusted accounts should not be reopened by the executive without authority from the legislative department. (1845) 4 Op. Atty. Gen. 378. See (1845) 4 Op. Atty. Gen. 366, 369, 429.

The proviso excepting from the operation of this general rule cases where special acts were passed for the relief of individuals merely protected them from its prohibition as if the section had never passed. It had no effect to facilitate the reopening of such accounts. (1845) 4 Op. Atty. Gen. 378.

A claimant who appealed to Congress after an unsuccessful application at the Department must abide by his election, whether the result be favorable or otherwise. (1845) 4 Op. Atty. Gen. 429.

When accounts settled at the Treasury are for any lawful cause reopened at the request of a claimant, and to correct errors in his behalf, they are to be considered open for errors in behalf of the government. (1854) 6 Op. Atty. Gen. 576.

The accounting officers had no authority in 1850 to reopen the accounts of an officer of the Army without his consent, after they had been finally and conclusively settled by the proper department in 1847, and charge him with a sum of money without notice to him. (1860) 9 Op. Atty. Gen. 505.

Irrespective of the fourth section of the Act March 3, 1845, c. 71, and not-

withstanding its repeal by Act Aug. 10, 1846, c. 175, § 5, 9 Stat. 97, a settlement of an account by the accounting officers, in pursuance of special statutory authority, which purports to be final, and which, having passed from their hands, has been consummated by payment, cannot afterwards be opened and readjusted by them. (1862) 10 Op. Atty. Gen. 231, 255.

The rule applies to the adjustment of an account under a special act of Congress, which, when it purports to be final, cannot be reopened without further special legislation. (1862) 10 Op. Atty. Gen. 231.

An account is adjusted when the proper Auditor and Comptroller have stated and certified the amount due on it, and the head of the department, at the request of the proper officer, has drawn a requisition for that amount, and it has been paid out of the Treasury to the claimant. Id.

Where the account of a Superintendent of Indian Affairs was finally adjusted under a special act of Congress, and the amount allowed duly paid, and the accounting officers afterwards made an additional statement and allowance to the claimant the Secretary of the Interior might lawfully refuse to sign a requisition upon the Treasury for such additional allowance. Id.

No subsequent decision upon a doubtful or controverted question of law, essentially modifying a prevailing rule which was applied to the settlement of an account, would authorize the reopening of it, with a view to a readjustment of it in accordance with such decision. (1868) 12 Op. Atty. Gen. 386, 388.

Where an account has been duly adjusted, settled, and closed by the proper officers, upon a full knowledge of all the facts, and no errors in calculation have been made, it cannot be reopened without express authority of law. (1868) 12 Op. Atty. Gen. 386, 388; (1882) 17 Op. Atty. Gen. 353; (1885) 18 Op. Atty. Gen. 223.

The prohibition in R. S. § 191, which was repealed by the Dockery Act of July 31, 1894, c. 174, § 8, 28 Stat. 207, against the changing or modifying by heads of departments of balances certified by the Comptrollers of the Treasury, did not apply to the Comptrollers themselves. (1877) 15 Op. Atty. Gen. 192.

The provision of that section making findings of the Comptrollers "conclusive upon the executive branch of the government" signified only that such findings were not to be revisable by any other officer or officers of that branch of the government. Id.

Whether the Comptrollers were authorized to reopen settlements made by themselves or their predecessors in office depended upon considerations founded on the law independently of the said section; its provisions had no bearing on this subject. Id.

21. Conclusiveness of balances certified by accounting officers on executive branch of government.—Before the passage of said Act March 30, 1868, c. 256, § 1, the heads of departments and even the President, as superior officers, claimed the right to direct the accounting officers in the matter of accounting and to change balances found by them when acting on their own judgment, before warrants were drawn for payment, and this claim of right was frequently resisted by the accounting officers. The question was never finally settled until the enactment of that act. Thereafter, for the purpose of drawing warrants and making payments, the balances stated by the accounting officers were final and conclusive upon the executive branch of the Government. But by the very terms of the act they were not conclusive upon Congress or the proper courts. Duval v. U. S. (1889) 25 Ct. Cl. 46, 57; (1882) 17 Op. Atty. Gen. 353. And see (1882) 17 Op. Atty. Gen. 448.

For a long series of years, extending from the first organization of the Treasury Department to 1868, there was a controversy as how far, if at all, the balances and action of a comptroller were subject to revision and change by the heads of departments or the President. Upon the advice of several Attorneys General, the question was practically settled against the right of the President and in favor of that of the Secretary of the Treasury. But the Comptrollers yielded with reluctance, and by Act March 30, 1868, c. 256, § 1, 15 Stat. 54, the balances certified by the Comptrollers were made conclusive upon the executive branch of the government, and subject to revision only by Congress or the proper courts, and the provisions of that section were reproduced in R. S. § 191, afterwards repealed by the Dockery Act of July 31, 1894, c. 174, § 8, which made other provisions on the subject, post, § 425. McKnight v. U. S. (1877) 13 Ct. Cl. 292, 307. See (1823) 1 Op. Atty. Gen. 624; (1829) 2 Op. Atty. Gen. 303; (1832) 2 Op. Atty. Gen. 508, 544; (1852) 5 Op. Atty. Gen. 630, 656; (1864) 11 Op. Atty. Gen. 14, 129. See, also, McKee v. U. S. (1876) 12 Ct. Cl. 504, 555, dissenting opinion of Richardson, J.

Under R. S. § 191, the decisions of the Comptroller, so far as they related to balances of accounts found and stated by him, were conclusive upon the executive branch of the government, but in other respects the Comptrollers were as much subject to the regulations and directions of the Secretary as other subordinate officers of the Treasury. Real Estate Savings Bank of Pittsburgh v. U. S. (1880) 16 Ct. Cl. 335.

The provision of R. S. § 191, that the balances stated by the accounting offi-

cers should be conclusive upon the executive branch of the government, did not conclude the head of an Executive Department in the exercise of his legal discretion as to orders issued to his subordinates. In re Billings (1888) 23 Ct. Cl. 166.

After the Comptroller had made a final settlement of a claim, the direction of the Secretary of War to have the accounts re-examined by the Quartermaster General had no validity. Baltimore & O. R. Co. v. U. S. (1899) 34 Ct. Cl. 484.

The President is not an auditor or comptroller of accounts, nor the accountant general of the nation; but he may require an accounting officer and other subordinate executive officers to perform the duty imposed on them by statute. (1864) 11 Op. Atty. Gen. 14.

Where a claim or account against the government, arising in the military service, had been adjusted by the accounting officers of the Treasury, and the balance found due thereon certified by the Comptroller to the War Department for payment, the Secretary of War could not lawfully withhold his requisition simply on the ground that the balance so certified was in excess of what the officers of his department deemed allowable. (1869) 13 Op. Atty. Gen. 6.

Where the question was merely one of computation or amount, the decision of the accounting officers was to be regarded as final. Id.

The purpose of R. S. § 191, was to declare the effect of the settlement of an account by the accounting officers of the Treasury as regards the executive branch of the government, not to define or explain the duties of those officers relative to the settlement itself; and the provisions thereof comprehend all balances arising upon settlement of accounts which it becomes the duty of the Comptroller to certify to the heads of departments. (1876) 15 Op. Atty. Gen. 140.

R. S. § 191, was limited to cases where balances were found upon the settlement of accounts or claims, and certificates thereof were transmitted to the head of the proper department for his warrant or requisition; it did not extend to any case where no balance was certified, or where the whole account or claim was disallowed. (1877) 15 Op. Atty. Gen. 192.

It was the duty of a head of a department, after facts had been submitted under R. S. § 191, which, in his judgment, affected the correctness of a balance certified to him upon settlement of a claim by the proper accounting officers of the Treasury, and after the certificate had been returned by the Comptroller with the decision in the case reaffirmed, to issue his requisition for payment of the balance certified. Signing the requisition in such case under protest was without effect. (1876) 15 Op. Atty. Gen. 596.

22. Statement of account not an award of arbitrators.—The Comptroller of the Treasury is merely an accounting officer, the agent of one of the parties; he has authority to determine whether the Treasurer shall pay a demand in the form and amid the circumstances of its presentation; he is not an arbitrator to settle the rights of both parties. Real Estate Savings Bank of Pittsburgh v. U. S. (1880) 16 Ct. Cl. 335, 350.

An account stated by the accounting officers, showing a balance due to a claimant, does not constitute an award. Mississippi Central R. R. v. U. S. (1888) 23 Ct. Cl. 27; Mumford v. U. S. (1896) 31 Ct. Cl. 210.

23. Recovery back of money paid on settlement of account.—On the settlement by the accounting officers of the Treasury of the account of one who was supposed to be, but was not, an officer of the government, he, announcing that he would not be concluded thereby, and protesting that the allowance was insufficient, received it, and brought suit in the Court of Claims for a balance which he claimed. Held, that the United States was not bound by the settlement, and was entitled to recover as a counterclaim the amount improperly paid to him thereon. McElrath v. U. S. (1880) 102 U. S. 426, 441, 26 L. Ed. 189, affirming judgment (1876) 12 Ct. Cl. 201.

Where a clerk of the circuit court expended money for clerk hire, and the first comptroller of the treasury demanded from the clerk the payment of a specified sum, claiming that he had expended more than was allowed by law, which sum the clerk paid over with full knowledge of all the facts and without duress of any sort, constituting a voluntary payment, the money could not be recovered. Selby v. U. S. (D. C. 1891) 47 Fed. 800.

Where the accounting officers of the Treasury, in mistake of law, have certified a balance in favor of a party upon a contract or obligation which was invalid, and the party brings a suit founded upon the same contract, the United States may set up as a counterclaim and recover back the money paid on the accounting officers' settlement, ex æquo et bono. McKee v. U. S. (1876) 12 Ct. Cl. 504.

Where the accounting officers have jurisdiction of a claim, their adjustment, in the absence of fraud or mistake of fact, cannot be attacked after payment, and the money be recovered back, because of their mistake of law. Mullett v. U. S. (1886) 21 Ct. Cl. 485, distinguishing McElrath v. U. S. (1876) 12 Ct. Cl. 201.

Where the responsible officers of the government give a construction to a statute, upon the faith of which a contractor renders a service and receives his pay, the government cannot subsequently open the transaction and recov-

er back the money upon a different interpretation of the law. Alabama Great Southern R. Co. v. U. S. (1889) 25 Ct. Cl. 30.

Balances stated by the accounting officers are not conclusive upon the judiciary, and will not preclude the government from recovering back an overpayment made in mistake of fact. Duval v. U. S. (1889) 25 Ct. Cl. 46.

When money is paid after careful consideration by the proper officers of the government upon settlements made by the accounting officers, it cannot be recovered back because paid in mistake of law. Hillborn v. U. S. (1892) 27 Ct. Cl. 547; Yoes v. U. S. (1895) 30 Ct. Cl. 370.

Where a case is merely that of executive officers reviewing the decisions of their predecessors and ascribing to the law a different meaning than their predecessors gave to it, it cannot be held that former payments made to an officer were made in mistake either of fact or law. Patterson v. U. S. (1893) 28 Ct. Cl. 321.

Money paid to a public officer on the settlement of his accounts cannot ordinarily be recovered back; but if he opens the settlement by bringing a suit for compensation, which at the time it was supposed he was not entitled to receive, he opens the whole case, and the United States can maintain a counterclaim for moneys erroneously paid him. Yoes v. U. S. (1895) 30 Ct. Cl. 370; Id. (1896) 31 Ct. Cl. 293.

Cited without definite application, U. S. v. Pinson (1880) 102 U. S. 548, 550, 26 L. Ed. 226; U. S. v. Brindle (1884) 4 Sup. Ct. 180, 182, 110 U. S. 688, 28 L. Ed. 286; U. S. v. Windom (1891) 11 Sup. Ct. 197, 199, 137 U. S. 636, 34 L. Ed. 811; U. S. v. Harmon (1893) 13 Sup. Ct. 327, 329, 147 U. S. 268, 37 L. Ed. 164; Jaedicke v. U. S. (1898) 85 Fed. 372, 374, 29 C. C. A. 199.

§ 420. (Act July 31, 1894, c. 174, § 7.) Settlement of accounts by Auditors.

Accounts shall be examined by the Auditors as follows:

First. The Auditor for the Treasury Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of the Treasury and all bureaus and offices under his direction, all accounts relating to the customs service, public debt, internal revenue, Treasurer and assistant treasurers, mints and assay offices, Bureau of Engraving and Printing, Coast and Geodetic Survey, Revenue-Cutter Service, Life-Saving Service, Light-House Board, Marine-Hospital Service, public buildings, Steamboat-Inspection Service, immigration, navigation, Secret Service, Alaskan fur-seal fisheries, and to all other business within the jurisdiction of the Department of the Treasury, and certify the balances arising thereon to the Division of Bookkeeping and Warrants.

Second. The Auditor for the War Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of War and all bureaus and offices under his direction, all accounts relating to the military establishment, armories and arsenals, national cemeteries, fortifications, public buildings and grounds under the Chief of Engineers, rivers and harbors, the Military Academy, and to all other business within the jurisdiction of the Department of War, and certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate to the Secretary of War.

Third. The Auditor for the Interior Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of the Interior, and of all bureaus and offices under his direction, and all accounts relating to Army and Navy pensions, Geological Survey, public lands, Indians, Architect of the Capitol, patents, census, and to all other business within the jurisdiction of the Department of the Interior, and certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate to the Secretary of the Interior.

Fourth. The Auditor for the Navy Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of the Navy, and of all bureaus and offices under

his direction, all accounts relating to the Naval Establishment, Marine Corps, Naval Academy, and to all other business within the jurisdiction of the Department of the Navy, and certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate to the Secretary of the Navy.

Fifth. The Auditor for the State and other Departments shall receive and examine all accounts of salaries and incidental expenses of the offices of the Secretary of State, the Attorney-General, and the Secretary of Agriculture, and of all bureaus and offices under their direction; all accounts relating to all other business within the jurisdiction of the Departments of State, Justice, and Agriculture; all accounts relating to the diplomatic and consular service, the judiciary, United States courts, judgments of United States courts, Executive Office, Civil Service Commission, Interstate Commerce Commission, Department of Labor, District of Columbia, Fish Commission, Court of Claims and its judgments, Smithsonian Institution, Territorial governments, the Senate, the House of Representatives, the Public Printer, Library of Congress, Botanic Garden, and accounts of all boards, commissions, and establishments of the Government not within the jurisdiction of any of the Executive Departments. He shall certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate, according to the character of the account, to the Secretary of the Senate, Clerk of the House of Representatives, Sergeant-at-Arms of the House of Representatives, or the chief officer of the Executive Department, commission, board, or establishment concerned.

Sixth. The Auditor for the Post-Office Department shall receive and examine all accounts of salaries and incidental expenses of the office of the Postmaster-General and of all bureaus and offices under his direction, all postal and money-order accounts of postmasters, all accounts relating to the transportation of the mails, and to all other business within the jurisdiction of the Post-Office Department, and certify the balances arising thereon to the Postmaster-General for accounts of the postal revenue and expenditures therefrom, and to the Division of Bookkeeping and Warrants for other accounts, and send forthwith copies of the certificates in the latter cases to the Postmaster-General.

The further duties of this Auditor shall continue as now defined by law, except as the same are modified by the provisions of this Act. (28 Stat. 206.)

This section was part of the Dockery Act, cited above.

See notes to section 3 of the Act, ante, § 417.

Provisions at the end of subdivision 3 of this section, omitted here, repealed R. S. §§ 273 and 275, and amended R. S. § 456.

R. S. §§ 273, 275, so repealed, prescribed duties of the Second Comptroller. The office of Second Comptroller was abolished, and the duties thereof were transferred to the Comptroller, by section 4 of this act, ante, § 402.

The amendment of R. S. § 456, by the same subdivision, consisted in the omission of provisions for the settlement, by the Commissioner of the General Land Office, of accounts relative to the public lands.

The further duties of the Auditor for the Post-Office Department, referred to in the last clause of the above section, as those defined by law, except as modified by this act, were prescribed by R. S. § 270, repealed by this act, § 277, subd. 7, §§ 292–300, 404–409, 792, 889, 3674, 3829, 3830, 3834–3836, 3856, 3862, 3864, 4020, 4049, 4050, 4055; also by Act March 3, 1875, c. 128, § 4, 18 Stat. 343; Act July 12, 1876, c. 179, §§ 4, 6, 19 Stat. 80; Act May 17, 1878, c. 107, § 3, 20 Stat. 62; Act Feb. 4, 1879, c. 45, 20 Stat. 281; Act Aug. 5, 1882, c. 389, § 1, 22 Stat. 219; Act Jan. 22, 1894, c. 17, 28 Stat. 28; Act Jan. 27, 1894, c. 21, § 4, 28 Stat. 32.

Contracts requiring the advance of money, or connected with the settlement of public accounts, were required to be deposited in the offices of the Auditors

of the Treasury, according to their nature, by R. S. § 3743, as amended by section 18 of this act, incorporated in that section, post, § 6894.

The system of accounting in the Treasury Department in existence before the passage of this act was fully explained in 13 Ct. Cl. 292.

The Auditor for the State and other Departments was to audit the accounts of the office of the Secretary of Commerce and of all bureaus and offices under his direction, and all accounts relating to various boards, commissions, etc., and to all other business within the jurisdiction of the Department of Commerce, by provisions of the act establishing that Department, Act Feb. 14, 1903, c. 552, § 2, post, § 854.

Similar provisions for examination by said Auditor for the State and other Departments of accounts of the office of Secretary of Labor and bureaus and offices under his direction, and accounts relating to all other business within the jurisdiction of the Department of Labor, were made by the act establishing that Department, Act March 4, 1913, c. 141, § 2, post, § 933.

The Auditor for the War Department was to audit the accounts for the Isthmian Canal Commission, by a provision of Act Feb. 3, 1905, c. 297, § 1, 33 Stat. 647. And the accounts of the Panama Canal under Act Aug. 24, 1912, c. 390, 37 Stat. 560, were to continue to be audited by him, by a provision of Act Oct. 22, 1913, c. 32, post, § 423.

Payment of final judgments and awards rendered against the United States by the Court of Claims, and of final judgments rendered against the United States by the circuit and district courts, under appropriations by Congress, is to be made on settlements by the Auditor for the department or branch of the public service having jurisdiction over the subject-matter out of which the claims arose, by a provision of Act Feb. 18, 1904, c. 160, § 1, post, § 6408.

The accounts of individual paymasters in the Army were required to be analyzed under the several heads of the appropriation, and recorded in detail by the Paymaster-General, before they were forwarded to the Treasury Department for final audit, by a provision of Act March 2, 1905, c. 1307, post, § 1802.

The settlement of accounts of deceased officers and enlisted men of the Army, and allowance of the amount found due, without administration, to the decedent's widow or heirs, were authorized by a provision of Act June 30, 1906, c. 3914, § 1, post, § 2203.

The mode of stating balances to be certified for arrears of pay or for bounty to volunteers, and for commutation of rations to prisoners of war and to soldiers on furlough, was prescribed by a provision of Act March 4, 1907, c. 2918, § 1, post, § 451.

The Auditor for the Post-Office Department was to maintain a complete and permanent record of all unpaid money orders issued by postmasters, by a provision of Act May 27, 1908, c. 206, post, § 7571.

The Auditor for the State and other Departments was to act as conservator of such part of the estates of citizens of the United States dying abroad as may be received at the Treasury from consuls, etc., by an amendment of Rev. St. § 1709, by Act March 3, 1911, c. 223, post, § 3162.

Notes of Decisions

Scope of authority of accounting officers.—The accounting officers cannot inquire into the wisdom, expediency, or necessity of assigning an officer of the Army to a command above that pertaining to his grade, but may inquire whether the order of assignment to higher command was carried into effect according to law, and to what extent the officer performed the service to which he was assigned. Glenn v. U. S. (1902) 37 Ct. Cl. 254.

The records of the War Department (apart from the opinions and conclusions of the officer having the custody thereof) are the best evidence of an officer's status in the service; but, if the record does not disclose the facts essential to the accounting officers administering the law, they may accept from other sources the necessary competent evidence. Northup v. U. S. (1909) 45 Ct. Cl. 50.

Where a consul has collected extra wages of the master of a vessel in a foreign port, or requested collection of such extra wages on the arrival of the vessel in the United States, it is not competent to the Secretary of the Treasury or any bureau of the Treasury Department, in the examination of the accounts of the consul, to do anything more than revise the amount of the collection and determine its arithmetical accuracy. (1879) 16 Op. Atty. Gen. 268.

Opening and re-examination by accounting officers of accounts and claims settled by them.—Where the accounts of a disbursing officer of the army, which were duly audited and allowed, were restated by the treasury department nearly 10 years later, and a claim made against the officer for a sum shown to be due from him by the restatement, the burden rests upon the

United States to falsify the accounts previously allowed by clear and satisfactory proof. U. S. v. Butler (C. C. 1902) 114 Fed. 582.

A claim once settled by the accounting officers cannot be reviewed because of a subsequent adjudication by the Supreme Court or by the Court of Claims adverse to the ruling of the accounting officers; but if a claim be reopened by the action of the accounting officers, then the decision of either court must be followed in the final disposition of the claim. Blazek v. U. S. (1909) 44 Ct. Cl. 188.

Cited without definite application, U. S. v. Bailey (D. C. 1913) 207 Fed. 782, 784.

§ 421. (Act Feb. 14, 1903, c. 552, § 2.) Settlement of accounts of Department of Commerce.

The Auditor for the State and other Departments shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of Commerce and Labor, and of all bureaus and offices under his direction, all accounts relating to the Light-House Board, Steamboat-Inspection Service, Immigration, Navigation, Alaskan fur-seal fisheries, the National Bureau of Standards, Coast and Geodetic Survey, Census, Department of Labor, Fish Commission and to all other business within the jurisdiction of the Department of Commerce and Labor, and certify the balances arising thereon to the Division of Bookkeeping and Warrants and send forthwith a copy of each certificate to the Secretary of Commerce and Labor. (32 Stat. 826.)

These provisions were part of section 2 of the "Act to establish the Department of Commerce and Labor," cited above. Other provisions of the act are set forth under Title XII A, "The Department of Commerce," post, §§ 853, 854, 856–861.

§ 422. (Act March 4, 1913, c. 141, § 2.) Settlement of accounts of Department of Labor.

The Auditor for the State and Other Departments shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of Labor and of all bureaus and offices under his direction, and all accounts relating to all other business within the jurisdiction of the Department of Labor, and certify the balances arising thereon to the division of bookkeeping and warrants and send forthwith a copy of each certificate to the Secretary of Labor. (37 Stat. 737.)

These provisions were part of section 2 of the "Act to create a Department of Labor," cited above. Other provisions of the act are set forth under Title XII B, "The Department of Labor," post, §§ 932–936, 940–942.

§ 423. (Act Oct. 22, 1913, c. 32.) Settlement of money accounts of Panama Canal, under Panama Canal Act.

The money accounts of the Panama Canal, under the Panama Canal Act of August twenty-fourth, nineteen hundred and twelve (Statutes at Large, volume thirty-seven, page five hundred and sixty), shall continue to be audited by the Auditor for the War Department. (38 Stat. 209.)

This was a provision of the urgent deficiency act for the fiscal year 1913, cited above.

The Panama Canal Act of Aug. 24, 1912, c. 390, mentioned in this provision, is set forth post, §§ 10037–10049.

A previous provision, that the accounts for the Isthmian Canal Commission should be audited by the Auditor for the War Department, of Act Feb. 3, 1905, c. 297, § 1, 33 Stat. 647, was superseded by the discontinuance of said Commission by executive order of the President pursuant to said Panama Canal Act of Aug. 24, 1912, c. 390, § 4, post, § 10040.

§ 424. (Act Aug. 24, 1912, c. 389, § 10.) Settlement of accounts of expenditures in Postal Savings System.

All expenditures in the Postal Savings System shall be audited by the Auditor for the Post Office Department. (37 Stat. 559.)

This was a proviso accompanying an appropriation to continue the estab-

lishment and extension of postal savings depositories in the postal service appropriation act for the fiscal year 1913, cited above.

It superseded a similar provision of the postal service appropriation act for the preceding year, Act March 4, 1911, c. 241, § 5, 36 Stat. 1340.

§ 425. (Act July 31, 1894, c. 174, § 8.) Conclusiveness of balances certified by Auditors, and revision of accounts.

The balances which may from time to time be certified by the Auditors to the Division of Bookkeeping and Warrants, or to the Postmaster-General, upon the settlements of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller of the Treasury, may, within a year, obtain a revision of the said account by the Comptroller of the Treasury, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government: Provided, That the Secretary of the Treasury may, when in his judgment the interests of the Government require it, suspend payment and direct the re-examination of any account.

Upon a certificate by the Comptroller of the Treasury of any differences ascertained by him upon revision the Auditor who shall have audited the account shall state an account of such differences, and certify it to the Division of Bookkeeping and Warrants, except that balances found and accounts stated as aforesaid by the Auditor for the Post-Office Department for postal revenues and expenditures therefrom shall be certified to the Postmaster-General.

Any person accepting payment under a settlement by an Auditor shall be thereby precluded from obtaining a revision of such settlement as to any items upon which payment is accepted; but nothing in this Act shall prevent an Auditor from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement. When suspended items are finally settled a revision may be had as in the case of the original settlement. Action upon any account or business shall not be delayed awaiting applications for revision: Provided, That the Secretary of the Treasury shall make regulations fixing the time which shall expire before a warrant is issued in payment of an account certified as provided in sections seven and eight of this Act.

The Auditors shall, under the direction of the Comptroller of the Treasury, preserve, with their vouchers and certificates, all accounts which have been finally adjusted.

All decisions by Auditors making an original construction or modifying an existing construction of statutes shall be forthwith reported to the Comptroller of the Treasury, and items in any account affected by such decisions shall be suspended and payment thereof withheld until the Comptroller of the Treasury shall approve, disapprove, or modify such decisions and certify his actions to the Auditor. All decisions made by the Comptroller of the Treasury under this Act shall be forthwith transmitted to the Auditor or Auditors whose duties are affected thereby.

Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement. (28 Stat. 207.)

This section was part of the Dockery Act, cited above.

See notes to section 3 of this act, ante, § 417.

A provision at the end of this section, omitted here, repealed R. S. §§ 191

and 270. R. S. § 191, so repealed, made settlements of public accounts in the Treasury Department conclusive upon the executive branch of the Government. R. S. § 270, also repealed thereby, authorized an appeal to the First Comptroller from settlements of postal accounts. Substitutes for both sections are contained in the provisions of this section.

Notes of Decisions

Conclusiveness of decisions of Comptroller on revision of accounts.—Act March 3, 1887, post, § 991 (20), giving the circuit and district courts concurrent jurisdiction of claims against the United States, excepts "claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." R. S. § 269 (since repealed), directs the first comptroller of the treasury "to superintend the adjustment and preservation of the public accounts subject to his revision;" and section 191 (since repealed), provides that the balances which may from time to time be certified to the heads of departments by the comptrollers of the treasury, upon the settlement of public accounts, shall be conclusive upon the executive branch of the government, and be subject to revision only by congress or the proper courts. Held, that the disallowance of a circuit court commissioner's fees by the first comptroller of the treasury is not within the exception. U. S. v. Rand (1892) 53 Fed. 348, 3 C. C. A. 556, following Harmon v. U. S. (C. C. 1890) 43 Fed. 560. The proviso must be limited to a rejection of a claim, or an adverse report thereon, by a court, department, or commission which determines the rights of parties, and that therefore the disallowance of a marshal's account for fees by the first comptroller of the treasury was not within the proviso, as his decision was conclusive only within the executive department. Harmon v. U. S. (C. C. 1890) 43 Fed. 560, judgment affirmed U. S. v. Harmon (1893) 13 Sup. Ct. 327, 147 U. S. 268, 37 L. Ed. 164. The provision of this section that the finding of the comptroller on claims against the United States shall be final and conclusive as to the executive branch of the government, does not render such finding conclusive on the courts, but leaves the merits open for judicial determination. U. S. v. Gillmore (C. C. 1911) 189 Fed. 761.

A settlement having been made in 1906, it was too late to reopen it for a revision by the Comptroller of the Treasury upon application made several years thereafter. Hinkley & Powers v. U. S. (1913) 49 Ct. Cl. 148.

Claims to which applicable.—Where the claim of an army officer for the loss of private property in the service, filed under Act March 3, 1885, post, § 6403, was audited, allowed, and paid in the usual manner, the government cannot reclaim the money without showing that it was obtained by fraud or paid under a mistake of fact. This act does not authorize the comptroller to take up a claim and revise it of his own motion, ex parte, after it has been paid in the regular course of business, and thereby create a legal demand against the claimant for repayment of the money received, but applies only to claims which are unpaid, and therefore still pending. U. S. v. Olmsted (1902) 118 Fed. 433, 55 C. C. A. 249.

Decisions of Comptroller on questions involving payments to be made.—This section makes it obligatory upon the Comptroller of the Treasury to render a decision upon any question involving a payment to be made by or under the head of any Executive Department, and contemplates the construction by him of statutes. (1895) 21 Op. Atty. Gen. 178, 181.

The Comptroller of the Treasury is charged with the duty of rendering decisions upon questions involving payments to be made by or under the head of an Executive Department, and his decision is final as to all executive officers. (1899) 22 Op. Atty. Gen. 581; (1901) 23 Op. Atty. Gen. 468.

The decision of the Comptroller as to whether a retired army officer advanced in rank and pay under the Act of April 23, 1904, may be paid at the advanced rate before the Senate has consented to the advancement, is conclusive. (1904) 25 Op. Atty. Gen. 185.

The authority conferred upon the Comptroller of the Treasury by this section to decide questions involving payments to be made from the Treasury is complete; but that act does not establish a rule which is universal and without exception. Congress did not, by that enactment, intend to shorten the reach of R. S. §§ 354, 356, post, §§ 529, 531, or to repeal pro tanto those sections. (1904) 25 Op. Atty. Gen. 301.

Cited without definite application, Moseley v. U. S. (1900) 35 Ct. Cl. 347.

§ 426. (Act July 31, 1894, c. 174, § 9.) Application of laws relating to Auditors.

All laws not inconsistent with this Act, relating to the Auditors of the Treasury in connection with any matter, shall be understood in each case to relate to the Auditor to whom this Act assigns the

business of the Executive Department or other establishments concerned in that matter. (28 Stat. 208.)

This provision was part of section 9 of the Dockery Act, cited above.

The preceding portion of the section, relating to the effect of the changes in designations and the duties of the Comptroller and the Auditors, is set forth ante, § 403.

See notes to section 3 of the act, ante, § 417.

Provisions of section 10 of this act, which established the Division of Bookkeeping and Warrants, to keep all accounts of receipts and expenditures of public money except those relating to the postal revenue and expenditures therefrom, and repealed R. S. § 313, and so much of R. S. §§ 283, 3675, as required those accounts to be kept by certain Auditors and the Register of the Treasury, is set forth ante, § 356.

§ 427. (Act July 31, 1894, c. 174, § 11.) Requisitions for advances and warrants for payment of money.

Every requisition for an advance of money, before being acted on by the Secretary of the Treasury, shall be sent to the proper Auditor for action thereon as required by section twelve of this Act.

All warrants, when authorized by law and signed by the Secretary of the Treasury, shall be countersigned by the Comptroller of the Treasury, and all warrants for the payment of money shall be accompanied either by the Auditor's certificate, mentioned in section seven of this Act, or by the requisition for advance of money, which certificate or requisition shall specify the particular appropriation to which the same should be charged, instead of being specified on the warrant, as now provided by section thirty-six hundred and seventy-five of the Revised Statutes; and shall also go with the warrant to the Treasurer, who shall return the certificate or requisition to the proper Auditor, with the date and amount of the draft issued indorsed thereon. Requisitions for the payment of money on all audited accounts, or for covering money into the Treasury, shall not hereafter be required. And requisitions for advances of money shall not be countersigned by the Comptroller of the Treasury. (28 Stat. 209.)

This section was part of the Dockery Act, cited above.

See notes to section 3 of the act, ante, § 417.

A provision at the end of this section, omitted here, repealed R. S. § 269, which prescribed the duties of the First Comptroller, and so much of R. S. § 305, as required the Register of the Treasury to record warrants. Said repealed provisions were superseded by those of this act.

Section 7 of this act, mentioned in this section, is set forth ante, § 420.

R. S. § 3675, also mentioned in this section, is set forth post, § 6748.

A requisition for an advance may be disapproved by the Auditor for delinquency of the officer in rendering his accounts, or for other reasons arising out of the condition of his accounts, by a provision of section 12 of this act, post, § 428.

Notes of Decisions

See § 425, ante, and notes thereunder.

§ 428. (Act July 31, 1894, c. 174, § 12, as amended by Act March 2, 1895, c. 177, § 4.) Rendition of current accounts for administrative examination, and transmission to Auditors; regulations and orders relating thereto.

All monthly accounts shall be mailed or otherwise sent to the proper officer at Washington within ten days after the end of the month to which they relate, and quarterly and other accounts within twenty days after the period to which they relate, and shall be transmitted to and received by the Auditors within twenty days of their actual receipt at the proper office in Washington in the case of monthly, and sixty days in the case of quarterly and other accounts. Should there be any delinquency in this regard at the time of the receipt by the Auditor of a requisition for an advance of money, he shall disapprove the requisition, which he may also do for other

reasons arising out of the condition of the officer's accounts for whom the advance is requested; but the Secretary of the Treasury may overrule the Auditor's decision as to the sufficiency of these latter reasons: Provided, That the Secretary of the Treasury shall prescribe suitable rules and regulations, and may make orders in particular cases, relaxing the requirement of mailing or otherwise sending accounts, as aforesaid, within ten or twenty days, or waiving delinquency, in such cases only in which there is, or is likely to be, a manifest physical difficulty in complying with the same, it being the purpose of this provision to require the prompt rendition of accounts without regard to the mere convenience of the officers, and to forbid the advance of money to those delinquent in rendering them: Provided further, That should there be a delay by the administrative Departments beyond the aforesaid twenty or sixty days in transmitting accounts, an order of the President, or, in the event of the absence from the seat of Government or sickness of the President, an order of the Secretary of the Treasury, in the particular case, shall be necessary to authorize the advance of money requested: And provided further, That this section shall not apply to accounts of the postal revenue and expenditures therefrom, which shall be rendered as now required by law. (28 Stat. 209. 28 Stat. 807.)

These provisions were part of section 12 of the Dockery Act, as amended by Act March 2, 1895, c. 177, § 4, also cited above.

See notes to section 3 of the act, ante, § 417.

The amendment of this section by Act March 2, 1895, c. 177, § 4, cited above, consisted in the insertion, in the second proviso, of the clause providing that, "in the event of the absence from the seat of Government or sickness of the President, an order of the Secretary of the Treasury" may authorize the advance of money; the section originally enacted having provided only for an order of the President for such purpose.

A further provision of this section, requiring a report to Congress by the Secretary of the Treasury of officers delinquent in rendering accounts or in making payment on settlement of accounts, is set forth, as amended by Act May 28, 1896, c. 252, § 4, ante, § 390.

Further provisions, at the end of this section, omitted here, repealed R. S. §§ 250 and 272, and amended R. S. § 3672, by striking out part thereof.

R. S. § 250, so repealed by this section, empowered the Secretary of the Treasury to require settlements of accounts of public money within the fiscal year or other fixed period. R. S. § 272, also repealed thereby, required a report to Congress by the First Comptroller of officers failing to make settlement.

The provision of R. S. § 3622, stricken therefrom by said amendment, was superseded by provisions of this section.

Further provisions requiring the administrative examination of accounts to be made as contemplated by this act, and relating to the preparation and examination of vouchers and pay rolls, contained in Act Aug. 23, 1912, c. 350, § 1, are set forth post, § 429.

Provisions for modifying the requirements as to the time for rendering and transmitting accounts, when, in the opinion of the Attorney-General, it will be impossible for accounts pertaining to the courts in Alaska to be transmitted to the Department of Justice within the time prescribed by law, were made by Act March 3, 1909, c. 269, § 10, post, § 430.

The time for the administrative examination of monthly accounts of expenditures for the Army was extended from 20 days, as limited by this section, to 60 days, by a provision of Act March 2, 1901, c. 803, post, § 431.

The time for the transmission of accounts of marshals and other disbursing officers of the Department of Justice to the Auditor was extended from 60 to 80 days, by a provision of Act March 4, 1907, c. 2918, § 1, post, § 432.

Heads of Departments and other officers were required to make regulations to secure a proper administrative examination of accounts, as required by this section, before transmission to the Auditors, by section 22 of the act, post, § 437.

Special provisions as to accounts in the customs service were made by R. S. §§ 2639, 2645, 2647, post, §§ 5380, 5385, 5387.

Distinct accounts, according to the appropriation, of public money, were required by R. S. § 3623, post, § 6618.

Failure of an officer to render account of public money was declared to be

and was punished as embezzlement, by R. S. § 5491, incorporated into Crim. Code, § 90, post, § 10258.

The Auditors are to superintend the recovery of debts certified by them to be due to the United States, by a provision of section 4 of this act, post, § 443.

Notes of Decisions

Jurisdiction of courts.—Act June 27, 1898, post, § 991 (20) repealing so much of Act March 3, 1887, § 2, as conferred on the district court concurrent jurisdiction with the court of claims of actions by United States officers for compensation, and providing that no person shall recover in the court of claims for such compensation who has not complied with this section, requiring monthly and quarterly accounts of officers to be sent to the proper authority at Washington within 10 and 20 days, respectively, after the expiration of the period to which they relate, does not, though containing no saving clause as to pending suits, apply to such suits. Strong v. U. S. (C. C. 1899) 93 Fed. 257.

§ 429. (Act Aug. 23, 1912, c. 350, § 1.) Administrative examination of accounts, and preparation and examination of vouchers and pay rolls, by heads of divisions and bureaus; duties of disbursing clerks and officers.

Hereafter the administrative examination of all public accounts, preliminary to their audit by the accounting officers of the Treasury, shall be made as contemplated by the so-called Dockery Act, approved July thirty-first, eighteen hundred and ninety-four, and all vouchers and pay rolls shall be prepared and examined by and through the administrative heads of divisions and bureaus in the executive departments and not by the disbursing clerks of said departments, except those vouchers heretofore prepared outside of Washington may continue to be so prepared and the disbursing officers shall make only such examination of vouchers as may be necessary to ascertain whether they represent legal claims against the United States. (37 Stat. 375.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1913, cited above.

§ 430. (Act March 3, 1909, c. 269, § 10.) Time for transmission of accounts pertaining to courts in Alaska to Department of Justice.

When, in the opinion of the Attorney-General, it will be impossible for the accounts of any court official or other person whose accounts pertain to the United States courts in Alaska to be transmitted to the Department of Justice within the period prescribed by law, the Attorney-General may modify, as he may deem proper, any requirement of law concerning the time when such accounts shall be rendered and transmitted. (35 Stat. 842.)

This section was part of an act amending the act to provide a government for the Territory of Hawaii, to provide for additional judges, and for other judicial purposes.

§ 431. (Act March 2, 1901, c. 803.) Time for administrative examination of accounts of Army expenditures.

The time for examination of monthly accounts, covering expenditures from appropriations for the Army, by the bureaus and offices of the War Department, after the date of actual receipt and before transmitting the same to the Auditor for the War Department, as limited by section twelve, Act approved July thirty-first, eighteen hundred and ninety-four, is hereby extended from twenty to sixty days. (31 Stat. 910.)

This was a provision of the Army appropriation act for the fiscal year 1902, cited above.

A temporary provision for a similar extension of the time for examination of such accounts, during a period of one year from the passage of the act, was made by Act Dec. 20, 1899, c. 1, 31 Stat. 1.

§ 432. (Act March 4, 1907, c. 2918, § 1.) Time for transmission of accounts of marshals and other disbursing officers of Department of Justice to Auditor.

The time prescribed by law for the transmission of accounts of United States marshals and other disbursing officers of the Department of Justice to the Auditor for the State and other Departments is hereby extended from sixty to eighty days after the date of their receipt in the Department of Justice at Washington, District of Columbia. (34 Stat. 1360.)

This was a provision of the sundry civil appropriation act for the fiscal year 1908, cited above.

The time for the transmission of accounts to the Auditors for settlement was prescribed by Act July 31, 1894, c. 174, § 12, ante, § 428.

§ 433. (Act July 31, 1894, c. 174, § 13.) Rendition of accounts of officers of courts, etc., and accounts relating to business of Department of Justice.

Before transmission to the Department of the Treasury, the accounts of district attorneys, assistant attorneys, marshals, commissioners, clerks, and other officers of the courts of the United States, except consular courts, made out and approved as required by law, and accounts relating to prisoners convicted or held for trial in any court of the United States, and all other accounts relating to the business of the Department of Justice or of the courts of the United States other than consular courts, shall be sent with their vouchers to the Attorney-General and examined under his supervision. (28 Stat. 210.)

This provision was part of section 13 of the Dockery Act, cited above.

See notes to section 3 of the act, ante, § 417.

The remaining portion of the section, relating to payment of salaries of judges, and other officers paid as judges are, is set forth post, § 547.

The Attorney-General was given general supervisory powers over the accounts mentioned in this section, by R. S. § 368, post, § 543.

The Attorney-General was authorized to modify the requirements concerning the time for rendering and transmitting accounts to the Department, when, in his opinion, it will be impossible for accounts pertaining to the courts in Alaska to be transmitted within the period prescribed by law, by a provision of Act March 3, 1909, c. 269, § 10, ante, § 430.

The time for the transmission of accounts of marshals and other disbursing officers of the Department of Justice to the Auditor was extended by a provision of Act March 4, 1907, c. 2918, § 1, ante, § 432.

The administrative audit of expenditures under control of the Department of Justice was to be made in the Division of Accounts of that Department, by a provision of Act Aug. 23, 1912, c. 350, § 1, post, § 434.

§ 434. (Act Aug. 23, 1912, c. 350, § 1.) Administrative audit of accounts under Department of Justice to be in Division of Accounts.

The administrative audit of all expenditures under the control of the Department of Justice shall hereafter be made in the Division of Accounts of that Department. (37 Stat. 404.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1913, cited above.

§ 434a. (Act March 4, 1915, c. 141, § 1.) Transmission of accounts of expenditures for government in Territories to Secretary of the Interior.

Hereafter the accounts and vouchers relating to the expenditure of the appropriations for government in the Territories shall be transmitted to the Secretary of the Interior for administrative examination and by him passed to the Auditor for the Interior Department for settlement. (38 Stat. 1021.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1916, cited above.

§ 435. (Act July 31, 1894, c. 174, § 14.) Settlement of accounts presented to Auditor without administrative examination.

In the case of claims presented to an Auditor which have not had an administrative examination, the auditor shall cause them to be examined by two of his subordinates independently of each other. (28 Stat. 210.)

This section was part of the Dockery Act, cited above.
See notes to section 3 of the act, ante, § 417.

§ 436. (Act July 31, 1894, c. 174, § 20.) Papers, records, etc., to be transmitted with accounts of customs officers.

It shall be the duty of the collectors of customs and other officers of customs to transmit, with their accounts, to the officers charged with the settlement of their accounts, all such papers, records, or copies thereof relating to their transactions as officers of customs as the Secretary of the Treasury may direct. (28 Stat. 210.)

This section was part of the Dockery Act cited above.
See notes to section 3 of the act, ante, § 417.

§ 437. (Act July 31, 1894, c. 174, § 22.) Regulations by Secretary and heads of Departments, etc., for carrying out provisions of act.

It shall be the duty of the Secretary of the Treasury to make appropriate rules and regulations for carrying out the provisions of this Act, and for transferring or preserving books, papers, or other property appertaining to any office or branch of business affected by it.

It shall also be the duty of the heads of the several Executive Departments and of the proper officers of other Government establishments, not within the jurisdiction of any Executive Department, to make appropriate rules and regulations to secure a proper administrative examination of all accounts sent to them, as required by section twelve of this Act, before their transmission to the Auditors, and for the execution of other requirements of this Act in so far as the same relate to the several Departments or establishments. (28 Stat. 210.)

This section was part of the Dockery Act, cited above.
See notes to section 3 of the act, ante, § 417.
Section 12 of the act, mentioned in this section, is set forth ante, § 428.
The examination of claims which have not had an administrative examination was provided for by section 14 of this act, ante, § 435.

§ 438. (Act July 31, 1894, c. 174, § 23.) Re-examination of claims disallowed or settled not authorized by act.

Nothing in this Act shall be construed to authorize the re-examination and payment of any claim or account which has heretofore been disallowed or settled. (28 Stat. 211.)

This section was part of the Dockery Act, cited above.
See notes to section 3 of the act, ante, § 417.

§ 439. (Act March 29, 1894, c. 49, § 1.) Property returns by officers; certification to accounting officer of charge for loss of public property.

Instead of forwarding to the accounting officers of the Treasury Department returns of public property entrusted to the possession of officers or agents, the Quartermaster-General, the Commissary-General of Subsistence, the Surgeon-General, the Chief of Engineers, the Chief of Ordnance, the Chief Signal Officer, the Paymaster-General of the Navy, the Commissioner of Indian Affairs, or other like chief officers in any Department, by, through, or under whom stores, supplies, and other public property are received for distribution, or whose duty it is to receive or examine returns of such property, shall certify to the proper accounting officer of the Treasury Department, for debiting on the proper ac-

count, any charge against any officer or agent intrusted with public property, arising from any loss, accruing by his fault, to the Government as to the property so intrusted to him. (28 Stat. 47.)

This section and the three sections next following were sections 1–4 of an act entitled "An act to regulate the making of property returns by officers of the Government," cited above. Section 5 of the act repealed all inconsistent laws.

This act was one of several suggested, in connection with the Dockery Act of July 31, 1894, c. 174, §§ 3–25, by the joint Committee of Congress to inquire into and examine the status of the laws organizing the Executive Departments, authorized by Act March 3, 1893, c. 211, 27 Stat. 681.

See notes to section 3 of the Dockery Act, ante, § 417.

Provisions for rendering accounts for administrative examination and transmission thereof to the Auditors were made by section 12 of the Dockery Act, ante, § 428.

Provisions for acceptance of the affidavit of a commanding officer on settlement of military property accounts were made by R. S. § 225, amended by Act Feb. 27, 1877, c. 69, § 1, ante, § 327.

Provisions for settlement of paymasters' accounts as to property on a lost or captured vessel were made by R. S. § 284, amended by Act Feb. 18, 1875, c. 80, post, § 455.

§ 440. (Act March 29, 1894, c. 49, § 2.) Certificate as to lost property; contents; effect.

Said certificate shall set forth the condition of such officer's or agent's property returns, that it includes all charges made up to its date and not previously certified, that he has had a reasonable opportunity to be heard and has not been relieved of responsibility; the effect of such certificate, when received, shall be the same as if the facts therein set forth had been ascertained by the accounting officers of the Treasury Department in accounting. (28 Stat. 47.)

See notes to preceding section of this act, ante, § 439.

Notes of Decisions

Effect of certificate under this act.— A certificate of the proper auditor, authenticated in accordance with R. S. § 886, post, § 1498, showing a balance audited against an officer on a certificate made under this act makes a prima facie case in a suit by the government against him for the value of property unaccounted for, both as to the property and its value, charged at its cost to the government. U. S. v. Du Perow (D. C. 1913) 208 Fed. 895.

§ 441. (Act March 29, 1894, c. 49, § 3.) Manner of making property returns or of ascertaining liability not affected by act.

The manner of making property returns to or in any administrative bureau or department, or of ascertaining liability for property, under existing laws and regulations, shall not be affected by this Act, except as provided in section one; but in all cases arising as to such property so intrusted the officer or agent shall have an opportunity to relieve himself from liability. (28 Stat. 47.)

See notes to section 1 of this act, ante, § 439.

§ 442. (Act March 29, 1894, c. 49, § 4.) Regulations by heads of Departments for carrying out provisions of act.

The heads of the several Departments are hereby empowered to make and enforce regulations to carry out the provisions of this Act. (28 Stat. 47.)

See notes to section 1 of this act, ante, § 439.

§ 443. (Act July 31, 1894, c. 174, § 4.) Auditors to superintend recovery of debts to the United States certified by them.

The Auditors, under the direction of the Comptroller of the Treasury, shall superintend the recovery of all debts finally certified by them, respectively, to be due to the United States. (28 Stat. 206.)

This provision was part of section 4 of the Dockery act, cited above.

Preceding provisions of the section, relating to the Comptroller and the Auditors, are set forth ante, §§ 402–404,, 412, 413.

A previous provision that the Auditor for the Post-Office Department should

superintend the collection of all debts due that Department was made by R. S. § 292, post, § 458.

§ 444. (Act March 2, 1895, c. 177, § 1.) Delegation of duties of deputy auditor in case of his absence or sickness.

Hereafter in case of the absence or sickness of any deputy auditor of the Treasury Department, the Secretary of the Treasury may, by an appointment under his hand and official seal, delegate to any officer, not below the grade of a fourth-class clerk, in the office of said auditor, the authority to perform the duties of deputy auditor until such absence or sickness shall cease. (28 Stat. 777.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above.

The position of deputy auditor was abolished, and its duties and powers were to be exercised by another officer in each of the Auditors' offices, by a provision of Act March 4, 1911, c. 237, § 1, ante, § 374.

§ 445. (Act March 4, 1909, c. 297, § 1.) Employees may be designated to countersign warrants and drafts in name of Auditor for Post-Office Department.

Hereafter the Secretary of the Treasury may from time to time designate any employees in the office of the Auditor for the Post-Office Department above the grade of class one to countersign warrants and drafts in the name of the auditor and such warrants and drafts, when so countersigned, shall be of the same validity as if countersigned by the Auditor for the Post-Office Department. (35 Stat. 866.)

This was a proviso annexed to the appropriation for the office of Auditor for the Post-Office Department in the legislative, executive, and judicial appropriation act for the fiscal year 1910, cited above.

§ 446. (R. S. § 278.) Settlement of accounts of Army officers.

The Second Auditor shall audit and settle the accounts of line officers of the Army, to the extent of the pay due them for their services as such, notwithstanding the inability of any such line officer to account for property intrusted to his possession, or to make his monthly reports or returns, if such Auditor shall be satisfied by the affidavit of the officer or otherwise that the inability was caused by the officer's having been a prisoner in the hands of the enemy, or by any accident or casualty of war.

Res. March 29, 1867, No. 22, 15 Stat. 25.

The designation of the Second Auditor was changed to Auditor for the War Department by Act July 31, 1894, c. 174, § 3, ante, § 417, and his duties were prescribed by section 7 of that act, ante, § 420.

Subsequent provisions relating to property returns by officers of lost property were made by Act March 29, 1894, c. 49, ante, §§ 439–442.

§ 447. (R. S. § 279.) Signing bounty certificates, etc.

The Second Auditor may detail one clerk to sign, in the place of the Auditor, all certificates and papers issued under any provisions of law relating to bounties; but the Auditor shall be responsible for the official acts of such clerk.

Act March 19, 1868, c. 31, § 4, 15 Stat. 44.

See note to R. S. § 278, ante, § 446, as to change of designation and duties of Second Auditor.

R. S. § 275, which contained a similar provision relating to the Second Comptroller, was repealed by Act July 31, 1894, c. 174, § 7, 28 Stat. 207, the duties of that office having been transferred to the Comptroller by section 4 of that act, ante, § 402. But the provisions of both sections are practically obsolete.

§ 448. (R. S. § 280.) Settlement of advance bounties paid by paymasters.

Any moneys paid by a paymaster in the Army to an enlisted man as an advance bounty shall be allowed in the settlement of the accounts of the paymaster, notwithstanding the discharge of such en-

listed man before serving the time required by law to entitle him to payment of such moneys.

Act March 3, 1863, c. 78, § 6, 12 Stat. 743.

The provisions of this section and of R. S. § 281, post, § 447, relating only to accounts growing out of the civil war, and not being applicable to existing conditions, are practically obsolete.

§ 449. (R. S. § 281.) Settlement of overpayments by paymasters.

The proper accounting officers are authorized, in the settlement of the accounts of the paymasters of the Army, to allow such credits for overpayments made in good faith on public account, since the fourteenth day of April, eighteen hundred and sixty-one, and before the sixteenth day of March, eighteen hundred and sixty-eight, as shall appear to them, by such vouchers and testimony as they shall require, to be just.

Act March 16, 1868, c. 29, 15 Stat. 42.

See note to preceding section.

§ 450. (Act July 16, 1892, c. 196, § 1.) Claims for arrears of pay and bounty already paid.

Hereafter nothing in section two hundred and seventy-seven of the Revised Statutes shall be construed as to prevent the Second Auditor of the Treasury from disallowing claims for arrears of pay and bounty in cases where it appears from the records and files of his office that payment in full has already been made to the soldier himself, or to his widow or legal heirs: Provided, That if any person whose claim may be disallowed be dissatisfied with the action of the Auditor, he may, within six months, appeal to the Second Comptroller; otherwise the Auditor's action shall be deemed final and conclusive and be subject to revision only by Congress or the proper courts. (27 Stat. 194.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1893, cited above.

R. S. § 277, mentioned in this provision, is set forth ante, § 419.

The designation of the Second Auditor was changed to Auditor for the War Department by section 3 of the Dockery Act, ante, § 417, and his duties as such were prescribed by section 7 of that act, ante, § 420.

The office of Second Comptroller was abolished, and its duties were transferred to the office of Comptroller, by section 4 of the Dockery Act, ante, § 402.

§ 451. (Act March 4, 1907, c. 2918, § 1.) Claims for arrears of pay or for bounty of volunteers, etc.

Back pay and bounty: For payment of amounts for arrears of pay of two and three year volunteers, for bounty to volunteers and their widows and legal heirs, for bounty under the Act of July twenty-eight, eighteen hundred and sixty-six, and for amounts for commutation of rations to prisoners of war in rebel States, and to soldiers on furlough, that may be certified to be due by the accounting officers of the Treasury during the fiscal year nineteen hundred and eight, two hundred thousand dollars: Provided, That in all cases hereafter so certified the said accounting officers shall, in stating balances, follow the decisions of the United States Supreme Court or of the Court of Claims of the United States after the time for appeal has expired, if no appeal be taken, without regard to former settlements or adjudications by their predecessors. (34 Stat. 1356.)

This was a provision of the sundry civil appropriation act for the fiscal year 1908, cited above.

Notes of Decisions

Claims embraced in and effect of proviso.—The provision of this act following the word "Provided" is not to be treated as distinct and independent legislation, but must be restricted to claims against the United States enumerated in the preceding provision, whether this further provision be regarded technically as a proviso or not. Pennington v. U. S. (1914) 34 Sup. Ct. 269, 231 U. S. 631, 58 L. Ed. 410; Pennington v. U. S. (1913) 48 Ct. Cl. 408.

By this statute, as well as by the

rulings of the Supreme Court, the decisions of the Court of Claims, when not appealed from, are made the rules by which the accounting officers are to be guided in like cases. Leigh v. U. S. (1908) 43 Ct. Cl. 374.

§ 452. (R. S. § 282.) Evidence of honorable discharge to be returned to officers and enlisted men.

In all cases where it has become necessary for any officer or enlisted man of the Army to file his evidence of honorable discharge from the military service of the United States, to secure the settlement of his accounts, the accounting officer with whom it has been filed shall, upon application by said officer or enlisted man, deliver to him such evidence of honorable discharge; but his accounts shall first be duly settled, and the fact, date, and amount of such settlement shall be clearly written across the face of such evidence of honorable discharge, and attested by the signature of the accounting officer before it is delivered.

Res. May 4, 1870, No. 42, 16 Stat. 374.

Provisions for the issue of a duplicate of a lost certificate of discharge were contained in R. S. § 224, ante, § 323.

§ 453. (Act June 6, 1900, c. 791.) Payment of claims for pay and allowances without deduction of attorneys' fees.

In the settlement of claims of officers, soldiers, sailors, and marines, or their representatives, and all other claims for pay and allowances within the jurisdiction of the Auditor for the War Department or the Auditor for the Navy Department, presented and filed hereafter in which it is the present practice to make deductions of attorneys' fees from the amount found due, no deductions of fees for attorneys or agents shall hereafter be made, but the draft, check, or warrant for the full amount found due shall be delivered to the payee in person or sent to his bona fide post-office address (residence or place of business). (31 Stat. 637.)

This was a proviso annexed to an appropriation for arrears of pay, bounty, etc., in the sundry civil appropriation act for the fiscal year 1901, cited above.

Agents or attorneys were forbidden to demand or accept any fee for services in connection with claims for arrears of pay, etc., of any officer or enlisted man of the Regular or Volunteer Armies, during the Civil War, by a provision of Act Dec. 22, 1911, c. 6, post, § 2204.

§ 454. (R. S. § 283.) Manner of keeping accounts of Departments of War and the Navy.

The Auditors charged with the examination of the accounts of the Departments of War and of the Navy, shall keep all accounts of the receipts and expenditures of the public money in regard to those Departments, and of all debts due to the United States on moneys advanced relative to those Departments; shall receive from the Second Comptroller the accounts which shall have been finally adjusted, and shall preserve such accounts, with their vouchers and certificates, and record all requisitions drawn by the Secretaries of those Departments, the examination of the accounts of which has been assigned to them. They shall annually, on the first Monday in November, severally report to the Secretary of the Treasury the application of the money appropriated for the Department of War and the Department of the Navy, and they shall make such reports on the business assigned to them as the Secretaries of those Departments may deem necessary and require.

Act March 3, 1817, c. 45, §§ 5, 6, 3 Stat. 367.

So much of this section as required these accounts to be kept by the Auditors was repealed by section 10 of the Dockery Act, ante, § 356, which established the Division of Bookkeeping and Warrants, and provided for keeping on the books of that division, all accounts of receipts and expenditures of public money except those relating to postal revenues and expenditures therefrom.

The office of Second Comptroller, mentioned in this section, was abolished,

and its duties were transferred to the office of Comptroller, by section 4 of the Dockery Act, ante, § 402.

Notes of Decisions

Final adjustment of account.—When an account has been examined, passed on, and the balance certified, it is "adjusted" within the meaning of this section, as well as of R. S. § 957, post, § 1595. U. S. v. Pinson (1880) 102 U. S. 548, 551, 26 L. Ed. 226.

§ 455. (R. S. § 284, as amended Act Feb. 18, 1875, c. 80, § 1.) Settlement of accounts of paymasters of lost or captured public vessels.

In every case of the loss or capture of a vessel belonging to the Navy of the United States, the proper accounting officers of the Treasury, under the direction of the Secretary of the Navy, are authorized, in the settlement of the accounts of the paymaster of such vessel, to credit him with such portion of the amount of the provisions, clothing, small stores, and money, with which he stands charged on the books of the Fourth Auditor of the Treasury, as they shall be satisfied was inevitably lost by such capture or loss of a public vessel; and such purser shall be fully exonerated by such credit from all liability on account of the provisions, clothing, small stores, and money so proved to have been captured or lost.

Act March 3, 1847, c. 48, § 6, 9 Stat. 173. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 317.

The amendment of this section by Act Feb. 18, 1875, c. 80, § 1, cited above, consisted in the insertion of the word "paymaster," instead of "purser," contained in the first clause of the section as originally enacted.

The designation of the Fourth Auditor was changed to Auditor for the Navy Department, by section 3 of the Dockery Act, ante, § 417, and his duties as such were prescribed by section 7 of that act, ante, § 420.

§ 456. (R. S. § 285.) Disbursements, etc., by order of commanding officer of Navy.

Every disbursement of public moneys, or disposal of public stores, made by a disbursing officer pursuant to an order of any commanding officer of the Navy, shall be allowed by the proper accounting officers of the Treasury, in the settlement of the accounts of the officer, upon satisfactory evidence of the making of such order, and of the payment of money or disposal of stores in conformity with it; and the commanding officer by whose order such disbursement or disposal was made, shall be held accountable for the same.

Res. March 3, 1849, No. 17, § 2, 9 Stat. 419.

(R. S. §§ 286–290. Transferred to Title XV, c. 8.)

These sections, provided for settlement of accounts of petty officers, seamen, etc., on vessels lost, etc., and for compensation to officers, seamen, etc., for personal effects on vessels sunk or otherwise destroyed. They are placed, with other provisions relating to the pay, etc., of the Navy, under Title XV, "The Navy," c. 8, post, §§ 2865–2869.

§ 457. (R. S. § 291.) Settlement of expenses of intercourse with foreign nations.

Whenever any sum of money has been or shall be issued, from the Treasury, for the purposes of intercourse or treaty with foreign nations, in pursuance of any law, the President is authorized to cause the same to be duly settled annually with the proper accounting officers of the Treasury, by causing the same to be accounted for, specifically, if the expenditure may, in his judgment, be made public; and by making or causing the Secretary of State to make a certificate of the amount of such expenditure as he may think it advisable not to specify; and every such certificate shall be deemed a sufficient voucher for the sum therein expressed to have been expended.

Act Feb. 9, 1793, c. 4, § 2, 1 Stat. 300.

Appropriations, to be expended under direction of the President, pursuant to the requirement of this section, to meet the expenses of the execution of the

neutrality act, and to meet emergencies in the diplomatic and consular service, and to extend the commercial and other interests of the United States, are made in the annual diplomatic and consular appropriation acts. The provision for the fiscal year 1917 was by Act July 1, 1916, c. 208, 39 Stat.

§ 458. (R. S. § 292.) Collection of debts, etc., due the Post-Office Department.

The Sixth Auditor shall superintend the collection of all debts due the Post-Office Department, and all penalties and forfeitures imposed for any violation of the postal laws, and take all such other measures as may be authorized by law to enforce the payment of such debts and the recovery of such penalties and forfeitures. He shall also superintend the collection of all penalties and forfeitures arising under other statutes, where such penalties and forfeitures are the consequence of unlawful acts affecting the revenues or property of the Post-Office Department.

Act June 8, 1872, c. 335, § 21, 17 Stat. 287.

The designation of the Sixth Auditor was changed to Auditor for the Post-Office Department by Act March 3, 1875, c. 130, § 2, ante, § 352, and section 3 of the Dockery Act, ante, § 417, and certain duties of the office were prescribed by section 7 of the Dockery Act, ante, § 420, which provided, however, that his duties should continue as then defined by law, except as modified by that act.

A general provision that the Auditors should superintend the recovery of all debts certified by them to be due to the United States, contained in section 3 of the Dockery Act, is set forth ante, § 417.

Provision for payment of fees of officers and special counsel employed in prosecuting suits instituted by the Auditor on postmasters' bonds, was made by Act Feb. 26, 1896, c. 33, § 1, post, § 459.

Cited without definite application, Williams v. Wells Fargo & Co. Express (1910) 177 Fed. 352, 101 C. C. A. 328, 35 L. R. A. (N. S.) 1034, 21 Ann. Cas. 699.

§ 459. (Act Feb. 26, 1896, c. 33.) Suits on postmasters' bonds; payment of fees, etc., therein.

Hereafter all fees for United States Attorneys, Marshals, Clerks of Courts and Special Counsel necessarily employed in prosecuting civil suits instituted by the Auditor for the Post Office Department through the Solicitor of the Treasury against the sureties on the official bonds of late post-masters, as provided for by section two hundred and ninety-two, Revised Statutes of the United States, shall be paid from the appropriations for expenses of the United States Courts. (29 Stat. 25.)

This was a provision of the urgent deficiency act for the fiscal year 1896, cited above.

R. S. § 292, mentioned in this provision, is set forth ante, § 458.

§ 460. (R. S. § 293.) Accounts of money-order business.

The Sixth Auditor shall keep the accounts of the money-order business separately, and in such manner as to show the number and amount of money-orders issued at each office, the number and amount paid, the amount of fees received, and all the expenses of the money-order business.

Act June 8, 1872, c. 335, § 120, 17 Stat. 299.

See note to R. S. § 292, ante, § 458, as to change of designation and duties of Sixth Auditor.

§ 461. (R. S. § 294.) Accounts of expenses paid by postmasters.

The Sixth Auditor shall state and certify quarterly to the Postmaster-General an account of the money paid by postmasters out of the receipts of their offices, and pursuant to appropriations, on account of the expenses of the postal service; designating the heads under which such payments were made.

Act June 8, 1872, c. 335, § 52, 17 Stat. 291.

See note to R. S. § 292, ante, § 458, as to change of designation and duties of Sixth Auditor.

A subsequent similar provision was made by Act March 3, 1875, c. 128, § 4, post, § 462.

§ 462. (Act March 3, 1875, c. 128, § 4.) Accounts of expenditures of Post-Office Department under items of appropriations.

Hereafter the Sixth Auditor shall keep the accounts in his office so as to show the expenditures of the Post-Office Department under each item of appropriation provided by law. (18 Stat. 343.)

This section was part of the postal appropriation act for the fiscal year 1876, cited above.

See note to R. S. § 292, ante, § 458, as to change of designation and duties of Sixth Auditor.

§ 463. (Act July 12, 1876, c. 179, § 4.) Reports of financial condition of Post-Office Department.

The annual reports of the Auditor of the Treasury for the Post-Office Department to the Postmaster-General shall show the financial condition of the Post-Office Department at the close of each fiscal year, and be made a part of the Postmaster General's annual report to Congress for that fiscal year. (19 Stat. 80.)

This section was part of the postal service appropriation act for the fiscal year 1877, cited above.

§ 464. (R. S. § 295.) Compromise of judgments.

Whenever a judgment is obtained for a debt or damages due the Post-Office Department, and it satisfactorily appears that such judgment, or so much thereof as remains unpaid, cannot be collected by due process of law, the Sixth Auditor may, with the written consent of the Postmaster-General, compromise such judgment, and accept in satisfaction less than the full amount thereof.

Act June 8, 1872, c. 335, § 315, 17 Stat. 325.

See note to R. S. § 292, ante, § 458, as to change of designation and duties of Sixth Auditor.

§ 465. (R. S. § 296.) Papers required in suits for delinquencies in Post-Office Department.

In case of delinquency of any postmaster, contractor, or other officer, agent, or employé of the Post-Office Department, in which suit is brought, the Sixth Auditor shall forward to the Department of Justice certified copies of all papers in his office tending to sustain the claim.

Act June 8, 1872, c. 335, § 311, 17 Stat. 324.

See note to R. S. § 292, ante, § 458, as to change of designation and duties of Sixth Auditor.

§ 466. (R. S. § 297.) Auditors may administer oaths.

The several Auditors are empowered to administer oaths to witnesses in any case in which they may deem it necessary for the due examination of the accounts with which they shall be charged.

Act March 3, 1817, c. 45, § 12, 3 Stat. 368. Act June 8, 1872, c. 335, § 24, 17 Stat. 288.

Provisions applicable to all the Departments, as to administration of oaths by officers and clerks, are contained in R. S. § 183, ante, § 265.

§ 467. (R. S. § 298.) Oaths in settlements with Sixth Auditor.

Any mayor of a city, justice of the peace, or judge of any court of record in the United States, may administer oaths, in relation to the examination and settlement of the accounts committed to the charge of the Sixth Auditor.

Act June 8, 1872, c. 335, § 24, 17 Stat. 288.

See note to R. S. § 292, ante, § 458, as to change of designation and duties of Sixth Auditor.

Cited without definite application,
U. S. v. Law (D. C. 1892) 50 Fed. 915, 917.

(R. S. § 299. Transferred to Title XIII, c. 16.)

This section related to the audit and allowance of accounts of district attorneys for services in certain cases in which the United States was not a party. It has become inapplicable to those officers by the provisions of Act May 28, 1896, c. 252, §§ 6, 7, post, §§ 1418, 1419, for payment to them of annual

salaries in lieu of other compensation, except the district attorney for the District of Columbia, and is placed, with other provisions relating to compensation for such services, under Title XIII, "The Judiciary," c. 16, § 1382.

§ 468. (R. S. § 300.) Allowance of lost checks.

Whenever the disbursing officer or agent by whom was issued any check which has been lost, destroyed, or stolen, is dead, or no longer in the service of the United States, the proper accounting officer shall, under such regulations as the Secretary of the Treasury may prescribe, state an account in favor of the owner of such original check for the amount thereof, and charge such amount to the account of such officer or agent.

Act Feb. 2, 1872, c. 12, §§ 1, 2, 17 Stat. 29.

Notes of Decisions

Liabilities of sureties of officer, etc.—This section and R. S. §§ 307, 308, post, §§ 481, 482, in relation to the payment of warrants after three years from issuance, form no part of the contract with the sureties of an officer in arrears, whose salary may be withheld, under R. S. § 1766, post, § 3239. Their provisions were not passed to protect sureties, but to better secure the government. U. S. v. Potter (C. C. 1879) Fed. Cas. No. 16,076.

§ 469. (R. S. § 300A.) Claims for quartermaster's stores.

All claims of loyal citizens in States not in rebellion, for quartermaster's stores actually furnished to the Army of the United States, and receipted for by the proper officer receiving the same, or which may have been taken by such officers without giving such receipt, may be submitted to the Quartermaster-General of the United States, accompanied with such proofs as each claimant can present of the facts in his case; and it shall be the duty of the Quartermaster-General to cause such claim to be examined, and if convinced that it is just, and of the loyalty of the claimant, and that the stores have been actually received or taken for the use of, and used by the Army, then to report each case to the Third Auditor of the Treasury, with a recommendation for settlement.

Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 317.

This section and section 300B, post, § 470, were added to this chapter by The "Act to correct errors and supply omissions in the Revised Statutes," cited above.

The designation of the Third Auditor was changed to Auditor for the Interior Department by section 3 of the Dockery Act, ante, § 417, and the settlement of all accounts relating to the military establishment, etc., is part of the duties of the Auditor for the War Department, by section 7 of that act, ante, § 420.

The provisions of these two sections, and of Act June 16, 1874, c. 285, § 2, post, § 471, relating only to claims arising out of the civil war, are practically obsolete.

Notes of Decisions

Effect of incorporation into Revised Statutes of sections 300a and 300b.—The amendment of the Revised Statutes by adding to this chapter, as sections 300a, 300b, this section, and post, § 470, the provisions of Act July 4, 1864, c. 240, §§ 2, 3, 13 Stat. 381, was not in the nature of a new enactment, but is to be taken and construed as though the Revised Statutes had been originally adopted with the alterations thus made incorporated into them in their proper places, as was done in the second edition; and they are subject to the provisions of R. S. §§ 5595, 5601, post, §§ 10592, 10598. Ludington v. U. S. (1879) 15 Ct. Cl. 453, 459.

Effect of examination of and report on claims.—Under the provisions of Act July 4, 1864, §§ 2, 3, as incorporated into the Revised Statutes as sections 300a and 300b thereof, this section, and post, § 470, and of Act June 16, 1874, § 2, post, § 471, whereby certain executive officers were authorized to examine certain classes of claims and report upon them, but their reports were to be submitted to Congress for consideration, the officers did not act as arbitrators, nor in a quasi judicial character, but simply as accounting officers, and the final determination of liability was with Congress. Ludington v. U. S. (1879) 15 Ct. Cl. 453. But see Huffman v. U. S. (1881) 17 Ct. Cl. 55.

§ 470. (R. S. § 300B.) Claims for subsistence, etc.

All claims of loyal citizens in States not in rebellion for subsistence actually furnished to the Army and receipted for by the proper officer receiving the same, or which may have been taken by such officers without giving such receipt, may be submitted to the Commissary-General of Subsistence, accompanied by such proof as each claimant may have to offer; and it shall be the duty of the Commissary-General of Subsistence to cause each claim to be examined, and if convinced that it is just, and of the loyalty of the claimant, and that the stores have actually been received, or taken for the use of, and used by the Army, then to report each case for payment to the Third Auditor of the Treasury with a recommendation for settlement.

The provisions of the above two sections shall extend to the State of Tennessee, and to the counties of Berkeley and Jefferson in the State of West Virginia. But the provisions of the above two sections shall not authorize the payment of claims for the occupation of, or injury to, real estate in any State declared in insurrection during the rebellion.

Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 317.
See notes to preceding section.

Notes of Decisions

Time for presentation of claims.—By virtue of the amendment of the Revised Statutes by the addition of this section, by Act Feb. 18, 1875, c. 80, which authorized the Commissary General to examine claims submitted by loyal citizens of the state of Tennessee, and of the counties of Berkeley and Jefferson, West Virginia, for subsistence stores taken or received during the rebellion, it was not material whether the actual presentation of such claims to him occurred before or after the adoption of that act. (1875) 15 Op. Atty. Gen. 36.

§ 471. (Act June 16, 1874, c. 285, § 2.) Allowance and report of claims for stores and supplies.

The Quartermaster General, Commissary General, and Third Auditor of the Treasury shall continue to receive, examine, and consider the justice and validity of such claims as shall be brought before them under the act of July fourth, eighteen hundred and sixty-four, and the acts amendatory thereof; and the Secretary of the Treasury shall make report of each claim allowed by them, at the commencement of each session of Congress, to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration. (18 Stat. 75.)

This was a provision of the Army appropriation act for the fiscal year 1875, cited above.

The substance of Act July 4, 1864, c. 240, 13 Stat. 381, and the acts amendatory thereof, referred to in this provision, was incorporated in R. S. §§ 300A, 300B, ante, §§ 469, 470.

See notes to said section 300A, ante, § 469.

No claim under the provisions of this act was to be allowed by the accounting officers, or by the Court of Claims, or by Congress, where a claimant who claimed more than was justly due in respect of the claim, or presented false evidence in support thereof, by a provision of Act April 30, 1878, c. 77, § 2, 20 Stat. 524, incorporated into the Judicial Code, in section 173 thereof, post, § 1164.

CHAPTER FIVE

The Treasurer

Sec.
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484a. Reports of Auditor to Secretary of Treasury of unpaid checks issued by disbursing officers.

§ 472. (R. S. § 301.) Treasurer.

There shall be in the Department of the Treasury a Treasurer of the United States, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of [six thousand five hundred dollars] a year.

Act Sept. 2, 1789, c. 12, § 1, 1 Stat. 65. Act July 23, 1866, c. 208, § 2, 14 Stat. 206.

The office of Treasurer was continued, with the same salary of $6,500, on the reorganization of the Department by Act March 3, 1875, c. 130, § 2, ante, § 352. Subsequent appropriations for the Treasurer were for a less amount. But his salary was increased to $8,000, superseding the words of this section inclosed in brackets, "six thousand five hundred dollars," by a provision of Act March 4, 1909, c. 314, § 7, post, § 473.

The Secretary of the Treasury is authorized to transfer and appoint in the office of the Treasurer of the United States such of the employés, in his discretion, as are now employed in said office under details authorized by Act March 4, 1913, c. 142, § 1, 37 Stat. 755, by a provision in Act July 16, 1914, c. 141, § 1, set forth ante, § 367a.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Compensation for performance of duties of former office transferred to Treasurer.—After the abolition of the offices of the Commissioners of the Sinking Fund of the District of Columbia and the transfer of their powers and duties to the Treasurer of the United States, by Act March 3, 1875, c. 180, 20 Stat. 102, he was not entitled, for performing the duties of treasurer of said commissioners, to the salary which had been provided for the commissioner acting as treasurer, by Act March 3, 1875, c. 130, 18 Stat. 376. Wyman v. U. S. (1891) 26 Ct. Cl. 103.

Cited without definite application, Cooke v. U. S. (1875) 91 U. S. 389, 398, 23 L. Ed. 237.

§ 473. (Act March 4, 1909, c. 314, § 7.) Salary of Treasurer.

Hereafter the salary of the Treasurer of the United States shall be eight thousand dollars per annum. (35 Stat. 1065.)

This section was part of an act fixing the compensation of certain officials in the customs service, etc., the other sections of which are omitted here, because superseded by the reorganization of the customs service pursuant to Act Aug. 24, 1912, c. 355, § 1, post, § 5327.

The appropriation for the Treasurer for the fiscal year 1917 was $8,000. Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 472, ante.

§ 474. (R. S. § 302.) Bond of Treasurer.

The Treasurer shall, before entering upon the duties of his office, give bond, with sufficient sureties, to be approved by the Secretary of the Treasury and by the First Comptroller, in the sum of one hundred and fifty thousand dollars, payable to the United States, with condition for the faithful performance of the duties of his office, and for the fidelity of the persons to be by him employed, which bond shall be lodged in the office of the First Comptroller.

Act Sept. 2, 1789, c. 12, § 4, 1 Stat. 66.

The designation of the First Comptroller was changed to Comptroller of the Treasury, by section 4 of the Dockery Act, ante, § 402. And the custody of the Treasurer's bond, and the duties of the Comptroller in regard thereto, were transferred to the Secretary of the Treasury, by Act March 2, 1895, c. 177, § 5, post, § 3288.

Notes of Decisions

Requisites of bond.—In most cases where official bonds are required, as in this section, the form thereof is tacitly or impliedly left by Congress to be regulated or fixed by the officers by whom the bonds are to be approved. In practice, the form ordinarily made use of is one in which the principal and sureties are jointly and severally bound for the full amount of the penalty. (1885) 18 Op. Atty. Gen. 274, 276.

§ 475. (R. S. § 303.) Assistant Treasurer.

There shall be in the Department of the Treasury an Assistant Treasurer of the United States, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of two thousand eight hundred dollars a year.

Act March 3, 1863, c. 89, § 1, 12 Stat. 761. Act June 25, 1864, c. 147, § 2, 13 Stat. 159.

The office of Assistant Treasurer was continued, with a salary of $3,800, on the reorganization of the department by Act March 3, 1875, c. 130, § 2, ante, § 352. Subsequent appropriations provided for a different salary for the Assistant Treasurer, and also for a Deputy Treasurer. The provisions for both for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat., for the Assistant Treasurer, $3,600, and for the Deputy Assistant Treasurer, $3,200.

See notes to § 472, ante.

§ 476. (R. S. § 304, as amended, Act March 31, 1886, c. 41.) When Assistant Treasurer may act as Treasurer; temporary appointment of clerk as Acting Assistant Treasurer.

The Treasurer may, in his discretion, and with the consent of the Secretary of the Treasury, authorize the Assistant Treasurer to act in the place and discharge any or all the duties of the Treasurer of the United States; and in the event of the absence or illness of either the Treasurer or the Assistant Treasurer, or both, the Secretary of the Treasury may, on the recommendation of the Treasurer appoint for a term not exceeding thirty days at one time, from among the clerks in the Treasury, any one of said clerks to be Acting Assistant Treasurer during such absence or illness: Provided, however, That no such appointment shall be made until the official bond given by the principal of the office shall be made in terms to cover and apply to the acts and defaults of every such person so appointed from time to time. Such acting officer shall, moreover, for the time being, be subject to all the liabilities and penalties pre-

scribed by law for the official misconduct in like cases of the Assistant Treasurer, for whom he acts.

Act March 3, 1863, c. 89, § 1, 12 Stat. 761. Act March 31, 1886, c. 41, 24 Stat. 9.

The section as enacted in the Revised Statutes contained only the first clause, providing that the Assistant Treasurer might act in place of the Treasurer. The amendment by Act March 31, 1886, c. 41, cited above, consisted in the addition of the further provisions.

§ 477. (Act March 14, 1900, c. 41, § 4.) Divisions of Issue and of Redemption.

That there be established in the Treasury Department, as a part of the office of the Treasurer of the United States, divisions to be designated and known as the division of issue and the division of redemption, to which shall be assigned, respectively, under such regulations as the Secretary of the Treasury may approve, all records and accounts relating to the issue and redemption of United States notes, gold certificates, silver certificates, and currency certificates. There shall be transferred from the accounts of the general fund of the Treasury of the United States, and taken up on the books of said divisions, respectively, accounts relating to the reserve fund for the redemption of United States notes and Treasury notes, the gold coin held against outstanding gold certificates, the United States notes held against outstanding currency certificates, and the silver dollars held against outstanding silver certificates, and each of the funds represented by these accounts shall be used for the redemption of the notes and certificates for which they are respectively pledged, and shall be used for no other purpose, the same being held as trust funds. (31 Stat. 46.)

This section was part of the Parity Act, cited above. Other sections of the act are set forth post, under Title XXXVII, "Coinage."

§ 478. (R. S. § 305.) Duties of Treasurer.

The Treasurer shall receive and keep the moneys of the United States, and disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned by either Comptroller, and recorded by the Register, and not otherwise. He shall take receipts for all moneys paid by him, and shall give receipts for all moneys received by him; and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury, without which warrant, so signed, no acknowledgment for money received into the public Treasury shall be valid. He shall render his accounts to the First Comptroller quarterly, or oftener if required, and shall transmit a copy thereof, when settled, to the Secretary of the Treasury. He shall at all times submit to the Secretary of the Treasury and the First Comptroller, or either of them, the inspection of the moneys in his hands.

Act Sept. 2, 1789, c. 12, § 4, 1 Stat. 66.

So much of this section as required the Register to record warrants was repealed, by section 11 of the Dockery Act, ante, § 427.

By other provisions of the same act, the office of Second Comptroller was abolished, the designation First Comptroller was changed to Comptroller of the Treasury, and he was to perform the duties of the office of Second Comptroller. Act July 31, 1894, c. 174, § 4, ante, § 402.

When disbursements for salaries of Senators, Members, and Delegates in Congress, or the officers and employés or expenses thereof, cannot be lawfully made by or through the officers specially charged therewith, they may be made by the Treasurer, by Act June 22, 1882, c. 236, post, § 479.

Cited without definite application, Cooke v. U. S. (1875) 91 U. S. 389, 398, 23 L. Ed. 237; Crain v. U. S. (1890) 25 Ct. Cl. 204, 235.

§ 479. (Act June 22, 1882, c. 236.) Payment by Treasurer, instead of disbursing officers, of appropriations for salaries of Senators, Members and officers, etc., and expenses of Congress.

Whenever any appropriation made for the payment of the sala-

ries of Senators, Members, and Delegates in Congress, or the officers and employees of both or either of the houses thereof, or for the expenses of the same, or any committees thereof, cannot be lawfully disbursed by or through the officers specially charged with such disbursements, such disbursements may be made for the purposes named in said appropriations by the Treasurer of the United States, who shall take proper vouchers therefor and charge such disbursements against such appropriations; and the accounts therefor shall be audited and passed or rejected, as the law may require, in the same manner that similar accounts are or may be required by law to be audited and passed or rejected. (22 Stat. 108.)

This act was entitled "An act to provide for the payment of the salaries and compensation of Members of the Houses of Congress and their officers and employees in certain contingencies."

§ 480. (R. S. § 306.) Liabilities outstanding three or more years. At the termination of each fiscal year all amounts of moneys that are represented by certificates, drafts, or checks, issued by the Treasurer, or by any disbursing officer of any Department of the Government, upon the Treasurer or any assistant treasurer, or designated depositary of the United States, or upon any national bank designated as a depositary of the United States, and which shall be represented on the books of either of such offices as standing to the credit of any disbursing officer, and which were issued to facilitate the payment of warrants, or for any other purpose in liquidation of a debt due from the United States, and which have for three years or more remained outstanding, unsatisfied, and unpaid, shall be deposited by the Treasurer, to be covered into the Treasury by warrant, and to be carried to the credit of the parties in whose favor such certificates, drafts, or checks were respectively issued, or to the persons who are entitled to receive pay therefor, and into an appropriation account to be denominated "outstanding liabilities."

Act May 2, 1866, c. 70, §§ 1, 4, 14 Stat. 41, 42.

The auditor of the Treasury Department is required, at the end of each fiscal year, to report to the Secretary of the Treasury all checks issued by disbursing officers of the government, unpaid for three years, by Act July 1, 1916, c. 209, § 5. post, § 484a.

Notes of Decisions

Claims on outstanding drafts not affected by limitations or lapse of time.—After a draft is issued and covered into the treasury, the government holds the fund in trust, and limitations as to the claim therefor does not run until demand. Ray v. U. S. (D. C. 1892) 50 Fed. 166, 168; Wayne v. U. S. (1891) 26 Ct. Cl. 274; Russell v. U. S. (1902) 37 Ct. Cl. 113.

While it may be that this section and R. S. §§ 307, 308, post, §§ 481, 482, do not provide for the creation of an express trust, liability for which, according to general rules, continues until there is a direct repudiation thereof, yet they contain a continuing promise by the government to hold the money thus covered into the Treasury for the benefit of the owner until such time as he shall call for it. This is a continuing promise, and one to which full force and efficacy should be given. Judgment, Wardwell v. U. S. (1895) 32 Ct. Cl. 30, affirmed. U. S. v. Wardwell (1898) 19 Sup. Ct. 86, 172 U. S. 48, 43 L. Ed. 360.

The purpose of the provisions of Act May 2, 1866, c. 70, incorporated into R. S. §§ 306–308 (this compilation §§ 480–482), was to secure to each party who holds government paper the amount thereof, to place it in the Treasury to his credit, and to prescribe a method by which whenever he wishes he can obtain it. No time is mentioned within which he must apply for a warrant or after which the money is forfeited to the government. The ordinary rules for the maturity of negotiable paper do not control. There is no occasion for suit until after an application for a warrant is refused. When the contract created by the promise made in R. S. § 308, post, § 482, is broken, then a claim for the breach of such contract first accrues, and the limitation prescribed by R. S. § 1069, incorporated into Jud. Code, § 156, post, § 1147, begins to run. Id.

The indebtedness of the United States on balances stated in favor of parties on the books of the Treasury Department under R. S. §§ 306–308 (this com-

pilation §§ 480–482), is not rendered stale by lapse of time in making application for payment. The only proof to be made as to them is the identity of the claimant or his right to represent the record creditor. Waddell v. U. S. (1890) 25 Ct. Cl. 323, 328.

Negotiability of outstanding draft.—A treasury draft outstanding for more than three years, the appropriation to pay it covered into the treasury, has ceased to be negotiable paper. Harris v. U. S. (1892) 27 Ct. Cl. 177.

Recovery on draft outstanding in hands of third person.—A claimant having an amount rightly due to her, standing to her credit on the books of the treasury, is entitled to recover, though a draft more than three years outstanding for the same debt is in the hands of a third person. Harris v. U. S. (1892) 27 Ct. Cl. 177.

Payment of lost or stolen draft not postponed.—Where a government check or draft is lost or stolen, the statutes do not require that payment must be postponed for three years or preclude a suit. Becker v. U. S. (1891) 26 Ct. Cl. 172.

§ 481. (R. S. § 307, as amended, Act July 31, 1894, c. 174, § 16.) Vouchers for drafts remaining unpaid.

The certificate of the Secretary of the Treasury, stating that the amount of any draft issued by the Treasurer, to facilitate the payment of a warrant directed to him for payment, has remained outstanding and unpaid for three years or more, and has been deposited and covered into the Treasury in the manner prescribed by the preceding section, shall be, when attached to any such warrant, a sufficient voucher in satisfaction of any such warrant or part of any warrant, the same as if the drafts correctly indorsed and fully satisfied were attached to such warrant or part of warrant. And all such moneys mentioned in this and in the preceding section shall remain as a permanent appropriation for the redemption and payment of all such outstanding and unpaid certificates, drafts, and checks.

Act May 2, 1866, c. 70, § 2, 14 Stat. 41. Act July 31, 1894, c. 174, § 16, 28 Stat. 210.

The amendment of this section by section 16 of the Dockery Act, cited above, consisted in the substitution of the words "Secretary of the Treasury," in the first line of the section, instead of the words "Register of the Treasury," in the section as originally enacted.

Notes of Decisions

Liabilities of sureties of officer.—R. S. § 1766, post, § 3239, authorizing the salary of an officer in arrears to be withheld, and this section with R. S. § 308, post, § 482, in relation to the payment of warrants after three years from issuance, form no part of the contract with the officer's sureties. They were not passed to protect sureties, but to better secure the government. U. S. v. Potter (C. C. 1879) Fed. Cas. No. 16,076.

§ 482. (R. S. § 308.) Payment upon presentation of outstanding drafts.

The payee or the bona-fide holder of any draft or check the amount of which has been deposited and covered into the Treasury pursuant to the preceding sections, shall, on presenting the same to the proper officer of the Treasury, be entitled to have it paid by the settlement of an account and the issuing of a warrant in his favor, according to the practice in other cases of authorized and liquidated claims against the United States.

Act May 2, 1866, c. 70, § 3, 14 Stat. 42.

§ 483. (R. S. § 309.) Accounts of disbursing officers unchanged for three years.

The amounts, except such as are provided for in section three hundred and six, of the accounts of every kind of disbursing officer, which shall have remained unchanged, or which shall not have been increased by any new deposit thereto, nor decreased by drafts drawn thereon, for the space of three years, shall in like manner be covered into the Treasury, to the proper appropriation to which they belong; and the amounts thereof shall, on the certificate of the

Treasurer that such amount has been deposited in the Treasury, be credited by the proper accounting officer of the Department of the Treasury on the books of the Department, to the officer in whose name it had stood on the books of any agency of the Treasury, if it appears that he is entitled to such credit.

Act May 2, 1866, c. 70, § 5, 14 Stat. 42.

§ 484. (R. S. § 310.) Reports of Treasurer, assistant treasurers, etc., and disbursing officers.

The Treasurer, each assistant treasurer, and each designated depositary of the United States, and the cashier of each of the national banks designated as such depositaries, shall, at the close of business on every thirtieth day of June, report to the Secretary of the Treasury the condition of every account standing, as in the preceding section specified, on the books of their respective offices, stating the name of each depositor, with his official designation, the total amount remaining on deposit to his credit, and the dates, respectively, of the last credit and the last debit made to each account. And each disbursing officer shall make a like return of all checks issued by him, and which may then have been outstanding and unpaid for three years and more, stating fully in such report the name of the payee, for what purpose each check was given, the office on which drawn, the number of the voucher received therefor, the date, number, and amount for which it was drawn, and, when known, the residence of the payee.

Act May 2, 1866, c. 70, § 6, 14 Stat. 42.

§ 484a. (Act July 1, 1916, c. 209, § 5.) Reports of Auditor to Secretary of Treasury of unpaid checks issued by disbursing officers.

Hereafter at the termination of each fiscal year each Auditor of the Treasury shall report to the Secretary of the Treasury all checks issued by any disbursing officer of the Government as shown by his accounts rendered to such auditor, which shall then have been outstanding and unpaid for three years or more, stating fully in such report the name of the payee, for what purpose each check was given, the office on which drawn, the number of the voucher received therefor, the date, the number, and the amount for which it was drawn, and, when known, the residence of the payee. And such reports shall be in lieu of the returns required of disbursing officers by section three hundred and ten of the Revised Statutes. (39 Stat.)

This section was a part of the sundry civil appropriation act for the fiscal year 1917, cited above.

(R. S. § 311. Repealed.)

This section required a report by the Treasurer, at each session of Congress, of his accounts and of the state of the Treasury. It was repealed by Act March 29, 1894, c. 48, 28 Stat. 47.

CHAPTER SIX

The Register

Sec.
485. Register.
486. Duties of Register.
487. Assistant Register.
488. Duties of Assistant Register.
489. Appointment temporarily of Acting Assistant Register.

§ 485. (R. S. § 312.) Register.

There shall be in the Department of the Treasury a Register of the Treasury, who shall be appointed by the President, by and with

the advice and consent of the Senate, and shall be entitled to a salary of [four thousand dollars] a year.

Act Sept. 2, 1789, c. 12, § 1, 1 Stat. 65. Act May 8, 1872, c. 140, § 13, 17 Stat. 85.

The office of Register was continued, with a salary of $4,500, superseding the words of this section inclosed in brackets, "four thousand dollars," on the reorganization of the Department by Act March 3, 1875, c. 130, § 2, ante, § 352. Subsequent appropriations for the Register were $4,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

(R. S. § 313. Repealed.)

This section prescribed the duties of the Register, as follows:

"It shall be the duty of the Register:

"First. To keep all accounts of the receipts and expenditures of the public money, and of all debts due to or from the United States.

"Second. To receive from the First Comptroller and Commissioner of Customs the accounts which shall have been finally adjusted, and preserve such accounts with their vouchers and certificates.

"Third. To record all warrants for the receipt or payment of moneys at the Treasury, and certify the same thereon, except those drawn by the Postmaster-General, and those drawn by the Secretary of the Treasury upon the requisitions of the Secretaries of the War and Navy Departments.

"Fourth. To transmit to the Secretary of the Treasury copies of the certificates of balances of accounts adjusted.

"Fifth. To furnish to the proper accounting officers copies of all warrants covering proceeds of Government property, where the same may be necessary in the settlement of accounts in their respective offices."

The section was expressly repealed, and so much of R. S. §§ 283, 3675, as required accounts of receipts and expenditures of public money to be kept by certain Auditors and the Register, was also repealed, by section 10 of the Dockery Act, ante, § 356; the repealing section having provided for the establishment of the Division of Bookkeeping and Warrants in the office of the Secretary, on the books of which all such accounts are to be kept.

So much of R. S. § 305, as required the Register to record warrants, was repealed by section 11 of the same act, ante, § 427. And by section 16 of that act, R. S. § 307, was amended, by substituting the Secretary of the Treasury instead of the Register, in the provision made thereby for certifying that drafts remain unpaid.

Immediately following the repeal of this section in section 10 of the Dockery Act is a clause relating to the duties of the Register, which is set forth post, § 486.

These changes in the duties of the Register were made as part of the change in the system of accounting in the Department, by provisions of said act.

Certain duties of the Register, under provisions of Title XLVIII, "Regulation of Commerce and Navigation," and Title L, "Regulation of Vessels in Domestic Commerce," in regard to the surrender or return of registers, enrollments, and licenses of vessels, were transferred to the Commissioner of Navigation by the act establishing a Bureau of Navigation, Act July 5, 1884, c. 221, § 2, post, § 891. The Bureau of Navigation was transferred to the Department of Commerce by section 4 of the act establishing that Department, Act Feb. 14, 1903, c. 552, § 4, post, § 857.

§ 486. (Act July 31, 1894, c. 174, § 10.) Duties of Register.

The duties of the Register of the Treasury shall be such as are now required of him in connection with the public debt and such

further duties as may be prescribed by the Secretary of the Treasury. (28 Stat. 208.)

This provision was part of section 10 of the Dockery Act, cited above. See notes above.

Notes of Decisions

Liability of United States for erroneous opinion given by register.—The government is not responsible for an erroneous opinion concerning the right of an administrator to transfer a United States bond given by the Register of the Treasury. German Bank of Memphis v. U. S. (1891) 26 Ct. Cl. 198.

§ 487. (R. S. § 314.) Assistant Register.

There shall be in the office of the Register of the Treasury an Assistant Register, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of [two thousand dollars] a year.

Act Feb. 20, 1863, c. 44, § 1, 12 Stat. 656. Act March 14, 1864, c. 30, § 7, 13 Stat. 28.

The office of Assistant Register was continued with a salary of $2,500, superseding the words of this section inclosed in brackets, "two thousand dollars," on the reorganization of the Department by Act March 3, 1875, c. 130, § 2, ante, § 352. The appropriation for the Assistant Register for the fiscal year 1917 was for $2,500, by Act May 10, 1916, c. 117, § 1, 39 Stat.

Besides the Assistant Register, a Deputy Register was authorized by said Act March 3, 1875, c. 130, § 2, but that office was abolished by a provision of Act Aug. 15, 1876, c. 287, § 1, ante, § 355.

See notes to § 485, ante.

§ 488. (R. S. § 315.) Duties of Assistant Register.

The Assistant Register shall perform such duties as may be devolved on him by the Register, and, in the absence of the Register, shall act in his stead; and any official record, certificate, or other document, excepting warrants, bonds, and drafts, signed by the Assistant Register, shall have the same effect as if signed by the Register.

Act Feb. 20, 1863, c. 44, § 2, 12 Stat. 656.

§ 489. (Res. Dec. 13, 1892, No. 1.) Appointment temporarily of Acting Assistant Register.

During the absence of the Register of the Treasury, and while the Assistant Register is discharging, under the law, the duties of Register during his said absence, the Secretary of the Treasury may, by appointment under his hand and seal, delegate authority to any Chief of Division or clerk in the office of Register to act as Assistant Register during the said absence of the Register. (27 Stat. 752.)

This was a resolution, entitled "Joint resolution relating to the discharge of certain official duties in the Office of Register of the Treasury."

CHAPTER SEVEN

The Commissioner of Customs

R. S. §§ 316–318. Omitted, superseded and transferred.)

This chapter of the Revised Statutes included sections 316–318. R. S. § 316 authorized the office, and sections 317 and 318 prescribed the duties of the Commissioner of Customs. The office was abolished and its duties were transferred to the Comptroller of the Treasury by section 4 of the Dockery Act, ante, § 402, in connection with other changes in the organization of the Department and the officers therein, and in the system of accounting, made by said section and other sections of that act, and R. S. § 316, is therefore omitted. R. S. § 317, as amended by Act Feb. 23, 1877, c. 69, § 1, is given in the notes to said section 4 of the Dockery Act, ante, § 402, its provisions having been superseded by those of that section and of sections 5 and 8 of that act,

ante, §§ 408, 425. R. S. § 318, requiring the Commissioner to report certain official forms for use in the collection of Customs, may be regarded as applicable to the Comptroller, and is set forth ante, § 409.

CHAPTER EIGHT

The Commissioner of Internal Revenue

Sec.
490. Commissioner of Internal Revenue.
491. Chief clerk.
492. Duties of Commissioner of Internal Revenue.
493. Deputy Commissioner of Internal Revenue.
494. Duties of Deputy Commissioner of Internal Revenue.

§ 490. (R. S. § 319.) Commissioner of Internal Revenue.

There shall be in the Department of the Treasury a Commissioner of Internal Revenue, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of six thousand dollars a year.

Act July 1, 1862, c. 119, § 1, 12 Stat. 432. Act June 30, 1864, c. 173, § 1, 13 Stat. 223.

The Office of Commissioner of Internal Revenue was continued, with the same salary, in the reorganization of the Department by Act March 3, 1875, c. 130, § 2, ante, § 352.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain specified exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Tenure of office.—Act July 1, 1862, creating the office of assessor of internal revenue, does not prescribe the tenure thereof, and the incumbent is deemed to hold such only during the pleasure of the appointing power. U. S. v. Avery (C. C. 1867) Fed. Cas. No. 14,481.

Cited without definite application, Boske v. Comingore (1899) 20 Sup. Ct. 701, 705, 177 U. S. 459, 44 L. Ed. 846.

§ 491. (R. S. § 320.) Chief Clerk.

The Commissioner of Internal Revenue is authorized to designate one of the heads of division as chief clerk of the Bureau without additional compensation.

Act Dec. 24, 1872, c. 13, § 9, 17 Stat. 403.

Recent appropriation acts have increased the salary of the Commissioner of Internal Revenue to $6,500 a year. The appropriation for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 492. (R. S. § 321.) Duties of Commissioner of Internal Revenue.

The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and

collection of internal revenue; and shall provide hydrometers, and proper and sufficient adhesive stamps and stamps or dies for expressing and denoting the several stamp duties, or, in the case of percentage duties, the amount thereof; and alter and renew or replace such stamps from time to time, as occasion may require. He may also contract for or procure the printing of requisite forms, decisions and regulations, but the printing of such forms, decisions and regulations shall be done at the Public Printing-Office, unless the Public Printer shall be unable to perform the work: Provided, That the Commissioner of Internal Revenue may, under such regulations as may be established by the Secretary of the Treasury, after due public notice, receive bids and make contracts for supplying stationery, blank-books and blanks to the collectors in the several collection-districts; and the said Commissioner shall estimate in detail by collection-districts the expense of assessing and the expense of the collection of internal revenue.

Act June 30, 1864, c. 173, § 1, 13 Stat. 223.

The Commissioner was required to submit to Congress estimates of expenses of assessing and of the collection of internal revenue, by R. S. § 3671, post, § 6741.

In the recent sundry civil appropriation acts, the annual appropriation "for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws," etc., contains a provision, renewed from year to year, that "the Commissioner of Internal Revenue shall make a detailed statement to Congress once in each year as to how he has expended this sum, and also a detailed statement of all miscellaneous expenditures in the Bureau of Internal Revenue for which appropriation is made in this act." The provision for the fiscal year 1914 was by Act June 23, 1913, c. 3, § 1, 38 Stat. 20.

Notes of Decisions

Power of commissioner to limit duties of internal revenue officers, etc.—This section, while relating generally to "matters pertaining to the assessment and collection of internal revenue," does not authorize a limitation of the duties of internal revenue officers and agents in special matters otherwise provided by law. (1908) 26 Op. Atty. Gen. 518.

The Commissioner of Internal Revenue has no authority to define and limit the official duties of deputy collectors and internal revenue agents by providing that, while it shall be a part of their official duties to appear before United States commissioners and federal grand juries in cases involving frauds against the revenue laws, up to the time when the parties charged are bound over to or held by a grand jury, after a prima facie case has been made out and the accused has been so bound over or held, such attendance shall not be a part of their official duties, and they should respond, in such cases, as a rule, only to a regular subpœna and attend "simply as witnesses." Such limitation of the duty of those officers would be in violation of the provisions of R. S. § 3163, post, § 5883, which make it the duty of all such officers to aid in the prevention, detection, and punishment of any frauds in relation to the collection of internal revenue taxes. Id.

Regulations by commissioner.—Under R. S. § 161, ante, § 235, a regulation promulgated by the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, a regulation prohibiting collectors from producing the records of their office or furnishing copies thereof, for the use of third persons, or for use as evidence in behalf of litigants in any court, is valid and binding; and a state court has no authority to require a collector to violate it, or to punish him for contempt because of his refusal to produce such records or to testify to their contents. Boske v. Comingore (1900) 20 Sup. Ct. 701, 177 U. S. 459, 44 L. Ed. 846 (affirming In re Comingore [D. C. 1899] 96 Fed. 552); In re Huttman (D. C. 1895) 70 Fed. 699, 702; In re Weeks (D. C. 1897) 82 Fed. 729, 730; In re Lamberton (D. C. 1903) 124 Fed. 446, 449; Stegall v. Thurman (D. C. 1910) 175 Fed. 813, 816. But see In re Hirsch (C. C. 1896) 74 Fed. 928 (affirmed 87 Fed. 1005, 31 C. C. A. 350).

Where, pursuant to this section and R. S. § 3165. post, § 5885, a regulation required collectors of taxes on distilled spirits to examine distiller's sureties and to require them to "justify" on a prescribed form, an oath taken by a surety with reference to his qualifications before a deputy collector was an oath taken in a case in which "a law of the United States authorizes an oath to be administered," within R. S. § 5392, incorporated in Cr. Code, § 125, post, § 10295, defining perjury. U. S. v. Hardison (D. C. 1905) 135 Fed. 419, 420.

Awards by commissioner.—When the commissioner of internal revenue makes

an award in reference to subject-matter of which he has jurisdiction, such award, if unimpeached, is binding. Dugan v. U. S. (1899) 34 Ct. Cl. 458.

Cited without definite application, Armour v. Roberts (C. C. 1907) 151 Fed. 846, 852; (1881) 17 Op. Atty. Gen. 111, 113; (1899) 22 Op. Atty. Gen. 568, 570.

§ 493. (R. S. § 322.) Deputy Commissioner of Internal Revenue.

There shall be in the office of the Commissioner of Internal Revenue a Deputy Commissioner of Internal Revenue, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of three thousand five hundred dollars a year.

Act March 3, 1863, c. 74, § 19, 12 Stat. 725. Act June 30, 1864, c. 173, § 3, 13 Stat. 224. Act July 13, 1866, c. 184, § 64, 14 Stat. 170.

R. S. § 235, also provided for "two Deputy Commissioners" at $3,000 a year each, "to be employed under the direction of the Secretary of the Treasury." Subsequent provisions, including the annual appropriations, relating to these Deputy Commissioners, are collected or referred to in the note to Act March 3, 1875, c. 130, § 2, ante, § 352. For many years previous to 1900 the appropriations were for but one Deputy Commissioner, $3,200. But in recent years, the appropriations were for a Deputy Commissioner, $4,000, and a Deputy Commissioner $3,600. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

The appointment of one additional Deputy Commissioner, two heads of divisions, and such other clerks, etc., as may be necessary, was authorized, in connection with other provisions to carry into effect section II, relating to income tax, of the Underwood Tariff Act of 1913, Act Oct. 3, 1913, c. 16, by a provision of said section II, subdivision N, ante, § 364.

A Solicitor of Internal Revenue, in the Department of Justice, was provided for by R. S. § 349, post, § 521.

The appointment in the office of the Commissioner of Internal Revenue, by the Secretary of the Treasury, of an analytical chemist and a microscopist, and the employment by the Commissioner of chemists and microscopists, were authorized by the act defining butter and imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine, Act Aug. 2, 1886, c. 840, § 14, post, § 6226. In subsequent years appropriations were made for chemists and assistant chemists. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 494. (R. S. § 323.) Duties of Deputy Commissioner of Internal Revenue.

The Deputy Commissioner of Internal Revenue shall be charged with such duties in the office of the Commissioner of Internal Revenue as may be prescribed by the Secretary of the Treasury, or by law, and shall act as Commissioner of Internal Revenue in case of the absence of that officer.

Act March 3, 1863, c. 74, § 19, 12 Stat. 725. Act June 30, 1864, c. 173, § 3, 13 Stat. 224. Act July 13, 1866, c. 184, § 64, 14 Stat. 170.

See notes to § 493, ante.

CHAPTER NINE

The Comptroller of the Currency

Sec.
495. Bureau of the Comptroller of the Currency.
496. Comptroller of the Currency.
497. Bond and oath of office of Comptroller of the Currency.
498. Deputy Comptroller of the Currency.
499. Additional Deputy Comptroller of the Currency.
500. Clerks.
501. Interest in national banks.
502. Seal of Comptroller of the Currency.
503. Rooms, vaults, furniture, etc., for Currency Bureau.
504. Banks in District of Columbia.
505. Report of Comptroller.
506. Report of expenses of liquidation of national banks.

§ 495. (R. S. § 324, as amended, Act Dec. 23, 1913, c. 6, § 10.) Bureau of the Comptroller of the Currency.

There shall be in the Department of the Treasury a Bureau charged with the execution of all laws passed by Congress relating

to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Federal Reserve Board, of all Federal Reserve notes, the chief officer of which Bureau shall be called the Comptroller of the Currency and shall perform his duties under the general directions of the Secretary of the Treasury.

Act June 3, 1864, c. 106, § 1, 13 Stat. 99. Act Dec. 23, 1913, c. 6, § 10, 38 Stat. 261.

This section, as enacted in the Revised Statutes, did not contain the words "and, under the general supervision of the Federal Reserve Board, of all Federal Reserve notes." They were inserted by amendment by section 10 of the Federal Reserve Act, last cited above.

The Comptroller of the Currency is ineligible, during his time in office and for two years thereafter, to hold any office, etc., in any bank which is a member of a Federal Reserve Bank, by a provision of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 10, post, § 9793. He is also prohibited, while acting as a member of the Federal Reserve Bank, from being an officer or director of any bank, etc., and from holding stock in any bank, etc., by a further provision of said section, post, § 9793.

The Secretary of the Treasury, the Secretary of Agriculture, and the Comptroller of the Currency were constituted "the Reserve Bank Organization Committee," and the duties and powers of said Committee were defined, by said Federal Reserve Act of Dec. 23, 1913, c. 6, § 2, post, § 9786. The Secretary of the Treasury and the Comptroller of the Currency were made members ex officio of the Federal Reserve Board created by section 10 of that act, post, § 9793, and the powers of said board were defined by section 11 of the act, § 9794. And the powers of the Comptroller of the Currency in regard to examinations of national banks were defined by amendment of R. S. § 5240, by section 21 of said Federal Reserve Act, post, § 9832.

Notes of Decisions

Appointments of receivers of national banks by Comptroller of the Currency as acts of Secretary of the Treasury.—Appointments of receivers of national banks, made by the Comptroller of the Currency as provided by law, are to be presumed to be made with the concurrence or approval of the Secretary of the Treasury, and are made by the head of a department, within the meaning of Const. art. 2, § 2. Price v. Abbott (C. C. 1883) 17 Fed. 506, 507; Frelinghuysen v. Baldwin (D. C. 1882) 12 Fed. 395, 396.

Effect of decisions of courts.—The Comptroller of the Currency must take notice of and be governed by the decisions of the courts. Williams v. Frank Levy, Inc. (City Ct. 1915) 152 N. Y. S. 454.

§ 496. (R. S. § 325.) Comptroller of the Currency.

The Comptroller of the Currency shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate; and he shall be entitled to a salary of five thousand dollars a year.

Act June 3, 1864, c. 106, § 1, 13 Stat. 99.

The office of Comptroller of the Currency was continued, at the same salary, on the reorganization of the Department by Act March 3, 1875, c. 130, § 2, ante, § 352.

The Comptroller of the Currency, as ex officio member of the Federal Reserve Board, is to receive an additional salary of $7,000 annually for his services as a member of said Board, by a provision of the Federal Reserve Act of Dec. 23, 1913, c. 6, § 10, post, § 9793.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute tthe rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any

act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 497. (R. S. § 326.) Bond and oath of office of Comptroller of the Currency.

The Comptroller of the Currency shall, within fifteen days from the time of notice of his appointment, take and subscribe the oath of office; and he shall give to the United States a bond in the penalty of one hundred thousand dollars, with not less than two responsible sureties, to be approved by the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office.

Act June 3, 1864, c. 106, § 1, 13 Stat. 99.

§ 498. (R. S. § 327.) Deputy Comptroller of the Currency.

There shall be in the Bureau of the Comptroller of the Currency a Deputy Comptroller of the Currency, to be appointed by the Secretary, who shall be entitled to a salary of two thousand five hundred dollars a year, and who shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office or during the absence or inability of the Comptroller. The Deputy Comptroller shall also take the oath of office prescribed by the Constitution and laws of the United States, and shall give a like bond in the penalty of fifty thousand dollars.

Act June 3, 1864, c. 106, § 1, 13 Stat. 99.

The office of Deputy Comptroller of the Currency was continued, at a salary of $3,000, on the reorganization of the Department, by Act March 3, 1875, c. 130, § 2, ante, § 352. Subsequent appropriations varied from this amount. For the fiscal year 1910, there was appropriated for Deputy Comptroller, $3,500, and also for Deputy Comptroller, $3,000, with provisions relating to the appointment and the powers and duties of such additional Deputy Comptroller, by Act March 3, 1909, c. 297, § 1, post, § 499. Appropriations of the same amounts for the fiscal year 1917 were made by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 496, ante.

Notes of Decisions

Deputy comptroller acting as comptroller.—A certificate issuing from the office of the comptroller of the currency, and under the seal of that office, given by the deputy comptroller as "acting" comptroller, held good. Keyser v. Hitz (1890) 10 Sup. Ct. 290, 293, 133 U. S. 138, 33 L. Ed. 531.

The deputy comptroller of the currency being authorized by law to act for the comptroller in certain contingencies, the courts will presume, in the absence of any showing to the contrary, that the deputy, in acting for the comptroller in any particular instance, has acted lawfully. Keyser v. Hitz (1890) 10 Sup. Ct. 293, 133 U. S. 138, 33 L. Ed. 531; Young v. Wempe (C. C. 1891) 46 Fed. 354.

The state courts take judicial notice of the acts of congress providing for the appointment of a deputy comptroller of the currency, and authorizing him to perform the duties of his principal. Davis' Estate v. Watkins (1898) 76 N. W. 575, 56 Neb. 288.

§ 499. (Act March 4, 1909, c. 297, § 1.) Additional Deputy Comptroller of the Currency.

Office of the Comptroller of the Currency: For Comptroller of the Currency, five thousand dollars; Deputy Comptroller, three thousand five hundred dollars; Deputy Comptroller, three thousand dollars, who shall be appointed by the Secretary of the Treasury, and shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office of Comptroller and Deputy Comptroller or during the absence or inability of the Comptroller and the Deputy Comptroller, and said Assistant Deputy Comptroller shall give a like bond in the penalty of fifty thousand dollars. (35 Stat. 867.)

This was a provision of the legislative, executive, and judicial appropriation

act for the fiscal year 1910, cited above. The appropriations were repeated in the similar acts for subsequent years.

See notes to R. S. § 327, ante, § 498.

See notes to § 496, ante.

Notes of Decisions

Previous provision for additional deputy comptroller.—The provision in the appropriation act for the preceding year, Act May 22, 1908, c. 186, § 1, 35 Stat. 203, for a second deputy comptroller of the currency, gave no power to the Secretary of the Treasury under R. S. § 169, ante, § 248, to appoint a person to fill the office; no such authority being expressly granted in the act. The power to appoint such second deputy comptroller was lodged in the President. (1908) 26 Op. Atty. Gen. 627.

The second deputy comptroller provided for by said Act May 22, 1908, had power to perform all the duties of the comptroller and first deputy comptroller of the currency in the absence or disability of those officers. Id.

The Secretary of the Treasury, upon the request of the comptroller of the currency and with the approval of the President, might require said second deputy comptroller to execute a voluntary bond in such penalty as might to him seem adequate to protect the public interests. Id.

§ 500. (R. S. § 328.) Clerks.

The Comptroller of the Currency shall employ, from time to time, the necessary clerks, to be appointed and classified by the Secretary of the Treasury, to discharge such duties as the Comptroller shall direct.

Act June 3, 1864, c. 106, § 1, 13 Stat. 100.

Provisions as to the employment of clerks by the heads of Departments were made by R. S. § 169, and Act Aug. 5, 1882, c. 389, § 4, ante, §§ 248, 249.

Clerks in the office of the Comptroller of the Currency are provided for in the annual appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

A list of all officers, agents, clerks, and other employés of the office of the Comptroller of the Currency, and persons connected with the work of the office, was required to be furnished for the Official Register, by a provision of Act April 28, 1902, c. 594, § 1, post, § 7127.

See notes to § 496, ante.

§ 501. (R. S. § 329.) Interest in national banks.

It shall not be lawful for the Comptroller or the Deputy Comptroller of the Currency, either directly or indirectly, to be interested in any association issuing national currency under the laws of the United States.

Act June 3, 1864, c. 106, § 1, 13 Stat. 100.

§ 502. (R. S. § 330, as amended, Act Feb. 18, 1875, c. 80, § 1.) Seal of Comptroller of the Currency.

The seal devised by the Comptroller of the Currency for his office, and approved by the Secretary of the Treasury, shall continue to be the seal of office of the Comptroller, and may be renewed when necessary. A description of the seal, with an impression thereof, and a certificate of approval by the Secretary of the Treasury, shall be filed in the Office of the Secretary of State.

Act June 3, 1864, c. 106, § 2, 13 Stat. 100. Act Feb. 18, 1875, c. 80, 18 Stat. 317.

This section, as enacted in the Revised Statutes, contained only the first sentence, providing for the continuance of the seal, and the renewal thereof. The last sentence, providing for the filing of a description of the seal, etc., in the office of the Secretary of State, was added by Act Feb. 18, 1875, c. 80, last cited above.

§ 503. (R. S. § 331.) Rooms, vaults, furniture, etc., for Currency Bureau.

There shall be assigned, from time to time, to the Comptroller of the Currency, by the Secretary of the Treasury, suitable rooms in the Treasury building for conducting the business of the Currency Bureau, containing safe and secure fire-proof vaults, in which the Comptroller shall deposit and safely keep all the plates not necessarily in the possession of engravers or printers, and other valuable

things belonging to his Department; and the Comptroller shall from time to time furnish the necessary furniture, stationery, fuel, lights, and other proper conveniences for the transaction of the business of his office.

Act June 3, 1864, c. 106, § 3, 13 Stat. 100.

§ 504. (R. S. § 332.) Banks in District of Columbia.

The Comptroller of the Currency, in addition to the powers conferred upon him by law for the examination of national banks, is further authorized, whenever he may deem it useful, to cause examination to be made into the condition of any bank in the District of Columbia organized under act of Congress. The Comptroller, at his discretion, may report to Congress the results of such examination. The expense necessarily incurred in any such examination shall be paid out of any appropriation made by Congress for special bank examinations.

Act Jan. 20, 1873, c. 43, 17 Stat. 412.

§ 505. (R. S. § 333, as amended, Act Feb. 18, 1875, c. 80, § 1.) Report of Comptroller.

The Comptroller of the Currency shall make an annual report to Congress, at the commencement of its session, exhibiting—

First. A summary of the state and condition of every association from which reports have been received the preceding year, at the several dates to which such reports refer, with an abstract of the whole amount of banking capital returned by them, of the whole amount of their debts and liabilities, the amount of circulating notes outstanding, and the total amount of means and resources, specifying the amount of lawful money held by them at the times of their several returns, and such other information in relation to such associations as, in his judgment, may be useful.

Second. A statement of the associations whose business has been closed during the year, with the amount of their circulation redeemed and the amount outstanding.

Third. Any amendment to the laws relative to banking by which the system may be improved, and the security of the holders of its notes and other creditors may be increased.

Fourth. A statement exhibiting under appropriate heads the resources and liabilities and condition of the banks, banking companies, and savings-banks organized under the laws of the several States and Territories; such information to be obtained by the Comptroller from the reports made by such banks, banking companies, and savings-banks to the legislatures or officers of the different States and Territories, and, where such reports cannot be obtained, the deficiency to be supplied from such other authentic sources as may be available.

Fifth. The names and compensation of the clerks employed by him, and the whole amount of the expenses of the banking department during the year.

Act June 3, 1864, c. 106, § 61, 13 Stat. 117. Act Feb. 19, 1873, c. 166, § 1, 17 Stat. 466. Act Feb. 18, 1875, c. 80, 18 Stat. 317.

The amendment of this section by Act Feb. 18, 1875, c. 80, § 1, cited above, consisted in the insertion, after the word "Congress," near the beginning of the section, of the words, "at the commencement of its session."

The report of the Comptroller was to include the expenses of liquidation of failed national banks, by a provision of Act April 28, 1902, c. 594, § 1, post, § 506.

Provisions applicable to all the Departments, as to the time for making annual reports, and for furnishing copies to the printer, are contained in R. S. §§ 195, 196, Act July 1, 1916, c. 209, § 3, ante, §§ 278, 279, 279a.

The printing and distribution of the report of the Comptroller of the Currency were provided for by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 38, post, § 7084.

§ 506. (Act April 28, 1902, c. 594, § 1.) Report of expenses of liquidation of national banks.

The Comptroller of the Currency is hereby directed to include in his Annual Report to the Speaker of the House of Representatives, expenses incurred during each year, in liquidation of each failed national bank separately. (32 Stat. 138.)

This was a proviso annexed to an appropriation for the office of the Comptroller of the Currency in the legislative, executive, and judicial appropriation act for the fiscal year 1903, cited above.

CHAPTER TEN

The Bureau of Statistics

(R. S. §§ 334–342. Transferred.)

This chapter of the Revised Statutes included sections 334–342, relating to the Bureau of Statistics, as a Bureau of the Treasury Department. The Bureau was transferred to the Department of Commerce, and the duties, powers, etc., of the head of the Treasury Department in and over the Bureau were vested in the head of the Department of Commerce, by the act establishing that Department, Act Feb. 14, 1903, c. 552, §§ 4, 10, post, §§ 857, 859. These sections are therefore set forth post, §§ 877–880, 882, 884, 886–888.

Subsequent provisions for the consolidation of the Bureau with other bureaus, and relating to such consolidated bureau, are set forth post, under Title XII A, "The Department of Commerce."

CHAPTER ELEVEN

The Bureau of the Mint

Sec.
507. Bureau of the Mint.
508. Salary and expenses of Director.
509. Powers of and reports by Director.

§ 507. (R. S. § 343.) Bureau of the Mint.

There shall be established in the Treasury Department a Bureau of the Mint, embracing in its organization and under its control all mints for the manufacture of coin, and all assay-offices for the stamping of bars, which are now, or which may be hereafter, authorized by law. The chief officer of the said Bureau shall be denominated the Director of the Mint, and shall be under the general direction of the Secretary of the Treasury. He shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold his office for the term of five years, unless sooner removed by the President, upon reasons to be communicated by him to the Senate.

Act Feb. 12, 1873, c. 131, § 1, 17 Stat. 424.

Provisions relating to the various mints, assay-offices, etc., and to the coins and coinage, are contained in Title XXXVII, "Coinage."

§ 508. (R. S. § 344.) Salary and expenses of Director.

There shall be allowed to the Director of the Mint an annual salary of four thousand five hundred dollars, payable monthly, and actual necessary traveling expenses in visiting the different mints and assay-offices, for which vouchers shall be rendered.

Act Feb. 12, 1873, c. 131, § 12, 17 Stat. 426.

For the Director of the Mint the appropriation for the fiscal year 1917 was $5,000, by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts

are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 509. (R. S. § 345.) Powers of and reports by Director.

The Director of the Mint shall have the general supervision of all mints and assay-offices, and shall make an annual report to the Secretary of the Treasury of their operations, at the close of each fiscal year, and from time to time such additional reports, setting forth the operations and condition of such institutions, as the Secretary of the Treasury shall require, and shall lay before him the annual estimates for their support. And the Secretary of the Treasury shall appoint the number of clerks, classified according to law, necessary to discharge the duties of said Bureau.

Act Feb. 12, 1873, c. 131, § 2, 17 Stat. 424.

The printing and distribution of the reports of the Director of the Mint were provided for by the Public Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 37, post, § 7084.

A provision of Act June 20, 1874, c. 328, § 1, 18 Stat. 96, that all salaries under the Director of the Mint at Washington and at the various mints should be at the rates appropriated for in that act, was practically superseded by subsequent appropriations for officers, clerks, and employés, and rates of compensation different from those fixed by said act. The provisions for the office for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

CHAPTER ELEVEN A

The Bureau of Engraving and Printing

This chapter, inserted here as additional to the original chapters of Title VII of the Revised Statutes, includes provisions relating to the Bureau of Engraving and Printing in the Treasury Department.

Sec.
510. Powers of and reports by Director.
511. Leaves of absence to employés of Bureau.
512. Leaves of absence to compositors and pressmen in awards division of Bureau.
513. Impressions of portraits to be furnished.
513a. Engraved plates of portraits of deceased Senators and Representatives; delivery to heirs or legal representatives.
514. Disposition of receipts for miscellaneous work.

§ 510. (Act June 4, 1897, c. 2, § 1.) Powers of and reports by Director.

All the business of the Bureau of Engraving and Printing shall be under the immediate control of the director of said Bureau, subject to the direction of the Secretary of the Treasury, and the director of the said Bureau shall report to and be responsible directly to the Secretary of the Treasury. (30 Stat. 18.)

This was a proviso annexed to an appropriation for engravers, etc., materials, in the sundry civil appropriation act for the fiscal year 1898, cited above. The same proviso was contained in the similar appropriation for the preceding year.

Annual appropriations for the Bureau are made in the legislative, executive,

and judicial appropriation acts. They are accompanied by a provision that "no other fund appropriated by this or any other Act shall be used for services, in the Bureau of Engraving and Printing, of the character specified in this paragraph, except in cases of emergency arising after the passage of this Act, and then only on the written approval of the Secretary of the Treasury, and in every such case of emergency a detailed statement of the expenditures on account thereof shall be reported to Congress at the beginning of each regular session." Recent appropriations provided for the Director, $6,000, Assistant Director, $3,500, and various other officers, clerks and employés. The provisions for the fiscal year 1917, were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Appropriations for expenditures of the Bureau are not to be contingent expenses of the Treasury Department, and are not to be subject to the provisions of R. S. § 240, ante, § 371, and R. S. § 3683, post, § 6784, by a preceding provision of this act, ante, § 372.

The Secretary of the Treasury was authorized, at the request of a Senator, Representative, or Delegate in Congress, or certain other officers, etc., to furnish impressions from any portrait or vignette, part of the engraved stock of the Bureau, by Act Dec. 22, 1879, c. 2, post, § 513.

The Secretary of the Treasury was authorized to deliver the engraved plates of portraits of deceased Senators and Representatives to their heirs or legal representatives on such terms and conditions as he may determine, by Act July 1, 1916, c. 209, § 1, post, § 513a.

§ 511. (Act July 6, 1892, c. 154.) Leaves of absence to employés of Bureau.

The employees of the Bureau of Engraving and Printing, including the pieceworkers, shall be allowed leave of absence with pay, not exceeding thirty days in any one year, under such regulations and at such time or times as the Chief of the Bureau, with the approval of the Secretary of the Treasury, may prescribe and designate: Provided, That the length of the leave of absence of any employee of said Bureau doing piecework, and the pay during such leave of absence, shall be determined by the average amount of work done by such person and the pay therefor during the several months of the year. (27 Stat. 87.)

This act was entitled "An act to allow thirty days' leave of absence to employees in the Bureau of Engraving and Printing."

This act superseded a provision of Act March 3, 1887, c. 392, § 1, 24 Stat. 594, which authorized leaves of absence of fifteen days.

Notes of Decisions

Provisions not repealed by Act March 3, 1893, c. 211, § 5.—Employés of the Bureau of Engraving and Printing are entitled to leave of absence under this act, notwithstanding the provisions of Act March 3, 1893, § 5, ante, § 238, applicable to all clerks and employés in the executive departments, as those provisions did not operate as an implied repeal of the special provisions of this act. (1896) 21 Op. Atty. Gen. 338.

Rates of pay of pieceworkers during leave of absence.—This act contemplated a maximum leave of absence to pieceworkers of thirty days, with a continuance of average compensation; and a leave of absence with pay during the same to a pieceworker whose service and consequent earnings are less than the maximum, determined by the average amount of his work and of his pay therefor. (1892) 20 Op. Atty. Gen. 429.

§ 512. (Act June 8, 1896, c. 373.) Leaves of absence to compositors and pressmen in awards division of Bureau.

The compositors and pressmen employed in the awards division of the Bureau of Engraving and Printing shall be allowed leave of absence with pay not exceeding thirty days in any one year, or a pro rata portion thereof for a less time than one year, under such regulations and such time or times as the Chief of the Bureau, with the approval of the Secretary of the Treasury, may prescribe and designate, and in conformity with the Act approved July sixth, eighteen hundred and ninety-two, granting leaves of absence with pay to the employees of the Bureau of Engraving and Printing. (29 Stat. 275.)

This was a provision of the deficiency appropriation act for the fiscal year 1896, cited above.

Act July 6, 1892, c. 154, mentioned in this provision, is set forth ante, § 511.

§ 513. (Act Dec. 22, 1879, c. 2.) Impressions of portraits to be furnished.

That the Secretary of the Treasury, at the request of a Senator, Representative, or Delegate in Congress, the head of a department or bureau, art association, or library, be, and he is hereby authorized to furnish impressions from any portrait or vignette which is now, or may hereafter be, a part of the engraved stock of the Bureau of Engraving and Printing, at such rates and under such conditions as he may deem necessary to protect the public interests. (21 Stat. 59.)

This act was entitled "An act relating to printing impressions from portraits and vignettes."

§ 513a. (Act July 1, 1916, c. 209, § 1.) Engraved plates of portraits of deceased Senators and Representatives; delivery to heirs or legal representatives.

The Secretary of the Treasury is authorized to deliver the engraved plates of portraits that have been or may hereafter be made of deceased Senators and Representatives in Congress, to their heirs or legal representatives on such terms and conditions as he may determine. (39 Stat.)

This was a provision in the sundry civil appropriation act for the fiscal year 1917, cited above.

§ 514. (Act Aug. 4, 1886, c. 902, § 1.) Disposition of receipts for miscellaneous work.

Hereafter receipts for miscellaneous work authorized by law to be performed by the Bureau of Engraving and Printing for the several Departments of the Government, and the amounts properly chargeable to national banks for engraving their plates shall be deposited, and covered into the Treasury as miscellaneous receipts. (24 Stat. 227.)

This was a proviso annexed to an appropriation for engravers, etc., materials, in the sundry civil appropriation act for the fiscal year 1887, cited above.

The similar acts for recent years contain a provision for the particular fiscal year only, that, during such fiscal year, all proceeds derived from work performed by the Bureau, by direction of the Secretary of the Treasury, not covered and embraced in the appropriation for the Bureau for the said fiscal year, instead of being covered into the Treasury as miscellaneous receipts, as provided by this act be credited when received to the appropriation for the bureau for the fiscal year. The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

CHAPTER ELEVEN B

The Bureau of War Risk Insurance

This chapter, inserted here as additional to the original chapters of Title VII of the Revised Statutes, includes provisions relating to the Bureau of War Risk Insurance in the Treasury Department.

Sec.
514a. Bureau of War Risk Insurance; Director; salary.
514b. Duties of Bureau; insurance of American vessels, freight, etc., and cargoes.
514c. Form of policy; rates of premium; proceeds of premiums.
514d. Regulations for carrying out purposes of act.
514e. Advisory Board; duties; compensation of members; actions on claims for losses.
514f. Payment of claims for losses.
514g. Appropriation for payment of losses.
514h. Appropriation for expenses.
514i. Suspension of operations of act authorized.
514ii. Suspension of operation of act; time for.
514j. Statement of expenditures and receipts.
514jj. Disposition of receipts from premiums and salvage.

§ 514a. (Act Sept. 2, 1914, c. 293, § 1.) Bureau of War Risk Insurance; Director; salary.

There is established in the Treasury Department a bureau to be known as the Bureau of War Risk Insurance, the director of which shall be entitled to a salary at the rate of $5,000 per annum. (38 Stat. 711.)

This section, and §§ 514b–514i, 514j, post, were part of an act entitled "An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," with the following preamble: "Whereas, the foreign commerce of the United States is now greatly impeded and endangered through the absence of adequate facilities for the insurance of American vessels and their cargoes against the risks of war; and whereas, it is deemed necessary and expedient that the United States shall temporarily provide for the export shipping trade of the United States adequate facilities for the insurance of its commerce against the risks of war: Therefore" be it enacted, etc. Section 11 of said act provided that the act should take effect from and after its passage. Section 9 of said act, post, § 514i, authorized the President to suspend the operation of the act as to that part of it authorizing insurance against loss or damage by risks of war, such suspension to be made, at any event, within two years after the passage of the act. Said section 9 was amended by Act Aug. 11, c. 332, § 1, set forth post, § 514ii, by requiring such suspension to be made within three years from the date of the approval of the act.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 514b. (Act Sept. 2, 1914, c. 293, § 2.) Duties of Bureau; insurance of American vessels, freight, etc., and cargoes.

The said Bureau of War Risk Insurance, subject to the general direction of the Secretary of the Treasury, shall, as soon as practicable, make provisions for the insurance by the United States of American vessels, their freight and passage moneys, and cargoes shipped or to be shipped therein, against loss or damage by the risks of war, whenever it shall appear to the Secretary that American vessels, shippers, or importers in American vessels are unable in any trade to secure adequate war risk insurance on reasonable terms. (38 Stat. 711.)

§ 514c. (Act Sept. 2, 1914, c. 293, § 3.) Form of policy; rates of premium; proceeds of premiums.

The Bureau of War Risk Insurance, with the approval of the Secretary of the Treasury, is hereby authorized to adopt and publish a form of war risk policy, and to fix reasonable rates of premium for the insurance of American vessels, their freight and passage moneys and cargoes against war risks, which rates shall be subject to such change, to each port and for each class, as the Secretary shall find may be required by the circumstances. The proceeds of the aforesaid premiums when received shall be covered into the Treasury of the United States. (38 Stat. 711.)

All moneys received from premiums under this act, and from salvage, is to be covered into the Treasury to the credit of the appropriation for the payment of losses, and is made available for the purposes thereof, by Act Aug. 11, 1916, c. 332, § 2, post, § 514jj.

§ 514d. (Act Sept. 2, 1914, c. 293, § 4.) Regulations for carrying out purposes of act.

The Bureau of War Risk Insurance, with the approval of the Secretary of the Treasury, shall have power to make any and all rules and regulations necessary for carrying out the purposes of this Act. (38 Stat. 711.)

§ 514e. (Act Sept. 2, 1914, c. 293, § 5.) Advisory Board; duties; compensation of members; actions on claims for losses.

The Secretary of the Treasury is authorized to establish an advisory board, to consist of three members skilled in the practices of war risk insurance, for the purpose of assisting the Bureau of War Risk Insurance in fixing rates of premium and in adjustment of claims for losses, and generally in carrying out the purposes of this Act; the compensation of the members of said board to be determined by the Secretary of the Treasury, but not to exceed $25 a day each, while actually employed. In the event of disagreement as to the claim for losses, or amount thereof, between the said bureau and the parties to such contract of insurance, an action on the claim may be brought against the United States in the District Court of the United States, sitting in admiralty, in the district in which the claimant or his agent may reside. (38 Stat. 711.)

§ 514f. (Act Sept. 2, 1914, c. 293, § 6.) Payment of claims for losses.

The Director of the Bureau of War Risk Insurance, upon the adjustment of any claims for losses in respect of which no action shall have been begun, shall, on approval of the Secretary of the Treasury, promptly pay such claim for losses to the party in interest; and the Secretary of the Treasury is directed to make provision for the speedy adjustment of claims for losses and also for the prompt notification of parties in interest of the decisions of the bureau on their claims. (38 Stat. 712.)

All moneys received from premiums under this act, and from salvage, is to be covered into the Treasury to the credit of the appropriation for the payment of losses, and is made available for the purposes thereof, by Act Aug. 11, 1916, c. 332, § 2, post, § 514jj.

§ 514g. (Act Sept. 2, 1914, c. 293, § 7.) Appropriation for payment of losses.

For the purpose of paying losses accruing under the provisions of this Act there is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $5,000,000. (38 Stat. 712.)

All moneys received from premiums under this act, and from salvage, is to be covered into the Treasury to the credit of this appropriation, and is made available for the purposes thereof, by Act Aug. 11, 1916, c. 332, § 2, post, § 514jj.

§ 514h. (Act Sept. 2, 1914, c. 293, § 8.) Appropriation for expenses.

There is hereby appropriated, for the purpose of defraying the expenses of the establishment and maintenance of the Bureau of War Risk Insurance, including the payment of salaries herein authorized and other personal services in the District of Columbia, out of any money in the Treasury of the United States not otherwise appropriated, the sum of $100,000. (38 Stat. 712.)

§ 514i. (Act Sept. 2, 1914, c. 293, § 9.) Suspension of operations of act authorized.

The President is authorized whenever, in his judgment, the necessity of further war insurance by the United States shall have ceased to exist, to suspend the operations of this Act in so far

as it authorizes insurance by the United States against loss or damage by risks of war, which suspension shall be made, at any event, within two years after the passage of this Act, but shall not affect any insurance outstanding at the time or any claims pending adjustment. For the purpose of the final adjustment of any such outstanding insurance or claims, the Bureau of War Risk Insurance may, in the discretion of the President, be continued in existence a further period not exceeding one year. (38 Stat. 712.)

§ 514ii. (Act Aug. 11, 1916, c. 332, § 1.) Suspension of operation of act; time for.

That section nine of an Act establishing a Bureau of War Risk Insurance, approved September second, nineteen hundred and fourteen, be, and it is hereby, amended so as to require the suspension of the operations of the Act within three years from the date said Act was approved. (39 Stat.)

This was section 1 of an act entitled "An act to amend an act entitled 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September second, nineteen hundred and fourteen." Section 2 of said act is set forth post, § 514jj.

§ 514j. (Act Sept. 2, 1914, c. 293, § 10.) Statement of expenditures and receipts.

A detailed statement of all expenditures under this Act and of all receipts hereunder shall be submitted to Congress at the beginning of each regular session. (38 Stat. 712.)

§ 514jj. (Act Aug. 11, 1916, c. 332, § 2.) Disposition of receipts from premiums and salvage.

All moneys received from premiums and from salvage shall be covered into the Treasury to the credit of the appropriation made for the payment of losses and be available for the purposes thereof. (39 Stat.)

See notes to § 514ii, ante.

TITLE VIII

THE DEPARTMENT OF JUSTICE

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§ 515. (R. S. § 346.) Establishment of Department of Justice.

There shall be at the seat of Government an Executive Department to be known as the Department of Justice, and an Attorney-General, who shall be the head thereof.

Act Sept. 24, 1789, c. 20, § 35, 1 Stat. 92. Act June 22, 1870, c. 150, § 1, 16 Stat. 162.

In case of the death, resignation, absence, or sickness of the head of any

Department, the first or sole assistant thereof is required, unless otherwise directed, to perform the duties of the head of such Department until a successor is appointed, or such absence or sickness shall cease, by R. S. § 177, set forth ante, § 259. In case of the death, resignation, absence, or sickness of the head of any Department, except where the Attorney General is concerned, the President may authorize and direct the head of any other Department or any officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease, by R. S. § 179, also set forth ante, § 261.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Nature of office of Attorney General.—Exposition of the constitution of the office of Attorney General as a branch of the executive administration of the United States. (1854) 6 Op. Atty. Gen. 326.

Powers and duties of department.—The initiation and control of a suit to cancel a fraudulent patent for land lies with the Attorney General. But the right to bring such suit exists only when the government has an interest in the remedy sought. U. S. v. San Jacinto Tin Co. (1888) 8 Sup. Ct. 850, 853, 125 U. S. 273, 31 L. Ed. 747 (affirming [C. C. 1885] 23 Fed. 279); U. S. v. Beebe (1888) 8 Sup. Ct. 1083, 1085, 127 U. S. 338, 32 L. Ed. 121 (affirming decree [C. C. 1883] 17 Fed. 36); (1894) 21 Op. Atty. Gen. 13.

While there is no specific federal statute, empowering the Attorney General of the United States to bring actions and suits in the name of the United States, yet the power resides in him as the head of the Department of Justice to do so. Cohen v. U. S. (1912) 38 App. D. C. 123.

The Department of Justice is charged with the duty of determining when the United States shall sue, for what it shall sue, and that such suits shall be brought in appropriate cases. (1895) 21 Op. Atty. Gen. 195.

Advising committees of Congress.—A committee of the House of Representatives having referred the papers in certain claims to the Attorney General, with a request for an official opinion thereon, the papers were returned unaccompanied by an opinion, the Attorney General holding (in accordance with the views of several of his predecessors on the same point) that it is not within his province to advise committees of Congress upon questions of law occurring in matters before them. (1872) 14 Op. Atty. Gen. 17.

Cited without definite application, U. S. v. Denison (1897) 80 Fed. 370, 371, 25 C. C. A. 496; U. S. v. Fleming (1897) 80 Fed. 372, 373, 25 C. C. A. 498; In re Neagle (C. C. 1889) 39 Fed. 833, 858, 5 L. R. A. 78 (affirmed Cunningham v. Neagle [1890] 10 Sup. Ct. 658, 135 U. S. 1, 34 L. Ed. 55); U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862, 867.

§ 516. (R. S. § 347.) Solicitor-General.

There shall be in the Department of Justice an officer learned in the law, to assist the Attorney-General in the performance of his duties, called the Solicitor-General, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of seven thousand five hundred dollars a year. In case of a vacancy in the office of Attorney-General, or of his absence or disability, the Solicitor-General shall have power to exercise all the duties of that office.

Act June 22, 1870, c. 150, § 2, 16 Stat. 162.

The annual appropriation for compensation of the Solicitor-General, by the legislative, executive, and judicial appropriation acts, has varied from the

amount fixed by this section, and in recent years is $10,000. The appropriation of that amount for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

Notes of Decisions

Acting as Attorney General.—That the commission of a special assistant to a district attorney is signed by the Solicitor General as "Acting Attorney General" does not affect the validity of the appointment. U. S. v. Twining (D. C. 1904) 132 Fed. 129, 130.

§ 517. (R. S. § 348.) Assistant Attorneys-General.

There shall be in the Department of Justice three officers, learned in the law, called the Assistant Attorneys-General, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall assist the Attorney-General and Solicitor-General in the performance of their duties. Each of them is entitled to a salary of five thousand dollars a year.

Act June 22, 1870, c. 150, § 2, 16 Stat. 162. Act Feb. 25, 1871, c. 72, 16 Stat. 432.

An additional Assistant Attorney-General was authorized by a provision of Act July 11, 1890, c. 697, § 1, post, § 518.

Provisions for the appointment of an additional Assistant Attorney-General to facilitate the speedy disposition of Indian depredation claims in the Court of Claims, contained in Act March 3, 1891, c. 538, § 12, 26 Stat. 854, and Act Dec. 21, 1893, c. 3, 28 Stat. 19, are omitted as temporary in their nature. And a provision for a similar appointment during the existence of the Spanish Claims Commission, contained in Act March 2, 1901, c. 800, § 6, 31 Stat. 878, is also omitted, as temporary merely.

The appointment of an Assistant to the Attorney-General, with compensation at the rate of $7,000 per annum, and an Assistant Attorney-General, at a compensation at the rate of $5,000 per annum, under and to be paid from an appropriation for the enforcement of the Interstate Commerce Act and other acts and to perform such duties as should be required of them by the Attorney-General, was authorized by a provision of Act March 3, 1903, c. 1006, § 1, 32 Stat. 1062; and appropriations for such Assistant to the Attorney-General and additional Assistant Attorneys-General were continued in the legislative, executive and appropriation acts for subsequent years. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat. The salary of the Assistant to the Attorney-General was fixed at $9,000 by a provision of Act Oct. 22, 1913, c. 32, post, § 520.

The appointment of an Assistant Attorney-General, a Deputy Assistant Attorney-General, and four attorneys, to have charge of the interests of and to represent the government in all matters of reappraisement and classification of imported goods and of all litigation incident thereto, was authorized by Act Aug. 5, 1909, c. 6, § 28, amending Act June 10, 1890, c. 407, besides other amendments, by adding thereto a new section, constituting section 30 of said Act June 10, 1890, c. 407, as so amended, which is set forth, post, § 519.

The annual appropriations by said acts for recent years have provided for an Assistant to the Attorney-General, $7,000; seven Assistant Attorneys-General, at $5,000 each; and numerous attorneys, assistant attorneys, and other officers, at various rates of compensation. The provisions for the fiscal year 1914 were by Act March 4, 1913, c. 142, § 1, 37 Stat. 781. Those for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat., and were as follows: "Assistant to the Attorney General, $9,000; six Assistant Attorneys General, at $7,500 each," etc.

The officers designated as Assistant Attorney-General for the Post-Office Department, authorized by R. S. § 390, post, § 570, and Assistant Attorney-General for the Interior Department, are the law officers for each of those Departments, and, although each is designated Assistant Attorney-General, their offices are of the same nature as those of the Solicitor of the Treasury and other Solicitors, authorized by R. S. § 349, and subsequent provisions, post, §§ 521–525.

See notes to § 516, ante.

§ 518. (Act July 11, 1890, c. 667, § 1.) Additional Assistant Attorney-General.

For an additional assistant Attorney-General to be appointed by the President, by and with the advice and consent of the Senate, who shall receive a compensation at the rate of five thousand dollars per annum. (26 Stat. 265.)

This was a provision accompanying the appropriation for three Assistant

Attorneys-General in the legislative, executive, and judicial appropriation act for the fiscal year 1891, cited above.

See notes to R. S. §§ 347, 348, ante, §§ 516, 517.

§ 519. (Act June 10, 1890, c. 407, § 30, as amended, Act Aug. 5, 1909, c. 6, § 28.) Assistant Attorney-General, Deputy Assistant Attorney-General, and attorneys, in charge of customs matters and litigation.

There shall be appointed by the President, by and with the advice and consent of the Senate, an Assistant Attorney-General, who shall exercise the functions of his office under the supervision and control of the Attorney-General of the United States, and who shall be paid a salary of ten thousand dollars per annum; and there shall also be appointed by the Attorney-General of the United States a Deputy Assistant Attorney-General, who shall be paid a salary of seven thousand five hundred dollars per annum, and four attorneys, who shall be paid salaries of five thousand dollars per annum each. Said attorneys shall act under the immediate direction of said Assistant Attorney-General, or, in case of his absence or a vacancy in his office, under the direction of said Deputy Assistant Attorney-General, and said Assistant Attorney-General, Deputy Assistant Attorney-General, and attorneys shall have charge of the interests of the Government in all matters of reappraisement and classification of imported goods and of all litigation incident thereto, and shall represent the Government in all the courts and before all tribunals wherein the interests of the Government require such representation.

But the Attorney-General may, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such special attorneys and counselors at law in the conduct of customs cases as he may think necessary to assist said Assistant Attorney-General in the discharge of any of the duties incumbent upon him and his said subordinates, and shall stipulate with such attorneys and counsel the amount of compensation and shall have supervision of their conduct and proceedings. (36 Stat. 108.)

This section was added to Act June 10, 1890, c. 407, the Customs Administrative Act of 1890, as section 30 thereof, by section 28 of the Payne-Aldrich Tariff Act of 1909, cited above.

This section was not repealed or affected by the repeal of sections 1–42 of said Payne-Aldrich Tariff Act of 1909, by the Underwood Tariff Act of Oct. 3, 1913, c. 16, § IV, S, by a proviso to that effect annexed to said section IV, S, thereof, post, § 5316.

Appropriations for conduct of customs cases have been made by the sundry civil appropriation acts for each year subsequent to the enactment of this section. The provisions so made have varied from those of this section as to the number and amounts of salaries of the officers, attorneys, etc., included. Appropriations, for the fiscal year 1917, for an Assistant Attorney General, $8,000, assistant attorney, $3,000, special attorneys and counselors at law in the conduct of customs cases, to be employed and their compensation fixed by the Attorney General, as authorized by section 30 of Act Aug. 5, 1909, $36,000, necessary clerical assistance and other employés at the seat of government and elsewhere, to be employed and their compensation fixed by the Attorney General, were made by Act July 1, 1916, c. 209, § 1, 39 Stat.

See notes to R. S. §§ 347, 348, ante, §§ 516, 517.

§ 520. (Act Oct. 22, 1913, c. 32.) Assistant to the Attorney-General; salary.

For salary of the Assistant to the Attorney General, which is hereby fixed at the rate of $9,000 per annum; in addition to the $7,000 heretofore appropriated, for the balance of the fiscal year nineteen hundred and fourteen, $1,500, or so much thereof as may be necessary. (38 Stat. 218.)

This was a provision of the urgent deficiency act for the fiscal year 1913, cited above.

The previous appropriation of $7,000 for the fiscal year 1914, mentioned in

this provision, was made by Act March 4, 1913, c. 142, § 1, 37 Stat. 781. The appropriation for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat., and was $9,000.

See notes to R. S. §§ 347, 348, ante, §§ 516, 517.

§ 521. (R. S. § 349, as amended, Act June 19, 1878, c. 329, § 1.) Solicitor of the Treasury and other Solicitors, etc., in Department of Justice.

There shall be in the Department of Justice a Solicitor of the Treasury, an Assistant Solicitor of the Treasury, a Solicitor of Internal Revenue, and an Examiner of Claims for the Department of State, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to the following salaries: The Solicitor of the Treasury to four thousand dollars a year, the Assistant Solicitor of the Treasury to three thousand dollars a year, the Solicitor of Internal Revenue to five thousand dollars a year, and the Examiner of Claims for the Department of State four thousand dollars a year.

Act June 22, 1870, c. 150, §§ 3, 9, 10, 16 Stat. 162, 163. Act May 29, 1830, c. 153, § 1, 4 Stat. 414. Act March 2, 1865, c. 76, § 1, 13 Stat. 468. Act July 23, 1866, c. 208, § 5, 14 Stat. 207. Act July 13, 1866, c. 184, § 64, 14 Stat. 170. Res. 66, May 27, 1870, § 1, 16 Stat. 378. Act March 3, 1873, c. 226, § 3, 17 Stat. 508. Act June 19, 1878, c. 329, § 1, 20 Stat. 205.

This section, as enacted in the Revised Statutes, included provisions for "a Naval Solicitor" to be entitled to a salary of $3,500 a year, which are omitted here. So much of the section as provided for the appointment and payment of a salary to a "Naval Solicitor" was repealed, and the office was abolished, by a provision of Act June 19, 1878, c. 329, § 1, cited above, and the Judge-Advocate General of the Navy, whose appointment in the Navy Department was provided for by Act June 8, 1880, c. 129, post, § 612, was authorized by that act to perform the duties theretofore performed by the Solicitor.

The designation of the Examiner of Claims for the Department of State was changed to Solicitor for the Department of State by a provision of Act March 3, 1891, c. 541, § 1, post, § 523.

A Solicitor for the Department of the Interior was authorized by a provision in Act July 16, 1914, c. 141, § 1, post, § 523a.

The appointment of a Solicitor for the Department of Commerce was authorized by a provision of Act March 18, 1904, c. 716, § 1, post, § 524.

R. S. § 390, post, § 570, provides for the employment in the Post Office Department of an assistant Attorney General, to be appointed by the Postmaster-General, and fixes his salary at $4,000 per annum. Act July 16, 1914, c. 141, § 1, post, § 570a, changes the title of said Assistant Attorney General to that of Solicitor for the Post Office Department, and fixes his salary at $5,000 per annum.

A Solicitor for the Department of Labor was authorized by Act March 4, 1913, c. 141, § 7, post, § 525.

The appropriations for compensation of officers enumerated in this section, and in §§ 523, 523a, 524, 525, post, by the legislative, executive, and judicial appropriation act for the fiscal year 1917, Act May 10, 1916, c. 117, § 1, 39 Stat., were as follows: In the office of the Attorney General, Solicitor for the Department of the Interior, $5,000, Solicitor for the Post Office Department, $5,000, Solicitor of Internal Revenue, $5,000, and Solicitor for the Department of State, $5,000; in the office of the Solicitor of the Treasury, Solicitor, $5,000, Assistant Solicitor, $3,000; in the office of Solicitor of the Department of Commerce, Solicitor, $5,000, Assistant Solicitor, $3,000; and in the office of Solicitor of the Department of Labor, Solicitor, $5,000.

See notes to § 516, ante.

Notes of Decisions

Nature of office of solicitors.—The Solicitor of the Treasury is an officer of the Department of Justice and not of the Treasury Department. (1894) 20 Op. Atty. Gen. 714.

Powers and duties.—The power of the office of solicitor of the treasury, created by this act, is limited by Act March 3, 1863, and the approval of the Secretary of the Treasury is an indispensable condition to the validity of a sale by the solicitor, and a purchaser need not accept a deed in the absence of written evidence of such approval. U. S. v. Jonas (1873) 19 Wall. 598, 603, 22 L. Ed. 177.

The law has invested the Solicitor of the Treasury with a plenary discretion to suspend the execution of a writ of fieri facias, under circumstances which appear to render such a course expedi-

ent and proper. (1844) 4 Op. Atty. Gen. 309.

The Solicitor of the Treasury is an adviser recognized by law and his opinion may be asked by the Secretary of the Treasury upon any question of pure law or of mixed law and fact arising in the Treasury Department, except questions involving the construction of the Constitution of the United States. His opinions have, however, no binding force. (1893) 20 Op. Atty. Gen. 654.

The Solicitor of the Treasury is empowered to examine and advise the Secretary of the Treasury in regard to proposed codes of rules or forms of applications, permits, bonds, etc., to be adopted by the Treasury Department as such matters come up for consideration. (1894) 20 Op. Atty. Gen. 738.

Cited without definite application, U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862, 867.

§ 522. (R. S. § 350.) What officers under control of Attorney-General.

The officers named in the preceding section shall exercise their functions under the supervision and control of the head of the Department of Justice.

Act June 22, 1870, c. 150, § 3, 16 Stat. 162. Act Aug. 2, 1861, c. 37, § 1, 12 Stat. 285. Act Aug. 6, 1861, c. 65, 12 Stat. 327.

The reference in this section to "the preceding section" is to R. S. § 349, ante, § 521.

Further provisions as to the duties which the solicitors and officers of the Department may be required to perform, under direction of the Attorney-General, were contained in R. S. §§ 360, 361, 367, post, §§ 535, 536, 542.

Special powers, functions, and duties of the Solicitor of the Treasury were prescribed in R. S. §§ 372–380, post, §§ 548–556.

The Secretary of State was authorized to prescribe duties for the Solicitor, not interfering with his duties as an officer of the Department of Justice, by a proviso of Act June 20, 1874, c. 328, § 1, ante, § 289.

§ 523. (Act March 3, 1891, c. 541, § 1.) Solicitor for Department of State.

Examiner of Claims, to be designated hereafter as solicitor for the Department of State. (26 Stat. 945.)

This provision was included in the appropriation for compensation of this officer, in the legislative, executive, and judicial appropriation act for the fiscal year 1892, cited above.

An assistant solicitor for the Department of State, to be appointed by the Secretary of State, was authorized by a provision of Act April 17, 1900, c. 192, § 1, 31 Stat. 97, repeated in the similar appropriations for each of the five years next following; and two assistant solicitors for that Department were authorized by a provision of Act June 22, 1906, c. 3514, § 1, ante, § 294, which was repeated in subsequent acts. See, also, ante, § 297.

See notes to R. S. § 348, ante, § 517.

§ 523a. (Act July 16, 1914, c. 141, § 1.) Solicitor for Department of the Interior.

Office of the Attorney General: * * Solicitor for the Department of the Interior, $5,000: Provided, That the title of Assistant Attorney General is hereby changed to that of Solicitor for the Department of the Interior, but this shall not affect the status of the present incumbent or require his reappointment. (38 Stat. 497.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1915, cited above.

See notes to R. S. §§ 347, 348, ante, §§ 516, 517.

§ 524. (Act March 18, 1904, c. 716, § 1.) Solicitor of Department of Commerce.

For Solicitor of the Department of Commerce and Labor, to be appointed by the President, by and with the advice and consent of the Senate, four thousand five hundred dollars. (33 Stat. 135.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1905, cited above. It was repeated in the similar act for the fiscal year 1906. Similar appropriations by recent acts are, for the Solicitor, $5,000, and also for an Assistant Solicitor, $3,000. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to R. S. §§ 347, 348, ante, §§ 516, 517.

§ 525. (Act March 4, 1913, c. 141, § 7.) Solicitor for Department of Labor.

There shall be a solicitor of the Department of Justice for the Department of Labor, whose salary shall be five thousand dollars per annum. (37 Stat. 738.)

This section was part of the "Act to create a Department of Labor," cited above.

Other sections of the act are set forth under Title XII B, "The Department of Labor," post, §§ 932–936, 940–942.

See notes to R. S. §§ 347, 348, ante, §§ 516, 517.

§ 525a. (Act July 16, 1914, c. 141, § 1.) Attorneys; one in charge of condemnation proceedings in District of Columbia.

Office of the Attorney General: * * Four attorneys, at $5,000 each, one of whom shall have charge of all condemnation proceedings in the District of Columbia and supervise the examination of titles and matters arising from such condemnation proceedings in which the United States shall be a party or have an interest, and no special attorney or counsel, or services of persons other than of those provided for herein, shall be employed for such purposes. (38 Stat. 497.)

This was a provision in the legislative, executive, and judicial appropriation act for the fiscal year 1915, cited above. It was repeated in the subsequent appropriation acts. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 516, ante.

§ 526. (R. S. § 351.) Subordinate officers.

There shall be in the Department of Justice,

One chief clerk, at a salary of two thousand two hundred dollars a year.

One law clerk, acting as examiner of titles, at a salary of three thousand dollars a year.

One stenographic clerk, at a salary of two thousand dollars a year.

One clerk, at a salary of two thousand dollars a year.

One disbursing clerk.

In the office of the Solicitor of the Treasury:

One chief clerk, at a salary of two thousand dollars a year, and such temporary clerks as may from time to time be needed, but the allowances for such temporary clerks shall in no one year exceed one thousand dollars.

Act March 3, 1853, c. 97, § 3, 10 Stat. 211. Act March 3, 1865, c. 98, § 2, 13 Stat. 516. Act July 23, 1866, c. 208, § 5, 14 Stat. 207. Act June 22, 1870, c. 150, § 10, 16 Stat. 163. Act June 25, 1868, c. 71, § 5, 15 Stat. 75. Act June 22, 1870, c. 150, § 3, 16 Stat. 162.

This section enumerated the subordinate officers in the Department and their salaries at the time of the compilation of the Revised Statutes, as authorized by the then existing statutes, cited above. But the officers, clerks, and others actually appointed or employed, and their respective salaries and other compensation, depend on the specific provisions made in the annual appropriation acts, each providing for the fiscal year next following; the employment or payment of others being forbidden by Act Aug. 5, 1882, c. 389, § 4, ante, § 249. Subsequent appropriation acts provided for officers and clerks and for salaries different from those fixed by the above section. The appropriations for recent years include those for the offices of the Solicitor of the Treasury and the Solicitor of the Department of Commerce. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Appropriations for subordinate officers, etc., in the offices of the Solicitor of the Department of State, the Assistant Attorney-General for the Post-Office Department, and the Assistant Attorney-General for the Interior Department, are made in connection with the appropriations for those Departments, respectively, in the annual legislative, executive, and judicial appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

A provision in the appropriations for the Department of Justice for the fiscal year 1898, Act Feb. 19, 1897, c. 265, § 1, for a "stenographic clerk," $1,-

800, was amended to read "private secretary to the Attorney-General," $2,400, by a provision of Act July 19, 1897, c. 9, § 1, 30 Stat. 129. Subsequent appropriations continued the provision for such an officer, in recent years as "private secretary and assistant to the Attorney-General," at a salary of $3,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 516, ante.

§ 527. (R. S. § 352.) Rooms to be provided.

The superintendent of the Treasury building shall from time to time provide such rooms as may be suitable and necessary for the accommodation of the Department of Justice, in some building in the vicinity of the Treasury building.

Act June 22, 1870, c. 150, § 13, 16 Stat. 164.

This section was practically superseded by appropriations, subsequent to Act June 22, 1870, c. 150, § 13, which was incorporated into this section for rent of a building for the Department. See Act March 3, 1871, c. 113, § 1, 16 Stat. 494, and similar subsequent acts.

§ 528. (R. S. § 353.) Seal.

The seal heretofore provided for the office of the Attorney-General shall be, with such change as the President shall approve, the seal of the Department of Justice.

Act March 5, 1872, c. 30, § 2, 17 Stat. 35.

The seal adopted for the office of Solicitor of the Treasury remains in his charge, under R. S. § 372, post, § 548.

§ 529. (R. S. § 354, as amended, Act Feb. 27, 1877, c. 69, § 1.) Duties of Attorney-General.

The Attorney-General shall give his advice and opinion upon questions of law, whenever required by the President.

Act Sept. 24, 1789, c. 20, § 35, 1 Stat. 92. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 241.

The amendment of this section by Act Feb. 27, 1877, c. 69, § 1, cited above, consisted in the insertion, after the word "questions," of the word "of."

Notes of Decisions

Power of President to call for opinion.—The President's right to call for an opinion from the Attorney General is not limited to questions of law. Article 2, § 2, cl. 1, of the Constitution provides that he "may require the opinion of the principal officer of each of the Executive Departments upon any subject relating to the duties of their respective offices." (1901) 23 Op. Atty. Gen. 360.

Conclusiveness of opinion.—If a question is presented to the Attorney General in accordance with law by the President, and the Attorney General is of opinion that the nature of the question is general and important in other directions than disbursement, and therefore conceives that it is proper for him to deliver his opinion, the opinion is final and authoritative under the law, and should be so treated by the accounting officers, even if the question involves a payment to be made. (1904) 25 Op. Atty. Gen. 304.

President acting through Attorney General.—A telegram, signed with the surname of the Attorney General, purporting to state the decision of the President on an application by a convicted prisoner for a commutation of sentence, is sufficient notice of the President's action, which, as the court will take judicial notice, may properly be taken in such matters through the Department of Justice. Perovich v. Perry (1909) 167 Fed. 789, 93 C. C. A. 209.

(R. S. § 355. Transferred to Title XLIII A.)

This section prohibited expenditure of public money on any site or land purchased by the United States for purposes of erecting any of certain specified buildings or structures or any other public building, until the written opinion of the Attorney-General should be had in favor of the validity of the title, and contained further provisions relating to titles to such lands. It is placed, with other provisions relating to the subject, under Title XLIII A, "Public Buildings and Works," post, § 6902.

§ 530. (R. S. § 356.) Opinion of Attorney-General upon questions of law.

The head of any Executive Department may require the opinion

of the Attorney-General on any questions of law arising in the administration of his Department.

Act June 22, 1870, c. 150, § 6, 16 Stat. 163.

Notes of Decisions

1. In general.
2. Guidance of department.
3. Advice as to civil actions or criminal prosecutions.
4. Mode of submission, stating facts and propositions of law.
5. Questions by others than heads of departments.
6. Questions involving payment of money from treasury.
7. Questions of law.
8. Questions of fact.
9. Questions of mixed law and fact.
10. Questions of administrative policy or practice.
11. Questions actually arising.
12. Hypothetical questions.
13. Judicial questions.
14. Advising Senate and House of Representatives.
15. Conclusiveness of opinion.

1. In general.—The Attorney General is not authorized to give an official opinion in any case except on the call of the President or some one of the heads of Departments. (1818) 1 Op. Atty. Gen. 211, 253; (1884) 18 Op. Atty. Gen. 59; (1893) 20 Op. Atty. Gen. 608.

The Attorney General cannot properly attempt to frame a definition of statutory language to cover all future cases. (1893) 20 Op. Atty. Gen. 640; (1894) 21 Op. Atty. Gen. 106, 109.

The Attorney General must give his opinion on questions referred to him by the heads of the Departments, touching matters concerning the department, not on questions in which the United States have no interest. (1830) 2 Op. Atty. Gen. 311.

He is not required to give opinions, except in cases that fall within the scope of his duties as marked out by law. (1832) 2 Op. Atty. Gen. 531.

He has no authority to settle questions of fact, nor to give advice on questions of law, except for the assistance of the officer calling for his opinion on points stated. He takes the facts as they are stated to him, and predicates his opinion thereon. (1838) 3 Op. Atty. Gen. 309.

The executive holds no such relation to the judicial department of the government as would render it proper for the Attorney General to request a United States District Judge to furnish him with an explanation of his judicial action in a case of which he had lawful jurisdiction. (1863) 10 Op. Atty. Gen. 501.

The Assistant Attorney General attached to the Interior Department having prepared an opinion upon a case, the approval or disapproval of the opinion by the Attorney General would in effect be giving his official opinion where it is not called for by the President or by the head of a department, and, therefore, where it is not authorized by law to be given. (1872) 14 Op. Atty. Gen. 21.

This section limits the functions of the Attorney General in the matter of opinions requested by the heads of departments, to questions arising out of the law as it is, and does not require him to give his views and opinions upon the advisability of making changes, by treaty, in any department of jurisprudence. (1890) 19 Op. Atty. Gen. 598.

The Attorney General declines to authorize an investigation to be made in order that an official opinion may thereafter be rendered by him based on the result of such investigation. (1893) 20 Op. Atty. Gen. 640.

An expression in an opinion of the Attorney General which is merely obiter does not have the force and effect of an official opinion. (1894) 21 Op. Atty. Gen. 25.

A question regarding the construction of Act Jan. 12, 1895, § 96 (28 Stat. 624), is a general question, applicable to all the departments, and is of sufficient importance to warrant its submission to the Attorney General for his opinion thereon. (1895) 21 Op. Atty. Gen. 181.

The Department of Justice can do nothing to restrict the exportation of arms and warlike material to China during the present insurrectionary movements in that country. (1902) 24 Op. Atty. Gen. 26.

2. Guidance of department.—The head of a department cannot require the Attorney General's opinion as to his powers to do an act unless it is his intention to be guided thereby. (1836) 3 Op. Atty. Gen. 39; (1893) 20 Op. Atty. Gen. 609, 648; (1894) 20 Op. Atty. Gen. 724, 728; (1895) 21 Op. Atty. Gen. 174.

3. Advice as to civil actions or criminal prosecutions.—The question of the expediency of continuing or dismissing an appeal in the Supreme Court, on a suit involving alleged trespass upon or title of the public lands, belongs to the competency of the Secretary of the Interior, not of the Attorney General. (1855) 7 Op. Atty. Gen. 550.

The Attorney General cannot with propriety give an official opinion to the head of a department upon the question whether it is expedient for him to prosecute an appeal in a matter of public interest pending before another department. (1876) 15 Op. Atty. Gen. 574.

The Attorney General cannot properly be asked for advice as to whether or not a prosecution should be instituted. (1893) 20 Op. Atty. Gen. 673; (1894) 20 Op. Atty. Gen. 702, 714; (1895) 21

Op. Atty. Gen. 133; (1897) 21 Op. Atty. Gen. 509.

The Attorney General will not give an official opinion upon the question whether certain plates and cuts used for making sketches and pictures of foreign postage stamps come within Act May 16, 1884, and that the Act of February 10, 1891 (except section 4), prohibiting counterfeiting, because they relate only to criminal proceedings. (1895) 21 Op. Atty. Gen. 133.

4. Mode of submission, stating facts and propositions of law.—Where a question of law arises upon facts submitted to the Attorney General, such facts must be agreed and stated as facts established. (1867) 12 Op. Atty. Gen. 206.

Where different statements of facts appear in any case that has been submitted by the head of a department to the Attorney General, the latter will not undertake to reconcile the differences between them, but in giving an opinion upon the questions presented will consider only such facts as are set forth or admitted by the head of the department. (1872) 14 Op. Atty. Gen. 45.

Where the question presented was very indefinite and vague, and partook of a speculative character, it was deemed inadvisable by the Attorney General to give his official opinion thereon. (1873) 14 Op. Atty. Gen. 191.

Where an official opinion from the Attorney General is desired on questions of law arising on any case, the request should be accompanied with a statement of the material facts of the case, and also the precise questions on which advice is wanted. (1874) 14 Op. Atty. Gen. 367.

In order that the Attorney General may advise the Treasury Department, as contemplated in Act March 3, 1875, c. 136, all the facts upon which the question turns should be stated and presented for his consideration. (1878) 16 Op. Atty. Gen. 94.

The Attorney General cannot investigate the papers and records for the purpose of ascertaining the facts upon which the question arises. (1881) 17 Op. Atty. Gen. 172; (1888) 19 Op. Atty. Gen. 115; (1891) 20 Op. Atty. Gen. 270; (1893) 20 Op. Atty. Gen. 640; (1894) 20 Op. Atty. Gen. 742; (1898) 22 Op. Atty. Gen. 156; (1899) 22 Op. Atty. Gen. 342; (1899) 22 Op. Atty. Gen. 498; (1910) 28 Op. Atty. Gen. 218.

A request for an opinion of the Attorney General on questions of law arising in any case should be accompanied by a statement of the facts of the case as well as of the questions on which advice is desired. The Attorney General declines to settle the facts ex parte from papers submitted and then proceed to give an opinion thereon. (1886) 18 Op. Atty. Gen. 487.

The Attorney General declines to express an opinion in a matter where no statement of facts and no question of law is submitted, but where numerous papers are referred with a request for an opinion in view of all the facts presented. (1886) 19 Op. Atty. Gen. 396.

The Attorney General is unable to express an opinion upon the question as to whether the Indian agent at the La Pointe Agency, Wis., acting under instructions from the Indian Office or Department of the Interior, can dispose of and give valid title to pine timber cut on the Fond du Lac Reservation, Minn., the request therefor being unaccompanied by a statement of the facts involved. (1885) 19 Op. Atty. Gen. 465.

The Department of Justice has uniformly declined to find the facts involved in a request for an opinion. At least this has been the rule ever since the year 1820. The facts must be stated by the Department asking for the opinion. (See 1 Op. Atty. Gen. 346; 3 Op. Atty. Gen. 309; 5 Op. Atty. Gen. 626; 10 Op. Atty. Gen. 267; 12 Op. Atty. Gen. 206.) (1889) 19 Op. Atty. Gen. 465, 466.

The Attorney General declines to express an opinion upon a question which requires him to look into the evidence and form a conclusion as to the facts involved. (See 7 Op. Atty. Gen. 494; 14 Op. Atty. Gen. 367, 368, 541; 10 Op. Atty. Gen. 267; 11 Op. Atty. Gen. 189; 18 Op. Atty. Gen. 487, 489.) (1890) 19 Op. Atty. Gen. 672.

The Attorney General must confine himself to the case stated for an opinion and is not authorized to look into the evidence. (1890) 19 Op. Atty. Gen. 684.

It is not within the province of the Attorney General to make a finding of facts in a case submitted for his opinion upon questions of law arising thereon. The facts of the case should be ascertained and presented by the officer requesting the opinion. (1890) 19 Op. Atty. Gen. 696.

The Attorney General declines to give an opinion where the request therefor contains no statement of facts and presents no question of law. (1891) 20 Op. Atty. Gen. 220.

When an opinion is desired by the head of a department, a statement of the facts upon which the question arises must be submitted. (1891) 20 Op. Atty. Gen. 270.

It is an unvarying practice of the Attorney General before rendering an opinion to require a succinct statement of the facts and of the question of law arising thereon upon which an opinion is desired. (1892) 20 Op. Atty. Gen. 493.

The Attorney General is not permitted to render an opinion unless the facts upon which the question arises are succinctly stated. (1893) 20 Op. Atty. Gen. 526.

The Attorney General cannot give an official opinion, except upon a question

of law which has already actually arisen and is submitted upon a definite statement of facts, not leaving it to him to draw inferences of fact from correspondence or documents. (1893) 20 Op. Atty. Gen. 614.

The Attorney General cannot properly give an official opinion except upon questions of law arising upon facts stated by the official requesting the opinion. (1893) 20 Op. Atty. Gen. 640.

It is well settled that the question to which an answer is required, as well as the statement of facts upon which the question is based, should be clearly contained in the request for an opinion. The Attorney General should not be expected to seek out the facts and infer the question submitted from the correspondence inclosed. (1890) 20 Op. Atty. Gen. 699.

Requests for opinions of the Attorney General should be accompanied by a definite statement of the material facts and a formulation of the questions to which an answer is desired. (1894) 20 Op. Atty. Gen. 711.

Where an official opinion from the head of this department is desired on questions of law arising on any case, the request should be accompanied by a statement of the material facts of the case, and also the precise questions on which advice is wanted. (1894) 20 Op. Atty. Gen. 713.

Requests for the opinions of the Attorney General must be accompanied with a statement of facts and separate formulation of the questions to which an answer is desired. (1894) 20 Op. Atty. Gen. 723.

The Attorney General has no general appellate authority, and cannot weigh evidence and make findings thereon. Questions of this kind referred to him are analogous to questions referred to the Supreme Court upon certificate of division of opinion in the lower courts. His decision cannot operate as a disposition of the whole case if there is any doubt or incompleteness in the facts. (1894) 20 Op. Atty. Gen. 742.

The Attorney General cannot give official opinions except upon questions of law, nor without a definite statement of the facts upon which the question is submitted. (1894) 21 Op. Atty. Gen. 36.

The laws of a foreign country are not known to the Attorney General, but are facts to be proved by competent evidence. (1894) 21 Op. Atty. Gen. 80.

Questions submitted to the Attorney General for his opinion must be definitely formulated. (1895) 21 Op. Atty. Gen. 179.

The Attorney General cannot be called upon for an opinion unless specific questions of law are formulated which relate to an existing question calling for the action of the department requesting it. (1895) 21 Op. Atty. Gen. 201.

When an opinion is desired by the head of a department a statement of facts upon which the question arises must be submitted. The Attorney General cannot investigate the papers for the purpose of ascertaining these facts. (1895) 21 Op. Atty. Gen. 220.

The Attorney General waives the settled practice of the department requiring a statement of the points upon which an opinion is asked for the reason that it is desired for guidance of the head of an Executive Department in the discharge of official duties, where both public and private interests are involved requiring prompt action. (1897) 21 Op. Atty. Gen. 486.

The Attorney General is not permitted by statute or precedent to respond to a request for an opinion which appears to present but a moot case and does not show what the facts are or that the case has presently arisen in the administration of the department. (1897) 21 Op. Atty. Gen. 506.

In the absence of facts presenting a case actually or presently arising and pending in the administration of a department, calling for action, which cannot be determined by the Attorney General without usurping judicial functions, his official opinion cannot be required. (1897) 21 Op. Atty. Gen. 583.

To authorize the expression of an opinion upon a question of law it is necessary that a statement of facts be submitted showing that the question has actually arisen in the administration of a department in an existing case calling for action. (1898) 22 Op. Atty. Gen. 85.

In a request for an opinion the facts must be definitely formulated and clearly stated by the person asking the opinion. The Attorney General cannot be required to extract a finding of facts from correspondence or reports. (1899) 22 Op. Atty. Gen. 342.

When an opinion is desired of the Attorney General, the particular question of law on which his advice is desired should be specifically formulated, and the facts which exist or are assumed as the basis of such question should also be definitely stated. (1899) 22 Op. Atty. Gen. 351.

In a certain case involving governmental transactions where there were no disputed facts, the Attorney General deemed it proper to gather the various circumstances from the papers presented and to waive the customary rule of the department requiring a definite statement of the facts upon which an opinion is requested. (1899) 22 Op. Atty. Gen. 477.

When the opinion of the Attorney General is required, it is necessary that the facts be plainly stated and the questions upon which the opinion is desired should be specifically propounded. (1899) 22 Op. Atty. Gen. 498.

The Attorney General cannot take the responsibility of examining the papers in a case and gather therefrom a

conclusion as to what particular matter he shall pass upon. Id.

When an opinion is desired from the Attorney General, the question to which an answer is desired, as well as a statement of the facts upon which the question is based, should be clearly set forth in the request. (1900) 23 Op. Atty. Gen. 92.

Under the rules regulating the opinions of the Attorney General, it is necessary that the question of law presented should rest upon some case actually arising in the administration of a department and that it should be accompanied by a statement or finding of the facts involved. (1900) 23 Op. Atty. Gen. 330.

The Attorney General will not express an opinion upon a question unless the request is accompanied by a definite statement of facts, and the question of law upon which an opinion is desired is specifically formulated. (1901) 23 Op. Atty. Gen. 472.

When an opinion is desired from the Attorney General, the facts which exist or are assumed as the basis of the inquiry, should be definitely stated. The Attorney General cannot safely assume that facts not stated probably exist. (1901) 23 Op. Atty. Gen. 507.

The settled policy of the department is that no opinion should be rendered upon any question of law unless it is specifically formulated in a case actually arising in the administration of a department and accompanied by a statement or finding of the facts involved. (1902) 24 Op. Atty. Gen. 59.

It is the invariable rule of the Department of Justice to decline to give an opinion except when the request is accompanied by a statement or finding of the facts involved. (1902) 24 Op. Atty. Gen. 102.

It has been the invariable rule of the Department to decline to give an opinion upon any question of law unless it is "specifically formulated" and "accompanied by a statement or finding of the facts involved." (23 Op. Atty. Gen. 330, 473; 24 Op. Atty. Gen. 59, 102.) (1907) 26 Op. Atty. Gen. 378.

The Attorney General cannot properly review a record and memorandum submitted, and render his opinion. based upon facts deduced therefrom, as to the correctness of a proposed action of the Secretary of Commerce and Labor in the matter of the appeal of Geronimo Garcia, an alien who was excluded from the United States by the decision of the board of special inquiry at the port of New Orleans. Id.

The question of law upon which the opinion of the Attorney General is desired must not only be one actually arising in the administration of the department preferring the request, and not hypothetical, but the facts upon which it arises must be found and definitely stated in the request, and not left for the Attorney General to extract from the papers submitted. The question of law also must be clearly and definitely formulated. (1908) 26 Op. Atty. Gen. 609.

The Attorney General will not undertake to find the facts involved in a request for an opinion. Such request must be accompanied by a definite statement of the facts upon which the question of law arises. (1910) 28 Op. Atty. Gen. 393.

Where no concrete facts are presented relative to the questions propounded, the Attorney General will not express an opinion. (1910) 28 Op. Atty. Gen. 417.

5. **Questions by others than heads of departments.**—Subordinate officers of the government who desire an official opinion of the Attorney General must seek it through the head of the department to which they are accountable. (1818) 1 Op. Atty. Gen. 211.

It is not the duty of the Attorney General to give advice to local officers of the government in the department of the Secretary of the Treasury. (1853) 6 Op. Atty. Gen. 21.

The Attorney General is by designation of person a member of the Smithsonian Institution; but it is not his duty individually, and as Attorney General, to give advice to the regents of that Institution. (1853) 6 Op. Atty. Gen. 24.

The Attorney General has no lawful right to give advice to individuals on matters affecting the government, or to entertain appeals from parties on questions of law decided by the departments; but only to give advice on public matters when required by the President, or requested by any head of department or by the solicitor. (1853) 6 Op. Atty. Gen. 147.

It is not the duty of the Attorney General to give an opinion on a question touching the private business of individuals, and with which the government has no present concern. (1859) 9 Op. Atty. Gen. 355.

The Attorney General will not give opinions on legal questions submitted by persons not connected with the government, through the head of a department, when they do not concern the action of officers of the government, and are properly questions for the decision of courts of justice. (1861) 10 Op. Atty. Gen. 122.

The Attorney General will only give an official opinion in a matter concerning a department at the request of the head of the department, and not at the request of a subordinate officer thereof. (1862) 10 Op. Atty. Gen. 458; (1891) 20 Op. Atty. Gen. 251, 279.

The Attorney General has no power to give an official opinion on questions referred to him by the Secretary of the Treasury, at the request of the Third Auditor, for the guidance not of the Secretary, but of the Third Auditor, in

a case under Act March 3, 1849, c. 129, which cannot come before the Secretary. (1863) 11 Op. Atty. Gen. 4.

The Attorney General declines to give an opinion on the right of the Union Pacific Railroad Company to issue mortgage bonds at the request of the president of that company. (1866) 11 Op. Atty. Gen. 431.

It is not within the authority of the Attorney General to reverse a decision of the Civil Service Commission, or to require it to issue a certificate of reinstatement to a former clerk claiming to have served with the civilian employés of the Quartermaster's Department during the Civil War. (1891) 20 Op. Atty. Gen. 270.

It is not the duty of the Attorney General, nor has he the right, to give an official opinion for the guidance of persons proposing to enter into contract relations with the United States. (1892) 20 Op. Atty. Gen. 465.

Accordingly he ought not, at the present time, to answer the question as to whether in an inquiry instituted by the Commissioner of Patents under R. S., § 476, post, § 736, the Commissioner has the power to appoint a referee to take testimony and to report the testimony taken, with conclusions thereon, subject to revision by the Commissioner of Patents and afterwards by the Secretary of the Interior. (1893) 20 Op. Atty. Gen. 608.

6. Questions involving payment of money from treasury.—The rule is well established that the Attorney General will not, except in matters of great importance, express an opinion upon any question involving the payment of money which should ordinarily be referred to the Comptroller of the Treasury for decision. (1895) 21 Op. Atty. Gen. 178, 181, 221; (1897) 21 Op. Atty. Gen. 530; (1899) 22 Op. Atty. Gen. 414, 581; (1899) 23 Op. Atty. Gen. 1; (1901) 23 Op. Atty. Gen. 431, 468; (1904) 25 Op. Atty. Gen. 185; (1909) 28 Op. Atty. Gen. 129.

A question affecting all the Executive Departments is answered by the Attorney General, as it falls within the exception to the rule that his opinion should not be rendered upon questions which, under section 8 of the act of July 31, 1894, can be referred to the Comptroller for decision, except in matters of great importance, inasmuch as a conflict of precedents might arise. (1895) 21 Op. Atty. Gen. 181.

The Attorney General declines to advise upon a question of refund, for the reason that the question should be asked of the Comptroller of the Treasury. (1895) 21 Op. Atty. Gen. 188; (1902) 24 Op. Atty. Gen. 553.

The Attorney General may properly render an opinion upon a question involving the disbursement or expenditure of public moneys when the question is one of general and great importance, and especially when the Comptroller, in advance of a decision by himself, requests that the matter be referred to the Attorney General for opinion and states that he will be guided thereby. (1895) 21 Op. Atty. Gen. 224; (1896) 21 Op. Atty. Gen. 402; (1904) 25 Op. Atty. Gen. 271; (1908) 26 Op. Atty. Gen. 609.

The question as to what appropriation the expense of printing the 760 copies of printing laws in slip form, authorized by section 56 of the act of January 12, 1895 (28 Stat. 609), is to be charged is one which may be asked of the Comptroller of the Treasury, and should not be answered by the Attorney General. (1896) 21 Op. Atty. Gen. 405.

The claim of Amelia Mary Hyde, administratrix, being one for the payment of money, and actually pending before the Treasury Department, the Attorney General deems it inexpedient to consider it. (1899) 23 Op. Atty. Gen. 2.

The claim of Dudley & Michener for the payment of a sum of money as compensation for the cancellation by the War Department of a contract entered into between that Department and the claimants for furnishing the government with Mauser rifles is one which should be referred to the Comptroller of the Treasury for his opinion. (1900) 23 Op. Atty. Gen. 86.

The Attorney General declines to express an opinion upon the authority of the Secretary of the Treasury to refund a fine exacted, in lieu of the payment of duties upon certain merchandise brought into the United States from Porto Rico after the ratification of the treaty of 1898 with Spain and before the taking effect of the Porto Rican act, due protest against the exaction not having been made. That duty is imposed upon the Comptroller of the Treasury. (1901) 23 Op. Atty. Gen. 586.

It is not deemed necessary or desirable for the Attorney General to express an opinion upon the question of granting extra compensation in lieu of annual leave to certain former employés of the Census Office, under a proviso to the deficiency appropriation act of June 30, 1902 (32 Stat. 571), that being a matter relating solely to payments out of the Treasury. (1902) 24 Op. Atty. Gen. 85.

The Comptroller of the Treasury, rather than the Attorney General, should pass upon the question of the power of refund and payment out of the Treasury of duty overpaid on an importation of merchandise. Opinions of March 26, 1901 (23 Op. Atty. Gen. 431), and July 20, 1901 (23 Op. Atty. Gen. 468), followed. (1902) 24 Op. Atty. Gen. 553.

The question as to whether the expense of preparing blank forms and furnishing them to collectors can be paid out of the appropriation for defraying the expenses for collecting the revenue from customs, is peculiarly one

for the Comptroller of the Treasury to decide (23 Op. Atty. Gen. 468). (1903) 25 Op. Atty. Gen. 50.

The Attorney General declines to express an opinion upon the question whether a retired officer advanced in rank and pay by the Executive under the act of April 23, 1904, may be paid at the advanced rate before the Senate has consented to the advancement, as that question has been decided by the Comptroller of the Treasury, whose decision, under section 8 of the act of July 31, 1894 (28 Stat. 208), is conclusive in law. (1904) 25 Op. Atty. Gen. 185.

The authority conferred upon the Comptroller of the Treasury by section 8 of the act of July 31, 1894 (28 Stat. 208), to decide questions involving payments to be made from the Treasury is complete; but that act does not establish a rule which is universal and without exception. Congress did not, by that enactment intend to shorten the reach of sections 354 and 356, R. S., (ante, § 529, and this section), or to repeal pro tanto those sections. (1904) 25 Op. Atty. Gen. 301; (1906) 26 Op. Atty. Gen. 81.

The Attorney General declines to express an opinion upon the question whether the rent of a letter box in a post office by an officer of the Army can, under section 3648, Revised Statutes, be paid in advance, for the reason that the precise question, which involves a payment of money from the Treasury, has been passed upon by the Comptroller of the Treasury; and as the question is not one of importance in other directions than disbursements, the decision of the Comptroller will be regarded as conclusive. (1906) 25 Op. Atty. Gen. 614.

The Attorney General deems it inexpedient to give an opinion upon a question involving a payment which is clearly proper for the Comptroller to decide, to wit, whether under the annual appropriation for the care of patients in the Providence Hospital, Washington, D. C., the Surgeon General of the Army may contract with that institution to pay a stipulated sum per month for keeping in a state of preparedness for 95 patients, there not being in every month an average of 95 patients in the hospital, but where the monthly average per year equals or exceeds that number of patients. (1907) 26 Op. Atty. Gen. 431.

7. **Questions of law.**—Legal opinions for the guidance of the head of a department are to be given by the Attorney General, and not by the judiciary. Berger v. U. S. (1901) 36 Ct. Cl. 243.

The Attorney General cannot properly give an official opinion except upon questions of law arising upon facts stated by the official requesting the opinion. (1820) 1 Op. Atty. Gen. 346; (1891) 20 Op. Atty. Gen. 253; (1893) 20 Op. Atty. Gen. 640.

Act June 22, 1870, c. 150, establishing the Department of Justice, made no change in the law as to the duty of the Attorney General in giving official opinions, according to which, as it has been repeatedly held, he is authorized to give an opinion upon a question of law only on the submission thereof by the President or by the head of an Executive Department. (1872) 14 Op. Atty. Gen. 21.

It is against the practice of the Department of Justice to give an opinion upon a question so general as not to present a definite question of law for opinion. (1891) 20 Op. Atty. Gen. 258.

The Attorney General is precluded from answering the question as to whether the appointment of an Indian agent as a deputy marshal is likely to cause any contention or conflict of authority, as that is not a legal question. (1892) 20 Op. Atty. Gen. 494.

The Attorney General should not give an opinion upon a question as to whether or not there is sufficient probability of securing a verdict to warrant a prosecution, as that is not purely a matter of law. (1895) 21 Op. Atty. Gen. 133.

The Attorney General cannot give opinions upon questions of foreign law. (1896) 21 Op. Atty. Gen. 377.

The rule of the Attorney General in declining to give an opinion in a case where it is doubtful whether a question of law is raised in the administration of the Department requesting it was disregarded in an instance where it appeared that proper cases raising such a question were pending in several of the other Executive Departments. (1897) 21 Op. Atty. Gen. 579.

The question as to whether or not a citizen of Porto Rico, legally a resident of New York, is eligible for appointment in the Marine Hospital Service under a departmental regulation which requires the applicant to be a citizen of the United States, or, if of foreign birth, to furnish proof of American citizenship, does not involve any question of law within the meaning of section 356. Revised Statutes, and is not, therefore, one properly calling for an opinion of the Attorney General. The requirement not being demanded by law, its interpretation may properly be left to the Department or Bureau responsible for its existence and execution. (18 Op. Atty. Gen. 521; 20 Op. Atty. Gen. 649; 21 Op. Atty. Gen. 255, followed.) (1904) 25 Op. Atty. Gen. 183.

While the sufficiency of the return of a contract by the Secretary of the Navy is not a question of law arising in the administration of the Department of the Interior, and therefore is not one upon which the Attorney General is required to render an opinion, it is proper that the Secretary of the In-

terior should be advised whether the case submitted presents a violation of the statute since it is his duty to call apparent violations of the statute to the attention of the Department of Justice. (1912) 29 Op. Atty. Gen. 293.

8. **Questions of fact.**—It is not the duty of the Attorney General to give opinions on questions of fact, nor to review the proceedings of a court-martial in search of questions of law. (1852) 5 Op. Atty. Gen. 626.

Questions of fact arising on a survey in the case of a private land claim in California are not for the determination of the Attorney General. (1855) 7 Op. Atty. Gen. 491.

The Attorney General is not permitted to render an official opinion upon questions of fact. (1867) 12 Op. Atty. Gen. 206; (1882) 17 Op. Atty. Gen. 436, 440; (1888) 19 Op. Atty. Gen. 105; (1890) 19 Op. Atty. Gen. 547; (1891) 20 Op. Atty. Gen. 253; (1894) 20 Op. Atty. Gen. 697, 711, 740; (1895) 21 Op. Atty. Gen. 174, 240; (1896) 21 Op. Atty. Gen. 454; (1897) 21 Op. Atty. Gen. 481 (483), 594; (1900) 23 Op. Atty. Gen. 231; (1908) 26 Op. Atty. Gen. 604.

Weight of evidence and credibility of witnesses are not questions to be considered in rendering an opinion. (1872) 14 Op. Atty. Gen. 55; (1894) 21 Op. Atty. Gen. 58.

The question proposed in the case of George M. Giddings—which has special reference to the provision in R. S. § 3480, post, § 6387, prohibiting the payment of certain claims which existed prior to April 13, 1861, and is in substance whether the claimant's demand "accrued or existed" prior to that date —being regarded as purely a question of fact, to be made out from the evidence presented, and not in any aspect a question of law, the Attorney General declined giving an opinion thereon. (1875) 14 Op. Atty. Gen. 526.

An impressment of property is simply a conclusion of fact, to be deduced from other facts established by the evidence submitted; and hence it is not within the province of the Attorney General to determine the question whether there was or was not an impressment in a particular case. (1875) 14 Op. Atty. Gen. 536.

The question of remote or proximate cause, though frequently treated as question of law, is in reality one of fact. (1881) 17 Op. Atty. Gen. 172.

The Attorney General's advisory powers do not extend to an examination of evidence to ascertain what is established by a preponderance of testimony. Id.

The Attorney General cannot pass upon the question as to whether a bridge is an "unreasonable" obstruction, and its maintenance a violation of law, as its determination involves an examination of all the facts, circumstances, and equities surrounding the case. (1890) 19 Op. Atty. Gen. 676.

The Attorney General will not express an opinion to the Postmaster General on the question whether a publication is within the description of matter which the statute denominates second class, as that is a pure question of fact. (1892) 20 Op. Atty. Gen. 384.

Whether or not certain persons are within the so-called eight-hour labor law is a question of fact. (1892) 20 Op. Atty. Gen. 459.

Whether various schemes are "dependent on lot or chance" within the meaning of the lottery law, is a mere question of fact. (1893) 20 Op. Atty. Gen. 530.

Whether certain compilers are scientific or professional experts, within the meaning of paragraph 7 of special departmental rule No. 1 of the Civil Service Commission, is entirely a matter of fact. (1893) 20 Op. Atty. Gen. 590.

The question of "similitude" under section 5430, R. S., post, § 10320, is a question of fact. (1894) 20 Op. Atty. Gen. 697.

The laws or usages of an Indian tribe are not matters of which judicial notice can be taken, but present questions of fact. (1894) 20 Op. Atty. Gen. 711.

The word "exceptional," in section 5 of the act of March 3, 1893 (27 Stat. 715), relating to sick leave of departmental clerks, raises a question of fact. (1894) 20 Op. Atty. Gen. 716.

The question as to whether a person had a right by the laws and usages of the Sioux tribe to claim citizenship therein in 1889, is a question of fact. (1894) 20 Op. Atty. Gen. 742.

The Attorney General is not at liberty to comply with a request for a reconsideration of his opinion of June 8, 1894 (21 Op. Atty. Gen. 33), as it would involve consideration and decision upon conflicting evidence. (1894) 21 Op. Atty. Gen. 58.

The Attorney General is not authorized to give an official opinion as to "the course which should be taken" by another department, as that involves questions of fact and considerations of expediency. (1894) 21 Op. Atty. Gen. 73; 22 Op. Atty. Gen. 98. See, also, 21 Op. Atty. Gen. 74.

The question as to whether one patent infringes upon others is a matter of fact. 21 Op. Atty. Gen. 96.

Questions of fraud, or intent or colorableness in a transaction, are questions of fact. (1895) 21 Op. Atty. Gen. 129.

Whether certain material or apparatus used in making pictures of foreign postage stamps come within the scope of section 4 of the act of February 10, 1891 (26 Stat. 742), is a question of fact. (1895) 21 Op. Atty. Gen. 133.

The existence of a usage affecting the

legal definition of a statutory term is a question of fact. (1895) 21 Op. Atty. Gen. 255.

The question of whether one trademark simulates another is one of fact. (1895) 21 Op. Atty. Gen. 260.

The existence of a foreign law is a question of fact. (1896) 21 Op. Atty. Gen. 377.

What constitutes prompt delivery is a question of fact. (1909) 28 Op. Atty. Gen. 47.

The determination of the meaning of the term "meat food product" is essential to the proper enforcement of the Meat Inspection Law, and as Congress has not defined the term, and it has no well-defined meaning, but is one of commercial usage, and such determination is a question of fact. (1910) 28 Op. Atty. Gen. 369.

The meaning of the term "work of art," and its application to a particular design drawing, or painting, etc., under section 11, Act March 4, 1909 (35 Stat. 1078), presents a question of fact, to be determined in each instance by the Register of Copyrights. (1911) 28 Op. Atty. Gen. 557.

9. Questions of mixed law and fact.—The Attorney General should not express an opinion upon the question as to whose fault or negligence, if any one's, it is that a wrongful payment has been made, as that is a question of mixed law and fact which only a court can determine. (1893) 20 Op. Atty. Gen. 524.

The Attorney General cannot be asked to exercise appellate jurisdiction upon mixed questions of fact and law. (1894) 20 Op. Atty. Gen. 711; (1892) 22 Op. Atty. Gen. 342.

10. Questions of administrative policy or practice.—No appeal lies from the decision of the Commissioner of Pensions or other officer of the government to the Attorney General. (1854) 6 Op. Atty. Gen. 289.

It is not the duty of the Attorney General to determine the amount of compensation payable to counsel specially retained by the Secretary of State or other head of department. (1854) 6 Op. Atty. Gen. 635.

The consideration and discussion of remonstrances and reclamations on behalf of the subjects of friendly foreign governments against the operation of our laws and the judgments of our courts are within the peculiar province of the Secretary of State, and will not be assumed by the Attorney General. (1862) 10 Op. Atty. Gen. 347.

The opinions of the Attorney General are advisory only. He has no control over the action of the head of department at whose request and to whom an opinion is given, nor could he with propriety express any judgment concerning the disposition of the matter to which the opinion relates, that being something wholly within the administrative sphere of such head of department. (1855) 17 Op. Atty. Gen. 332.

The Attorney General will not, at the request of the Solicitor of the Treasury, consider and express his views as to the correctness of an opinion prepared by the latter upon a question submitted to him by the Secretary of the Treasury. (1884) 18 Op. Atty. Gen. 57.

The Attorney General will not interpret a regulation of practice made by the Commissioner of Patents for his own guidance and that of his subordinates, for the convenient, intelligent, and orderly disposal of the business of his office. Such regulations, which the heads of bureaus and departments can make, modify, or annul at will, or enforce or waive, as seems expedient, may well be left for their interpretation to the head of the department or bureau to which they pertain. (1887) 18 Op. Atty. Gen. 521.

The Attorney General is not authorized to give to the Secretary of the Treasury his opinion as to the proper construction of a pension appropriation act, because the Treasury Department is bound to follow the rulings of the Department of the Interior in considering that act. (1891) 20 Op. Atty. Gen. 178.

The Attorney General cannot reverse the decision of the Civil Service Commission or require it to issue a certificate of reinstatement. (1891) 20 Op. Atty. Gen. 270, 312.

The question as to whether the Civil Service Commission shall issue a certificate for reinstatement of an officer of the Treasury Department is not one arising in the administration of the Treasury Department and, therefore, not a question upon which it would be proper for the Attorney General to express an opinion at the request of the Secretary of the Treasury. (1892) 20 Op. Atty. Gen. 312.

The Attorney General declined to give an opinion as to whether the so-called eight-hour law is applicable to certain contracts for public works. (1892) 20 Op. Atty. Gen. 463, 465, 500; (1910) 28 Op. Atty. Gen. 534.

The Attorney General declines to express an opinion as to whether certain employés of the Mississippi Commission are "laborers" or "mechanics" within the meaning of the act of August 1, 1892 (27 Stat. 340), for the reason that those words are used in the statute in their ordinary sense, and the determination of that question is, therefore, a matter of administration only, involving the ascertainment of a question of fact, upon which the Attorney General is not authorized to express an opinion. (1892) 20 Op. Atty. Gen. 487.

Where terms are used in a statute in their ordinary acceptation and the duty of applying it in a particular matter is one of administration merely, that duty cannot be devolved upon the Attorney General. Id.

The Attorney General has no author-

ity to give an opinion upon the reasonableness of fees demanded by persons proposing to act as attorneys for Indian litigants. (1893) 20 Op. Atty. Gen. 620.

The construction of regulations of the Civil Service Commission is a matter entirely within the province of the Commission, and should not be attempted by the Attorney General. (1893) 20 Op. Atty. Gen. 649.

The nature of the evidence required from applicants for leave and sufficiency of reasons for extending or limiting hours of labor are matters within the discretion of the Secretary as to which the Attorney General cannot advise. (1894) 20 Op. Atty. Gen. 728.

The Attorney General declined to pass upon the original merits of a doubtful question, where the departmental practice had been in accordance with a decision of the Board of General Appraisers. Such practice should not be changed without a decision of the court. (1894) 20 Op. Atty. Gen. 730.

The Attorney General cannot give an official opinion upon the construction of customs regulations which may be modified at any time by the Secretary of the Treasury. (1895) 21 Op. Atty. Gen. 255.

A request for an opinion failing to state definite facts showing by what persons, in what manner, and during what period of the year fur seals are being killed in the passes of the Aleutian Islands, it is impossible to determine whether the administrative duty imposed upon the Secretary of the Treasury by section 1956, R. S., post, § 8850, is or is not qualified by the provisions of Act April 6, 1894. (1897) 21 Op. Atty. Gen. 583.

It is not the duty of the Attorney General and he cannot, from the meager facts submitted, determine the question of good faith or intention on the part of the deserting sailors from the British steamship Columbia, as to whether they came to this country pursuant to their calling, intending to ship again, or as immigrants. That duty rests with the Treasury Department. (1901) 23 Op. Atty. Gen. 521.

The question as to whether or not a citizen of Porto Rico, legally a resident of New York, is eligible for appointment in the Marine Hospital Service under a departmental regulation which requires the applicant to be a citizen of the United States, or, if of foreign birth, to furnish proof of American citizenship, does not involve any question of law within the meaning of section 356, R. S. (this section), and therefore is not one properly calling for an opinion of the Attorney General. The requirement not being demanded by law, its interpretation may properly be left to the department or bureau responsible for its existence and execution (18 Op. Atty. Gen. 521; 20 Op. Atty. Gen. 649; 21 Op. Atty. Gen. 255, followed). (1904) 25 Op. Atty. Gen. 183.

The Attorney General declines to express an opinion upon the question of the propriety of the Secretary of the Interior permitting Boysen to go upon the reservation and make examinations prior to the completion and approval of the surveys of the ceded portion; it not being within his province to pass upon the propriety of the exercise by the Secretary of the Interior of his official discretion. (1905) 25 Op. Atty. Gen. 524.

The Attorney General declines to express an opinion upon the question whether proceedings by court-martial would bar proceedings in the civil courts for an assault or other crime involved in the offense of hazing, for the reason that it would be of no assistance to those officers in the proper discharge of their duties, and should such action be taken the matter would peculiarly be one for the consideration of his department. (1905) 25 Op. Atty. Gen. 543.

The question as to whether charges suggested by the Secretary of Agriculture for the use of ground and rights of way within the National Forest Reserves, are reasonable or not, is not one which can properly be determined by the Attorney General. (1907) 26 Op. Atty. Gen. 421.

The Attorney General advised the Secretary of the Treasury as to the legality of a course of action contemplated by him, in order that immediate notification might be given to the parties to be affected thereby in the hope that such notification might result in a change of existing practices which would render the contemplated action unnecessary; but he expressed a doubt as to his authority to render such an opinion. (1908) 27 Op. Atty. Gen. 37.

The R. P. Clarke Company is bound by the contract it entered into with the "several departments and independent establishments of the government" to furnish to the Department of Agriculture, for the use of the Forest Service, such amount of either of the varieties of cloth described in the contract as may be ordered by said department during the fiscal year ending June 30, 1910, notwithstanding the fact that it was not estimated by the general supply committee that any such cloth would be required by that department. (1909) 28 Op. Atty. Gen. 47.

The Attorney General cannot properly express an opinion as to whether or not the bonds of certain surety companies should be accepted, as that is a question of administrative policy. (1909) 28 Op. Atty. Gen. 127.

II. Questions actually arising.—It is not his duty to give an opinion concerning infringements of the rights of patentees by dealers in the patented articles of manufacture; it not being required of the officers in charge of

the Patent Office to decide upon the legal effect of patents issued in conformity to the laws, nor to inform patentees of their rights. (1822) 1 Op. Atty. Gen. 575.

The Attorney General having no power to give an official opinion at the request of the head of a department, except on matters that concern the official powers and duties thereof, all opinions given by him in respect to claims under the Cherokee treaty have been extra-official and unauthorized. (1838) 3 Op. Atty. Gen. 368.

The Attorney General is neither required nor authorized to give an opinion to the head of a department except in cases actually pending for decision by him in such department. (1857) 9 Op. Atty. Gen. 82; (1860) 9 Op. Atty. Gen. 421; (1861) 10 Op. Atty. Gen. 50; (1862) 10 Op. Atty. Gen. 220, 267; (1865) 11 Op. Atty. Gen. 189; (1868) 12 Op. Atty. Gen. 433; (1871) 13 Op. Atty. Gen. 535; 15 Op. Atty. Gen. 138; (1889) 19 Op. Atty. Gen. 332, 412, 414; (1890) 19 Op. Atty. Gen. 695; (1891) 20 Op. Atty. Gen. 50, 249; (1892) 20 Op. Atty. Gen. 383, 420, 440; (1893) 20 Op. Atty. Gen. 536, 583, 588, 618; (1894) 20 Op. Atty. Gen. 703, 729; (1894) 21 Op. Atty. Gen. 37, 106, 109; (1895) 21 Op. Atty. Gen. 167, 178, 186, 219, 240; (1896) 21 Op. Atty. Gen. 320, 369; (1897) 21 Op. Atty. Gen. 478, 506, 509, 510, 568; (1897) 22 Op. Atty. Gen. 77; (1908) 27 Op. Atty. Gen. 37, 49.

It is not the duty of the Attorney General to give an opinion to the Secretary of the Treasury upon questions relating to the past action of the Board of Supervising Inspectors, which was had on a matter properly submitted to such board under the provisions of R. S. § 4491, post, § 8267, and which is not reviewable by the Secretary. (1884) 18 Op. Atty. Gen. 77.

It is not deemed proper for the Attorney General to give an official opinion where the question submitted by the head of a department relates to duties of territorial officers in a matter touching which such department has no administrative concern. (1887) 19 Op. Atty. Gen. 7.

The Attorney General declines to give an opinion upon the question whether a bond taken by the collector of a port from one of his subordinates, for his own protection, is valid in the absence of a statute authorizing it; it not appearing to be a question in which the United States are concerned or one arising in the administration of a department. (1890) 19 Op. Atty. Gen. 556.

The Attorney General deems it improper to give an official opinion upon a question which does not arise out of any case actually existing in the administration of the department seeking advice, notwithstanding such question may involve the construction of the immigration and contract labor laws (9 Op. Atty. Gen. 82, 355, 421; 10 Op. Atty. Gen. 50; 13 Op. Atty. Gen. 531 568). (1889) 19 Op. Atty. Gen. 331.

The Attorney General is not authorized to review, at the request of the Secretary of the Interior, the decisions of the Civil Service Commission on the construction of departmental rule X in regard to reinstatement, for the reason that under that rule the matter of certification rests with the Commission and, the Commission having decided adversely to the applicant, there is now no question in the matter pending before the Interior Department. (1891) 20 Op. Atty. Gen. 158.

The Attorney General is not authorized to give his opinion to the Secretary of the Treasury as to the proper construction of a pension appropriation act, inasmuch as it appears that the Treasury Department is bound by the rulings of the Department of the Interior in construing that law, and therefore no question is pending in the Treasury Department arising in the administration of that Department (17 Op. Atty. Gen. 339, followed). (1891) 20 Op. Atty. Gen. 178.

The question as to whether the Civil Service Commission shall issue a certificate for reinstatement of an officer of the Treasury Department is not one arising in the administration of the Treasury Department, and is therefore not a question upon which it would be proper for the Attorney General to express an opinion at the request of the Secretary of the Treasury. (1892) 20 Op. Atty. Gen. 312.

The question as to the right of an irrigation company to construct a dam across the Yakima river, which is one of the boundaries of the Yakima Indian reservation, is not one arising in a matter before the Interior Department, as the Secretary has no authority to settle that question; it is essentially judicial in character, and therefore the Attorney General has no power to give an opinion thereon. (1892) 20 Op. Atty. Gen. 314.

The Attorney General is not authorized to give his opinion upon the application of the eight-hour law to a proposed contract, where the contractors whose bids have been accepted desire to be advised before signing the contract what portion of the work that law will affect, as it is not a question which the Secretary of the Treasury is called upon to decide. (1892) 20 Op. Atty. Gen. 463.

The Attorney General declines to give an opinion as to the applicability of the so-called eight-hour law to a certain contract for public work, for the reason that the contractor, not the Secretary of the Treasury, is liable for the violation of the law. (1892) 20 Op. Atty. Gen. 465, 500.

The Attorney General cannot state as a basis for future departmental action, the classes of Chinese persons

whose occupations would place them within the category of laborer. He can only answer as to each case when it arises. (1893) 20 Op. Atty. Gen. 602.

The question as to the right of a state judge to compel an employé of the federal government to perform jury duty, not decided, as no such serious occasion is shown to have arisen as would justify the Attorney General reviewing the ruling of a state judge. (1893) 20 Op. Atty. Gen. 618.

The Attorney General cannot properly give an opinion as to whether if a certain Chinaman should visit his native country he could thereafter lawfully return to the United States, as it is not a question arising in the administration of an Executive Department. (1893) 20 Op. Atty. Gen. 667.

While certain regulations posted in the Department of Agriculture seem to be valid, yet until the lawfulness of some particular regulation is actually called in question no opinion respecting its legality can properly be asked for or given. (1894) 20 Op. Atty. Gen. 703.

The Attorney General cannot properly be asked, for the information of the owners of a vessel, whether if they rebuilt their vessel in Canada it could be thereafter reregistered as a vessel built in the United States, for the reason that it is not a question arising in the administration of the Treasury Department. (1894) 20 Op. Atty. Gen. 723.

The Attorney General's opinion cannot be asked by the Secretary of the Interior upon questions relating only to the duties of the Commission to the Five Civilized Tribes appointed under section 16 of the act of March 3, 1893 (27 Stat. 645), as he, the Secretary, has no control over the proceedings of the Commission. (1894) 20 Op. Atty. Gen. 724.

The Attorney General cannot be asked to examine and approve codes of rules or forms of applications, etc., adopted by a department, to apply to cases arising in the future. (1894) 20 Op. Atty. Gen. 738.

Certain steamship companies disputed the validity of the Treasury Department's regulations, holding them liable under the Immigration Act of March 3, 1891 (26 Stat. 1084), for the maintenance and transportation to the seaboard of certain alien immigrants who had reached the interior of the country: Held that, as there was no way of enforcing the statute against the steamship companies except through the courts, the question is not one arising in the administration of that department and the Attorney General cannot properly express his opinion thereon. (1894) 21 Op. Atty. Gen. 6.

The rule of the Attorney General in declining to give an opinion in a case where it is doubtful whether a question of law is raised in the administration of the department requesting it was disregarded in an instance where it appeared that proper cases raising such a question were pending in several of the other Executive Departments. (1897) 21 Op. Atty. Gen. 579.

The Attorney General is not authorized to answer an inquiry made of the Treasury Department with reference to an increase in the amount of subsidiary silver coinage, whether regarded as an abstract question of law or an inquiry into the legality of the course of a predecessor in office in matters not now demanding official action. (1898) 22 Op. Atty. Gen. 85.

The question of the validity of a proposed regulation of the Treasury Department providing that in case a Chinese laborer who has left the United States upon a valid return certificate is delayed beyond one year from the date of his departure by reason of sickness or other disability beyond his control the consular representative of the United States shall certify to such facts before the Chinaman shall be admitted into this country, not being a question actually or presently arising in the administration of the Treasury Department, the Attorney General declines to express his opinion thereon. (1901) 23 Op. Atty. Gen. 582.

The Attorney General declines to express an opinion upon the question whether the joint resolution of July 1, 1902 (32 Stat. 750), construing the Pension Act of June 27, 1890 (26 Stat. 182), has any retroactive force, for the reason that the question is not predicated upon an actual case arising in the Interior Department, and for the further reason that that department has an officer clothed with authority to determine questions of that nature in the first instance coming up on appeal from the Pension Bureau. (1903) 24 Op. Atty. Gen. 556.

The Attorney General declines to answer the question whether citizens of the Philippine Islands are entitled to the benefits of the patent laws of the United States, there being no case involving that question pending before the department making the inquiry. (1904) 25 Op. Atty. Gen. 179.

The Attorney General declines to express an opinion upon the question submitted by the Civil Service Commission as to whether the Secretary of the Interior in employing persons to make the transcripts of records and plats in the General Land Office authorized by Act April 28, 1904 (33 Stat. 483), may select such persons without regard to the civil service act and rules, for the reason that the Secretary of the Interior and the Civil Service Commission have had no conference respecting the question and no disagreement thereon, as is required by the executive order of November 29, 1904, before the matter may be submitted to the Attorney Gen-

for his opinion. (1905) 25 Op. Atty. Gen. 492.

The Attorney General declines to express an opinion upon the question propounded by the Secretary of the Interior as to whether the preliminary draft of Title LXVIII, "Railway and Telegraph Companies," submitted to him by the Commission to Revise and Codify the Laws of the United States, correctly embodies the provisions of existing law upon the subject, for the reason that the inquiry does not present a question of law arising in the administration of his department. (1906) 25 Op. Atty. Gen. 584.

The Attorney General held that it was inappropriate for him to review certain briefs and correspondence submitted to him by the Postmaster General with a request for an opinion thereon, as to do so would require him to consider questions of fact and some questions of law which clearly had not arisen in the administration of the Post Office Department. (1908) 27 Op. Atty. Gen. 49.

The Attorney General cannot properly render an opinion to the head of an executive department regarding the eligibility of a temporary clerk to permanent appointment under the civil service, as that is not a question arising in the administration of a department which its head is called upon to determine. (1910) 28 Op. Atty. Gen. 393, 431.

The question as to whether lands used for Indian schools, but not within Indian reservations, may be considered as Indian country for the purposes of the enforcement of Act Jan. 30, 1897 (29 Stat. 506), whereby it is made an offense to introduce liquor into the Indian country, is one not arising in the administration of the Interior Department, and therefore it would be improper for the Attorney General to give an official opinion thereon. (1911) 29 Op. Atty. Gen. 226.

12. Hypothetical questions.—The Attorney General will not answer a purely hypothetical question. (1871) 13 Op. Atty. Gen. 531; (1872) 13 Op. Atty. Gen. 568; (1891) 20 Op. Atty. Gen. 288; (1910) 28 Op. Atty. Gen. 239.

The question as to whether the consul's jurisdiction is limited to the cognizance of matters occurring within the territory nearer his consulate than to any other consulate of the United States in China is not one which it is proper for the Attorney General to answer, as it does not arise in the administration of an Executive Department, and is therefore purely hypothetical. (1892) 20 Op. Atty. Gen. 391.

The question as to whether the parts of a vessel which a British subject proposes to take to Alaska by ocean steamer for use on the Yukon river will be subject to duty, being a hypothetical one, is not answered. (1898) 22 Op. Atty. Gen. 77.

The Attorney General declines to express an opinion upon the question whether the Postmaster General should enter into a contract with the Return Postage Clearing Company for the institution of the "reply envelope and postal card" scheme, for the reason that the question is hypothetical in its nature and involves considerations of administrative discretion and judgment, and of practicability and advisability, which must be determined solely by the Postmaster General. (1902) 24 Op. Atty. Gen. 118.

The Attorney General declines to express an opinion as to whether a proposed instruction to customs officials to inquire into the bona fides of a journey and the ownership of goods imported can be enforced on proof that the object of the journey was to purchase goods, as the latter is a hypothetical as well as a judicial question. (1903) 25 Op. Atty. Gen. 94.

The question whether a suit by the government to enforce recovery from the owners of an American fishing vessel for the expense of transporting its destitute crew to the United States would be successful is speculative and hypothetical, and beyond the power and functions of the Attorney General under the statutes to answer. The question is one which must be determined by the courts. (1908) 26 Op. Atty. Gen. 631.

The Attorney General also declines to answer the question whether an appeal would lie from the judgment of a naturalizing court to one of the higher courts of North Dakota for the same reasons, and for the additional reason that the question relates merely to a hypothetical case. (1911) 29 Op. Atty. Gen. 99.

The Attorney General declines to express an opinion as to what, if any, steps must be taken under the proviso by the contracting officer, and what is the status of claims presented for payment for labor and material furnished under a contract, in the event that a contractor who had actually announced an eight-hour workday before obtaining his contract should afterwards for any reason revert to a longer workday, as the question is hypothetical. (1912) 29 Op. Atty. Gen. 488.

The question whether the commodities clause would apply to the shipment of coal over the Atchison, Topeka & Santa Fé Railway Company by the Folsom Morris Coal Mining Company, although purely hypothetical, deals rather with the establishment of a policy than the determination of a particular case, and hence it is permissible for the Attorney General to call the attention of the Secretary of Commerce and Labor to the law on the subject (1912) 29 Op. Atty. Gen. 587.

13. Judicial questions.—The judiciary cannot enjoin the executive branch of the government from performing any

duty specially devolved on it by the Legislature or by the Constitution of the United States; but where the government becomes a stakeholder and several individuals are claiming a fund, the officers of the Treasury may refer the claimants to the courts. (1824) 1 Op. Atty. Gen. 681.

The political department of the government has no legal power to annul or alter the judgment of a court of law; and therefore the Attorney General will not, at the request of the Secretary of State, give an opinion as to the sufficiency of the grounds on which such a judgment was based. (1862) 10 Op. Atty. Gen. 347.

The Attorney General will not give an opinion as to the validity of any exercise of jurisdiction by a court of the United States without a full record of the case; and when a department doubts the validity of such an exercise of jurisdiction, the Attorney General will advise the head of the department to raise the question before the court. (1865) 11 Op. Atty. Gen. 407.

Where the question proposed related to a matter pending before a court and might be raised there, and was not asked in reference to any action contemplated by the department which submitted it, the Attorney General requested to be excused from expressing an opinion thereon. (1869) 13 Op. Atty. Gen. 160.

It is not proper for the Attorney General to express an opinion upon the meaning of the word "destitute," as used in R. S. § 4577, post, § 8368, in view of the conflict in that regard between the Department of State and a United States District Court. The question is a judicial one, and should be settled by the courts. (1887) 19 Op. Atty. Gen. 25.

It is inexpedient for the Attorney General to express an opinion upon certain questions proposed, relating to a right of fishery in the Klamath river, California, claimed in behalf of the Klamath Indians, such questions being justiciable in the appropriate courts at the suit of the Indians themselves who are interested in them. (1887) 19 Op. Atty. Gen. 56.

The Attorney General deems it inexpedient to give an opinion upon a question which is essentially judicial in its character and must ultimately be decided by the judicial department of the government, to wit, whether an express company, in receiving from a lottery company letters and packages declared unmailable by section 3894, R. S., as amended by Act Sept. 19, 1890, post, § 10383, and forwarding them along the ordinary mail routes, violates section 3982, R. S., post, § 10351. (1890) 19 Op. Atty. Gen. 670.

The Attorney General declines to express an opinion on the question whether or not certain pictures of coins constitute a violation of section 3, Act Feb. 10, 1891 (26 Stat. 742), on the ground that it is one for the determination of the courts, not for the Executive Departments. (1891) 20 Op. Atty. Gen. 210.

The question as to the right of a state to tax lands in an Indian reservation being judicial and not administrative, the Attorney General ought not to express an opinion thereon. (19 Op. Atty. Gen. 56, followed.) (1891) 20 Op. Atty. Gen. 277.

The question as to the right of an irrigation company to construct a dam across the Yakima river, which is one of the boundaries of the Yakima Indian reservation, is not one arising in a matter before the Interior Department, as the Secretary has no authority to settle that question. It is essentially judicial in character, and therefore the Attorney General has no power to give an opinion thereon. (1892) 20 Op. Atty. Gen. 314.

The jurisdiction of consuls as courts is a judicial question, subject to review by regular appeal provided by statute, and therefore it is beyond the power of the Attorney General to express an opinion thereon. (1892) 20 Op. Atty. Gen. 391.

The Attorney General will not answer a question purely judicial in its nature. (1893) 20 Op. Atty. Gen. 539.

The Attorney General is reluctant to pass upon any question whose answer may bring the Department of Justice into conflict with a judicial tribunal. (1893) 20 Op. Atty. Gen. 618.

The Attorney General should not answer the question as to whether "building, loan, and savings associations" are "corporations doing the business of bankers, brokers, or savings institutions," within R. S., § 5243, post, § 9835, and as such prohibited from using the word "national" as a portion of their name or title, for the reason that the designation given does not afford sufficient information, and the question seems to be one for judicial rather than executive determination. (1893) 20 Op. Atty. Gen. 673.

It is inexpedient for the Attorney General to render an official opinion as to whether a civil suit or criminal prosecution if brought by the government ought to be decided by the courts in its favor; such questions being essentially judicial in character. (1894) 20 Op. Atty. Gen. 702.

The Attorney General should not express an official opinion upon a judicial question as to which the Circuit Courts are in conflict. (1894) 20 Op. Atty. Gen. 729.

Where certain steamship companies disputed the validity of the Treasury Department's regulations, holding them liable for the maintenance and transportation to the seaboard of certain alien immigrants who had reached the interior of the country, it was held that, as there was no way of enforcing the

statute against the steamship companies except through the courts, the question is not one arising in the administration of that department, the Attorney General cannot properly express his opinion thereon. (1894) 21 Op. Atty. Gen. 6.

The Attorney General cannot give an opinion upon a judicial question, or one not arising in the administration of a department, within the meaning of this section. (1896) 21 Op. Atty. Gen. 369.

Whether the statute of limitations does or does not bar a claim on behalf of the government is a judicial question to be determined by the courts and not by the Attorney General. (1897) 21 Op. Atty. Gen. 557.

The question whether a proceeding under R. S. § 3456, post, § 6358, or any other law would or would not be successful, is judicial in its nature and one on which it is not necessary or proper for the Attorney General to give an official opinion. (1898) 22 Op. Atty. Gen. 181.

It is not the practice of the Department of Justice to give an opinion in a matter where the question involved is disputable and is the subject of a pending suit, as such action would be equivalent to expressing an opinion as to whether the question ought to be decided in favor of the government, and might bring the department into conflict with a judicial tribunal. (1900) 23 Op. Atty. Gen. 221.

The question of the right of transit of Chinese persons from a port of the United States to the territory of Mexico, or from a port of the United States directly by sea to a foreign port, being now before the courts, it would not be proper for the Attorney General to express an opinion thereon. (1901) 23 Op. Atty. Gen. 585.

The Department will not consider any question committed to judicial review. To do so might bring it into conflict with a judicial tribunal. (1902) 24 Op. Atty. Gen. 59.

The Attorney General cannot properly pass upon the question whether the courts in this country have authority to execute letters rogatory issued out of the German patent office, as that is a matter for judicial and not for executive determination. (1902) 24 Op. Atty. Gen. 69.

The Attorney General declines to express an opinion as to the liability of the postmaster at Baltimore, Md., for a sum of money paid by him to a former clerk in the Baltimore post office and for which no service was performed, for the reason that the question is essentially a judicial one, amounting to an inquiry whether in regular legal proceedings a court and jury would hold that officer liable. Advised, however, that the circumstances may be regarded as showing a prima facie case of liability and calling for action in the way of securing a judicial determination of the question of liability. (1903) 25 Op. Atty. Gen. 97.

The Attorney General declines to express an opinion upon the question whether a willful refusal to give true answers to inquiries concerning statistics which, by section 6 of the Permanent Census Act March 6, 1902 (32 Stat. 52), the Department of Commerce and Labor is authorized to collect would subject a person to the penalties prescribed by section 22, Act March 3, 1899 (30 Stat. 1020), for the reason that the question is pre-eminently one for judicial and not executive determination. (1905) 25 Op. Atty. Gen. 369.

The Attorney General cannot properly express an official opinion upon the legality of certain orders issued by the Commissioner of Internal Revenue prohibiting the reclamation of alcohol from the staves of empty spirit packages, in the absence of affirmative proof that such alcohol had been properly tax paid, for the reason that the question has been decided by the Treasury Department, and is presented merely because of the request of counsel for parties interested, and for the further reason that the question must ultimately be decided by the courts. (1911) 28 Op. Atty. Gen. 596.

The Attorney General declines to give an official opinion upon the question whether an objection made to the naturalization of an alien should have been sustained, as that is a judicial one. (1911) 29 Op. Atty. Gen. 99.

14. Advising Senate and House of Representatives.—The Attorney General is not authorized by the law creating and defining his office to give legal opinions at the call of either House of Congress or of Congress itself. His duty to render such opinions is limited to calls from the President and heads of departments. (1820) 1 Op. Atty. Gen. 335; (1832) 2 Op. Atty. Gen. 499; (1852) 5 Op. Atty. Gen. 561; (1869) 12 Op. Atty. Gen. 544, 546; (1872) 14 Op. Atty. Gen. 17; (1873) 14 Op. Atty. Gen. 177; (1878) 15 Op. Atty. Gen. 475; (1884) 18 Op. Atty. Gen. 87.

In acknowledging the receipt of a resolution of the Senate, that a certain petition be referred to the Attorney General, and that he be requested to inquire into the facts and the law of the case and report his opinion to the Senate at its next session, the Attorney General stated that he doubted whether, in the absence of statutory authority to give official opinions to the legislative department of the government, the assumption of such a power would not be in violation of his oath of office, and of dangerous example, and, further, that as he was not provided by law with the means of obtaining the information desired he was compelled to decline the commission of the Senate. (1861) 10 Op. Atty. Gen. 164.

In response to a resolution of the

Senate directing the Attorney General to investigate and report to that body who are the owners of the land and water power at the Great Falls of the Potomac river, advised that any information on the subject found in the records of the department would be gladly furnished the Senate, but that beyond this, it was submitted, such investigation is not within the duties of the Attorney General as prescribed by law. (1882) 17 Op. Atty. Gen. 324.

The Attorney General is not authorized to give an official opinion upon a Senate bill submitted to him by the head of a department at the request of a Senator, where the matter involved no question of departmental administration, but was submitted in order that the opinion might be laid before the committee of the Senate in charge of the bill. (1882) 17 Op. Atty. Gen. 357.

The Attorney General is without authority to render an opinion to the head of an executive department, in compliance with a resolution of the House of Representatives, for the information of the latter, and without reference to any question of law arising to the administration of that department. (1885) 18 Op. Atty. Gen. 107.

15. Conclusiveness of opinion.—Although the acts prescribing the duties of Attorneys General do not declare the effect of their advice, it has been the practice of the departments to heed it. It has been found greatly advantageous, if not absolutely necessary, to have uniformity of action upon analogous questions and cases; and that result is more likely to be attained under the guidance of a single department constituted for the purpose than by a disregard of its opinions and advice. (1849) 5 Op. Atty. Gen. 97.

In giving his advice and opinion on questions of law to the President and heads of departments, the action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive, not only as respects the action of public officers in administrative matters, who are thus relieved from the responsibility which would otherwise attach to their acts, but also in questions of private right, inasmuch as parties having concerns with the government possess in general no means of bringing a controverted matter before the courts of law, and can obtain a purely legal decision of the controversy, as distinguished from an administrative one, only by reference to the Attorney General. (1854) 6 Op. Atty. Gen. 326.

Accordingly, the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice. Id.

The opinion of the Attorney General for the time being is in terms advisory to the Secretary who calls for it; but it is obligatory as the law of the case, unless, on appeal by such Secretary to the common superior of himself and the Attorney General, namely, the President of the United States, it be by the latter overruled. (1856) 7 Op. Atty. Gen. 692.

A question once fully considered and answered by one Attorney General cannot with propriety be reconsidered by his successor, unless in some extraordinary case. (1865) 11 Op. Atty. Gen. 189; (1894) 21 Op. Atty. Gen. 24; (1895) 21 Op. Atty. Gen. 264; (1902) 24 Op. Atty. Gen. 53.

Official opinions of the Attorney General should be followed by other departments. (1893) 20 Op. Atty. Gen. 648; (1894) 20 Op. Atty. Gen. 719.

Questions purely of law actually arising in the administration of the Treasury Department, and requiring the personal consideration of the Secretary, may be referred to the Solicitor of the Treasury or to the Attorney General. If referred to the latter, however, his answer should be regarded by the Department as law until withdrawn by him or overruled by the courts. (1893) 20 Op. Atty. Gen. 654.

When the Comptroller of the Treasury waives his right to determine a matter involving disbursements within the scope of his authority under the law and requests or suggests a ruling by the Attorney General, the Attorney General's opinion should be controlling upon the accounting officers of the Treasury and should be followed by them unless contrary to some authoritative judicial decision. (1904) 25 Op. Atty. Gen. 301.

Where a question is presented to the Attorney General in accordance with law for decision, and he is of opinion that the nature of the question is general and important in other respects than disbursement, and therefore conceives that it is proper for him to deliver his opinion, it is final and authoritative under the law and should be so treated by the accounting officers of the Treasury, even though the question involves a payment to be made from the Treasury. Id.

The Attorney General reviews claims of Spanish subjects residing in Florida arising under the provisions of the treaty of 1819 with Spain, but declines to express an opinion upon the merits of said claims for the reason that all open questions have been settled by uniform rulings of the administrative officers of the government and the matter has been repeatedly passed upon by his predecessors in office. (1910) 28 Op. Atty. Gen. 306.

§ 531. (R. S. § 357.) Legal advice to Departments of War and Navy.

Whenever a question of law arises in the administration of the Department of War or the Department of the Navy, the cognizance of which is not given by statute to some other officer from whom the head of the Department may require advice, it shall be sent to the Attorney-General, to be by him referred to the proper officer in his Department, or otherwise disposed of as he may deem proper.

Act June 22, 1870, c. 150, § 6, 16 Stat. 163.

Notes of Decisions

Advice to War Department.—The Attorney General cannot pass upon the question as to whether a bridge is an "unreasonable" obstruction, and its maintenance a violation of law, as its determination involves an examination of all the facts, circumstances, and equities surrounding the case. (1890) 19 Op. Atty. Gen. 676.

The question of unreasonableness must be determined in the first instance by the Secretary of War, whose decision is probably subject to review by the courts. Id.

A question of a legality of a provision of long standing in contracts of the War Department determined, as presented, in general terms, though a strict regard to the rule of the Department of Justice which forbids the expression of an official opinion upon any question of law which has not arisen in an existing case and presented upon a definite statement of facts, might warrant a refusal of an opinion thereon. (1895) 21 Op. Atty. Gen. 207.

The Attorney General will not give an opinion upon a question proposed by the Secretary of War, where no occasion has arisen for his official action. (1896) 21 Op. Atty. Gen. 457.

The question as to whether a retired army officer is eligible to hold certain diplomatic or consular appointments without affecting his position on the retired list, with rank and pay, is one of private concern only, and not a subject with which the United States can be interested until some action has been taken by such officer. (1897) 21 Op. Atty. Gen. 510.

Although the Attorney General cannot determine, without considering questions of fact, whether or not a bar in Flushing creek, formed opposite the mouth of a sewer and offering an obstruction to navigation, is such a case as comes within the exception provided in section 6 of the act of August 17, 1894 (28 Stat. 363), the Secretary of War is not precluded from taking such action inviting the attention of the town authorities of Flushing to the matter, as may be advisable. (1897) 21 Op. Atty. Gen. 594.

The Attorney General declines to express an opinion upon the question whether proceedings by court-martial would bar proceedings in the civil courts for an assault or other crime involved in the offense of hazing, for the reason that it would be of no assistance to those officers in the proper discharge of their duties, and should such action be taken, the matter would be one peculiarly for the consideration of his department. (1905) 25 Op. Atty. Gen. 543.

The Attorney General cannot properly advise the Secretary of War as to whether he should withhold the execution of the conveyance to Sidney Bieber of square 1137 and part of square 1117, Washington, D. C., authorized by section 21 of the act of June 30, 1906 (34 Stat. 787), until Congress shall have an opportunity to further consider the matter, as that is a question of propriety and expediency rather than of law. (1908) 26 Op. Atty. Gen. 578.

Advice to Navy Department.—The opinion of the Attorney General addressed to the Secretary of the Navy is merely advisory, and cannot be regarded as a determination of the case to which it refers, unless it appears from the record that the Secretary has adopted the advice it contained. (1857) 9 Op. Atty. Gen. 33.

It is not within the province of the Attorney General to consider questions looking to changes in maritime law to be accomplished by treaty with foreign governments. (1890) 19 Op. Atty. Gen. 598.

A question of the legality of a provision of long standing in contracts of the Navy Department determined, as presented, in general terms, although a strict regard to the rule of the Department of Justice which forbids the expression of an official opinion upon any question of law which has not arisen in an existing case and presented upon a definite statement of facts, might warrant a refusal of an opinion thereon. (1895) 21 Op. Atty. Gen. 207.

The question as to whether or not a citizen of Porto Rico, legally a resident of New York, is eligible for appointment in the Marine Hospital Service under a departmental regulation which requires the applicant to be a citizen of the United States, or, if of foreign birth, to furnish proof of American citizenship, does not involve any question of law, and is not, therefore, one properly calling for an opinion of the Attorney General. The requirement not being demanded by law, its interpretation may properly be left to the department or bureau responsible for

its existence and execution. 18 Op. Atty. Gen. 521; 20 Op. Atty. Gen. 649; 21 Op. Atty. Gen. 255, followed. (1904) 25 Op. Atty. Gen. 183.

The Attorney General declines to express an opinion upon the question whether a paymaster's clerk in the Navy retains his status as such clerk while traveling home under orders received prior to the revocation of his appointment, for the reason that the question is hypothetical in its nature. (1909) 28 Op. Atty. Gen. 129.

The validity of article 1367 of the Naval Regulations as applied to cases arising in the future cannot properly be considered. Id.

The Attorney General is not authorized to express an official opinion as to whether the provisions of the eight-hour law of August 1, 1892 (27 Stat. 340), will apply to the construction of caissons for the United States, where the information is desired for the guidance of certain prospective bidders, as the question is not one which the Secretary of the Navy is called upon to decide in the administration of his department. (1910) 28 Op. Atty. Gen. 534.

The general rule would seem to be well recognized that, in the absence of statutory prohibition, partial payments may be made on account of work done in the construction of vessels for the Navy if (1) title to the vessel shall have passed to the United States at the time of such payments, or (2) a lien shall have been created by law or contract upon the unfinished vessel to the amount of such partial payments. (1911) 29 Op. Atty. Gen. 46.

The Attorney General declines to answer the question whether the Navy Department would be justified in continuing to make partial payments under contracts in the event of the repeal of the clause in the naval appropriation act of March 4, 1911 (36 Stat. 1267), which authorizes the Secretary of the Navy to make partial payments on work done under contracts for public purposes, as no case involving that question is now pending before that department. Id.

§ 532. (R. S. § 358.) Reference of questions by Attorney-General to subordinates.

Any question of law submitted to the Attorney-General for his opinion, except questions involving a construction of the Constitution of the United States, may be by him referred to such of his subordinates as he may deem appropriate, and he may require the written opinion thereon of the officer to whom the same may be referred. If the opinion given by such officer is approved by the Attorney-General, such approval indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney-General.

Act June 22, 1870, c. 150, § 4, 16 Stat. 162.

Notes of Decisions

When Attorney General will pass upon subordinates' opinions.—Where a question is submitted by the Secretary of the Treasury to the Solicitor of the Treasury for the opinion of the latter thereon, the Attorney General will not, at the request of the Solicitor, consider such opinion and express his views as to its conclusions. (1884) 18 Op. Atty. Gen. 57.

Although the Attorney General may refer the question to a subordinate for a written opinion, the action of the subordinate must be examined and approved by the Attorney General to give it effect. (1895) 21 Op. Atty. Gen. 176.

§ 533. (R. S. § 359.) Conduct and argument of cases.

Except when the Attorney-General in particular cases otherwise directs, the Attorney-General and Solicitor-General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney-General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor-General or any officer of the Department of Justice to do so.

Act Sept. 24, 1789, c. 20, § 35, 1 Stat. 92. Act June 25, 1868, c. 71, § 5, 15 Stat. 75. Act June 22, 1870, c. 150, § 5, 16 Stat. 162.

Authority was given to the Attorney-General and to officers, attorneys, etc., specially directed by him, to conduct legal proceedings in any district, by Act June 30, 1906, c. 3935, post, § 534.

Notes of Decisions

In general.—The purpose of the statute was to gather into the Department of Justice all legal business of the government, and to break up the practice

of employing attorneys in the public service. Perry v. U. S. (1910) 28 Ct. Cl. 483.

It is not the duty of the Attorney General to instruct district attorneys in the discharge of their duties; nor to draw pleas at the request of the heads of departments; nor to indicate the course to be pursued in particular suits depending in the District and Circuit Courts; nor to interfere at all with suits until they reach the Supreme Court. (1823) 1 Op. Atty. Gen. 608.

Officers of department.—A special assistant to the Attorney General is not an officer of the Department of Justice, within R. S. §§ 359, 367 (this section, and post, § 542), providing for the organization of the department and the duties of the Attorney General. U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862.

Conduct of suits.—Under this section the Attorney General in his discretion is not required to represent the United States in the Supreme Court, but may make other arrangements for the management of the case, though the exercise of his discretion does not abridge the fact that the full responsibility and control are imposed directly on him as the head of the department of justice, and by virtue of such section, and post, §§ 537, 538, he may either himself assume the management of government cases in the Circuit Court of Appeals, or direct what officers shall have control and management thereof, if he deems it essential to appoint special counsel. U. S. v. Winston (1898) 18 Sup. Ct. 701, 703, 170 U. S. 522, 42 L. Ed. 1130.

An appeal by the United States from the judgment of the Circuit Court, on an appeal from the Board of General Appraisers, can only be allowed on the application and in the name of the Attorney General, when the record does not show that the court is of opinion that the question involved is of such importance as to require an appeal; but where such an appeal is irregularly taken in the name of the collector of the port by the district attorney, and the parties admit, in the Circuit Court of Appeals, that same was in fact taken by direction of the Attorney General, and consent that the petition for appeal may be amended by substituting his name for that of the collector, the Circuit Court of Appeals has jurisdiction to allow such amendment. U. S. v. Hopewell (1892) 51 Fed. 798, 2 C. C. A. 510.

The Attorney General has no power to maintain in his own name a bill in equity to repeal letters patent for an invention. Attorney General v. Rumford Chemical Works (C. C. 1876) 32 Fed. 608, 623.

The authority given to the Attorney General to "conduct suits" on behalf of the government may be held to include every act which an attorney at law might lawfully do in a suit between individuals, except the admission of adverse facts not known to him officially. Campbell v. U. S. (1884) 19 Ct. Cl. 426.

The Attorney General may stipulate that a judgment in favor of the government shall be set aside, if the Supreme Court shall hold adversely to it in a similar case. Id.

The Attorney General does not perceive that it is his official duty to conduct a suit in the Supreme Court brought by a private citizen against the Sergeant at Arms of the House of Representatives. (1820) 5 Op. Atty. Gen. 720.

It is the regular statute duty of the Attorney General only to conduct in person the causes of the United States in the Supreme Court; but the President may undoubtedly, in the performance of his constitutional duty, instruct the Attorney General to give his direct personal attention to legal concerns of the United States elsewhere, when the interests of the government seem to the President to require this. (1854) 6 Op. Atty. Gen. 326.

The relation of the Attorney General to any one of the departments in reference to lawsuits in the business of the latter is that of counsel to client, determining matters of law, but leaving all considerations of mere administrative expediency to the proper department. (1855) 7 Op. Atty. Gen. 576.

The Attorney General has no direct relation by statute, and without order of the President, to suits instituted by either of the departments. (1855) 8 Op. Atty. Gen. 465.

It is unwise for the Department of Justice to adopt any general rule waiving by stipulation the right of appeal from judgments of the Court of Claims in direct tax cases, thus allowing the payment of such claims prior to the expiration of the 90 days within which appeals must be taken. (1893) 20 Op. Atty. Gen. 547.

Cited without definite application, Confiscation Cases (1868) 7 Wall. 454, 457, 19 L. Ed. 196; U. S. v. Smith (1895) 15 Sup. Ct. 846, 849, 158 U. S. 346, 39 L. Ed. 1011; U. S. v. Virginia-Carolina Chemical Co. (C. C. 1908) 163 Fed. 66; Smith v. U. S. (1891) 26 Ct. Cl. 568.

§ 534. (Act June 30, 1906, c. 3935.) Conduct of any legal proceedings which district attorneys are authorized to conduct.

The Attorney-General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney-General under any provision of law, may, when thereunto

specifically directed by the Attorney-General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. (34 Stat. 816.)

This was an act entitled "An act to authorize the commencement and conduct of legal proceedings under the direction of the Attorney-General."

Notes of Decisions

In general.—It is the duty of the attorneys of the United States to act as counsel in a prosecution of officers of the United States. State of Delaware v. Emerson (C. C. 1881) 8 Fed. 411.

The court will entertain a bill to vacate a state selection of land having the signature of the Attorney General of the United States, subscribed by his authority. U. S. v. Mullan (C. C. 1882) 10 Fed. 785, decree affirmed Mullan v. United States (1886) 6 Sup. Ct. 1041, 118 U. S. 271, 30 L. Ed. 170.

That a merchants' association of the city of New York assured the Attorney General that, if necessary, it would furnish funds to compensate a special assistant to the Attorney General appointed to investigate frauds in the importation of Japanese silks, did not disqualify the appointee, who looked to the United States for compensation. U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862.

Conduct of grand jury proceedings.—A special assistant to the Attorney General, appointed to investigate as to alleged fraudulent importation of Japanese silks at the port of New York, and to prepare and conduct civil and criminal proceedings resulting therefrom, is not authorized to conduct proceedings before a federal grand jury. U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862.

An expert accountant, who is not an attorney at law, appointed by the Attorney General "a special assistant to" a United States attorney to assist in the investigation and prosecution of a particular case is not an "officer of the Department of Justice," within the meaning of this section, and cannot be authorized by the Attorney General to conduct, or assist in conducting, proceedings before the grand jury in connection with such case, nor to be present in the room during the examination of witnesses, to aid the district attorney by suggestions. U. S. v. Heinze (C. C. 1910) 177 Fed. 770.

Under this act it is competent for two or more attorneys specially appointed to be present in a grand jury room and to conduct the proceedings, dividing the labor as they deem best, and that one acts only as a stenographer does not vitiate indictments found. U. S. v. Haskell (D. C. 1909) 169 Fed. 449.

—— Stenographer to take testimony.—Presence of district attorney's clerk and stenographer, taking notes of the testimony of witnesses before the grand jury, held violation of defendant's right, and ground for quashing the indictment, although no prejudice was shown. Latham v. U. S. (1915) 226 Fed. 420, 141 C. C. A. 250.

A stenographer duly appointed and sworn by the district attorney held not an attorney at law specially appointed by the Attorney General, and not authorized to attend grand jury sessions and take testimony for the district attorney's benefit, under this act. U. S. v. Rubin (D. C. 1914) 218 Fed. 245.

Presence of stenographer in grand jury room by direction of district attorney, pursuant to appointment as clerk and assistant to the district attorney, held not to invalidate indictment. U. S. v. Rockefeller (D. C. 1914) 221 Fed. 462.

The act does not authorize the appointment of a special attorney to conduct grand jury proceedings, whose sole duty was to report the testimony of the witnesses, and the presence of such person is ground for quashing the indictment. U. S. v. Philadelphia & R. Ry. Co. (D. C. 1915) 221 Fed. 683.

§ 535. (R. S. § 360.) Performance of duty by officers of Department of Justice.

The Attorney-General may require any solicitor or officer of the Department of Justice to perform any duty required of the Department or any officer thereof.

Act June 22, 1870, c. 150, § 14, 16 Stat. 164.

Further provisions that the Solicitor-General or any officer of the Department may be sent to any State or District to attend to the interests of the United States, were made by R. S. § 367, post, § 542.

Notes of Decisions

Taking testimony.—A district attorney may be required to take depositions to be used in another district. U. S. v. Ady (1896) 76 Fed. 359, 361, 22 C. C. A. 223.

§ 536. (R. S. § 361.) Officers of the Department to perform all legal services required for other Departments.

The officers of the Department of Justice, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of Departments, and the heads of Bureaus and other officers in the Departments, to discharge their respective duties; and shall, on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court and in the Court of Claims, in which the United States, or any officer thereof, as such officer, is a party or may be interested; and no fees shall be allowed or paid to any other attorney or counselor at law for any service herein required of the officers of the Department of Justice, except in the cases provided by section three hundred and sixty-three.

Act June 22, 1870, c. 150, § 14, 16 Stat. 164.

The Departments and the Bureaus and officers thereof were required to furnish to the Attorney-General, for use in suits in the Court of Claims, all evidence, touching the claim, in their possession or knowledge, by R. S. § 188, ante, § 268.

Notes of Decisions

Questions to be submitted by Interior Department to Attorneys designated.—For the guidance of the heads of bureaus and other officers of the departments in the discharge of their duties, provision is made for assistance from the officers of the Department of Justice, under the direction of the Attorney General. An assistant attorney general and law clerks having accordingly been assigned to the Department of the Interior, the Commissioner of Patents should submit questions to them. (1893) 20 Op. Atty. Gen. 609.

Advice to Solicitor of Treasury.—Where a question has been submitted by the Secretary to the Solicitor of the Treasury for advice thereon, the latter is not entitled to call upon the Attorney General for his views on such question. (1884) 18 Op. Atty. Gen. 59.

The Solicitor should, in such case, return his advice directly to the Secretary, who may, if he choose, require an opinion from the Attorney General upon the same question. Id.

Cited without definite application, Bentley v. U. S. (1891) 26 Ct. Cl. 241.

§ 537. (R. S. § 362.) Superintendence of district attorneys and marshals.

The Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct.

Acts Aug. 2, 1861, c. 37, § 1, 12 Stat. 285. Act June 22, 1870, c. 150, §§ 16, 17, 16 Stat. 164.

General supervisory power over the accounts of district attorneys, marshals, etc., was conferred on the Attorney-General by R. S. § 368, post, § 543.

Notes of Decisions

Supervision and control of district attorneys.—The attorneys of the United States in every judicial district are under the immediate supervision and control of the Attorney General. U. S. v. San Jacinto Tin Co. (1888) 8 Sup. Ct. 850, 854, 125 U. S. 273, 31 L. Ed. 747.

Under sections 533, 538, and this section the Attorney General may either himself assume the management of government cases in the Circuit Court of Appeals, or direct what officers shall have control and management thereof, if he deems it essential to appoint special counsel. U. S. v. Winston (1898) 18 Sup. Ct. 701, 703, 170 U. S. 522, 42 L. Ed. 1130.

This section does not authorize the Attorney General to control the action of the district attorney in criminal cases by general regulations. It must be a particular instruction, given in a particular case, and based on the facts of the particular case. Fish v. U. S. (D. C. 1888) 36 Fed. 677, 680.

The Attorney General has authority to direct district attorneys to follow cases on appeal from their own districts into the Circuit Court of Ap-

peals. Garter v. U. S. (1896) 31 Ct. Cl. 344.

It was within the scope and authority of the Attorney General to require the district attorney at Chicago to render services to the World's Columbian Exposition. He is the law officer of the government, and, under this section, may call upon district attorneys to render such service within their respective districts. Milchrist v. U. S., 31 Ct. Cl. 418.

The act does not transfer the settlement of the accounts of district attorneys to the Attorney General's office. (1861) 10 Op. Atty. Gen. 95.

The provision in the act of July 18, 1888 (25 Stat. 333), making an appropriation "for carrying out the provisions of the act of May 29, 1884 (23 Stat. 31), establishing the Bureau of Animal Industry," does not authorize the Commissioner of Agriculture to employ counsel for the defense of employés of the Bureau for acts done by them in carrying out such provisions under its direction. Employment of counsel in such cases is governed by sections 189, 362, and 363, R. S. (this compilation, §§ 271, 537, 538). (1889) 19 Op. Atty. Gen. 328.

The Attorney General has no proper authority and should refrain from interfering by directions to district attorneys in the matter of the prosecution and punishment of frauds upon the revenue. (1894) 20 Op. Atty. Gen. 715, note.

—— Effect of direction to district attorney on court.—A direction given by the Attorney General to a district attorney in respect to his official action in regard to an indictment cannot control the court. U. S. v. Davis (C. C. 1869) Fed. Cas. No. 14,923.

Control of marshals.—Under the power to exercise general superintendence over marshals as to the manner of discharging their duties, it was contended that the Attorney General had authority to declare that the special deputies appointed to supervise election, should be paid only for four days' attendance upon the registration. But it was held impossible for the special deputy marshals in Baltimore city to perform the duties required of them in less than 10 days, and a claim for 10 days' compensation was allowed. Stocksdale v. U. S. (D. C. 1889) 39 Fed. 64.

Under this section the Attorney General was authorized to direct the assignment by a marshal of any deputy to perform any special national police duty within his jurisdiction arising out of the statutes, whether by express provision or necessary implication; and his act in directing a United States marshal to protect the life of a justice of the Supreme Court against the assault of dissatisfied litigants was, in legal contemplation, the act of the President. In re Neagle (C. C. 1889) 39 Fed. 833, 860, 5 L. R. A. 78, affirmed (1890) 10 Sup. Ct. 658, 135 U. S. 1, 34 L. Ed. 55.

Cited without definite application, Confiscation Cases (1868) 7 Wall. 454, 457, 19 L. Ed. 196; Minnesota v. Northern Securities Co. (1904) 24 Sup. Ct. 598, 603, 194 U. S. 48, 48 L. Ed. 870; U. S. v. Denison (1897) 80 Fed. 370, 371, 25 C. C. A. 496; U. S. v. Fleming (1897) 80 Fed. 372, 373, 25 C. C. A. 498; In re Beavers (C. C. 1904) 131 Fed. 366, 370; Ex parte Hibbs (D. C. 1886) 26 Fed. 421, 426; Bentley v. U. S. (1891) 26 Ct. Cl. 241.

§ 538. (R. S. § 363.) Retaining counsel to aid district attorneys.

The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counselors at law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.

Act Aug. 2, 1861, c. 37, § 2, 12 Stat. 285. Act March 3, 1869, c. 121, § 1, 15 Stat. 283. Act April 10, 1869, c. 25, 16 Stat. 46. Act June 22, 1870, c. 150, § 16, 16 Stat. 164.

Annual appropriations for payment of assistants to the Attorney-General and to United States district attorneys employed to aid in special cases are made in the sundry civil appropriation acts. Each such appropriation is accompanied by a provision that "this appropriation shall be available also for the payment of foreign counsel employed by the Attorney-General in special cases, and such counsel shall not be required to take oath of office in accordance with section three hundred and sixty-six, Revised Statutes of the United States." The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

Attorneys or counsel specially appointed by the Attorney-General, when thereunto specifically directed by him, may conduct any legal proceeding which district attorneys are authorized to conduct, whether they are residents of the district or not, by Act June 30, 1906, c. 3935, ante, § 534.

A provision of Act March 2, 1895, c. 187, § 1, 28 Stat. 848, that the Attorney-General, at the request of the Secretary of the Treasury, might employ

counsel to protect the interests of the Treasury Department in cases before the Board of General Appraisers, was amended by Act June 30, 1906, c. 3914, § 4, 34 Stat. 762, to provide for the appointment of a Solicitor of Customs and assistants, to protect the interests of the United States in all cases and matters before the Board of General Appraisers, and, when directed by the Attorney General, to appear in the courts in cases appealed from said Board. But so much of said section 4 of Act June 30, 1906, c. 3914, as related to the appointment of a Solicitor of Customs and assistants was repealed by section 41 of the Payne-Aldrich Tariff Act of 1909, Act Aug. 5, 1909, c. 6, § 41, 36 Stat. 118; other provisions for the purpose having been made by a new section added by section 28 of said Tariff Act of 1909 to the Customs Administrative Act of June 10, 1890, c. 407, as section 30 thereof, ante, § 519.

See notes to said section, ante, § 519.

Authority to appoint assistant district attorneys was given by Act May 28, 1896, c. 252, § 8, post, § 1420.

Notes of Decisions

History of legislation.—As to history of legislation, see U. S. v. Crosthwaite (1897) 18 Sup. Ct. 107, 108, 168 U. S. 375, 42 L. Ed. 507.

Authority to appoint.—This section does not contemplate that the district attorney himself shall be so employed. U. S. v. Smith (1895) 15 Sup. Ct. 846, 849, 158 U. S. 346, 39 L. Ed. 1011.

Under this section and ante, §§ 533, 537, the Attorney General may either himself assume the management of government cases in the Circuit Court of Appeals, or direct what officers shall have control and management thereof, if he deems it essential to appoint special counsel. U. S. v. Winston (1898) 18 Sup. Ct. 701, 703, 170 U. S. 522, 42 L. Ed. 1130.

The Attorney General was not authorized to appoint special assistants to a district attorney having the authority or right to appear before and participate in the proceedings of a grand jury, and the presence of two such attorneys specially appointed for a particular case and their examination of witnesses on whose testimony an indictment was returned renders such indictment invalid. U. S. v. Virginia-Carolina Chemical Co. (C. C. 1908) 163 Fed. 66.

The Attorney General has not power to employ a district attorney under this section to perform legal services for the United States in his own district. Smith v. U. S. (1891) 26 Ct. Cl. 568.

The Attorney General may employ as special counsel one who is district attorney within the district in which the Court of Appeals is sitting in a case coming from another district. Garter v. U. S. (1896) 31 Ct. Cl. 344.

The Attorney General has no authority to make an appointment retroactive, so that it shall embrace a period prior to the date of the appointment. Lee v. U. S. (1910) 45 Ct. Cl. 57.

The power to retain and employ attorneys and counselors for the government rests solely with the Attorney General, and the marshal has no authority to expend funds for that purpose. U. S. v. Hillyer (1892) 1 Alaska, 47, 48.

Validity of appointment.—The fact that the commission of a special assistant to a district attorney is signed by the Solicitor General in the Department of Justice as "Acting Attorney General" does not affect the validity of the appointment; the Solicitor General being empowered by R. S. § 347, ante, § 516, to exercise the duties of the office of the Attorney General in case of his absence, which will be presumed in support of the regularity of the appointment. U. S. v. Twining (D. C. 1904) 132 Fed. 129.

Employment in foreign countries.—Matters relating to the employment of special counsel in foreign countries for the institution of suits on behalf of the United States for the recovery of damages caused to war vessels of the United States should be referred to the Department of Justice. (1895) 21 Op. Atty. Gen. 195.

Powers and duties of assistants.—Special assistants were not entitled to attend grand jury proceedings. U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862, 868; U. S. v. Virginia-Carolina Chemical Co. (C. C. 1908) 163 Fed. 66, 72.

Such assistant may perform any of the duties which devolve on the district attorney, and a special assistant appointed to assist a district attorney in a certain class of suits and prosecutions in his district may, by direction of the district attorney, appear before the grand jury, and assist in the conducting of examinations by that body. U. S. v. Cobban (C. C. 1904) 127 Fed. 713.

A commission from the Department of Justice to an attorney appointing him a special assistant to a district attorney is not to be construed with technical nicety, and such a commission appointing an attorney as special assistant to a district attorney, to assist "in the preparation and trial" of cases of the United States against the officers of an insolvent national bank against some of whom indictments had previously been returned, is to be construed as having been given under this section and to authorize the person so commissioned to assist in the performance of any duties of the district attorney, in-

cluding appearing before the grand jury to present evidence for new indictments. U. S. v. Twining (D. C. 1904) 132 Fed. 129.

The duties of an examiner in the Department of Justice and of special assistant attorneys appointed to assist in the prosecution of criminal business are distinct and different. Crosthwaite v. U. S. (1895) 30 Ct. Cl. 300.

Special assistants or officers.—A special assistant to district attorney is not an "assistant district attorney" within the meaning of the statute. U. S. v. Crosthwaite (1897) 18 Sup. Ct. 107, 108, 168 U. S. 375, 42 L. Ed. 507; U. S. v. Virginia-Carolina Chemical Co. (C. C. 1908) 163 Fed. 66, 72.

When an additional attorney for the United States is employed, he should be termed an "assistant to the district attorney," or an "assistant district attorney." McDonald v. U. S. (C. C. 1894) 66 Fed. 257.

A special assistant to the Attorney General is not an officer of the department. U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862, 868.

An assistant district attorney, employed at a salary and also appointed by the Attorney General as a special assistant to a district attorney, must be regarded as an officer in the public service. Cole v. U. S. (1893) 28 Ct. Cl. 501.

Reimbursement of district attorney for expenses.—There is no provision by law under which a district attorney, who has paid the traveling expenses of his assistants, can be reimbursed. Townsend v. U. S. (1887) 22 Ct. Cl. 207.

Cited without definite application, U. S. v. Fleming (1897) 80 Fed. 372, 373, 25 C. C. A. 498; Ruhm v. U. S. (C. C. 1895) 66 Fed. 531, 533; Perry v. U. S. (1893) 28 Ct. Cl. 483; Milchrist v. U. S. (1896) 31 Ct. Cl. 403.

§ 539. (R. S. § 364.) Attendance of counsel.

Whenever the head of a Department or Bureau gives the Attorney-General due notice that the interests of the United States require the service of counsel upon the examination of witnesses touching any claim, or upon the legal investigation of any claim, pending in such Department or Bureau, the Attorney-General shall provide for such service.

Act Feb. 14, 1871, c. 51, § 3, 16 Stat. 412.

A similar provision was contained in R. S. § 187, ante, § 269.

Notes of Decisions

Employment of counsel for boards of immigration.—It is not the duty of a United States attorney to advise or defend boards of immigration; but the Secretary of the Treasury is empowered by Act Aug. 3, 1882 (22 Stat. 214), to employ counsel for those purposes and pay him out of the immigrant fund. (1885) 18 Op. Atty. Gen. 108.

Cited without definite application, U. S. v. Crosthwaite (1897) 18 Sup. Ct. 107, 108, 168 U. S. 375, 42 L. Ed. 507; In re Beavers (C. C. 1904) 131 Fed. 366, 370; U. S. v. Virginia-Carolina Chemical Co. (C. C. 1908) 163 Fed. 66, 73.

§ 540. (R. S. § 365.) Counsel fees restricted.

No compensation shall hereafter be allowed to any person, besides the respective district attorneys and assistant district attorneys for services as an attorney or counselor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney-General that such services were actually rendered, and that the same could not be performed by the Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.

Act June 22, 1870, c. 150, § 17, 16 Stat. 164.

Notes of Decisions

Counsel fees under prior acts.—The district attorney for the District of Columbia is not entitled to extra compensation for services rendered the United States by him in a proceeding by mandamus against the Postmaster General for refusing to allow credits settled and adjusted by the Solicitor of the Treasury, under Act July 2, 1836; it being his duty to attend to the proceeding in behalf of the United States; nor can he have extra compensation for arguing the cause before the Supreme Court. (1843) 4 Op. Atty. Gen. 191.

Previous to this act the departments were authorized to settle and pay the claim for services rendered with their approbation. (1854) 6 Op. Atty. Gen. 355; (1856) 7 Op. Atty. Gen. 686; (1858) 9 Op. Atty. Gen. 14; (1859) 9

Op. Atty. Gen. 300; (1861) 10 Op. Atty. Gen. 41, 48; (1865) 11 Op. Atty. Gen. 349, 360; (1868) 12 Op. Atty. Gen. 401, 416; (1876) 15 Op. Atty. Gen. 168; (1885) 18 Op. Atty. Gen. 124.

Branch or department of government.—A commission created by statute to acquire land for a public park is a branch of the government. Perry v. U. S. (1893) 28 Ct. Cl. 483.

Amount of fees.—The Attorney General has no authority to stipulate to pay an attorney at law, under the name of a fee, a sum which, as is understood beforehand, is much larger than the professional services involved can be worth, and is intended to cover, in addition thereto, services not professional. (1874) 14 Op. Atty. Gen. 655.

Compensation as assistant district attorneys.—A special assistant is not an assistant district attorney within the meaning of the statute. U. S. v. Crosthwaite (1897) 18 Sup. Ct. 107, 108, 168 U. S. 375, 42 L. Ed. 507; Stanton v. U. S. (C. C. 1889) 37 Fed. 260; U. S. v. Virginia-Carolina Chemical Co. (C. C. 1908) 163 Fed. 66, 72.

Necessity of certificate.—Certificate essential. U. S. v. Crosthwaite (1897) 18 Sup. Ct. 107, 108, 168 U. S. 375, 42 L. Ed. 507; U. S. v. Winston (1898) 18 Sup. Ct. 701, 170 U. S. 522, 42 L. Ed. 1130; Same v. Herron (1898) Id. 703, affirming judgment (1896) 73 Fed. 149, 19 C. C. A. 419.

Cited without definite application, Ruhm v. U. S. (C. C. 1895) 66 Fed. 531, 533; U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862, 868; Smith v. U. S. (1891) 26 Ct. Cl. 568.

§ 541. (R. S. § 366.) Appointment and oath of special attorneys or counsel.

Every attorney or counselor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law.

Act June 22, 1870, c. 150, § 17, 16 Stat. 164.

The appropriation made for each recent fiscal year, for the payment of assistants to the Attorney-General and to district attorneys employed by the Attorney-General to aid in special cases, is made available for the payment of foreign counsel so employed, and such counsel shall not be required to take oath of office in accordance with this section, by a provision accompanying said appropriation, quoted in the note to R. S. § 363, ante, § 538.

Notes of Decisions

Construction in general.—This section and R. S. § 363, ante, § 538, must be read together. U. S. v. Virginia-Carolina Chemical Co. (C. C. 1908) 163 Fed. 66, 72.

The purpose of the statute was to gather into the Department of Justice all legal business of the government, and to break up the practice of employing attorneys in the public service. Perry v. U. S. (1893) 28 Ct. Cl. 483.

This section recognizes a contemplated special retainer of an attorney or counselor to assist in the trial of any case in which the government is interested, and directs concerning his commission, oath, and liabilities, and the trial of a case does include proceedings before a grand jury. U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862, 868.

Appointment and commission.—Special counsel may be employed by the Attorney General, at the request of the Secretary of the Navy, to assist the judge advocate in a trial by court-martial; the compensation of such counsel (in the absence of other provision) to be paid from the appropriation for the contingent expenses of the Navy. (1885) 18 Op. Atty. Gen. 135. Such counsel should be commissioned by the Attorney General under this section. Id.

Special assistant as officer of department.—A special assistant to Attorney General is not an officer of the department. U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862, 867.

A "special assistant" is not an officer, and his compensation must be confined to the terms of his appointment. Lee v. U. S. (1910) 45 Ct. Cl. 57.

Cited without definite application, U. S. v. Crosthwaite (1897) 18 Sup. Ct. 107, 108, 168 U. S. 375, 42 L. Ed. 507; U. S. v. Cobban (C. C. 1904) 127 Fed. 713, 717; U. S. v. Twining (D. C. 1904) 132 Fed. 129; Smith v. U. S. (1891) 26 Ct. Cl. 568.

§ 542. (R. S. § 367.) Interest of United States in pending suits, who may attend to.

The Solicitor-General, or any officer of the Department of Justice, may be sent by the Attorney-General to any State or District in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States.

Act June 22, 1870, c. 150, § 5, 16 Stat. 162.

Provision for payment of expenses of the Solicitor-General or officer sent on such business, while absent from the seat of government, is made by R. S. § 370, post, § 545.

Notes of Decisions

Grand jury proceedings.—Neither the Attorney General, the Solicitor General, nor any officer of the Department of Justice, is authorized to conduct, or to aid in the conduct of, proceedings before a grand jury. U. S. v. Rosenthal (C. C. 1903) 121 Fed. 862.

Taking testimony.—A district attorney may be required to take depositions to be used in another district without extra compensation. U. S. v. Ady (1896) 76 Fed. 359, 363, 22 C. C. A. 223.

Special compensation.—A district attorney is not entitled to special compensation for services rendered by direction of the Attorney General in an appellate court outside of his district. U. S. v. Fleming (1897) 80 Fed. 372, 25 C. C. A. 498.

Cited without definite application, Smith v. U. S. (1891) 26 Ct. Cl. 568.

§ 543. (R. S. § 368.) Accounts of district attorneys, marshals, etc.

The Attorney-General shall exercise general supervisory powers over the accounts of district attorneys, marshals, clerks, and other officers of the courts of the United States.

Act June 22, 1870, c. 150, § 15, 16 Stat. 164.

The accounts mentioned in this section, and all other accounts relating to the business of the Department of Justice of the courts of the United States, other than consular courts, were required to be sent to the Attorney-General and examined under his supervision, by section 13 of the Dockery Act, ante, § 432; and the administrative audit of all expenditures under control of the Department of Justice was to be made in the Division of Accounts of that Department, by a provision of Act Aug. 23, 1912, c. 350, § 1, ante, § 433.

Appropriations are made annually, in the sundry civil appropriation acts, under the heading "Detection and prosecution of crimes," for investigation of official acts, records, and accounts of the officers mentioned in this section and other officers of the courts. The provision for the fiscal year 1917, by Act July 1, 1916, c. 209, § 1, 39 Stat., was as follows:

"Detection and prosecution of crimes: For the detection and prosecution of crimes against the United States; the investigation of the official acts, records, and accounts of marshals, attorneys, clerks, referees, and trustees of the United States courts and the Territorial courts, and United States commissioners, for which purpose all the official papers, records, and dockets of said officers, without exception, shall be examined by the agents of the Attorney General at any time; for the protection of the person of the President of the United States; for such other investigations regarding official matters under the control of the Department of Justice or the Department of State as may be directed by the Attorney General, per diem in lieu of subsistence when allowed pursuant to section thirteen of the sundry civil appropriation Act approved August first, nineteen hundred and fourteen, and including not to exceed $18,500 for necessary employees at the seat of government, to be expended under the direction of the Attorney General, $485,000."

Notes of Decisions

History of provision.—The statutory history of the provisions examined and stated. Waters v. U. S. (1886) 21 Ct. Cl. 30.

Accounts of district attorneys.—The Attorney General is not authorized to reduce counsel fees of district attorneys fixed by the court within the statutory limit. U. S. v. Waters (1890) 10 Sup. Ct. 249, 133 U. S. 208, 33 L. Ed. 594, affirming Waters v. U. S. (1886) 21 Ct. Cl. 30; Hillborn v. U. S. (1892) 27 Ct. Cl. 547.

Accounts of marshals.—A marshal is entitled to be reimbursed for money paid with the approval of the Attorney General, to whom this statute gives general supervisory power over the accounts of the court officers; the payment having been made on a requisition of the district attorney for blanks necessary for his use. U. S. v.

Harmon (1893) 13 Sup. Ct. 327, 331, 147 U. S. 268, 37 L. Ed. 164, affirming 43 Fed. 565.

The Attorney General, in passing on claims of marshals for allowances to supervisors, is not required to determine whether the period of service of supervisors of elections is reasonable or unreasonable. (1885) 18 Op. Atty. Gen. 102.

The Attorney General of the United States has vested in him a general supervisory power over the accounts of the United States marshals, and his decision of any point connected with the subject is conclusive, and not subject to collateral attack by the courts. Schloss v. Hewlett (1887) 81 Ala. 266, 1 South. 263.

Cited without definite application, U. S. v. Denison (1897) 80 Fed. 370, 371, 25 C. C. A. 496; U. S. v. Fleming (1897) 80 Fed. 372, 373, 25 C. C. A. 498; Ruhm v. U. S. (C. C. 1895) 66 Fed. 531, 533.

§ 544. (R. S. § 369.) Requisitions.

The Attorney-General shall sign all requisitions for the advance or payment of moneys appropriated for the Department of Justice, out of the Treasury, subject to the same control as is exercised on like estimates or accounts by the First Auditor or First Comptroller of the Treasury.

Act June 22, 1870, c. 150, § 15, 16 Stat. 164.

The designations of the First Auditor and First Comptroller of the Treasury were changed by the Dockery Act of July 31, 1894, c. 174, §§ 3, 4, ante, §§ 402, 417.

§ 545. (R. S. § 370.) Traveling expenses of officers of the Department.

Whenever the Solicitor-General, or any officer of the Department of Justice, is sent by the Attorney-General to any State, District, or Territory, to attend to any interest of the United States, the person so sent shall receive, in addition to his salary, his actual and necessary expenses while absent from the seat of Government; the account thereof to be verified by affidavit.

Act June 22, 1870, c. 150, § 5, 16 Stat. 162.

Notes of Decisions

Traveling expenses.—A district attorney sent by the Attorney General to conduct a cause in a court outside of his district is entitled to recover expenses necessarily incurred. U. S. v. Fleming (1897) 80 Fed. 372. 25 C. C. A. 498.

§ 546. (R. S. § 371.) Disbursement of moneys.

All moneys drawn out of the Treasury upon the requisition of the Attorney-General shall be disbursed by such one of the clerks in the Department of Justice as the Attorney-General may designate.

Act June 22, 1870, c. 150, § 11, 16 Stat. 163.

A disbursing clerk is provided for by the annual appropriations for the Department for recent years. The provision for such clerk for the fiscal year 1917 was $2,750, by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 547. (Act July 31, 1894, c. 174, § 13.) Disbursement of salaries of judges, etc.; certificates of non-absence or cause of absence.

Judges receiving salaries from the Treasury of the United States shall be paid monthly by the disbursing officer of the Department of Justice, and to him all certificates of nonabsence or of the cause of absence of judges in the Territories shall be sent. Interstate Commerce Commissioners and other officers, now paid as judges are, shall be paid monthly by the proper disbursing officer or officers. (28 Stat. 210.)

These provisions were part of section 13 of the Dockery Act, cited above. The preceding portion of the section, providing for the examination of accounts of judicial officers in the Department of Justice before transmission to the Treasury Department for settlement, is set forth ante, § 432.

Notes of Decisions

Construction in general.—This provision means that before such accounts be transmitted to the Treasury for settlement they shall be made out, presented, and approved as required by Act Feb. 22, 1875, c. 95, § 1, 18 Stat. 333. Summey v. U. S. (1904) 39 Ct. Cl. 199.

§ 548. (R. S. § 372.) Records formerly appertaining to the office of agent of the Treasury.

The Solicitor of the Treasury shall have charge, within the Department of Justice, of the books, papers, and records formerly appertaining to the office of agent of the Treasury, or to the superintendence of the collection of outstanding direct taxes and internal duties which have been transferred to him by the act of May twenty-nine, eighteen hundred and thirty, and remain in his charge; and of the seal adopted for the office of the Solicitor of the Treasury.

Act May 29, 1830, c. 153, § 2, 4 Stat. 414. Act Feb. 22, 1849, c. 61, § 2, 9 Stat. 347.

§ 549. (R. S. § 373.) Liability of district attorney upon receiving a bond for suit.

Whenever the Solicitor of the Treasury receives information from a collector of duties that such collector has delivered any bond for duties to a district attorney for suit, the Solicitor of the Treasury shall make such entry thereof as that the attorney may duly appear chargeable therewith, until the amount has been paid to the United States, or he has obtained judgment thereon and delivered execution to the marshal, or otherwise been duly discharged therefrom.

Act May 29, 1830, c. 153, § 3, 4 Stat. 414.

Notes of Decisions

Instructions to district attorneys receiving bonds.—The Solicitor of the Treasury may grant indulgences upon custom house bonds in the form of instructions to district attorneys who shall have received them for prosecution, in such cases and on such terms as shall be deemed advantageous to the United States. (1837) 3 Op. Atty. Gen. 247.

And although the Solicitor has no jurisdiction of bonds until they are placed in the hands of district attorneys, he may, in proper cases, give the instructions conditionally in advance, as to the course to be pursued. Id.

§ 550. (R. S. § 374.) Examination of reports of district attorneys and collectors upon bonds delivered for suit.

The Solicitor of the Treasury shall make constant and strict examinations and comparisons of the reports made by collectors of bonds for duties delivered by them to district attorneys for suit, and of the returns made by district attorneys of such bonds so received by them.

Act May 29, 1830, c. 153, § 3, 4 Stat. 414.

§ 551. (R. S. § 375.) False reports of bonds delivered for suit.

Whenever it appears that any collector has made return of any bond as in suit, or delivered for suit, which is not, at the time, in suit, or delivered for suit, or has returned any bond as in suit for the whole amount thereof, when part thereof has been paid to him, or as in suit for more than is actually due thereon, the Solicitor of the Treasury shall, immediately upon discovery thereof, communicate the facts to the President of the United States.

Act May 29, 1830, c. 153, § 3, 4 Stat. 414.

§ 552. (R. S. § 376.) Measures taken for the discovery of frauds.

The Solicitor of the Treasury, under direction of the Secretary of the Treasury shall take cognizance of all frauds or attempted frauds upon the revenue, and shall exercise a general supervision over the measures for their prevention and detection, and for the prosecution of persons charged with the commission thereof.

Act March 3, 1863, c. 76, § 2, 12 Stat. 739.

Notes of Decisions

Authority of Attorney General.—The Attorney General has no proper authority and should refrain from interfering by directions to district attorneys in the matter of the prosecution and punishment of frauds upon the revenue. (1894) 20 Op. Atty. Gen. 715.

Authority of Secretary of Treasury.—An action for the recovery of duties on goods previously smuggled would be simply an action of assumpsit, not involving any issue of fraud, and therefore not coming under the direction of the Secretary of the Treasury. (1894) 20 Op. Atty. Gen. 714.

The Secretary of the Treasury, and not the Attorney General, should direct prosecutions for fraud or attempted fraud upon the revenue. (1894) 20 Op. Atty. Gen. 715.

§ 553. (R. S. § 377.) Rules established by Solicitor of Treasury respecting suits.

The Solicitor of the Treasury shall establish such regulations, not inconsistent with law, with the approbation of the Secretary of the Treasury, for the observance of collectors of the customs, and, with the approbation of the Attorney-General, for the observance of district attorneys and marshals respecting suits in which the United States are parties, as may be deemed necessary for the just responsibility of those officers, and the prompt collection of all revenues and debts due and accruing to the United States. But this section does not apply to suits for taxes, forfeitures, or penalties arising under the internal-revenue laws.

Act May 29, 1830, c. 153, § 7, 4 Stat. 415.

Provisions for similar regulations respecting suits under the internal revenue laws were made by R. S. § 3215, post, § 5939.

Notes of Decisions

Violation of regulations.—A district attorney had no power to agree upon a compromise of a claim in suit in favor of the United States, contrary to regulations established by the Solicitor of the Treasury, and approved by the Attorney General, prohibiting such a compromise except under special circumstances. U. S. v. Beebe (1901) 21 Sup. Ct. 371, 374, 180 U. S. 343, 45 L. Ed. 563.

§ 554. (R. S. § 378.) Report by Solicitor of Treasury of moneys recovered.

The Solicitor of the Treasury shall report all moneys recovered or collected under his direction to the officer from whom the bond or other evidence of debt was received, who shall give proper credit therefor; and he shall report in like manner all credits allowed by due course of law on any suits under his direction.

Act May 29, 1830, c. 153, § 6, 4 Stat. 415.

§ 555. (R. S. § 379.) Instructions by Solicitor of Treasury to district attorneys and other officers.

The Solicitor of the Treasury shall have power to instruct the district attorneys, marshals, and clerks of the circuit and district courts in all matters and proceedings appertaining to suits in which the United States is a party or interested, except suits for taxes, penalties, or forfeitures under the internal-revenue laws, and to cause them, or either of them, to report to him from time to time any information he may require in relation to the same.

Act May 29, 1830, c. 153, § 5, 4 Stat. 415.

Notes of Decisions

United States as party interested.—In proceedings taken by a district attorney of the United States, by order of the Attorney General at the request of the Secretary of War, and conducted under directions of the latter, to secure the condemnation of private lands within the limits of his district for the purpose of erecting fortifications thereon for the use of the United States, he is performing his official duties as district attorney of the United States, and is not entitled to any extra or special compensation for them. United States v. Johnson (1899) 173 U. S. 363, 19 Sup. Ct. 427, 430, 43 L. Ed. 731.

A direction to stay proceedings in a suit commenced on a duty bond is clearly an instruction in a matter appertaining to a suit in which the United States is a party, and therefore plainly within the statute * * * a direction to the district attorney to stay the commencement of a suit on a duty bond handed over to him by the collector, in such cases and on such terms as shall be deemed advantageous to the United States, is also an instruction in a matter appertaining

to a suit in which the United States is interested, and may lawfully be given by the Solicitor. (1837) 3 Op. Atty. Gen. 251.

It is not necessary for the Solicitor to use the name of the President in his directory correspondence. On the other hand, it is not intended by the statute to confer on the Solicitor a mandatory power independent of the authority of the President, or of the heads of department. On the contrary, by the tenor of the statute itself, and by a subsisting general order of the President, the Solicitor, in giving his instructions, is to act upon advice of the Attorney General, or special direction of the Secretary within whose department any suit in law may arise; and he is subject to the direction, both general and special, of the President. (1855) 7 Op. Atty. Gen. 475.

No statutory provision gives to the Secretary of the Treasury any direct control over suits instituted for the collection of unpaid duties. This section places these matters in charge of the Solicitor of the Treasury. As matter of prudent administration, the discretion of the Solicitor of the Treasury should be exercised under the supervision and with the approbation of the Secretary or the head of the department to which the Solicitor is attached as subordinate. (1881) 17 Op. Atty. Gen. 143.

An action for the recovery of duties on goods previously smuggled would be a suit "in which the United States is a party, or interested," and as such the Solicitor of the Treasury has power to instruct in regard thereto. (1894) 20 Op. Atty. Gen. 714.

§ 556. (R. S. § 380.) Conduct of suits involving national banks. All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.

Act Feb. 25, 1863, c. 58, § 55, 12 Stat. 680. Act June 3, 1864, c. 106, § 56. 13 Stat. 116.

Notes of Decisions

Construction as directory.—This provision is merely directory. Kennedy v. Gibson (1869) 8 Wall. 498, 504, 19 L. Ed. 476.

This section is directory, and an action to enforce an assessment against stockholders in a national bank may be brought by the receiver's special attorney. McCormick v. Smith, 130 P. 999, 23 Idaho, 487.

As counsel for receiver of bank.—Under section 556, it is the duty of the district attorney to act as counsel for the receiver of an insolvent national bank, such receiver being a United States officer, appointed by the comptroller of the currency; and the appointment of special counsel by such receiver, though sanctioned by the comptroller, does not affect such district attorney's right to fees as such counsel, in suits to which the receiver was a party, it appearing that he was ready and offered to perform them, and did perform them so far as the opposition of the receiver allowed—no want of skill, diligence, or industry being imputed to him. Set aside by circuit judge (C. C. 1888) 36 Fed. 487. Gibson v. Peters (C. C. 1888) 35 Fed. 721, judgment affirmed (1893) 14 S. Ct. 134, 150 U. S. 342, 37 L. Ed. 1104.

A district attorney need not wait until actually instructed by the solicitor of the treasury, to enter on the duties of counsel to the receiver, but, if the solicitor fails to give directions, he may nevertheless enter on the duties, and recover compensation from the receiver. Id.

A receiver of a national bank is an officer of the United States. Frelinghuysen v. Baldwin (D. C. 1882) 12 Fed. 395, 396.

Suits and proceedings instituted by the receiver of a failed national bank to enforce the payment of a debt which may be maintained in a state court as well as in a United States court, fall within this section, and are therefore to be conducted by district attorneys under the direction of the Solicitor of the Treasury. (1892) 20 Op. Atty. Gen. 476.

Under this section district attorneys are charged with the duty, under the direction of the solicitor of the treasury, of conducting suits brought by receivers of national banks in collecting assets and winding up their affairs, and they are not entitled to any compensation or allowance therefor beyond the salary attached to the office. Gibson v. Peters (1893) 14 Sup. Ct. 134, 150 U. S. 342, 37 L. Ed. 1104, reversing (C. C. 1888) 35 Fed. 721, 727, wherein it was held that R. S. § 299, post, § 1382, did not apply to such suits or affect the right of the district attorney to recover a reasonable compensation for services therein beyond fees allowed by law.

Compensation, and from what funds paid.—The compensation of the district attorney in such suits is not limited to the fees prescribed by law in suits to which the United States is a party; but, the United States not being a party to or interested in such suits, and the district attorney's compensation therein

not being audited by any of the treasury officers to whose supervision his accounts as district attorney are subjected, he is entitled to the usual compensation for such services, to be paid out of the assets of the bank. Gibson v. Peters (1888) 35 Fed. 721, judgment affirmed (1893) 14 Sup. Ct. 134, 150 U. S. 342, 37 L. Ed. 1104.

The district attorney's compensation therefor is not regulated by the fee bill prescribed by statute, nor should it be paid by the government and not out of the fund of the trust, but the amount of fees to be allowed in any given case is a matter to be adjusted by the Comptroller in the exercise of a legal discretion under the advice of the Solicitor of the Treasury. (1892) 20 Op. Atty. Gen. 476.

The account of the district attorney for his services, upon approval thereof by the Attorney General, may properly be paid out of the appropriation for the payment of miscellaneous expenses authorized by the Attorney General. (1888) 19 Op. Atty. Gen. 152.

The expenses of proceedings instituted by the Comptroller of the Currency for the forfeiture of the charter of a national banking association, including the fee of the United States attorney for his services in such proceedings, should be defrayed out of the funds or assets of the association. (1890) 19 Op. Atty. Gen. 633.

Cited without definite application, Colman v. U. S. (1895) 66 Fed. 695, 699, 14 C. C. A. 65; U. S. v. Rea-Read Mill & Elevator Co. (C. C. 1909) 171 Fed. 501.

§ 557. (R. S. § 381.) Duties of United States attorneys.

In the prosecution of any suit for money due the Post-Office Department, the United States attorney conducting the same shall obey the directions which may be given him by the Department of Justice.

Act June 8, 1872, c. 335, § 309, 17 Stat. 324.

§ 558. (R. S. § 382.) Proceedings in equity in cases of Post-Office Department.

When proceedings at law for money due the Post-Office Department are fruitless, the Department of Justice may direct the institution of a suit in chancery, in any United States district or circuit court, to set aside fraudulent conveyances or trusts, or attach debts due the defendant, or obtain any other proper exercise of the powers of equity to have satisfaction of any judgment against such defendant.

Act June 8, 1872, c. 335, § 310, 17 Stat. 324.

§ 559. (R. S. § 383.) Publication of opinions.

The Attorney-General shall from time to time cause to be edited, and printed at the Government Printing-Office, an edition of one thousand copies of such of the opinions of the law-officers herein authorized to be given as he may deem valuable for preservation in volumes, which shall be, as to size, quality of paper, printing, and binding, of uniform style and appearance, as nearly as practicable, with volume eight of such opinions, published, by Robert Farnham, in the year eighteen hundred and sixty-eight. Each volume shall contain proper head-notes, a complete and full index, and such footnotes as the Attorney-General may approve. Such volumes shall be distributed in such manner as the Attorney-General may from time to time prescribe.

Act June 22, 1870, c. 150, § 18, 16 Stat. 165.

Appropriations have been made regularly for employment of a competent person to edit and prepare for publication the successive volumes of Opinions of the Attorney-General, in accordance with this section. The appropriation for Vol. 29 was by Act March 4, 1913, c. 149, 37 Stat. 925.

§ 560. (R. S. § 384.) Report of business and statistics.

It shall be the duty of the Attorney-General to make to Congress, at the commencement of each regular session, a report of the business of the Department of Justice for the last preceding fiscal year, and of any other matters appertaining thereto that he may deem proper, including a statement of the several appropriations now or which may hereafter be placed under its control, the amount appropriated, and a detailed statement of the amounts used for de-

fraying the expenses of the United States courts in each judicial district; also the statistics of crime under the laws of the United States, and a statement of the number of causes, civil and criminal, pending during the preceding year in each of the several courts of the United States.

Act June 22, 1870, c. 150, § 12, 16 Stat. 164. Act March 3, 1873, c. 238, § 1, 17 Stat. 578.

Further requirements as to matters to be included in the report of the Attorney-General, contained in Act June 20, 1874, c. 328, § 1, and Act June 30, 1879, c. 52, § 3, are set forth post, §§ 561, 562.

A report of the suits under Jud. Code, § 180, post, § 1171, in which a final judgment or decree has been rendered, was required by Jud. Code, § 183, post, § 1174.

Provisions applicable to all the Departments, as to the time of making annual reports, and the time of furnishing copies thereof to the printer, were contained in R. S. §§ 195, 196, and Act July 1, 1916, c. 209, § 3, ante, §§ 278, 279, 279a.

§ 561. (Act June 20, 1874, c. 328, § 1.) Report of expenditure of contingent fund.

The Attorney-General shall hereafter annually report to Congress, in detail, the items, amounts, and causes of expenditure of the contingent expenses of this Department. (18 Stat. 109.)

This was a provision accompanying an appropriation for contingent expenses of the Department in the legislative, executive, and judicial appropriation act for the fiscal year 1875, cited above.

Provisions applicable to all the Departments, as to reports of expenditures of contingent funds, were contained in R. S. § 193, ante, § 275.

§ 562. (Act June 30, 1879, c. 52, § 3.) Report of payments from appropriations.

The Attorney-General shall include in his annual report a statement of all payments or expenditures during any fiscal year out of any appropriation fund subject to requisitions by him. (21 Stat. 44.)

This section was part of an act making appropriations for certain judicial expenses of the government, etc., cited above.

Provisions for requisitions by the Attorney-General for moneys appropriated for the Department were made by R. S. § 369, ante, § 544.

§ 563. (R. S. § 385.) Report of additional attorneys and counsel employed.

The Attorney-General shall make an annual report to Congress of the names of all persons employed or retained as attorneys or counselors at law to assist any district attorneys in the performance of their duties, stating where and upon what business each was employed, and the compensation paid to each.

Act April 10, 1869, c. 25, 16 Stat. 46.

Provisions for employment of such additional attorneys, etc., were made by R. S. § 363, ante, § 538.

Further requirements as to similar matters to be reported, contained in Act May 28, 1896, c. 252, § 23, are set forth post, § 564.

Provisions applicable to all the Departments, as to the time of making annual reports, and the time of furnishing copies thereof to the printer, were made by R. S. §§ 195, 196, ante, §§ 278, 279.

§ 564. (Act May 28, 1896, c. 252, § 23.) Report of assistants to district attorneys and marshals' deputies and assistants.

The Attorney-General shall, in his annual report to Congress each year, include a statement in detail showing for the preceding fiscal year the number of assistant district attorneys employed, the salaries of each; the number of clerical assistants employed for each district attorney, the salaries of each; the amount expended for necessary subsistence, and actual and necessary traveling expenses of each district attorney and his assistants; the number of office dep-

uties and clerical assistants employed for each marshal, the salaries paid to each; the amount expended for necessary subsistence and actual and necessary traveling expenses of each marshal and his office deputies, and the number of field deputy marshals employed by each marshal and the amount of fees earned by and the compensation paid to each of them out of such fees. (29 Stat. 185.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1897, cited above.

Authority to appoint assistant district attorneys was given by section 8 of this act, post, § 1420; and provisions for employment by marshals of deputies and clerical assistance were made by section 10 thereof, post, § 1422.

§ 565. (R. S. § 386.) Distribution of statutes and reports to judges.

The Department of Justice shall be charged with the distribution to the various judges and courts of the statutes, reports, and other judicial documents provided by law.

Act March 3, 1873, c. 238, § 2, 17 Stat. 578.

So much of this section as charged the Department of Justice with the distribution of the reports of the Supreme Court was repealed, and the Secretary of the Interior was charged with such distribution, by provisions of Act Feb. 12, 1889, c. 135, 25 Stat. 661, which amended R. S. § 683. But R. S. § 683, was repealed, and different provisions for distribution of copies of the Supreme Court Reports were made, by Jud. Code, § 227, post, § 1203. Provisions regulating the distribution of the statutes were made by Act June 20, 1874, c. 333, 18 Stat. 113, and Act Aug. 7, 1882, c. 433, § 1, 22 Stat. 336; and subsequent provisions for the printing and distribution of copies of the Revised Statutes and the Supplements thereto, and of pamphlet copies and bound volumes of the Statutes at Large, were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, pars. 18–25, post, §§ 7070–7073.

§ 566. (R. S. § 387.) Register of statutes and reports distributed.

A register of the statutes of the United States and reports of the Supreme Court shall be kept, under the authority of the head of the Department of Justice, showing the quantity of each kind received by him from the Secretary of the Interior; and it shall be his duty to cause to be entered in such register, and at the proper time, when, where, and to whom the same, or any part of them, have been distributed and delivered, and to report the same to Congress in his annual report.

Act March 3, 1873, c. 238, § 3, 17 Stat. 578.

See notes to preceding section as to subsequent provisions for distribution of statutes.

TITLE IX

THE POST-OFFICE DEPARTMENT

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§ 567. (R. S. § 388.) Establishment of the Post-Office Department.

There shall be at the seat of Government an Executive Department to be known as the Post-Office Department, and a Postmaster-General, who shall be the head thereof, and who shall be appointed by the President, by and with the advice and consent of the Senate,

and who may be removed in the same manner; and the term of the Postmaster-General shall be for and during the term of the President by whom he is appointed, and for one month thereafter, unless sooner removed.

Act May 8, 1794, c. 23, § 3, 1 Stat. 357. Act June 8, 1872, c. 335, §§ 1, 2, 17 Stat. 283.

Cited without definite application, Central Trust Co. v. Central Trust Co. of Illinois (1910) 30 Sup. Ct. 341, 342, 216 U. S. 251, 54 L. Ed. 469, 17 Ann. Cas. 1066; U. S. v. Warfield (1909) 170 Fed. 43, 95 C. C. A. 317, 24 L. R. A. (N. S.) 312, 17 Ann. Cas. 1186.

§ 568. (R. S. § 389.) Assistant Postmasters-General.

There shall be in the Post-Office Department three Assistant Postmasters-General, who shall be appointed by the President, by and with the advice and consent of the Senate, and who may be removed in the same manner, and who shall be entitled to a salary of four thousand dollars a year each.

Act June 8, 1872, c. 335, § 2, 17 Stat. 284. Act March 3, 1873, c. 226, § 3, 17 Stat. 508.

A provision for a Fourth Assistant Postmaster-General, contained in Act March 3, 1891, c. 541, § 1, is set forth post, § 569.

Appropriations for the Assistant Postmasters-General in recent years are $5,000 each. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof is required, unless otherwise directed, to perform the duties of the head of such Department until a successor is appointed, or such absence or sickness shall cease, by R. S. § 177, set forth ante, § 259. In case of the death, resignation, absence, or sickness of the head of any Department, except where the Attorney General is concerned, the President may authorize and direct the head of any other Department or any officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease, by R. S. § 179, also set forth ante, § 261.

Provisions for authorizing the Assistant Postmasters-General to approve bonds and sign contracts in the name of the Postmaster-General, made by Act March 3, 1877, c. 103, §§ 2, 3, and Act Dec. 21, 1893, c. 6, are set forth post, §§ 583–585.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Cited without definite application, Central Trust Co. v. Central Trust Co. of Illinois (1910) 30 Sup. Ct. 341, 342, 216 U. S. 251, 54 L. Ed. 469, 17 Ann. Cas. 1066.

§ 569. (Act March 3, 1891, c. 541, § 1.) Fourth Assistant Postmaster-General.

For Fourth Assistant Postmaster-General, four thousand dollars. (26 Stat. 944.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1892, cited above.

The appropriation was continued in the subsequent similar acts, and the amount was increased, in recent years, to $5,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to R. S. § 389, ante, § 568.

§ 570. (R. S. § 390.) Assistant Attorney-General for Post-Office Department.

There shall be employed in the Post-Office Department one Assistant Attorney-General, who shall be appointed by the Postmaster-General, and shall be entitled to a salary of four thousand dollars a year.

Act June 8, 1872, c. 335, § 3, 17 Stat. 284.

The title of the Assistant Attorney General provided for by this section was changed to that of Solicitor for the Post Office Department, and his salary fixed at $5,000, by a provision in the legislative, executive, and judicial appropriation act for the fiscal year 1915, Act July 16, 1914, c. 141, § 1, post, § 570a. The appropriations for the Solicitor for the Post Office Department in the subsequent legislative, executive, and judicial appropriation acts was at the same rate. The provision for the fiscal year 1917, was by Act May 10, 1916, c. 117, § 1, 39 Stat. Appropriations are also made annually for assistant attorneys, clerks, etc., in the Division of the Solicitor. The provisions for the fiscal year 1917, were also by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 568, ante.

§ 570a. (Act July 16, 1914, c. 141, § 1.) Solicitor for Post Office Department.

Office of the Attorney General: * * Solicitor for the Post Office Department, $5,000: Provided, That the title of Assistant Attorney General for the Post Office Department is hereby changed to that of Solicitor for the Post Office Department, but this shall not affect the status of the present incumbent or require his reappointment. (38 Stat. 497.)

This was a provision in the legislative, executive, and judicial appropriation act for the fiscal year 1915, cited above.

See notes to R. S. §§ 389, 390, ante, §§ 568, 570.

Notes of Decisions

Assistant Attorney General as officer of Post Office Department.—It is no objection to a "fraud order" issued by the Postmaster General under R. S. §§ 3929, 4041, post, §§ 7411, 7573, that the Assistant Attorney General for the department acted in the hearing of evidence before the issuance of the order, and in recommending it. People's U. S. Bank v. Gibson (C. C. 1905) 140 Fed. 1, 5, affirmed (1908) 161 Fed. 286, 88 C. C. A. 332.

The Assistant Attorney General appointed by the Postmaster General was an officer of the Post Office Department, notwithstanding the making of appropriations for his salary under the head "Department of Justice." (1893) 20 Op. Atty. Gen. 677, 681.

Cited without definite application, McCollum v. U. S. (1881) 17 Ct. Cl. 92, 101.

§ 571. (R. S. §§ 391, 392, as amended, Act March 5, 1874, c. 46.) Oath of office; before whom taken.

Before entering upon the duties, and before they shall receive any salary, the Postmaster General, and all persons employed in the postal service, shall respectively take and subscribe before some magistrate or other competent officer authorized to administer oaths by the laws of the United States, or of any State or Territory, the following oath or affirmation:

"I, A. B. do solemnly swear (or affirm, as the case may be,) that I will faithfully perform all the duties required of me and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post-roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control; and I also further swear (or affirm) that I will support the Constitution of the United States; so help me God."

And this oath or affirmation may be taken before any officer civil or military holding a commission under the United States, and such

officer is hereby authorized to administer and certify such oath or affirmation.

Act June 8, 1872, c. 335, § 15, 17 Stat. 287. Act March 5, 1874, c. 46, 18 Stat. 19.

These two sections of the Revised Statutes incorporated the provisions of section 15 of Act June 8, 1872, c. 335, first above cited. That section was amended, to read as above set forth, by Act March 5, 1874, c. 46, also cited above, which, though passed before the enactment of the Revised Statutes, took effect, by virtue of R. S. § 5601, post, § 10,598, as a subsequent statute, repealing any portion of the revision inconsistent therewith.

The oath prescribed by R. S. § 1757, post, § 3218, is to be taken by any person elected or appointed to any office of honor or profit, in the civil, military, or naval service, except the President, by Act May 13, 1884, c. 46, § 2, post, § 3216.

Notes of Decisions

Oath of postmasters.—A mail contractor cannot draw pay for services or work rendered or done prior to his taking the oath prescribed by Act March 3, 1863, in part re-enacted herein. (1866) 11 Op. Atty. Gen. 498.

While postmasters, in common with all other officers of the United States, except the President, are now required to take the oath of office prescribed in R. S. § 1757, post, § 3218, they are not exempted from taking the oath prescribed by this act, but must take this also. (1885) 18 Op. Atty. Gen. 182.

Eligibility of Indian.—An Indian residing in the Indian Territory, who is a member of one of the tribes there and not a citizen of the United States, and is subject to tribal jurisdiction, is not eligible to appointment as a postmaster; he being incompetent, in contemplation of law, to take the required oath of office. (1885) 18 Op. Atty. Gen. 181.

§ 572. (R. S. § 393.) Clerks and employés.

There shall be in the Post-Office Department:

One chief clerk, at a salary of two thousand two hundred dollars a year.

One superintendent of the Post-Office building and disbursing clerk, at a salary of two thousand three hundred dollars a year.

One topographer, at a salary of two thousand five hundred dollars a year.

One stenographer, at a salary of one thousand eight hundred dollars a year.

One messenger to the Postmaster-General, at a salary of nine hundred dollars a year.

One captain of the watch, at a salary of one thousand dollars a year.

One engineer, at a salary of one thousand six hundred dollars a year.

One assistant engineer, at a salary of one thousand dollars a year.

One carpenter, at a salary of one thousand two hundred and fifty-two dollars a year.

One assistant carpenter, at a salary of one thousand dollars a year.

One fireman and blacksmith, at a salary of nine hundred dollars a year.

Two firemen, at a salary of seven hundred and twenty dollars a year each.

Three female laborers, at a salary of four hundred and eighty dollars a year each.

In the office of the money-order system:

One superintendent, at a salary of four thousand dollars a year.

One chief clerk, at a salary of two thousand dollars a year.

In the office of foreign mails:

One superintendent, at a salary of four thousand dollars a year.

One chief clerk, at a salary of two thousand dollars a year.

In the dead-letter office:

One chief of division, at a salary of two thousand five hundred dollars a year.

In the office of mail-depredations:

One chief of division, at a salary of two thousand five hundred dollars a year.

In the office of the blank-agency:

One superintendent, at a salary of one thousand eight hundred dollars a year.

One assistant superintendent, at a salary of one thousand six hundred dollars a year.

Four assistants, at a salary of one thousand two hundred dollars a year each.

In the office of each of the Assistant Postmasters-General:

One chief clerk, at a salary of two thousand dollars a year.

Act June 8, 1872, c. 335, §§ 3, 4, 17 Stat. 284. Act March 3, 1873, c. 226, § 3, 17 Stat. 508.

This section enumerated the subordinate officers in the Department and their salaries at the time of the compilation of the Revised Statutes, as authorized by the then existing statutes, cited above. But the officers, clerks, and others actually appointed or employed, and their respective salaries and other compensation, depend on the specific provisions made in the annual appropriation acts, each providing for the fiscal year next following; the employment or payment of others being forbidden by Act Aug. 5, 1882, c. 389, § 4, ante, § 249. Subsequent appropriation acts provided for officers and clerks and for salaries different from those fixed by the above section. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Special provisions for an assistant general superintendent and a chief clerk of the Railway Mail Service, were made by Act April 16, 1890, c. 85, post, § 577.

The annual appropriations in the legislative, executive, and judicial appropriation acts provide for various superintendents, assistant superintendents, and other officers in the Department, in connection with the several branches of the Postal Service. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

The appointment of a purchasing agent for the Department was provided for by Act April 28, 1904, c. 1759, § 3, post, § 579.

The detail of clerks or other employés, paid from general appropriations for the postal service, from any branch of said service, to any of the offices or bureaus of the Post-Office Department, was forbidden by Act March 15, 1898, c. 68, § 9, post, § 580.

Provisions applicable to all the Departments, as to the employment of clerks and others, were made by R. S. § 169, and Act Aug. 5, 1882, c. 389, § 4, ante, §§ 248, 249.

Provisions applicable to all the Departments, as to the duties of chief clerks and disbursing clerks, were made by R. S. §§ 173, 174, 176, ante, §§ 255, 256, 258.

See notes to § 568, ante.

(R. S. § 394. Superseded.)

This section of the Revised Statutes incorporated a provision of the postal service appropriation act for the fiscal year 1874, Act March 3, 1873, c. 231, § 1, 17 Stat. 557, authorizing the Postmaster-General to designate one of the then fourth-class clerks to act as Superintendent of Free Delivery, at an annual salary of $2,500, with a proviso that the salary thereby fixed should terminate at the end of the fiscal year 1874. This provision, practically temporary only, was re-enacted, without limitation of the continuance of the increased salary, by the postal service appropriation act for the year next following, Act June 23, 1874, c. 456, § 1, 18 Stat. 231. Subsequently appropriations were made in the annual legislative, executive, and judicial appropriation acts, for a "chief of division of free delivery," and, later, for a "general superintendent free delivery system," and after 1897, for assistant superintendents. After the fiscal year 1904, appropriations were made for a superintendent city delivery service and assistant superintendent of city free delivery system, and also for a superintendent rural free delivery service and supervisor of rural free delivery service. Recent appropriations provided, in the office of the First Assistant Postmaster-General, under the heading "Division of City Delivery," for a superintendent, $3,000, assistant superintendent, $2,000, and clerks, etc., and in the office of the Fourth Assistant Postmaster General, under the heading "Division of Rural Mails," for a superintendent, $3,000, assistant superintendent, $2,000, and a chief clerk, $2,000. The provisions for the fiscal year 1916 were by Act March 4, 1915, c. 141, § 1, 38 Stat. 1036, 1037. For the fiscal year 1917 the appropriations by Act May 10, 1916, c. 117, § 1, 39 Stat., were somewhat different. They were as follows: In the office of the First

Assistant Postmaster General, under the heading "Division of Post Office Service," for an "assistant superintendent $3,000 (formerly Superintendent Division of City Delivery) * * two assistant superintendents $2,000 each (one formerly Assistant Superintendent Division of City Delivery * *)," and in the office of the Fourth Assistant Postmaster General, under the heading "Division of Rural Mails," for a superintendent, $3,000, assistant superintendent, $2,000, and a chief clerk, $2,000.

A provision for a per diem allowance to assistant superintendents of free delivery, when traveling on business, was made by Act Feb. 24, 1899, c. 187, § 1, post, § 573.

§ 573. (Act Feb. 24, 1899, c. 187, § 1.) Assistant superintendents of free-delivery; per diem for traveling expenses.

The assistant superintendents of free-delivery shall hereafter be allowed a per diem of four dollars in lieu of all expenses when traveling on business of the Department. (30 Stat. 884.)

This was a provision accompanying the appropriations for the Department, including "three assistant superintendents of free delivery," at $2,000 each, in the legislative, executive, and judicial appropriation act for the fiscal year 1900, cited above.

The only statutory authority for the appointment of assistant superintendents of free delivery was in the annual appropriation acts. The earliest provision, for two assistant superintendents, was by Act Feb. 19, 1897, c. 265, § 1, 29 Stat. 573.

See notes under (R. S. § 394), just above.

See notes to § 568, ante.

§ 574. (R. S. § 4020, as amended, Act March 3, 1897, c. 385, § 1.) Agents to superintend Railway Mail Service; salary and expenses; salaries, etc., of certain officers, to be charged to appropriation for mail transportation and free delivery system.

The Postmaster-General may appoint two agents to superintend the railway postal service, each of whom shall be paid out of the appropriation for the transportation of the mail a salary at the rate of two thousand five hundred dollars a year, with an allowance for traveling and incidental expenses, while actively employed in the service, of not more than five dollars a day; and the Auditor for the Post-Office Department shall charge to the appropriation for mail transportation the salary and per diem of the assistant superintendents of the postal-railway service, and to the appropriation for the free-delivery system the salary and per diem of the special agent detailed for that service.

Act June 8, 1872, c. 335, § 35, 17 Stat. 289. Act March 3, 1897, c. 385, § 1, 29 Stat. 648.

The latter portion of this section, as enacted in the Revised Statutes, was as follows:

"And the Sixth Auditor shall charge to the appropriation for mail transportation the salary and per diem of the assistant superintendents of the postal railway service; and to the appropriation for the free delivery system the salary and per diem of the special agent detailed for that service; and the special agents employed in the money-order service shall be paid out of the proceeds of that service."

The section was amended by changing said provisions to read as set forth here, by Act March 3, 1897, c. 385, § 1, last cited above.

The provision of this section for two agents was superseded, for a time at least, by the provision for one agent only to superintend the postal railway service, contained in Act June 17, 1878, c. 259, § 1, post, § 575, although it may be regarded as revived by re-enactment in the same language by said amendment of this section by Act March 3, 1897, c. 385, § 1, cited above.

The salary of nine assistant superintendents of railway mail service, who may be detailed to act as superintendents of division of railway mail service, was fixed by Act June 17, 1878, c. 259, § 1, post, § 7548.

The allowance to the superintendent of railway mail service of actual traveling expenses was authorized by Act March 1, 1881, c. 96, § 1, post, § 576.

The appointment of an assistant general superintendent, Railway Mail Service, and a chief clerk of Railway Mail Service, to be employed in the Department, was authorized by Act April 16, 1890, c. 85, post, § 577.

Appropriations are also made in the recent legislative, executive, and judicial appropriation acts for other superintendents, assistant superintendents, and

other officers in the Department, in connection with the Railway Mail Service and other branches of the postal service.

The provisions authorizing the appointment of the officers mentioned directed that their salaries and expenses should be paid out of the appropriation for transportation of mail. Specific appropriations were made by the postal service appropriation act for the fiscal year 1901, Act June 2, 1900, c. 613, § 1, 31 Stat. 258, for the office of the Second Assistant Postmaster-General, under the heading "Railway Mail Service," for a General Superintendent, and Assistant General Superintendent, and also for division superintendents, assistant division superintendents, assistant superintendents, etc. And similar appropriations were continued in later postal service appropriation acts down to the fiscal year 1907, the later acts providing also for an assistant chief clerk, Office of General Superintendent. But for the fiscal year 1908, the appropriations for said General Superintendent and Assistant General-Superintendent, and chief clerk and assistant chief clerk, were made by the legislative, executive, and judicial appropriation act, Act Feb. 26, 1907, c. 1635, § 1, 34 Stat. 983, with the appropriations for the office of the Second Assistant Postmaster-General, under the heading "Division of Railway Mail Service," and such appropriations were continued in the subsequent similar acts. The appropriations for the fiscal year 1917 provided for a General Superintendent, $4,000, Assistant General Superintendent, $3,500, chief clerk, $2,000, and other clerks, by Act May 10, 1916, c. 117, § 1, 39 Stat.

Further provisions relating to allowances for traveling and other expenses of officers in the Railway Mail Service and other branches of the postal service are set forth or referred to post, under title XLVI, "The Postal Service," c. 12.

See notes to § 568, ante.

Notes of Decisions

"Special agents."—Where the duties of "special agents" employed by the Postmaster General, under R. S. § 4017, post, § 7547, concern the railway postal service, such agents may, so far (and so far only) as regards the performance of those duties, be placed under the supervision of one or both of the officers authorized to be appointed by the Postmaster General by section 4020 (this section) to superintend the railway postal service. (1876) 15 Op. Atty. Gen. 171.

§ 575. (Act June 17, 1878, c. 259, § 1.) Agent to superintend Railway Mail Service; salary and expenses.

Hereafter the Postmaster-General may appoint one agent only to superintend the postal railway service, who shall be paid, out of the appropriation for the transportation of the mail on railways, a salary at the rate of three thousand five hundred dollars a year, and no allowances for traveling or incidental expenses. (20 Stat. 142.)

This was a provision of the postal service appropriation act for the fiscal year 1879, cited above.

The previous provision of R. S. § 4020, for the appointment of two agents for the same purpose, was superseded by this provision for "one agent only." But said section 4020 was subsequently amended, and the original provision was retained in the section as amended, by Act March 3, 1897, c. 385, § 1, ante, § 574. See notes to said section.

The clause of this act forbidding allowances for traveling expenses was superseded by a provision for allowance of actual expenses of Act March 1, 1881, c. 96, § 1, post, § 576.

See notes to § 568, ante.

§ 576. (Act March 1, 1881, c. 96, § 1.) Superintendent of Railway Mail Service and chief of post-office inspectors; allowance for traveling expenses.

Hereafter the superintendent of railway mail service and the chief of post-office inspectors shall be paid their actual expenses while travelling on the business of the department. (21 Stat. 374.)

This was a provision following an appropriation for post-office inspectors in the postal service appropriation act for the fiscal year 1882, cited above.

Similar provisions, without the word "hereafter," were made by postal service appropriation acts for the two preceding years, Act March 3, 1879, c. 180, § 1, 29 Stat. 356, and Act June 11, 1880, c. 206, § 1, 21 Stat. 177.

See notes to § 568, ante.

§ 577. (Act April 16, 1890, c. 85.) Assistant general superintendent and chief clerk, Railway Mail Service.

The Postmaster-General may appoint, and assign to duty, one assistant general superintendent, Railway Mail Service, who shall be paid a salary of three thousand dollars per year; and one chief clerk of Railway Mail Service, to be employed in the Post-Office Department, who shall be paid two thousand dollars per year; said assistant general superintendent and chief clerk to be also paid their necessary and actual expenses while traveling on the business of the Department. The salaries and expenses of these officers shall be paid out of the appropriation for the transportation of mail on railways. (26 Stat. 56.)

This act was entitled "An Act providing for the appointment of an assistant general superintendent and a chief clerk, Railway Mail Service."

See notes to R. S. § 4020, ante, § 574.

See notes to § 568, ante.

§ 578. (Act March 4, 1913, c. 142, § 1.) Superintendent of Division of Finance, in office of Third Assistant Postmaster-General.

Office Third Assistant Postmaster General: * * Division of finance—superintendent, who shall give bond in such amount as the Postmaster General may determine for the faithful discharge of his duties, $2,250. (37 Stat. 779.)

This was a provision of the appropriations for the office of the Third Assistant Postmaster General, in the legislative, executive, and judicial appropriation act for the fiscal year 1914, cited above. It was repeated in subsequent appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 579. (Act April 28, 1904, c. 1759, § 3.) Purchasing agent for Department; appointment; salary; bond; duties; purchases of supplies.

There shall be appointed by the President, by and with the advice and consent of the Senate, a purchasing agent for the Post-Office Department, who shall hold office for four years unless sooner removed by the President, and who shall receive an annual salary of four thousand dollars, give bond to the United States in such sum as the Postmaster-General may determine, and report direct to the Postmaster-General; and who shall, under such regulations, not inconsistent with existing law, as the Postmaster-General shall prescribe, and subject to his direction and control, have supervision of the purchase of all supplies for the postal service.

The purchasing agent, in making purchases for supplies necessary for the Post-Office Department, shall advertise, as now provided by law, and award contracts for such supplies to the lowest responsible bidder in pursuance of existing law. The purchasing agent shall have recorded in a book to be kept for that purpose a true and faithful abstract of all bids made for furnishing supplies to the Post-Office Department, giving the name of the party bidding, the terms of the offer, the sum to be paid, and he shall keep on file and preserve all such bids until the end of the contract term to which they relate. Each bidder shall have the right to be present, either in person or by attorney, when the bids are opened, and shall have the right to examine and inspect all bids. All purchases, advertisements, and contracts for supplies for the Post-Office Department shall be made by the purchasing agent in the name of the Postmaster-General subject to his approval, and in purchasing such supplies preference shall be given to articles of domestic production and manufacture, conditions of price and quality being equal. There shall be separate proposals and separate

contracts for each class of material furnished. These records shall be open at all times for the inspection of Congress, and for the inspection of those who may be interested in such contracts made, or to be made, to furnish supplies to the Post-Office Department. (33 Stat. 440.)

This section was part of the postal appropriation act for the fiscal year 1905, cited above.

Appropriations are made by the annual legislative, executive, and judicial appropriation acts, in the office of the Postmaster-General, under the heading "Division of the Purchasing Agent," for his salary, clerks, etc., and his expenses while traveling on business of the Department. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 568, ante.

Notes of Decisions

Effect of subsequent provisions regulating procurement of supplies for executive departments.—This act was amended and modified by the repealing clause, section 5, of Act June 17, 1910, section 4 of which, post, § 6653, related to procuring certain supplies for the executive departments, etc., only in so far as said act is inconsistent therewith. (1911) 28 Op. Atty. Gen. 573.

§ 580. (Act March 15, 1898, c. 68, § 9.) Detail of clerks from Postal Service to Post-Office Department forbidden.

Hereafter it shall not be lawful to detail clerks or other employés, paid from general appropriations for the postal service, from any branch of said postal service, whether located at the seat of Government or elsewhere, to any of the offices or bureaus of the Post-Office Department at Washington. (30 Stat. 317.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1899, cited above.

Notes of Decisions

Appointment by postmaster of clerk in his office for service in department at Washington.—A postmaster who, by direction of the Post Office Department, appointed a clerk in his office and mailed the checks for her salary to her in Washington, taking credit therefor in his accounts, which he certified under oath were just and true as he verily believed, though such clerk rendered no services in his office, is liable on his bond for the salary so allowed and paid, notwithstanding he acted in good faith and in the supposition that the clerk was employed in the department in connection with the establishment of a free delivery at his office. U. S. v. Moore (1909) 168 Fed. 36, 93 C. C. A. 458, 24 L. R. A. (N. S.) 309.

A postmaster who, under instructions from the assistant postmaster general given him under statutory authority, appointed a clerk and paid his salary from month to month from government money in his hands, receiving proper vouchers therefor, is not liable to the United States for the amounts so paid, though the clerk was not employed in his office; the postmaster acting in good faith without any knowledge of the place or nature of the clerk's employment. U. S. v. Warfield (1909) 170 Fed. 43, 95 C. C. A. 317, 24 L. R. A. (N. S.) 312, 17 Ann. Cas. 1186.

Detail from post office for service at office of President.—Before the provision of Act Feb. 3, 1905, § 1, ante, § 229, for detailing employés of the executive departments to the office of the President, the Postmaster General had no authority to detail a registry clerk from the Washington post office on detached service at the White House. (1904) 25 Op. Atty. Gen. 302.

§ 581. (R. S. § 395.) Seal.

The Postmaster-General shall keep the seal heretofore adopted for his Department, which shall be affixed to all commissions of postmasters and others, and used to authenticate all transcripts and copies which may be required from his Department.

Act June 8, 1872, c. 335, § 5, 17 Stat. 285.

The commissions of all officers under the direction and control of the Postmaster-General are to be made out and recorded in the Post-Office Department, and the department seal affixed thereto, by Act March 3, 1905, c. 1422, post, § 3253.

§ 582. (R. S. § 396.) Duties of Postmaster-General.

It shall be the duty of the Postmaster-General:

First. To establish and discontinue post-offices.

Second. To instruct all persons in the postal service with reference to their duties.

Third. To decide on the forms of all official papers.

Fourth. To prescribe the manner of keeping and stating accounts.

Fifth. To enforce the prompt rendition of returns relative to accounts.

Sixth. To control, according to law, and subject to the settlement of the Sixth Auditor, all expenses incident to the service of the Department.

Seventh. To superintend the disposal of the moneys of the Department.

Eighth. To direct the manner in which balances shall be paid over; issue warrants to cover money into the Treasury; and to pay out the same.

Ninth. To superintend generally the business of the department, and execute all laws relative to the postal service.

Act June 8, 1872, c. 335, § 6, 17 Stat. 285. Act March 3, 1877, c. 103, § 2, 19 Stat. 335.

Provisions relating to the duties of the Postmaster-General in regard to post-offices and postmasters, the carriage and delivery of the mail, and the various branches of the postal service, are contained in Title XLVI, "The Postal Service."

The performance by the Assistant Postmasters-General of certain acts in the name of the Postmaster-General was provided for by Act March 3, 1877, c. 103, §§ 2, 3, and Act Dec. 21, 1893, c. 6, post, §§ 583–585.

Notes of Decisions

1. Establishment and discontinuance of post offices.
2. Procuring buildings for post offices.
3. Requiring postmasters' bonds.
4. Regulations of postal service.
5. Orders to postmasters.
6. Decision as to right to receive mail, between claimants having similar names.
7. Discretion as to "fraud orders" against delivery of registered letters and payment of money orders.
8. Conclusiveness of decisions upon successors in office.
9. Assistants representatives of Postmaster General.
10. Liabilities for official acts.

1. Establishment and discontinuance of post offices.—Under former statutes authorizing the postmaster general to establish post offices and appoint postmasters, he had power to discontinue any post office, as incident to the power to establish them, whenever it might appear to him to be expedient and proper. Ware v. U. S. (1866) 4 Wall. 617, 632, 18 L. Ed. 389.

2. Procuring buildings for post offices.—The Postmaster General, being required by this section and R. S. § 3829, post, § 7188, to establish post offices, to superintend generally the business of the department, and to execute all laws relating to the postal service, has authority to procure buildings for post offices, and while he cannot bind the government by an express contract, his action may render it liable to the owner for just compensation. Semmes v. U. S. (1891) 26 Ct. Cl. 119.

3. Requiring postmasters' bonds.—Under former statutes, making it the duty of the Postmaster General to collect moneys received by postmasters for the general post office, he was authorized to take postmasters' bonds. Postmaster General v. Early (1827) 12 Wheat. 136, 150, 6 L. Ed. 577.

A bond given by a postmaster for the performance of his official duties did not constitute a binding contract until approved and accepted by the Postmaster General. Postmaster General v. Norvell (D. C. 1829) Fed. Cas. No. 11,310.

4. Regulations of postal service.—Regulations regarding entry of publications as second-class matter were promulgated under this section. Lewis Publishing Co. v. Morgan (1913) 33 Sup. Ct. 867, 229 U. S. 288, 57 L. Ed. 1190.

The "postal regulations," promulgated under this section by the Postmaster General as the head of the Post Office Department, are controlling upon postmasters. U. S. v. Warfield (1909) 170 Fed. 43, 95 C. C. A. 317, 24 L. R. A. (N. S.) 312, 17 Ann. Cas. 1186.

Federal courts will take judicial notice of the statutes conferring on the Postmaster General authority to promulgate regulations and of the regulations adopted and promulgated pursuant thereto. Bruce v. U. S. (1912) 202 Fed. 98, 120 C. C. A. 370.

The regulations of the Post Office Department are a part of the public records, of which courts take judicial notice. Carr v. First Nat. Bank (1905) 73 N. E. 947, 35 Ind. App. 216.

5. Orders to postmasters.—The duty of a postmaster to obey the valid order of the Postmaster General is enjoined in this section. Enterprise Sav. Ass'n

v. Zumstein (1895) 67 Fed. 1000, 1005, 15 C. C. A. 153.

A postmaster, who in good faith followed instructions from the First Assistant Postmaster General, given under authority conferred by this section, to appoint a clerk and pay his salary from post office moneys, was not liable, though the clerk did not work in his office; he supposing that the clerk was performing postal services in some capacity elsewhere. U. S. v. Warfield (1909) 170 Fed. 43, 95 C. C. A. 317, 24 L. R. A. (N. S.) 312, 17 Ann. Cas. 1186.

6. Decision as to right to receive mail, between claimants having similar names.—This section, in connection with R. S. §§ 388, 389, ante, §§ 567, 568, places the management of the post office in the hands of the Postmaster General and assistants, and the courts will not interfere, where palpable error does not appear in the ruling of the post office department in deciding to which addressee certain mail matter belongs as between two claimants. Central Trust Co. v. Central Trust Co. of Illinois (1910) 30 Sup. Ct. 341, 342, 216 U. S. 251, 54 L. Ed. 469, 17 Ann. Cas. 1066. See National Life Ins. Co. of United States v. National Life Ins. Co. (1908) 28 Sup. Ct. 541, 209 U. S. 317, 52 L. Ed. 808.

7. Discretion as to "fraud orders" against delivery of registered letters and payment of money orders.—This section and R. S. §§ 3834, 3926, 3929, 4027, 4041, post, §§ 7193, 7405, 7411, 7553, 7573, give the Postmaster General complete authority over money orders and registered matter, and vest in him a discretion relating to fraud orders as against lotteries, which discretion cannot be supervised or controlled by the federal courts. Enterprise Sav. Ass'n v. Zumstein (C. C. 1894) 64 Fed. 837, decree affirmed (1895) 67 Fed. 1000, 15 C. C. A. 153.

8. Conclusiveness of decisions upon successors in office.—The Postmaster General is not bound by the construction placed by a predecessor in office on the statute relating to second-class mail matter, so as to preclude him from revoking a certificate of entry of a publication as second-class matter, which had been issued by such predecessor, where no vested right has been created by such certificate. Columbian Correspondence College v. Wynne (1905) 25 App. D. C. 149.

9. Assistants representatives of Postmaster General.—The acts of the assistants authorized by law to be appointed by the Postmaster General and designated by him as chiefs of the several branches of the postal service, subject only to his supervision and direction, are the acts of the Postmaster General when confined within the scope of the duties assigned to them by him. U. S. v. Warfield (1909) 170 Fed. 43, 45, 95 C. C. A. 317, 24 L. R. A. (N. S.) 312, 17 Ann. Cas. 1186; McCollum v. U. S. (1881) 17 Ct. Cl. 92.

The order of an Assistant Postmaster General found in the archives of the department unrevoked must be deemed, in the absence of fraud or mistake, to be within the scope of his delegated authority and the act of his principal. McCollum v. U. S. (1881) 17 Ct. Cl. 92.

10. Liabilities for official acts.—It was within the duty of the Postmaster General, in sending drafts for claims on account of readjustment of postmasters' salaries directly to the persons entitled thereto, as directed by Act March 3, 1883, c. 119, 22 Stat. 487, and Act Aug. 4, 1886, c. 903, § 8, 24 Stat. 307, to inform them of the provisions of said acts, and that no attorney's services were necessary to the presentation of the claims, and to advise them that, by R. S. § 3477, post, § 6383, any transfer, etc., of such a claim was void; and for so doing he was not liable to an attorney employed by such persons to collect their claims. Spalding v. Vilas (1896) 16 Sup. Ct. 631, 161 U. S. 483, 40 L. Ed. 780.

Cited without definite application, U. S. v. Mayers (D. C. 1896) 81 Fed. 159, 161; (1887) 18 Op. Atty. Gen. 587, 589.

§ 582a. (Act July 28, 1916, c. 261, § 1.) Rewards for detection, etc., of post-office burglars, etc.

Office of the Postmaster General: For payment of rewards for the detection, arrest, and conviction of post-office burglars, robbers, and highway mail robbers: Provided, That rewards may be paid, in the discretion of the Postmaster General, when an offender of the class mentioned was killed in the act of committing the crime or in resisting lawful arrest. (39 Stat.)

This section was part of the postal service appropriation act for the fiscal year 1917, cited above.

§ 583. (Act March 3, 1877, c. 103, § 2.) First Assistant Postmaster-General may be authorized to approve bonds of postmasters.

From and after the passage of this act the bonds of all post-

masters may by the direction of the Postmaster General be approved and accepted, and the approval and acceptance signed by the First Assistant Postmaster General in the name of the Postmaster General. (19 Stat. 335.)

This provision and that contained in the section next following were parts of sections 2 and 3, respectively, of an act entitled "An act establishing post roads and for other purposes," cited above.

The latter part of this section, omitted here, provided that all contracts for stationery and other specified supplies for the postal service might be signed by the First Assistant Postmaster-General, in the place and stead of the Postmaster-General.

In section 3 of this act, next following, providing that the Second Assistant Postmaster-General might sign contracts for mail transportation, the latter part of the section, also omitted, included in the provision contracts for supplies of mail bags, etc., and all other articles necessary and proper to mail transportation.

Section 4 of this act, which is wholly omitted, contained similar provisions that the Third Assistant Postmaster-General might sign contracts for supplies of postage stamps, stamped envelopes, newspaper wrappers, postal cards, registered package envelopes, locks, seals, and official envelopes for the use of postmasters, and return of dead letters, required for the postal service.

All these omitted provisions, relating to the signing of contracts for supplies, were superseded by the provisions for the appointment of a Purchasing Agent for the Department, to have supervision of the purchase of all supplies, and to make all contracts for supplies in the name of the Postmaster-General, subject to his approval, which were made by Act April 28, 1904, c. 1759, § 3, ante, § 579.

A subsequent provision for the approval of postmasters' bonds by the Fourth Assistant Postmaster-General, was contained in Act Dec. 21, 1893, c. 6, post, § 585.

§ 584. (Act March 3, 1877, c. 103, § 3.) Second Assistant Postmaster-General may be authorized to sign contracts for mail transportation.

The Second Assistant Postmaster General on the order of the Postmaster General may sign with his name, in the place and stead of the Postmaster General, and attest his signature by the seal of the Post-Office Department, all contracts made in the said Department for mail transportation. (19 Stat. 335.)

See notes to section 2 of this act, ante, § 583.

§ 585. (Act Dec. 21, 1893, c. 6.) Fourth Assistant Postmaster-General may be authorized to approve postmasters' bonds.

From and after the passage of this Act the bonds of all postmasters, by the direction of the Postmaster-General, may be approved and accepted and the approval and acceptance signed by the Fourth Assistant Postmaster-General in the name of the Postmaster-General. (28 Stat. 21.)

This act was entitled "An act authorizing the Fourth Assistant Postmaster-General to approve postmasters' bonds."

A previous provision for approval of such bonds by the First Assistant Postmaster-General was made by Act March 3, 1877, c. 103, § 2, ante, § 583.

§ 586. (R. S. § 397.) Property in charge of the Department.

The Postmaster-General shall make out and keep, in proper books, full and complete inventories and accounts of all the property belonging to the United States in the buildings, rooms, offices, and grounds occupied by him and under his charge; and shall add thereto, from time to time, an account of such property as may be procured subsequently to the taking of the same, and also an account of the sale or disposal of any such property, and to report the same to Congress during the first week of each annual session. But this section shall not apply to the supplies of stationery and fuel.

Act June 8, 1872, c. 335, § 10, 17 Stat. 286.

A similar provision except as to the annual report to Congress, relating to the heads of the various Departments, the Postmaster-General included, was contained in R. S. § 197, ante, § 280.

§ 587. (R. S. § 398.) Postal arrangements with foreign countries.

For the purpose of making better postal arrangements with foreign countries, or to counteract their adverse measures affecting our postal intercourse with them, the Postmaster-General, by and with the advice and consent of the President, may negotiate and conclude postal treaties or conventions, and may reduce or increase the rates of postage on mail-matter conveyed between the United States and foreign countries.

Act June 8, 1872, c. 335, § 167, 17 Stat. 304.

The Postmaster-General was authorized to make arrangements with countries adjoining the United States for the transportation of the mail of such countries through the United States by R. S. § 4012, post, § 7541.

Notes of Decisions

Constitutionality of provisions.—By the previous legislation of Congress conferring on the Postmaster General power to make postal arrangements and conventions with foreign countries, and the practice of the government thereunder, the Constitution has been so interpreted that the power vested in the President, by Const. art. 2, § 2, to make treaties, with the concurrence of two-thirds of the Senate, does not exclude the right of Congress to vest in the Postmaster General power to conclude postal conventions with foreign governments, and the provisions of this section, therefore, are not in conflict with said constitutional provision. (1890) 19 Op. Atty. Gen. 513, 520.

The right of Congress to vest such power in the Postmaster General may perhaps be derived from the authority given to Congress in Const. art. 1, § 8, cl. 7, to establish post offices and post roads. Id.

Limitation of weight of packages.—The Postmaster General has power, under this section, with the approbation of the President, to conclude a postal convention with a foreign country for admission to and transmission through the mails exchanged with such foreign country of parcels of mail matter of either class exceeding 4 pounds in weight. The limitation as to weight of mail packages in R. S. § 3879, post, § 7329, Revised Statutes, applies only to domestic mail service. (1887) 19 Op. Atty. Gen. 39; (1890) 19 Op. Atty. Gen. 513.

Indemnity for loss of registered mail matter.—The Postmaster General has no authority, under this section, to negotiate a postal convention providing for the payment of indemnity for the loss of registered articles or letters. (1878) 15 Op. Atty. Gen. 462. But see (1899) 22 Op. Atty. Gen. 363, 366.

Arrangements with Philippine Islands.—The Postmaster General has no authority to arrange a special parcel post service or to conclude arrangements for money order exchanges with the Philippine Islands under the power conferred upon him by this section and R. S. § 4028, post, § 7554. (1912) 29 Op. Atty. Gen. 380.

§ 588. (R. S. § 399.) Publication of postal conventions.

The Postmaster-General shall transmit a copy of each postal convention concluded with foreign governments to the Secretary of State, who shall furnish a copy of the same to the Congressional Printer for publication; and the printed proof-sheets of all such conventions shall be revised at the Post-Office Department.

Act June 8, 1872, c. 335, § 20, 17 Stat. 287.

Provisions similar to those of this section, for furnishing copies of postal conventions to the Secretary of State, were made by R. S. § 3804, and the Secretary of State was required to furnish them to the printer for publication, by R. S. § 3803, in connection with other sections providing for the printing and distribution thereof, which were superseded by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 56, post, § 7029.

See R. S. § 210, ante, § 308, and note to said section.

§ 589. (R. S. § 400.) Blank-agency at Washington.

The Postmaster-General may establish a blank-agency for the Post-Office Department, to be located at Washington, District of Columbia.

Act June 8, 1872, c. 335, § 30, 17 Stat. 289.

Appropriations were formerly made in the annual legislative, executive, and judicial appropriation acts for a superintendent of blank-agency and an assistant superintendent, assistants, clerks, etc., but have been discontinued for many years.

§ 590. (R. S. § 401.) Foreign dead-letters.

The action of the Post-Office Department respecting foreign dead-letters shall be subject to conventional stipulations with the respective foreign administrations.

Act June 8, 1872, c. 335, § 197, 17 Stat. 308.

§ 591. (R. S. § 402.) Date of orders, entries, contracts, etc., to be indorsed.

Every order, entry, or memorandum whatever, on which any action is to be based, allowance made, or money paid, and every contract, paper, or obligation made by or with the Post-Office Department, shall have its true date affixed to it; and every paper relating to contracts or allowances filed in the Department shall have the date when it was filed indorsed upon it.

Act June 8, 1872, c. 335, § 18, 17 Stat. 287.

§ 592. (R. S. § 403.) Form of bonds and contracts.

All bonds taken and contracts entered into by the Post-Office Department shall be made to and with the United States of America.

Act June 8, 1872, c. 335, § 13, 17 Stat. 287.

Notes of Decisions

Contract for carrying mail.—Contracts entered into by the Post Office Department for carrying the mail should be in the name of the United States as directed by statute. See, also, § 7436, post. (1885) 18 Op. Atty. Gen. 112.

Witnesses to bonds.—The attestation of witnesses to a bond is merely for convenience of proof. The law does not require such witnesses, but it is expedient and safe always to require them. (1882) 17 Op. Atty. Gen. 285.

Alteration of bonds.—An erasure and interlineation in a bond increasing the amount of the penalty does not invalidate that instrument or impair its legal effect, if in fact it was made prior to its execution. (1882) 17 Op. Atty. Gen. 285.

If any material change is made in a bond subsequent to its execution, the instrument is thereby rendered void, unless it can clearly be shown that after the change the parties assented to it and still asknowledge the signing and sealing to be their act. Id.

§ 593. (R. S. § 404.) Copies of contracts for carrying mail.

The Postmaster-General shall deliver to the Sixth Auditor, within sixty days after the making of any contract for carrying the mail, a duplicate copy thereof.

Act June 8, 1872, c. 335, § 262, 17 Stat. 315.

The Sixth Auditor was designated Auditor for the Post-Office Department by Act March 3, 1875, c. 130, § 2, ante, § 352, and the Dockery Act of July 31, 1894, c. 174, § 3, ante, § 417.

Notes of Decisions

Necessity of contract in writing.—See (1878) 15 Op. Atty. Gen. 482, 484.

§ 594. (R. S. § 405.) Orders and regulations affecting accounts.

All orders and regulations of the Postmaster-General which may originate a claim, or in any manner affect the accounts of the postal service, shall be certified to the Sixth Auditor.

Act June 8, 1872, c. 335, § 29, 17 Stat. 289.

The Sixth Auditor was designated Auditor for the Post-Office Department, as stated in note to preceding section.

Cited without definite application,
Minneapolis & St. L. R. Co. v. U. S.
(1889) 24 Ct. Cl. 350.

§ 595. (R. S. § 406.) Warrant of Postmaster-General, on quarterly statement of Auditor.

Upon the certified quarterly statement by the Sixth Auditor of the payments by postmasters on account of the postal service, the Postmaster-General shall issue his warrant to the Treasurer to carry

the amount to the credit of the postal revenues and to the debit of the proper appropriations upon the books of the Auditor.

Act June 8, 1872, c. 335, § 53, 17 Stat. 292.

The Sixth Auditor was designated Auditor for the Post-Office Department, as stated in note to R. S. § 404, ante, § 593.

Provisions changing the system of accounting in the Treasury Department were made by the Dockery Act of July 31, 1894, c. 174, §§ 7–23, ante, §§ 402–404, 408, 411–413, 419, 420, 425–428, 433, 435–438.

Notes of Decisions

Official status of Sixth Auditor.—The Sixth Auditor, designated by Act July 2, 1836, c. 270, § 8, 5 Stat. 81, as "Auditor of the Treasury for the Post Office Department," had direct official relation to both the Treasury and Post Office Departments. (1855) 7 Op. Atty. Gen. 439.

Cited without definite application, (1878) 15 Op. Atty. Gen. 482, 485.

§ 596. (R. S. § 407, as amended, Act Jan. 22, 1894, c. 17.) Postal revenues and collections to be paid into the Treasury.

The postal revenues and all debts due the Post-Office Department shall, when collected, be paid into the Treasury of the United States under the direction of the Postmaster-General, and the Treasurer, Assistant Treasurer, or designated depository receiving such payment shall give the depositor a duplicate receipt therefor, to be retained by him in his office as a voucher, and shall forward the original to the Auditor of the Treasury for the Post-Office Department, to be placed to the credit of the depositor in audit of his accounts.

Act June 8, 1872, c. 335, § 54, 17 Stat. 292. Act Jan. 22, 1894, c. 17, 28 Stat. 28.

This section, as enacted in the Revised Statutes, ended with the provision for receipts for deposits, in the words, "shall give the depositor duplicate receipts therefor." The amendment by Act Jan. 22, 1894, c. 17, cited above, consisted in the change of the words "duplicate receipts therefor," to "a duplicate receipt therefor," and the addition of the remainder of the section as set forth here.

The mode of payment of postal revenues, etc., into the Treasury was not changed by the amendment of R. S. § 3621, by Act May 28, 1896, c. 252, § 5, post, § 6615, requiring deposit of public moneys, under a proviso to that section as amended.

Unclaimed money in dead letters for which no owner can be found; money taken from the mail by robbery, theft, etc., which may come into the hands of postal employés; fines and penalties imposed for violations of postal laws; and all money derived from the sale of waste paper or other property of the Post-Office Department—were required to be deposited in the Treasury, as part of the postal revenue, by R. S. § 4050, post, § 7599, and the neglect by any officer or employé in the postal service to make such deposit was punishable by R. S. § 4053, incorporated in Crim. Code, § 225, post, § 10395.

The net proceeds of the money-order business were required to be placed to the credit of the Treasurer of the United States for the service of the Post-Office Department, and to be entered under the head "revenue from money-order business," by R. S. § 4050, post, § 7599.

Cited without definite application, Lewis Pub. Co. v. Wyman (1910) 182 Fed. 13, 104 C. C. A. 453, affirmed 33 Sup. Ct. 599, 228 U. S. 610, 57 L. Ed. 989.

§ 597. (R. S. § 408.) Deposits, how brought into the Treasury.

All deposits on account of the postal service shall be brought into the Treasury by warrants of the Postmaster-General, countersigned by the Auditor; and no credit shall be allowed for any deposit until such warrant has been issued.

Act June 8, 1872, c. 335, § 55, 17 Stat. 292.

Notes of Decisions

Payments quarterly.—Payments by the post office department to the treasury may be carried in quarterly by large "covering warrants." Boody v. U. S. (C. C. 1846) Fed. Cas. No. 1,636.

§ 598. (Act March 3, 1903, c. 1009, § 6.) Designation of officer to sign warrants and drafts.

Hereafter the Postmaster-General may from time to time designate any officer of the Post-Office Department above the grade of fourth-class clerk to sign warrants, and "collection" and "transfer" drafts, in his stead, and such warrants and drafts when so signed shall be of the same validity as if they had been signed by the Postmaster-General. (32 Stat. 1176.)

This section was part of the postal service appropriation act for the fiscal year 1904, cited above.

Before this provision, the Postmaster-General had been authorized to delegate to the Third Assistant Postmaster-General authority to sign in his stead all warrants, registered and countersigned by the Auditor of the Treasury for the Post-Office Department, for the payment of money from the Treasury on account of the postal service, by Act Feb. 25, 1882, c. 16, 22 Stat. 4; and subsequently he was authorized to designate, from time to time, any officer of the Department, above the grade of fourth-class clerk, to sign warrants in his stead, by a provision of Act March 3, 1891, c. 547, 26 Stat. 1081. The provision of Act March 3, 1903, set forth above, is in the same language as that of Act March 3, 1891, except that it includes, with warrants, collection and transfer drafts, and it may be regarded as superseding both said previous provisions.

A subsequent provision, authorizing the designation, for the same purpose, of any employé in the office of the Third Assistant Postmaster-General above the grade of a clerk of Class E, contained in Act March 2, 1907, c. 2513, is set forth, post, § 599.

§ 599. (Act March 2, 1907, c. 2513.) Designation of employé to sign warrants and drafts.

That hereafter the Postmaster-General may from time to time designate any employee in the office of the Third Assistant Postmaster-General above the grade of a clerk of Class E to sign warrants, collection and transfer drafts in his stead, and such warrants and drafts when so signed shall be of the same validity as if signed by the Postmaster-General. (34 Stat. 1206.)

This was a provision of the postal service appropriation act for the fiscal year 1908, cited above.

See notes to Act March 3, 1903, c. 1009, § 6, ante, § 598.

Class E, mentioned in this provision, was the highest of five classes, A, B, C, D, and E, additional to the four classes in which clerks were arranged by R. S. § 163, ante, § 242, and including subordinate places, clerks, etc., which five classes were designated by the Postmaster-General pursuant to the provisions of the Civil Service Act of Jan. 16, 1883, c. 27, § 6, par. 3, post, § 3277. By Postal Laws and Regulations of 1902, § 23, par. 3, in force at the time of the enactment of this provision, said Class E included "all persons receiving an annual salary of $1,000 or more, or a compensation at the rate of $1,000 or more, but less than $1,200 per annum."

§ 600. (Act June 17, 1878, c. 259, § 2.) Disbursements for post-route maps; pay-rolls of topographer's office; vouchers.

That the disbursements of the moneys appropriated for the preparation and publication of post-route maps be made by a regular bonded disbursing-officer of the Post-Office Department, according to the laws, rules, and customs as recognized by the accounting-officers of the Treasury Department: And provided also, That the pay-rolls of the draughtsmen, clerks, messengers, and other employees of the topographer's office, shall be regularly made out by the chief of the topographer's office, examined and checked by the appointment clerk of the Post-Office Department, and the payments thereof made by a bonded disbursing-officer of the Post-Office Department: And also provided further, That all expenditures made by the chief of the topographer's office for the preparation and publication of post-route maps shall be accounted for by vouchers, accompanied by affidavit, and the moneys therefor shall be disbursed by a disbursing-officer of the Post-Office Department; and all of the above disbursements shall be paid out of the appropriation for the preparation and publication of post-route maps. (20 Stat. 143.)

These were provisos annexed to the appropriation to supply deficiencies in

revenue of the Department, in section 2 of the postal service appropriation act for the fiscal year 1879, cited above.

As these provisions are not restricted by their language to the appropriations made by the act, they may be regarded as permanent. But, to some extent, they have been rendered inoperative, in subsequent years, by the making of specific appropriations for the officers and employés of the topographer's office, in the annual legislative, executive, and judicial appropriation acts. The provisions for the fiscal year 1914 were by Act March 4, 1913, c. 142, § 1, 37 Stat. 780. Said provisions do not appear in the appropriation acts for subsequent years.

Provisions authorizing the sale to the public of post-route maps and rural-delivery maps are contained in the annual legislative, executive, and judicial appropriation acts. The provision for the fiscal year 1914, by Act March 4, 1913, c. 142, § 1, 37 Stat. 781, was as follows:

"For miscellaneous expenses in the Division of Topography in the preparation and publication of post-route maps and rural delivery maps or blue prints, including tracing for photolithographic reproduction, $26,000. And the Postmaster General may authorize the sale to the public of post-route maps and rural delivery maps or blue prints at the cost of printing and ten per centum thereof added, the proceeds of such sales to be used as a further appropriation for the preparation and publication of post-route maps and rural delivery maps or blue prints. Of this amount $100 may be expended in the purchase of atlases, geographical and technical works needed in the Division of Topography." Said provisions do not appear in the appropriation acts for subsequent years.

§ 601. (R. S. § 409.) Investigating and remitting fines, penalties, and forfeitures.

In all cases of fine, penalty, forfeiture, or disability, or alleged liability for any sum of money by way of damages or otherwise, under any provision of law in relation to the officers, employés, operations, or business of the postal service, the Postmaster-General may prescribe such general rules and modes of proceeding as shall appear to be expedient, for the government of the Sixth Auditor, in ascertaining the fact in each case in which the Auditor shall certify to him that the interests of the Department probably require the exercise of his powers over fines, penalties, forfeitures, and liabilities; and upon the fact being ascertained, the Auditor may, with the written consent of the Postmaster-General, mitigate or remit such fine, penalty, or forfeiture, remove such disability, or compromise, release, or discharge such claim for such sum of money and damages, and on such terms as the Auditor shall deem just and expedient.

Act June 8, 1872, c. 335, § 316, 17 Stat. 325.

The Sixth Auditor was designated as Auditor for the Post-Office Department, as stated in note to R. S. § 404, ante, § 593.

Notes of Decisions

Power to remit fines, etc.—Under the previous Act of March 3, 1851, c. 21, § 3, 9 Stat. 593, the Auditor for the Post Office Department had power with the written consent of the Postmaster General, to compromise a penalty for violation of postal laws. (1871) 13 Op. Atty. Gen. 540.

Where the agreement with a mail contractor contains the usual stipulation that "in all cases there is to be a forfeiture of the pay of a trip when the trip is not run," etc., held in view of the above provisions, that it is competent to the Postmaster General to waive the forfeiture thereby provided for, in any case arising upon the agreement, according as it may seem to him just and proper to do so under the particular circumstances of the case. (1873) 14 Op. Atty. Gen. 179.

Where a deduction from the pay of a mail contractor has been ordered by the Postmaster General, under R. S. § 3962, post, § 7450, and he afterwards becomes satisfied that the order was made under a misapprehension of the facts, it is within his power either to directly rescind his order or to refer the matter to the Auditor, under this section. (1885) 18 Op. Atty. Gen. 313, 315.

See, also, under previous similar provisions of Act June 8, 1872, §§ 266, 316, incorporated into this section and R. S. § 3962, post, § 7450. (1873) 14 Op. Atty. Gen. 179. But see, to the contrary effect (1882) 17 Op. Atty. Gen. 276, 278, holding that the provisions of this section have no application to the deduction, authorized by R. S. § 3962, post, § 7450, from the pay of a mail contractor, of the price of the trip in all cases where the trip is not performed, that section making such de-

duction imperative upon the Postmaster General.

Fact required to be ascertained.—In the exercise of the discretionary power conferred by this section, the "fact" to be ascertained in the case is whether the interests of the Post Office Department require the exercise of such power. (1880) 16 Op. Atty. Gen. 484.

Cited without definite application, U. S. v. Knabe (C. C. 1906) 147 Fed. 802; Leathers v. U. S. (D. C. 1904) 127 Fed. 776 (affirmed 133 Fed. 1021, 66 C. C. A. 579).

§ 602. (R. S. § 410.) Discharge of judgment debtors from imprisonment.

The Postmaster-General may discharge from imprisonment any person confined in jail on any judgment in a civil case, obtained in behalf of the Department, if it be made to appear that the defendant has no property of any description.

Act June 8, 1872, c. 335, § 314, 17 Stat. 324.

Similar provisions for discharge of poor debtors by the Secretary of the Treasury were made by R. S. § 3471, post, § 6377, and provisions for such discharge by the President, in R. S. § 3472, post, § 6378.

§ 603. (R. S. § 411.) Subsequent execution on same judgment.

The release provided for by the preceding section shall not bar a subsequent execution against the property of the defendant on the same judgment.

Act June 8, 1872, c. 335, § 314, 17 Stat. 324.

(R. S. § 412. Repealed.)

This section, forbidding persons employed in the Department to become interested in any contract for carrying the mail, etc., was incorporated into the Criminal Code, § 226, post, § 10396, and was repealed by section 341 thereof, post, § 10515.

Notes of Decisions

R. S. § 412.—See (1903) 24 Op. Atty. Gen. 557.

§ 604. (R. S. § 413, as amended, Act March 3, 1897, c. 385, § 1.) Reports of Postmaster-General.

The Postmaster-General shall make the following annual reports to Congress:

First. A report of the finances of the Department for the preceding year, showing the amount of balance due the Department at the beginning of the year, the amount of postage which accrued within the year, the amount of engagements and liabilities and the amount actually paid during the year for carrying the mail, showing how much of the amount was for carrying the mail in preceding years.

Second. A report of the amount expended in the Department for the preceding fiscal year, including detailed statements of expenditures made from the contingent fund.

And the Postmaster-General shall cause all of such reports to be printed at the Public Printing Office, either together or separately, and in such numbers as may be required by the exigencies of the service or by law.

Act June 8, 1872, c. 335, § 8, 17 Stat. 285. Act March 3, 1897, c. 385, § 1, 29 Stat. 647.

This section as enacted in the Revised Statutes, required ten annual reports of different matters described in separate subdivisions. The amendment by Act March 3, 1897, c. 385, § 1, cited above, reduced the reports required to the two specified in the amended section as set forth here.

The Postmaster-General was required to submit in his annual report estimates or revenue and expenditures for the fiscal year current and also for that next ensuing together with a statement of the receipts and expenditures for the preceding fiscal year, by a provision of Act May 27, 1908, c. 206, post, § 605.

The Postmaster-General was directed to request from railroad companies transporting the mails, data to enable him to ascertain the cost of mail transportation, and, in his annual report, make recommendations founded on the information so obtained, by Act March 3, 1879, c. 180, § 6, post, § 606.

A report by the Postmaster-General of his action on claims of postmasters

for losses from burglary, fire, etc., was required by a provision of Act March 17, 1882, c. 41, § 1, amended by Act May 9, 1888, c. 231, § 2, post, § 7212.

Provisions relating to estimates of expenditures and appropriations by the Postmaster-General were made by R. S. § 3668, and by Act March 3, 1879, c. 180, § 1, and Act June 9, 1896, c. 386, post, §§ 6709–6711.

Provisions applicable to all the Departments, as to reports of expenditures of contingent funds, were made by R. S. § 193, ante, § 275.

Provisions applicable to all the Departments, as to the time of making annual reports, and the time of furnishing copies thereof to the printer, were made by R. S. §§ 195, 196, and Act July 1, 1916, c. 209, § 3, ante, §§ 278, 279, 279a.

Provisions for the printing and distribution of the reports of the Postmaster-General were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 27, post, § 7075.

§ 605. (Act May 27, 1908, c. 206.) Report to include estimates of revenue and expenditures, and statement of receipts and expenditures.

Hereafter the Postmaster-General shall each year prepare and submit in his annual report to Congress estimates of the revenue and expenditures in the postal service for the fiscal year current, and also for the fiscal year next ensuing at the time said report is submitted, together with a statement of the receipts and expenditures for the preceding completed fiscal year. (35 Stat. 418.)

This was a provision of the postal service appropriation act for the fiscal year 1909, cited above.

A similar provision, without the word "hereafter," was contained in the similar act for the preceding year.

§ 606. (Act March 3, 1879, c. 180, § 6.) Obtaining data of cost of railway mail transportation, and report thereon.

The Postmaster-General shall request all railroad companies transporting the mails to furnish, under seal, such data relating to the operating, receipts and expenditures of such roads as may, in his judgment be deemed necessary to enable him to ascertain the cost of mail transportation and the proper compensation to be paid for the same; and he shall, in his annual report to Congress, make such recommendations, founded on the information obtained under this section, as shall, in his opinion, be just and equitable. (20 Stat. 358.)

This section was part of the postal service appropriation act for the fiscal year 1880, cited above.

(R. S. § 414. Superseded.)

This section required the Postmaster-General to furnish a copy of his annual estimates to the Secretary of the Treasury prior to November 1st in each year. It was superseded by the provision requiring the heads of the several Departments to furnish their annual estimates to the Secretary of the Treasury on or before October 1st in each year, made by Act March 3, 1875, c. 129, § 3, 18 Stat. 370, which was itself superseded by a provision requiring said estimates to be so furnished on or before Oct. 15 of each year, of Act March 3, 1901, c. 830, § 5, post, § 6734.

§ 607. (Act March 3, 1881, c. 130, § 1.) Disposition of useless papers in the Department.

The Postmaster-General is hereby authorized to sell as waste paper, or otherwise dispose of, the files of papers which have accumulated, or may hereafter accumulate, in the Post-Office Department that are not needed in the transaction of current business and have no permanent value or historical interest; and the proceeds of said sales he shall pay into the treasury, and make report thereof to Congress. (21 Stat. 412.)

This was a provision accompanying appropriations for the Department in the legislative, executive, and judicial appropriation act for the fiscal year 1882, cited above.

Provisions for the disposition of useless papers in the office of the Auditor

for the Post-Office Department were made by Act Aug. 5, 1882, c. 389, § 1, and Act May 27, 1908, c. 206, § 1, post, §§ 608, 609.

Provisions for the disposition of proposals for carrying the mails, and of reports of arrivals and departures of the mails and certificates of oaths of carriers on mail routes, were made by amendment of R. S. § 3948 by Act June 13, 1898, c. 446, § 2, incorporated in R. S. § 3948, as set forth post, § 7435.

Provisions applicable to all the Departments, for the disposition of useless papers, etc., were made by Act Feb. 16, 1889, c. 171, and Act March 2, 1895, c. 189, § 1, ante, §§ 282, 283.

Provisions similar to those of this act, for the disposition of useless papers accumulated in post-offices, contained in Act May 11, 1906, c. 2448, are set forth post, § 7203.

§ 608. (Act Aug. 5, 1882, c. 389, § 1.) Disposition of useless papers in office of Auditor for Post-Office Department.

The Secretary of the Treasury is hereby authorized to sell as waste paper, or otherwise dispose of, the files of papers which have accumulated, or may hereafter accumulate, in the Office of the Auditor of the Treasury for the Post-Office Department that are not needed in the transaction of current business and have no permanent official or historical value; and the proceeds of said sales he shall pay into the Treasury, and make report thereof to Congress. (22 Stat. 228.)

This was a provision accompanying an appropriation for a temporary force to dispose of accumulated money orders in the legislative, executive, and judicial appropriation act for the fiscal year 1883, cited above.

Further provisions for the same purpose were made by Act May 27, 1908, c. 206, § 1, post, § 609.

Notes of Decisions

Implied repeal of act by subsequent general provisions.—This act was impliedly repealed by the general and comprehensive Act of Feb. 16, 1889, ante, § 282, which provided for the disposition of useless papers in the executive departments. (1895) 21 Op. Atty. Gen. 151.

§ 609. (Act May 27, 1908, c. 206, § 1.) Disposition of money-order statements, paid money-orders, and lists and coupons of international money-orders in office of Auditor for Post-Office Department.

The Secretary of the Treasury and the Postmaster-General shall cause to be destroyed, in such manner as they may deem best, all money-order statements rendered by postmasters and all paid money orders accompanying the same, as well as all descriptive lists of international money orders certified to or by the exchange offices designated for conducting money-order transactions with foreign countries, and all coupons of issued international money orders now filed in the office of the Auditor for the Post-Office Department, or which may hereafter be filed therein, after three years shall have elapsed from the expiration of the period covered by such statements and lists. (35 Stat. 415.)

This was a provision of the postal service appropriation act for the fiscal year 1909, cited above.

Previous provisions for the disposition of such papers, made by Act July 16, 1894, c. 137, § 4, 28 Stat. 107, amended by Act March 3, 1897, c. 385, 29 Stat. 648, and in Act March 15, 1898, c. 68, § 10, 30 Stat. 317, were superseded by this provision.

TITLE X

THE DEPARTMENT OF THE NAVY

This Title, as enacted in the Revised Statutes, was not divided into chapters. For convenience, the sections thereof remaining in force and subsequent provisions which relate to the Department, the Bureaus therein, its officers, clerks, employés, etc., generally, are placed in chapter A; and the sections and provisions applicable only to the Hydrographic Office and to the Naval Observatory and the Nautical Almanac Office, respectively, are placed in separate chapters, B and C.

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CHAPTER A

The Department and the Secretary of the Navy

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627. Report by Chief of Bureau of Supplies and Accounts to Secretary of the Navy.
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654. Contingent expenses not to be paid out of appropriations for naval establishment.
655. Contingent expenses not to be paid out of appropriations for naval establishment.

§ 610. (R. S. § 415.) Establishment of the Department of the Navy.

There shall be at the seat of Government an Executive Department, to be known as the Department of the Navy, and a Secretary of the Navy, who shall be the head thereof.

Act April 30, 1798, c. 35, § 1, 1 Stat. 553.

A council of National Defense, composed of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor, was created by Act Aug. 29, 1916, c. 418, § 2, set forth post, under Title XVII A, "The Council of National Defense and the Advisory Committee on Aeronautics."

The President is authorized to appoint as members of the Advisory Committee for Aeronautics two members from the Navy Department, from the office in charge of Naval Aeronautics, by a provision in Act March 3, 1915, c. 83, also, post, under Title XVII A, "The Council of National Defense and the Advisory Committee on Aeronautics."

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

By a provision in the naval service appropriation act for the fiscal year

1916, Act March 3, 1915, c. 83, post, § 621b, the Chief of Naval Operations, an office created by another provision in said act, also post, § 621a, is declared to be next in succession to act as Secretary of the Navy in the absence of the Secretary and the Assistant Secretary of the Navy.

Other provisions relating to the Chief of Naval Operations, contained in the naval service appropriation act for the fiscal year 1917, Act Aug. 29, 1916, c. 417, are set forth post, § 621c.

Notes of Decisions

Powers of Secretary.—The Secretary of the Navy has authority to transfer control of certain land at San Juan, P. R., reserved by executive order for naval purposes, to the Department of Commerce and Labor, for the extension of the lighthouse reservation at that place. (1907) 25 Op. Atty. Gen. 269.

Cited without definite application, Smith v. Whitney (1886) 6 Sup. Ct. 570, 576, 116 U. S. 167, 29 L. Ed. 601.

§ 611. (Act July 11, 1890, c. 667, § 1.) Assistant Secretary of the Navy.

For an assistant Secretary of the Navy, to be appointed, from civil life, by the President, by and with the advice and consent of the Senate, who shall receive a compensation, at the rate of four thousand five hundred dollars per annum. (26 Stat. 254.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1891, cited above.

A previous provision for the appointment of an Assistant Secretary, contained in Act Aug. 5, 1882, c. 389, § 1, 22 Stat. 243, was repealed by Act March 3, 1883, c. 128, § 1, 22 Stat. 550.

A provision relating to the duties of the Assistant Secretary, made by Act March 3, 1891, c. 541, § 1, is set forth post, § 621.

By a provision in the naval service appropriation act for the fiscal year 1916, Act March 3, 1915, c. 83, post, § 621b, the Chief of Naval Operations, an office created by another provision in said act, also post, § 621a, is declared to be the next in succession to act as Secretary of the Navy in the absence of the Secretary and the Assistant Secretary of the Navy.

Other provisions relating to the Chief of Naval Operations, contained in the naval service appropriation act for the fiscal year 1917, Act Aug. 29, 1916, c. 417, are set forth post, § 621c.

Recent appropriations for the Assistant Secretary are $5,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See, also, notes to § 610, ante.

§ 612. (Act June 8, 1880, c. 129, as amended, Act June 5, 1896, c. 331.) Judge-Advocate-General of the Navy.

That the President of the United States be, and he is hereby, authorized to appoint, for the term of four years, by and with the advice and consent of the Senate, from the officers of the Navy or the Marine Corps, a judge-advocate-general of the Navy with the rank and highest pay of a captain the Navy or the rank, pay, and allowances of a colonel in the Marine Corps, as the case may be. And the office of the said judge-advocate-general shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service, and perform such other duties as have heretofore been performed by the solicitor and naval judge-advocate-general. (21 Stat. 164. 29 Stat. 251.)

This act was entitled "An act to authorize the President to appoint an officer of the Navy or the Marine Corps to perform the duties of Solicitor and Judge-Advocate-General, and so forth, and to fix the rank and pay of such officer."

As originally enacted, the act provided for the appointment "with the rank, pay, and allowances of a captain in the Navy or a colonel in the Marine Corps, as the case may be." The amendment by Act June 5, 1896, c. 331, cited above, inserted, in lieu of said words, the words "with the rank and highest pay of a captain the Navy, or the rank, pay, and allowances of a colonel in the Marine Corps, as the case may be," making the act read as set forth here. Said amendatory act also contained a proviso that the amendment

ld take effect from July 19, 1892, the date on which the then incumbent ered on duty, and that the amount therein appropriated should be payable om the appropriation "Pay of the Navy."

The office of Naval Solicitor in the Department of Justice, authorized by R. S. § 349, was abolished by a provision of Act June 19, 1878, c. 329, § 1, 20 Stat. 205. See note to R. S. § 349, ante, § 521.

The appointment of a solicitor, as assistant to the Judge-Advocate-General, at a salary of $2,500, was authorized by a provision of Act April 17, 1900, c. 192, § 1, 37 Stat. 117, which provision was repeated in the same language in subsequent legislative, executive, and judicial appropriation acts. A provision of Act June 29, 1906, c. 3590, 34 Stat. 555, increased the salary to $4,000 during the service of the then incumbent. Recent appropriations for said solicitor were $4,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat. All of these provisions were superseded by a provision in the naval service appropriation act for the fiscal year 1917, Act Aug. 29, 1916, c. 417, post, § 613, authorizing the detail of an officer of the line of the Navy or Marine Corps as assistant to the Judge-Advocate-General.

Notes of Decisions

Rank, pay, etc., of Judge Advocate General.—This act did not give an officer of the navy appointed Judge Advocate General the sea pay and allowances of a captain in the navy, but only shore duty pay. Lemly v. U. S. (1893) 28 Ct. Cl. 468.

The rank of the Judge Advocate General under this act was actual, as distinguished from assimilated rank, and a captain in the Marine Corps appointed to the office held actual rank as colonel in that corps, and on retirement was entitled to the retired pay of that rank. Remey v. U. S. (1898) 33 Ct. Cl. 218.

§ 613. (Act Aug. 29, 1916, c. 417.) Detail of officer of line of Navy or Marine Corps as assistant to Judge-Advocate-General; performance of duties of Judge-Advocate-General.

Hereafter an officer of the line of the Navy or Marine Corps may be detailed as assistant to the Judge Advocate General of the Navy, who shall, under similar conditions, perform the duties of the Judge Advocate General. (39 Stat.)

This was a provision of the naval service appropriation act for the fiscal year 1917, cited above. It superseded provisions in Act April 17, 1900, c. 192, § 1, 31 Stat. 117, and subsequent acts, for a solicitor, to be an assistant to the Judge-Advocate-General. See note to § 612, ante.

The "similar conditions" mentioned in this section refer to a previous paragraph of said Act Aug. 29, 1916, c. 417, authorizing the detail of officers as assistants to the Chief of the Bureau of Yards and Docks and the Chief of the Bureau of Construction and Repair, said assistants to perform the duties of their respective chiefs, in case of their death, resignation, absence, or sickness, etc. See post, § 642a.

§ 614. (R. S. § 416.) Clerks and employés.

There shall be in the Department of the Navy:

One chief clerk, at a salary of two thousand five hundred dollars a year, so long as there is no Assistant Secretary of the Navy, and at a salary of two thousand two hundred dollars a year when there is an Assistant Secretary of the Navy.

One disbursing clerk.

* * * * * * * * *

In the Bureau of Yards and Docks:

One civil engineer, at a salary of three thousand dollars a year.

One chief clerk, at a salary of one thousand eight hundred dollars a year.

One draughtsman, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Equipment and Recruiting:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Construction and Repair:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

One draughtsman, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Steam Engineering:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

One draughtsman, at a salary of one thousand eight hundred dollars a year.

One assistant draughtsman, at a salary of one thousand two hundred dollars a year.

In the Bureau of Navigation:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Ordnance:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

One draughtsman, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Provisions and Clothing:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Medicine and Surgery:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

Act July 5, 1862, c. 134, 12 Stat. 510. Act July 2, 1864, c. 219, § 4, 13 Stat. 373. Act July 23, 1866, c. 208, § 8, 14 Stat. 207. Act March 3, 1871, c. 113, § 3, 16 Stat. 494. Act March 3, 1873, c. 226, § 1, 17 Stat. 501, 502.

This section enumerated the subordinate officers in the Department and their salaries at the time of the compilation of the Revised Statutes, as authorized by the then existing statutes, cited above. But the officers, clerks, and others actually appointed or employed, and their respective salaries and other compensation, depend on the specific provisions made in the annual appropriation acts, each providing for the fiscal year next following; the employment or payment of others being forbidden by Act Aug. 5, 1882, c. 389, § 4, ante, § 248. Subsequent appropriation acts provided for officers and clerks and for salaries different from those fixed by the above section. The appropriations for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

A provision of this section for "one superintendent of the Navy Department building," was superseded by the provision for a superintendent of the State, War, and Navy Department building, contained in Act March 3, 1883, c. 128, § 1, post, § 3328, and is omitted.

The salary of the chief clerk was continued at $2,500 a year, and was not reduced to $2,200 in accordance with this section, on the creation of the office of Assistant Secretary by Act July 11, 1890, c. 667, § 1, ante, § 611. Recent appropriations for the chief clerk are $3,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

Recent appropriations for chief clerks in the several Bureaus of the Department are usually $2,250. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat., and were as follows: Office of Naval Records and Library, $2,000; Office of Chief of Naval Operations, $2,250; Bureau of Navigation, $2,250; Hydrographic Office, $1,800; Bureau of Steam Engineering, $2,250; Bureau of Construction and Repair, $2,250; Bureau of Ordnance, $2,250; Bureau of Medicine and Surgery, $2,250; Bureau of Yards and Docks, $2,250.

An appropriation by Act May 28, 1896, c. 252, § 1, 29 Stat. 164, as amended by Act June 8, 1896, c. 373, § 1, 29 Stat. 285, for a "clerk in charge of civil appointments and labor regulations at navy-yards, who shall also perform the duties of appointment clerk of the Navy Department," repeated in several later acts, was not continued in subsequent years, and is omitted as temporary merely.

The Bureau of Provisions and Clothing was designated the Bureau of Supplies and Accounts, by a provision of Act July 19, 1892, c. 206, § 1, post, § 623.

In addition to the specific appropriations in the annual legislative, executive, and judicial appropriation acts for compensation of the officers, clerks, and other employés enumerated therein, said acts make special provisions each year for the employment of services of draftsmen and such other technical services as the Secretary may deem necessary, in the Bureau of Steam Engineering, in the Bureau of Construction and Repair, in the Bureau of Ordnance, and in the Bureau of Yards and Docks, to carry into effect appropriations specified, and to be paid from such appropriations, the entire expenditures by each of said Bureaus for such purposes for the fiscal year not

to exceed a specified sum; the terms of such provisions and the amount limited varying from year to year. Such provisions practically supersede, at least for the particular fiscal year, the provisions of this section for draftsmen in some of said Bureaus. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Recent legislative, executive, and judicial appropriation acts, in connection with the appropriations for the Department, provide that "no part of any appropriations made for the naval service shall be expended for any of the purposes herein provided for on account of the Navy Department at Washington, District of Columbia, except for personal services in certain bureaus as herein expressly authorized." The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

The employment in the Department, and payment out of the appropriations for new ships, of any civilian expert aids, additional draftsmen, etc., was forbidden by a provision of Act March 18, 1904, c. 716, § 1, post, § 615.

Provisions applicable to all the Departments, relating to the employment of clerks and others, were made by R. S. § 169, and Act Aug. 5, 1882, c. 389, § 4, ante, §§ 248, 249.

Provisions applicable to all the Departments, relating to the duties of chief clerks and disbursing clerks, were made by R. S. §§ 173, 174, 176, ante, §§ 255, 256, 258.

See notes to § 610, ante.

Notes of Decisions

Who may act in absence of chief of bureau.—This section makes no provision for the appointment of any assistants to chiefs of bureaus. To determine who should act in the place of the chief of the bureau during his absence, section 260, ante, is to be read in connection with this section. (1890) 19 Op. Atty. Gen. 504.

§ 615. (Act March 18, 1904, c. 716, § 1.) Employment and payment out of appropriations for new ships, of civilian expert aids, draftsmen, writers, copyists, and model makers, only as authorized.

On and after July first, nineteen hundred and four, it shall not be lawful for the Secretary of the Navy to employ in the Navy Department, at Washington, District of Columbia, and pay out of the appropriations for new ships, any civilian expert aids, additional draftsmen, writers, copyists, and model makers, except as herein or as may hereafter be specifically authorized. (33 Stat. 117.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1905, cited above. By the same act numerous appropriations were made for various offices and bureaus in the Department, for clerks and other employés, "in lieu of employés now authorized and paid from appropriations for new ships."

Provisions of the naval service appropriation acts for subsequent fiscal years forbid the use of the appropriation in each act under "Increase of the Navy" for clerical, drafting, etc., service, or for pay of any of the other classified force under the various bureaus of the Department in Washington, and restrict the use of any sum appropriated by the act for any expense of the Department at Washington, unless specific authority is given by law for such expenditure. The provision for the fiscal year 1917 was by Act Aug. 29, 1916, c. 417, 39 Stat.

§ 615a. (Act Aug. 29, 1916, c. 417.) Expenditure for pay of drafting, technical, and inspection force from lump sum appropriations giving specific authority therefor; discretion of Secretary of Navy; report to Congress of expenditures.

Hereafter such amount may be expended annually for pay of drafting, technical, inspection force from the several lump sum appropriations in which specific authority for such expenditure is given, as the Secretary of the Navy may deem necessary within the limitation of appropriation provided for such service in said lump sum appropriations at such rates of compensation as the Secretary of the Navy may prescribe; and the Secretary of the Navy shall each year, in the annual estimates, report to Congress the number of persons so employed, their duties, and the amount paid to each. (39 Stat.)

This was a provision of the naval service appropriation act for the fiscal year, 1917, cited above.

§ 616. (R. S. § 417.) Procurement of naval stores and equipment of vessels.

The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment.

Act April 30, 1798, c. 35, § 1, 1 Stat. 553.

Provisions for furnishing naval vessels and equipment to nautical schools at certain specified ports were made by Act March 4, 1911, c. 265, § 1, post, § 2762.

The loan temporarily of naval vessels and equipment to the naval militia of the States was authorized by Act Aug. 3, 1894, c. 192, post, § 3078.

Provisions relating to contracts for naval supplies, etc., were made by R. S. §§ 3714, 3718–3728, and subsequent provisions, post, §§ 6842, 6862–6879.

Notes of Decisions

Secretary as representative of President.—The Secretary of the Navy represents the President, and exercises his power on the subjects confided to his department. His acts and decisions, on subjects submitted to his jurisdiction and control by the constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. U. S. v. Jones (1855) 18 How. 92, 95, 15 L. Ed. 274.

An order dismissing an officer in the Marine Corps issued by the Secretary of the Navy as such, not purporting to be the act or by direction of the President, is nevertheless in legal effect the order of the President. McElrath v. U. S. (1876) 12 Ct. Cl. 201.

An official communication from the Secretary of the Navy to the Fourth Auditor in effect restricting the operation of a proclamation of the President increasing the pay of enlisted men in the Navy must be deemed the act of the President himself. Button v. U. S. (1885) 20 Ct. Cl. 423.

The order of the Secretary of the Navy appointing a marine meteorologist at a navy yard must be regarded as the order of the President. Hayden v. U. S. (1903) 38 Ct. Cl. 39.

Where the Secretary dismissed a midshipman for violation of the regulations and the President appointed another to fill the vacancy, it must be held that the act of the Secretary was the act of the President. Weller v. U. S. (1906) 41 Ct. Cl. 324.

Rating vessels.—The power of rating all vessels authorized to be built for the Navy was given to the Secretary of the Navy, under direction of the President, by Act April 30, 1798, § 1, incorporated into this section. (1845) 4 Op. Atty. Gen. 387, 388.

Allowances to officers detached for special duty.—The propriety of the act of the Secretary of the Navy, in transmitting to an officer of the Navy, detached for special duty in a foreign country, a sum of money to discharge the expenses of medical attendance required by injuries received by him there, was peculiarly within the jurisdiction and discretion of the head of the Navy Department. U. S. v. Jones (1855) 18 How. 92, 96, 15 L. Ed. 274.

The amount and the form of an allowance by the Secretary of the Navy for compensation to an officer of the Navy detached as naval attaché at a foreign mission, made from an appropriation for such purposes, in the nature of a contingent fund to be disbursed by the Secretary in his discretion, was not subject to judicial review. Dyer v. U. S. (1902) 37 Ct. Cl. 337.

Regulations for government of the Navy.—Such regulations, not conflicting with statute, have the force of law. Ex parte Reed (1879) 100 U. S. 13, 22, 25 L. Ed. 538; U. S. v. Symonds (1887) 7 Sup. Ct. 411, 412, 120 U. S. 46, 49, 30 L. Ed. 557; (1869) 13 Op. Atty. Gen. 9; (1894) 21 Op. Atty. Gen. 46, 47.

The authority of the Secretary of the Navy to issue orders, regulations, and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the Navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. U. S. v. Symonds (1887) 7 Sup. Ct. 411, 412, 120 U. S. 46, 49, 30 L. Ed. 557; (1853) 6 Op. Atty. Gen. 10; (1869) 13 Op. Atty. Gen. 9; (1894) 21 Op. Atty. Gen. 46, 47.

The Secretary of the Navy, by virtue of his general authority, under the President, to make rules and regulations for the government of the Navy, may determine matters not regulated by statute, such as the relative rank of naval officers, either by general rules or by decisions in particular cases. (1900) 23 Op. Atty. Gen. 155, 160. See (1869) 13 Op. Atty. Gen. 9; (1894) 21 Op. Atty. Gen. 6.

Military reservations.—The acts of the Secretary of the Navy in reserving parts of the public domain are, in legal effect, the acts of the President. A

portion of the public lands in Alaska set apart by order of the Secretary of the Navy, and used by that department for public purposes connected with the navy, constitutes a valid reservation by the executive. Behrends v. Goldsteen (1902) 1 Alaska, 518.

Settlement with defaulting contractor.—See Corliss Steam Engine Co. v. U. S. (1874) 10 Ct. Cl. 494; (1875) U. S. v. Corliss Steam Engine Co. 91 U. S. 321, 23 L. Ed. 397.

Effect of orders of Secretary.—Lawful and public orders from the president and from the secretary of the navy are a good defense to a suit against a naval officer for the destruction of property by a bombardment of a foreign town. Durand v. Hollins (C. C. 1860) Fed. Cas. No. 4,186.

§ 617. (R. S. § 418.) Custody of the books and records.

The Secretary of the Navy shall have the custody and charge of all the books, records, and other property now remaining in and appertaining to the Department of the Navy, or hereafter acquired by it.

Act April 30, 1798, c. 35, § 3, 1 Stat. 554.

Provisions for the custody of the books and records of the several Bureaus of the Department were contained in R. S. § 420, post, § 625.

The transfer of naval records, from the beginning of the Navy Department to the war of the rebellion, from other Departments to the Secretary of the Navy, was provided for by Act April 27, 1904, c. 1630, § 1, post, § 618.

The transfer of records relating to public and private armed vessels of the colonies in the war of the Revolution, from other Departments to the Secretary of the Navy, was provided for by Act June 29, 1906, c. 3590, post, § 619.

§ 618. (Act April 27, 1904, c. 1630, § 1.) Custody of naval records from beginning of Department to war of rebellion.

All naval records, such as muster and pay rolls, orders, and reports relating to the personnel and operations of the Navy of the United States, from the beginning of the Navy Department to the war of the rebellion, eighteen hundred and sixty-one, including operations against the French navy, Tripolitan war, war of eighteen hundred and twelve, operations against pirates in the West Indies, Florida war, and the war with Mexico, now in any of the Executive Departments, shall be transferred to the Secretary of the Navy, to be preserved. (33 Stat. 403.)

This was a provision accompanying appropriations for the Navy Department in the deficiency appropriation act for the fiscal year 1904, cited above.

A similar provision for the transfer to the War Department of military rolls and records of wars prior to the civil war was made by Res. April 28, 1904, No. 38, ante, § 341.

§ 619. (Act June 29, 1906, c. 3590.) Custody of records relating to public and private armed vessels of the colonies in war of Revolution.

That all records (such as muster and pay rolls and reports) relating to the personnel and operations of public and private armed vessels of the North American colonies in the war of the Revolution now in any of the Executive Departments shall be transferred to the Secretary of the Navy, to be preserved, indexed, and prepared for publication. (34 Stat. 579.)

This was a provision of the naval service appropriation act for the fiscal year 1907, cited above.

§ 620. (Act Feb. 7, 1890, c. 8.) Certificate of discharge in lieu of lost or destroyed certificate.

From and after the passage of this act, whenever satisfactory proof is furnished at the Navy Department that any commissioned officer, regular or volunteer, appointed or enlisted man who served in the Navy or the Marine Corps of the United States in the war of eighteen hundred and twelve, the Mexican war, or the war of the rebellion, has lost his certificate of discharge, or the same has been destroyed without his privity or procurement, the Secretary of the Navy shall be authorized to furnish to such commissioned officer, regular or volunteer, appointed or enlisted man,

a certificate of discharge in lieu thereof: Provided, That such certificate shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty, or any other allowance, or as evidence in any other case. (26 Stat. 6.)

This act was entitled "An act to provide certificates of honorable service to those who have served in the United States Navy or Marine Corps who have lost their certificates of discharge."

Similar provisions for furnishing duplicates of lost or destroyed certificates of discharge to officers and enlisted men of the Army were made by R. S. § 224, and Act July 1, 1902, c. 1353, ante, §§ 323, 324.

Provisions for the issue by the Secretary of War and the Secretary of the Navy of certificates of discharge or orders of acceptance of resignation in the true names of persons who enlisted or served under assumed names in the Army or Navy during certain wars, were made by Act April 14, 1890, c. 80, and Act Aug. 22, 1912, c. 321, ante, §§ 324, 325.

§ 621. (Act March 3, 1891, c. 541, § 1.) Duties of Assistant Secretary of the Navy.

Assistant Secretary of the Navy, who shall hereafter perform such duties as may be prescribed by the Secretary of the Navy or required by law. (26 Stat. 934.)

This was a provision, accompanying an appropriation for the Assistant Secretary, in the legislative, executive, and judicial appropriation act for the fiscal year 1892, cited above.

In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof is required, unless otherwise directed, to perform the duties of the head of such Department until a successor is appointed, or such absence or sickness shall cease, by R. S. § 177, set forth ante, § 259. In case of the death, resignation, absence, or sickness of the head of any Department, except where the Attorney General is concerned, the President may authorize and direct the head of any other Department or any officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease, by R. S. § 179, also set forth ante, § 261.

During the temporary absence of the Secretary of the Navy and the Assistant Secretary of the Navy the Chief of Naval Operations is next in succession to act as Secretary of the Navy by a provision of Act March 3, 1915, c. 83, post, § 621b.

§ 621a. (Act March 3, 1915, c. 83.) Chief of Naval Operations; appointment; duties; rank, title, and emoluments.

There shall be a Chief of Naval Operations, who shall be an officer on the active list of the Navy appointed by the President, by and with the advice and consent of the Senate, from among the officers of the line of the Navy not below the grade of captain for a period of four years, who shall, under the direction of the Secretary of the Navy, be charged with the operations of the fleet, and with the preparation and readiness of plans for its use in war: Provided, That if an officer of the grade of captain be appointed Chief of Naval Operations, he shall have the rank, title, and emoluments of a rear admiral while holding that position. (38 Stat. 929.)

This section and the next section were parts of the naval service appropriation act for the fiscal year 1916, cited above.

§ 621b. (Act March 3, 1915, c. 83.) Chief of Naval Operations; when to act as Secretary of Navy.

During the temporary absence of the Secretary and the Assistant Secretary of the Navy, the Chief of Naval Operations shall be next in succession to act as Secretary of the Navy. (38 Stat. 929.)

See notes to § 621a, ante.

§ 621c. (Act Aug. 29, 1916, c. 417.) Chief of Naval Operations; rank, title, and pay; orders of deemed orders of Secretary of Navy; assignment of officers of Navy or Marine Corps to assist; retirement while serving as Chief of Naval Operations; rank and pay.

Hereafter the Chief of Naval Operations, while so serving as such

Chief of Naval Operations, shall have the rank and title of admiral, to take rank next after The Admiral of the Navy, and shall, while so serving as Chief of Naval Operations, receive the pay of $10,000 per annum and no allowances. All orders issued by the Chief of Naval Operations in performing the duties assigned him shall be performed under the authority of the Secretary of the Navy, and his orders shall be considered as emanating from the Secretary, and shall have full force and effect as such. To assist the Chief of Naval Operations in performing the duties of his office there shall be assigned for this exclusive duty not less than fifteen officers of and above the rank of lieutenant commander of the Navy or major of the Marine Corps: Provided, That if an officer of the grade of captain be appointed Chief of Naval Operations he shall have the rank and title of admiral, as above provided, while holding that position: Provided further, That should an officer, while serving as Chief of Naval Operations, be retired from active service he shall be retired with the lineal rank and the retired pay to which he would be entitled had he not been serving as Chief of Naval Operations. (39 Stat.)

This was a provision of the naval service appropriation act for the fiscal year 1917, cited above.

§ 622. (R. S. § 419.) Establishment of Bureaus.

The business of the Department of the Navy shall be distributed in such manner as the Secretary of the Navy shall judge to be expedient and proper among the following Bureaus:

First. A Bureau of Yards and Docks.
Second. A Bureau of Equipment and Recruiting.
Third. A Bureau of Navigation.
Fourth. A Bureau of Ordnance.
Fifth. A Bureau of Construction and Repair.
Sixth. A Bureau of Steam Engineering.
Seventh. A Bureau of Provisions and Clothing.
Eighth. A Bureau of Medicine and Surgery.

Act Aug. 31, 1842, c. 286, § 2, 5 Stat. 579. Act July 5, 1862, c. 134, §§ 1, 4, 12 Stat. 510, 511.

The Bureau of Equipment and Recruiting was designated the Bureau of Equipment, in the appropriations therefor in Act March 3, 1891, c. 541, § 1, 26 Stat. 935, and subsequent similar acts.

The designation of the Bureau of Provisions and Clothing was changed to Bureau of Supplies and Accounts, by a provision of Act July 19, 1892, c. 206, § 1, post, § 623.

Special provisions relating to the duties of said Bureau, made by Act March 2, 1889, c. 371, § 1, and Act May 13, 1908, c. 166, are set forth post, §§ 626, 627.

Provisions for the distribution, among other bureaus and offices of the department, of the duties of the Bureau of Equipment, and of the funds appropriated for the employés of the Bureau, and for the discontinuance of the Bureau thereupon, were made in the naval service appropriation act for the fiscal year 1912, Act March 4, 1911, c. 237, § 1, 36 Stat. 1212, and repeated in the similar acts for subsequent years. Such provisions for the fiscal year 1914 were by Act March 4, 1913, c. 148, 37 Stat. 899. By a provision in the naval service appropriation act for the fiscal year 1915, Act June 30, 1914, c. 130, set forth post, § 624, the Bureau of Equipment was expressly abolished, and the duties assigned by law to that bureau were required to be distributed among the other bureaus and offices of the Navy Department.

A Division of Naval Militia Affairs was authorized by Act Feb. 16, 1914, c. 21, § 17, set forth post, § 3078q, and the legislative, executive, and judicial appropriation acts for subsequent years made appropriations therefor. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

Cited without definite application,
Smith v. Whitney (1886) 6 Sup. Ct. 570, 576, 116 U. S. 167, 29 L. Ed. 601.

§ 623. (Act July 19, 1892, c. 206, § 1.) Designation of Bureau of Supplies and Accounts.

Bureau of Provisions and Clothing, hereafter to be called Bureau of Supplies and Accounts: * *

And all laws now in force relating to the Bureau of Provisions and Clothing shall now and hereafter apply to the Bureau of Supplies and Accounts. (27 Stat. 243, 245.)

In the naval service appropriation act for the fiscal year 1893, cited above, the words, "Bureau of Provisions and Clothing, hereafter to be called Bureau of Supplies and Accounts," appear as a heading, under which are the appropriations for the Bureau for the year, followed by the further provision as to laws relating to the Bureau set forth here.

§ 624. (Act June 30, 1914, c. 130.) Bureau of Equipment abolished; duties distributed and funds and civil employés transferred to other bureaus and offices.

The Bureau of Equipment of the Navy Department is hereby abolished, and the duties assigned by law to that bureau shall be distributed among the other bureaus and offices of the Navy Department as herein provided, and all available funds heretofore appropriated for that bureau and such civil employees of that bureau as were heretofore authorized by law are hereby assigned and transferred to the other bureaus and offices as herein provided: Provided, That nothing herein shall be so construed as to authorize the expenditure of any appropriation for purposes other than those specifically provided by the terms of the appropriations heretofore and herein made. (38 Stat. 408.)

This was a provision of the naval service appropriation act for the fiscal year 1915, cited above.

See notes to R. S. § 419, ante, § 622.

§ 625. (R. S. § 420.) Custody of books and records of Bureaus.

The several Bureaus shall retain the charge and custody of the books of records and accounts pertaining to their respective duties; and all of the duties of the Bureaus shall be performed under the authority of the Secretary of the Navy, and their orders shall be considered as emanating from him, and shall have full force and effect as such.

Act Aug. 31, 1842, c. 286, § 8, 5 Stat. 580. Act July 5, 1862, c. 134, § 4, 12 Stat. 511.

Notes of Decisions

Powers of Secretary of the Navy and of chiefs of bureaus as to changes in contracts.—Under this section the Secretary of the Navy may direct or consent to a change in a contract for the construction of a government dry dock which he was authorized to construct, although the contract provided that changes could only be made upon written order of the Bureau of Yards and Docks. U. S. v. Barlow (1902) 22 Sup. Ct. 468, 473, 184 U. S. 123, 46 L. Ed. 463. See U. S. v. Walsh (1902) 115 Fed. 697, 704, 52 C. C. A. 419.

A contract made with the secretary of the navy cannot be rescinded by the chief of the bureau having charge of such contracts. U. S. v. Shaw (C. C. 1859) Fed. Cas. No. 16,266.

Cited without definite application, Smith v. Whitney (1886) 6 Sup. Ct. 570, 576, 116 U. S. 167, 29 L. Ed. 601; (1881) 17 Op. Atty. Gen. 154, 155.

§ 626. (Act March 2, 1889, c. 371, § 1.) Accounts and report of supplies by Bureau of Supplies and Accounts.

It shall be the duty of the Bureau of Provisions and Clothing to cause property accounts to be kept of all the supplies pertaining to the naval establishment, and to report annually to Congress the money value of the supplies on hand at the various stations at the beginning of the fiscal year, the dispositions thereof, and of the purchases, and the expenditures of supplies for the year, and the balances remaining on hand at the end thereof. (25 Stat. 817.)

The designation of the Bureau was changed to Bureau of Supplies and Accounts, by provisions of Act July 19, 1892, c. 206, § 1, ante, § 623.

An annual report of receipts and expenditures was required to be made

by the Chief of the Bureau to the Secretary of the Navy, by a provision of Act May 13, 1908, c. 166, post, § 627.

Notes of Decisions

Supplies for future use.—The intentional acquisition of supplies for consumption or use in succeeding years, by purchases from appropriations for the current fiscal year, is inconsistent with this act. (1911) 28 Op. Atty. Gen. 634.

Supplies thus purchased should be utilized in advance of stores regularly purchased under the annual appropriation for the current fiscal year, and Congress should be advised of the circumstances of these accumulations. Id.

§ 627. (Act May 13, 1908, c. 166.) Report by Chief of Bureau of Supplies and Accounts to Secretary of the Navy.

A full report shall be made annually of receipts and expenditures by the Chief of the Bureau of Supplies and Accounts to the Secretary of the Navy. (35 Stat. 153.)

This was a provision, accompanying a proviso requiring the storekeeper at the Naval Academy to render quarterly returns of property to the Chief of the Bureau, in the naval service appropriation act for the fiscal year 1909, cited above.

A previous provision requiring an annual report by the Bureau to Congress, contained in Act March 2, 1889, c. 371, § 1, is set forth ante, § 626.

The Chief of the Bureau of Supplies and Accounts is required to report to the Secretary of the Navy expenditures under an appropriation for the Naval Academy dairy and farm, made by Act Aug. 29, 1916, c. 417, 39 Stat., by a proviso annexed to said appropriation.

§ 628. (R. S. § 421.) Appointment of chiefs of Bureaus.

The chiefs of the several Bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections respectively, or from officers having the relative rank of captain in the staff corps of the Navy, on the active list, and shall hold their offices for the term of four years.

Act July 5, 1862, c. 134, §§ 1, 2, 12 Stat. 510. Act March 3, 1871, c. 117, § 10, 16 Stat. 537.

The "next five sections," referred to in this section, were the five sections of the Revised Statutes next following, R. S. § 422, post, § 629; R. S. § 423, post, § 633; R. S. § 424, post, § 635; R. S. § 425, post, § 637; and R. S. § 426, post, § 640.

Provisions relating to pay and allowances of chiefs of bureaus, and their rank, pay, and allowances on retirement, made by Act June 24, 1910, c. 378, 36 Stat. 607, were repealed by Act Aug. 22, 1912, c. 335, 37 Stat. 329. See post, § 2645, and notes thereunder.

Notes of Decisions

Office not a grade in the Navy.—The office of chief of bureau in the Navy Department is not designated in the acts of Congress as a "grade in the Navy." (1909) 27 Op. Atty. Gen. 376, 379; (1910) 28 Op. Atty. Gen. 526.

Time of beginning of term.—The term of office of a chief of a bureau, as prescribed in this section, must be deemed to begin at the date of his appointment by and with the consent of the Senate, and not from the date of his previous temporary appointment by the President, which was not confirmed by the Senate, notwithstanding the nomination and confirmation specify the date of said temporary appointment for the beginning of the term. (1879) 16 Op. Atty. Gen. 656.

Holding over after expiration of term.—The chief of a bureau cannot lawfully hold over after the expiration of the term for which he was appointed. (1884) 17 Op. Atty. Gen. 648.

Filling vacancies temporarily.—The chief clerks of the Bureaus of Yards and Docks and of Construction, Equipment, and Repair are entitled to the pay of the chiefs of those bureaus whilst acting as such under the authority of the President; but they cannot receive the pay of chiefs and clerks at the same time. (1844) 4 Op. Atty. Gen. 320.

In the absence of any specific provision for the assignment of a naval officer to duty as an assistant to the chief of a bureau in the Navy Department, such officer so assigned by the Secretary of the Navy under his general powers is not authorized by R. S. § 178, ante, § 260, to perform the duties of such chief in case of his death, resignation, absence, or sickness, where the President has not otherwise directed, as provided by R. S. § 179, ante, § 261. (1890) 19 Op. Atty. Gen. 503.

A vacancy in the office of Chief of the Bureau of Steam Engineering, occasioned by the retirement of the officer hold-

ing that position, could not be temporarily filled by the designation of another officer under R. S. § 179, ante, § 261, as Acting Chief of the Bureau. Such vacancy could only be filled by the President, by and with the advice and consent of the Senate, pursuant to this section and R. S. § 424, post, § 635. (1909) 27 Op. Atty. Gen. 337.

In case of such a vacancy, caused by death, resignation, absence, or sickness, the bureau remains without a head until the place is filled pursuant to this section. Id.

Officers of the Navy holding commissions issued by the President, by and with the advice and consent of the Senate, but who do not hold any office in the Navy Department or in a bureau thereof by appointment of the President, cannot be legally designated by the President to act as chiefs of bureaus in the absence of the appointed Chiefs of Bureaus of Equipment, Construction and Repair and Yards and Docks. (1909) 28 Op. Atty. Gen. 95.

Such an officer, although assigned to act as an assistant to an officer in the department, did not thereby become an officer in the department within the meaning of section 179, R. S., ante, § 261. Id.

Rank on retirement of captain while holding other position.—See (1881) 17 Op. Atty. Gen. 155.

Cited without definite application, Smith v. Whitney (1886) 6 Sup. Ct. 570, 576, 116 U. S. 167, 29 L. Ed. 601.

§ 629. (R. S. § 422.) Chiefs of Bureaus of Yards and Docks, Equipment, Navigation, and Ordnance.

The chiefs of the Bureau of Yards and Docks, of the Bureau of Equipment and Recruiting, of the Bureau of Navigation, and of the Bureau of Ordnance, shall be appointed from the list of officers of the Navy, not below the grade of commander.

Act July 5, 1862, c. 134, § 1, 12 Stat. 510.

The Chief of the Bureau of Yards and Docks is to be selected from the Corps of Civil Engineers of the Navy, by a provision of Act June 29, 1906, c. 3590, post, § 630.

Provisions for the detail of officers of the Navy as assistants to the Chiefs of the Bureaus of Navigation and of Ordnance, respectively, in Act March 3, 1893, c. 212, § 1, and Act May 4, 1898, c. 234, § 1, are set forth post, §§ 631, 632.

A provision for the detail of an officer of the Corps of Engineers as assistant to the Chief of the Bureau of Yards and Docks in Act Aug. 29, 1916, c. 417, is set forth post, § 642a.

Notes of Decisions

Eligibility for appointment.—The expression in this section and in R. S. § 423, post, § 633, "the list of officers of the Navy not below the grade of commander," strictly construed, applies only to officers of the line. (1898) 22 Op. Atty. Gen. 47, 49.

While this section restricts the President in his choice of the chiefs of the four bureaus mentioned to officers of the line not below the grade of commander, the provision of Act March 3, 1871, incorporated in R. S. § 421, ante, § 628, enlarged the President's power, giving him the alternative of making the appointment "from officers having the relative rank of captains on the staff corps of the Navy on the active list." (1898) 22 Op. Atty. Gen. 47, 50.

Salary of rear admiral appointed as chief.—A rear admiral appointed chief of the Bureau of Yards and Docks may demand the salary of a rear admiral performing shore duty. (1862) 10 Op. Atty. Gen. 377.

§ 630. (Act June 29, 1906, c. 3590.) Chief of Bureau of Yards and Docks.

The Chief of the Bureau of Yards and Docks shall be selected from the members of the Corps of Civil Engineers of the Navy having not less than seven years' active service. (34 Stat. 564.)

This was a provision of the naval appropriation act for the fiscal year 1907, cited above.

§ 631. (Act March 3, 1893, c. 212, § 1.) Detail of officer of Navy as assistant to Chief of Bureau of Navigation.

An officer of the Navy not below the rank of commander may be detailed as assistant to the Chief of the Bureau of Navigation in the Navy Department, and such officer shall receive the highest pay of his grade, and, in case of the death, resignation, absence, or sickness of the Chief of the Bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of

such Chief until his successor is appointed or such absence or sickness shall cease. (27 Stat. 717.)

This was a provision of the naval service appropriation act for the fiscal year 1894, cited above.

§ 632. (Act May 4, 1898, c. 234, § 1.) Detail of officer of Navy as assistant to Chief of Bureau of Ordnance.

That a line officer of the Navy may be detailed temporarily as assistant to the Chief of the Bureau of Ordnance in the Navy Department, and that such officer during such detail shall receive the highest pay of his grade, and in the case of the death, resignation, absence, or sickness of the chief of the bureau shall, unless otherwise directed by the President, as provided by sections one and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease, provided that, in case of the death, sickness, or absence on duty of the chief of the bureau and the assistant thereto, the chief clerk shall act as chief of the bureau. (30 Stat. 373.)

This was a provision of the naval service appropriation act for the fiscal year 1899, cited above.

The reference in this provision to sections "one and seventy-nine" of the Revised Statutes was obviously intended to be to R. S. § 179, ante, § 261.

§ 633. (R. S. § 423.) Chief of Bureau of Construction and Repair.

The chief of the Bureau of Construction and Repair shall be appointed from the list of officers of the Navy, not below the grade of commander, and shall be a skillful naval constructor.

Act July 5, 1862, c. 134, § 1, 12 Stat. 510.

A subsequent provision relating to the qualifications of chief of this Bureau, by Act March 3, 1893, c. 212, § 1, is set forth post, § 634.

The Chief of the Bureau has the title of Chief Constructor, by R. S. § 1471, post, § 2665.

A provision for the detail of an officer of the Corps of Naval Constructors as assistant to the Chief of the Bureau of Construction and Repair in Act Aug. 29, 1916, c. 417, is set forth post, § 642a.

Notes of Decisions

Eligibility for appointment.—Under the practical interpretation of this section, naval constructors are treated as officers of the Navy and their relative rank as the actual rank or grade required by the section. (1898) 22 Op. Atty. Gen. 47.

An officer of the Corps of Civil Engineers, not below the relative rank of captain, is eligible for appointment as Chief of the Bureau of Yards and Docks. Id.

§ 634. (Act March 3, 1893, c. 212, § 1.) Naval Constructor eligible as Chief of Bureau of Construction and Repair.

Any Naval Constructor having the rank of Captain, Commander or Lieutenant Commander shall be eligible as Chief of the Bureau of Construction and Repair. (27 Stat. 716.)

This was a provision of the naval service appropriation act for the fiscal year 1894, cited above.

§ 635. (R. S. § 424, as amended Act June 7, 1900, c. 859, § 1.) Chief of Bureau of Steam Engineering.

The chief of the Bureau of Steam Engineering shall be appointed from the line of officers of the Navy not below the grade of lieutenant-commander, and shall be a skillful engineer.

Act July 5, 1862, c. 134, § 1, 12 Stat. 510. Act June 7, 1900, c. 859, § 1, 31 Stat. 702.

This section, as enacted in the Revised Statutes, provided that the chief of the Bureau should be appointed from the chief engineers of the Navy, and should be a skillful engineer. It was amended by Act June 7, 1900, c. 859, § 1, cited above, to read as set forth here. The officers of the Engineer Corps of the Navy were transferred to the line by the Navy Personnel Act of March 8, 1899, c. 413, §§ 1–7, post, §§ 2476–2482.

The Chief of the Bureau has the title of Engineer in Chief, by R. S. § 1471, post, § 2665.

A provision for the detail of a line officer of the Navy as assistant to the

Chief of the Bureau, made by Act March 3, 1905, c. 1481, is set forth post, § 636.

§ 636. (Act March 3, 1905, c. 1481.) Detail of officer of Navy as assistant to Chief of Bureau of Steam Engineering.

A line officer of the Navy may be detailed as assistant to the Chief of the Bureau of Steam Engineering in the Navy Department, and such officer during such detail shall receive the highest pay of his grade, and in case of death, resignation, absence, or sickness of the Chief of the Bureau shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease. (33 Stat. 1111.)

This was a provision of the naval service appropriation act for the fiscal year 1906, cited above.

§ 637. (R. S. § 425.) Chief of Bureau of Supplies and Accounts.

The chief of the Bureau of Provisions and Clothing shall be appointed from the list of paymasters of the Navy of not less than ten years' standing.

Act July 5, 1862, c. 134, § 1, 12 Stat. 510.

This Bureau was designated as Bureau of Supplies and Accounts, by provisions of Act July 19, 1892, c. 206, § 1, ante, § 624.

Provisions for the detail of an officer of the Navy as assistant to the chief of this Bureau, made by Act July 26, 1894, c. 165, § 1, and for the pay of the officer so detailed, by Act March 3, 1899, c. 421, are set forth post, §§ 638, 639.

The Chief of the Bureau has the title of Paymaster-General, by R. S. § 1471, post, § 2665.

An annual report by the Chief of the Bureau to the Secretary of the Navy, was required by provisions of Act May 13, 1908, c. 166, ante, § 627.

Notes of Decisions

Chief of bureau as officer in the Navy.—The Paymaster General of the Navy must be at the time of his appointment an officer in the Navy. By the appointment he merely secures higher rank, title, and pay. Smith v. U. S. (1891) 26 Ct. Cl. 143.

Jurisdiction of naval court-martial.—A naval court-marshal has jurisdiction to try the Paymaster General of the Navy. Though chief of a bureau in the Navy Department, he is not a civil officer. Smith v. U. S. (1891) 26 Ct. Cl. 143. And see Smith v. Whitney (1886) 6 Sup. Ct. 570, 116 U. S. 167, 29 L. Ed. 601.

§ 638. (Act July 26, 1894, c. 165, § 1.) Detail of officer of Navy as assistant to Chief of Bureau of Supplies and Accounts.

An officer of the pay corps of the Navy may be detailed as assistant to the Chief of the Bureau of Supplies and Accounts in the Navy Department, and [that] such officer shall, in case of the death, resignation, absence, or sickness of the Chief of the Bureau, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease. (28 Stat. 132.)

This was a provision of the naval service appropriation act for the fiscal year 1895, cited above.

The pay of the officer detailed pursuant to this provision was prescribed by a provision of Act March 3, 1899, c. 421, post, § 639.

§ 639. (Act March 3, 1899, c. 421.) Pay of officer of Navy detailed as assistant to Chief of Bureau of Supplies and Accounts.

The officer of the Pay Corps of the Navy detailed as assistant to the Chief of the Bureau of Supplies and Accounts pursuant to the Act of Congress approved July twenty-seventh, eighteen hundred and ninety-four, shall hereafter receive the highest pay of his grade. (30 Stat. 1038.)

This was a provision of the naval service appropriation act for the fiscal year 1900, cited above.

§ 640. (Act March 18, 1904, c. 716, § 1.) Civilian assistant to Chief of Bureau of Supplies and Accounts.

Bureau of Supplies and Accounts: For a civilian assistant who shall perform the duties of chief clerk, and in case of the death, resignation, sickness, or absence of both the Paymaster-General of the Navy and his assistant, now provided by law, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, Revised Statutes such civilian assistant shall become the acting chief of the Bureau, two thousand five hundred dollars. (33 Stat. 121.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1905, cited above. A similar provision was made for the preceding year by Act Feb. 25, 1903, c. 755, § 1, 32 Stat. 890.

An assistant to the Chief of the Bureau, mentioned in this paragraph, was provided for by Act July 26, 1894, c. 165, § 1, ante, § 638.

R. S. § 179, mentioned in this paragraph, authorizing the President to provide for the performance of the duties of a vacant office in any department, is set forth ante, § 261.

Appropriations for the salary of the civilian assistant were made by the subsequent appropriation acts. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 641. (R. S. § 426.) Chief of Bureau of Medicine and Surgery.

The chief of the Bureau of Medicine and Surgery shall be appointed from the list of the surgeons of the Navy.

Act July 5, 1862, c. 134, § 1, 12 Stat. 510.

The Chief of the Bureau has the title of Surgeon-General, by R. S. § 1471, post, § 2665.

The detail of a medical officer of the Navy as assistant to the Bureau of Medicine and Surgery was authorized by R. S. § 1375, post, § 642.

Notes of Decisions

See Smith v. U. S. (1891) 26 Ct. Cl. 143.

Jurisdiction of naval court-martial.—The chief of the Bureau of Medicine and Surgery is amenable to the jurisdiction of a naval court-martial upon charges and specifications preferred against him for acts done as such chief. (1885) 18 Op. Atty. Gen. 176. And see Wales v. Whitney (1885) 5 Sup. Ct. 1050, 114 U. S. 564, 29 L. Ed. 277.

Prohibition to general court-martial.—See Smith v. Whitney (1886) 6 Sup. Ct. 570, 116 U. S. 181, 29 L. Ed. 601.

§ 642. (R. S. § 1375, as amended, Act Feb. 27, 1877, c. 69, § 1.) Detail of medical officer of Navy as assistant to Bureau of Medicine and Surgery.

A surgeon, assistant surgeon, or passed assistant surgeon, may be detailed as assistant to the Bureau of Medicine and Surgery, who shall receive the highest shore pay of his grade.

Act July 16, 1862, c. 183, § 18, 12 Stat. 587. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 244.

This section, as enacted in the Revised Statutes, ended with the words "Bureau of Medicine and Surgery." The words, "who shall receive the highest shore pay of his grade," were added by amendment by Act Feb. 27, 1877, c. 69, § 1, cited above, which further provided, "and said section thirteen hundred and seventy-five shall have the same force and effect as though enacted as herein amended."

Notes of Decisions

Retroactive operation of amendment of section.—The language of the amendment made to this section by Act Feb. 27, 1877, clearly gave it a retrospective character. (1877) 15 Op. Atty. Gen. 259.

Cited without definite application, Schuetze v. U. S. (1889) 24 Ct. Cl. 299, 305.

§ 642a. (Act Aug. 29, 1916, c. 417.) Detail of officers of Corps of Civil Engineers and Corps of Naval Constructors as assistants to Chiefs of Bureaus of Yards and Docks and Bureau of Construction and Repair; performance of duties of Chiefs.

Hereafter an officer of the Corps of Civil Engineers may be detailed

as assistant to the Chief of the Bureau of Yards and Docks and an officer of the Corps of Naval Constructors as assistant to the Chief of Bureau of Construction and Repair; and, in case of death, resignation, absence, or sickness of the chief of bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease. (39 Stat.)

This was a provision of the naval service appropriation act for the fiscal year 1917, cited above.

(R. S. § 427. Obsolete.)

This section of the Revised Statutes provided for the use by the Department, for the purpose of printing charts, of engraved plates of the Wilkes' Exploring Expedition, in charge of the Joint Committee on the Library. It is practically obsolete.

§ 643. (Act Oct. 19, 1888, c. 1210, § 3.) Loan of Scientific instruments for use of Weather Service.

The Secretary of the Navy be, and he is hereby, authorized, in his discretion, to loan any scientific instruments in the possession of any of the bureaus under his charge, and not in use, to persons taking observations, or making investigations in connection with, or for the use of, the Signal Service under such regulations as he may prescribe, taking such security for the safe-keeping and return of such instruments on demand as he may deem necessary. (25 Stat. 600.)

This was a provision of section 3 of the deficiency appropriation act for the fiscal year 1888, cited above.

The civilian duties previously performed by the Signal Corps, mentioned in this provision, devolved upon the Weather Bureau in the Department of Agriculture, by Act Oct. 1, 1890, c. 1266, post, § 840.

§ 644. (R. S. § 428.) Collection of enemies' flags.

The Secretary of the Navy shall from time to time cause to be collected and transmitted to him at the seat of Government all flags, standards, and colors taken by the Navy from the enemies of the United States.

Act April 18, 1814, c. 78, § 1, 3 Stat. 133.

A similar provision, derived from the same act, cited above, was incorporated in R. S. § 1554, post, § 645.

A similar requirement of the Secretary of War, as to flags, etc., taken by the Army, was contained in R. S. § 218, ante, § 320.

§ 645. (R. S. § 1554.) Captured flags.

The Secretary of the Navy shall cause to be collected and transmitted to him, at the seat of Government of the United States, all such flags, standards, and colors as shall have been or may hereafter be taken by the Navy from enemies.

Act April 18, 1814, c. 78, § 1, 3 Stat. 133.

A similar provision, derived from the same act, cited above, was incorporated in R. S. § 428, ante, § 644.

§ 646. (R. S. § 1555.) Preservation of flags in some public place.

All flags, standards, and colors of the description mentioned in the foregoing section, which are now in the possession of the Navy Department, or may hereafter be transmitted to it, shall be delivered to the President, for the purpose of being, under his direction, preserved and displayed in such public place as he may deem proper.

Act April 18, 1814, c. 78, § 1, 3 Stat. 133.

§ 647. (Act May 20, 1908, c. 182.) Acceptance and care of gifts presented to vessels of the Navy.

The Secretary of the Navy is hereby authorized to accept and care for such gifts in the form of silver, colors, books, or other articles of equipment or furniture as, in accordance with custom,

may be presented to vessels of the Navy by States, municipalities, or otherwise. The necessary expense incident to the care and preservation of gifts of this character which have been or may hereafter be accepted shall be defrayed from the appropriation "equipment of vessels." (35 Stat. 171.)

This act was entitled "An act authorizing the Secretary of the Navy to accept and care for gifts presented to vessels of the Navy of the United States."

§ 647a. (Act Aug. 29, 1916, c. 417.) Lease of property by Secretary of the Navy; reports to Congress; oil, mineral, or phosphate lands excepted; disposition of proceeds of lease.

Lease of Naval Lands: That authority be, and is hereby, given to the Secretary of the Navy, when in his discretion it will be for the public good, to lease for periods not exceeding five years and revocable at any time, such property of the United States under his control as may not for the time being be required for public use and for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress: Provided, That the authority herein granted shall not be held to apply to oil, mineral, or phosphate lands: Provided further, That all moneys received from such leases shall be covered into the Treasury as miscellaneous receipts. (39 Stat.)

This was a provision of the naval service appropriation act for the fiscal year 1917, cited above.

§ 648. (R. S. § 429, as amended, Act June 22, 1910, c. 331.) Reports to Congress by Secretary of Treasury.

The Secretary of the Navy shall make annual reports to Congress upon the following subjects:

First. A statement of the appropriations of the preceding fiscal year for the Department of the Navy, showing the amount appropriated under each specific head of appropriation, the amount expended under each head, and the balance which, on the thirtieth day of June preceding such report, remained unexpended. Such report shall be accompanied by estimates of the probable demands which may remain on each appropriation.

Second. [Repealed.]

Third. A statement showing the amounts expended during the preceding fiscal year for wages of mechanics and laborers employed in building, repairing, or equipping vessels of the Navy, or in receiving and securing stores and materials for those purposes, and for the purchase of material and stores for the same purpose; and showing the cost or estimated value of the stores on hand, under this appropriation, in the navy-yards, at the commencement of the next preceding fiscal year; and the cost or estimated value of articles received and expended during the year; and the cost or estimated value of the articles belonging to this appropriation which may be on hand in the navy-yards at the close of the next preceding fiscal year.

Fourth. A statement of all acts done by him in making sale of any vessel or materials of the Navy; specifying all vessels and materials sold, the parties buying the same, and the amount realized therefrom, together with such other facts as may be necessary to a full understanding of his acts.

Act May 1, 1820, c. 52, § 2, 3 Stat. 567. Act March 3, 1843, c. 83, 5 Stat. 617. Act July 27, 1866, c. 287, § 3, 14 Stat. 305. Act June 22, 1910, c. 331, 36 Stat. 591.

The second paragraph of this section, as enacted in the Revised Statutes, required "a statement of all offers for contracts for supplies and services made during the preceding year, by classes, indicating such as have been accepted." This clause, and a similar provision of R. S. § 3720, were repealed by Act June 22, 1910, c. 331, cited above.

A report of the expenditures from certain appropriations for civilian em-

ployés, other than ordinary mechanics and workingmen, was required by Act Jan. 30, 1885, c. 43, § 3, post, § 649.

Reports of proposed repairs or changes of vessels which in any case amount to more than $200,000, and of expenditures exceeding that amount on any one vessel in any one year, were required by provisions of Act March 2, 1907, c. 2512, and Act March 3, 1909, c. 255, post, §§ 650, 651.

A report, in the annual report, of the proceeds of all sales of old materials, etc., made under Act Aug. 5, 1882, c. 391, was required by a provision of section 2 of that act, post, § 2785.

A statement by the Secretary of the Treasury showing the receipts and expenditures in the naval service under each appropriation, was required by Act June 19, 1878, c. 311, ante, §§ 394, 395.

Provisions applicable to all the Departments, relating to the time of making annual reports, and the time of furnishing copies thereof to the printer, were made by R. S. §§ 195, 196, Act July 1, 1916, c. 209, § 3, ante, §§ 278, 279, 279a.

General provisions relating to the submission by the heads of Departments to Congress of estimates of expenditures and appropriations are contained in Title XLI, "Appropriations."

The Secretary of the Navy is required to send to Congress at the beginning of its next regular session a complete schedule or list showing the amount of money of all pay and for all allowances for each grade of officers in the Navy, including retired officers, and for all officers included in the naval service appropriation act for the fiscal year 1917 and for all enlisted men so included, by a provision in said act. See Act Aug. 29, 1916, c. 417, 39 Stat.

§ 649. (Act Jan. 30, 1885, c. 43, § 3.) Report of expenditures for civilian employés other than ordinary mechanics and workingmen; estimates therefor.

The Secretary of the Navy is hereby directed to report to Congress, at its next and each regular session thereafter, the amount expended during the prior fiscal year, from the appropriations for the pay of the Navy, Bureaus of Navigation, Ordnance, Equipment and Recruiting, Yards and Docks, Medicine and Surgery, Provisions and Clothing, Construction and Repair, and Steam-Engineering, for civilians employed on clerical duty, or in any other capacity than as ordinary mechanics and workingmen, and to submit, under the estimates for pay of the Navy and for the respective Bureaus enumerated above, specific estimates for such civilian employees for the fiscal year eighteen hundred and eighty-seven, and each fiscal year thereafter. (23 Stat. 295.)

This was the last section of an act making additional appropriations for the naval service for the fiscal year 1885, cited above.

See, as to changes in designations of Bureaus mentioned in this section, notes to R. S. § 419, ante, § 622.

§ 650. (Act March 2, 1907, c. 2512.) Report of proposed repairs or changes on vessels amounting to more than [$200,000]; expenditures therefor only after appropriations.

The Secretary of the Navy shall hereafter report to Congress, at the commencement of each regular session, the number of vessels and their names upon which any repairs or changes are proposed which in any case shall amount to more than [two hundred thousand dollars], the extent of such proposed repairs or changes, and the amounts estimated to be needed for the same in each vessel; and expenditures for such repairs or changes so limited shall be made only after appropriations in detail are provided for by Congress. (34 Stat. 1195.)

This was a proviso in the appropriation act for the fiscal year 1908, cited above. It is amended by a provision in the appropriation act for the fiscal year 1917, Act Aug. 29, 1916, c. 417, increasing the amount to $300,000.

A provision requiring, in addition to the report directed by this act, a statement of expenditures for such repairs, made by Act March 3, 1909, c. 255, is set forth, post, § 651.

§ 651. (Act March 3, 1909, c. 255.) Report of expenditures for repairs amounting to more than [$200,000] on one vessel in one year.

Hereafter it shall be the duty of the Secretary of the Navy to report to Congress at the beginning of each regular session thereof, in addition to the report directed to be made in the Act of March second, nineteen hundred and seven, making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eight, and for other purposes, a detailed statement showing the amount expended from each of the appropriations for the repair of every ship where such repairs exceed for any one ship the sum of [two hundred thousand dollars] in any one fiscal year. (35 Stat. 769.)

This was a proviso in the naval appropriation act for the fiscal year 1910, cited above. It is amended by implication by Naval Appropriation Act Aug. 29, 1916, c. 417, by increasing the amount named to $300,000.

The provision of Act March 2, 1907, c. 2512, mentioned in this provision, is set forth, ante, § 650.

§ 652. (Act June 24, 1910, c. 378.) Adjustment and report of claims for damages by collision for which vessels of Navy found responsible.

The Secretary of the Navy is hereby authorized to consider, ascertain, adjust and determine the amounts due on all claims for damages, where the amount of the claim does not exceed the sum of five hundred dollars, hereafter occasioned by collision, for which collisions vessels of the navy shall be found to be responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. (36 Stat. 607.)

This was a provision of the Navy appropriation act for the fiscal year 1911, cited above.

A similar provision for adjustment and report by the Secretary of War of claims not exceeding $1,000 for damages to private property due to military operations, was made by Act Aug. 24, 1912, c. 391, § 1, ante, § 334.

Notes of Decisions

Adjustment of claims before this act.—A special act of Congress (Act May 27, 1902, c. 887, 32 Stat. 242), authorizing the claim of the owners of a British steamship, sunk by collision with a naval vessel of the United States, for the loss of such steamship and cargo, to be submitted to a district court "under and in compliance with the rules of said court sitting as a court of admiralty," and providing that "said court shall have jurisdiction to hear and determine and to render judgment thereupon," conferred upon the court jurisdiction to render a decree against the United States for the amount of the loss, on a finding that the collision resulted solely from the violation of the navigation laws by the government vessel. Watts v. U. S. (D. C. 1903) 123 Fed. 105.

Before this provision, it was not the duty of the Secretary of the Navy to investigate a claim founded on the tortious or negligent acts of naval officers whereby a collision at sea was caused. Pope v. U. S. (1886) 21 Ct. Cl. 50.

§ 652a. (Act Aug. 29, 1916, c. 417.) Report of expenditures for experimental and research laboratory.

Experimental and research laboratory: For laboratory and research work on the subject of gun erosion, torpedo motive power, the gyroscope, submarine guns, protection against submarine, torpedo and mine attack, improvement in submarine attachments, improvement and development in submarine engines, storage batteries and propulsion, aeroplanes and aircraft, improvement in radio installations, and such other necessary work for the benefit of the Government service, including the construction, equipment, and operation of a laboratory, the employment of scientific civilian assistants as may become necessary, to be expended under the direction of the

Secretary of the Navy (limit of cost not to exceed $1,500,000), $1,000,000: Provided, That nothing herein shall be construed as preventing or interfering with the continuation or undertaking of necessary experimental work during the fiscal year ending June thirtieth, nineteen hundred and seventeen, as heretofore conducted under other appropriations: Provided further, That the Secretary of the Navy shall make detailed reports to the Congress not later than June thirtieth, nineteen hundred and seventeen, and annually thereafter, showing the manner in which all expenditures hereunder have been made. (39 Stat.)

This was a provision of the naval service appropriation act for the fiscal year 1917, cited above.

§ 653. (R. S. § 430.) Estimates for expenses.

All estimates for specific, general, and contingent expenses of the Department, and of the several Bureaus, shall be furnished to the Secretary of the Navy by the chiefs of the respective Bureaus.

Act July 5, 1862, c. 134, § 5, 12 Stat. 511.

Provisions relating to the estimates to be submitted by the Secretary of the Navy to Congress were made by R. S. §§ 3666, 3667, and subsequent statutes, post, §§ 6705–6708.

The appropriations for the expenses of the Navy Department are to be under the control of the Secretary of the Navy, and the appropriation for each Bureau is to be kept separate in the Treasury, by R. S. § 3676, post, § 6753.

Provisions relating to the purchase, classification, and issue of supplies for the different branches of the naval establishment, and to the charges against particular funds, are set forth, post, §§ 6754–6762.

Provisions relating to contracts for naval supplies, etc., were made by R. S. §§ 3714, 3718–3728, post, §§ 6842, 6862–6879.

The expenditure, out of appropriations for the naval establishment, of any sum for certain contingent expenses of the Department, was forbidden by provisions of Act June 22, 1906, c. 3514, § 1, post, § 654, and of subsequent similar acts, particularly Act March 4, 1913, c. 142, § 1, post, § 655.

The Secretary of the Navy was authorized to enter into contract for the rental of a fire-proof building or buildings or parts thereof for the use of the Department for a period of not exceeding ten years from July 1, 1913, by a provision of Act March 4, 1913, c. 142, § 1, post, § 6933.

§ 654. (Act June 22, 1906, c. 3514, § 1.) Contingent expenses not to be paid out of appropriations for naval establishment.

For stationery, furniture, newspapers, plans, drawings, drawing materials, horses and wagons to be used only for official purposes, freight, expressage, postage, and other absolutely necessary expenses of the Navy Department and its various bureaus and offices, fourteen thousand dollars.

For additional amount for the objects mentioned in the foregoing paragraph and in lieu of expenditures heretofore made therefor from general appropriations for the naval establishment, twenty-six thousand dollars; and hereafter it shall not be lawful to expend, for any of the offices or bureaus of the Navy Department at Washington, any sum out of appropriations made for the naval establishment for any of the purposes mentioned or authorized in the said foregoing paragraph. (34 Stat. 427.)

These were provisions under the heading "Contingent expenses, Navy Department," of the legislative, executive, and judicial appropriation act for the fiscal year 1907, cited above.

The use of the word "hereafter" in connection with the restriction on the use of appropriations for the naval establishment, indicates an intention to make that provision permanent. Each subsequent similar act makes an appropriation, for like purposes, of a single sum, and adds a like restriction, omitting the word "hereafter." The appropriation for the fiscal year 1917, by Act May 10, 1916, c. 117, § 1, is set forth post, § 655.

Notes of Decisions

Expenditure of contingent fund.—The Secretary of the Navy has the contingent fund of the Department entirely at his disposal, from which he may

draw for the purpose of compensating any services rendered in any of the relations of his Department which are of a contingent character. (1819) 1 Op. Atty. Gen. 302.

§ 655. (Act May 10, 1916, c. 117, § 1.) Contingent expenses not to be paid out of appropriations for naval establishment.

For stationery, furniture, newspapers, plans, drawings, drawing materials, horses and wagons to be used only for official purposes, including rental of stable; purchase, maintenance, repair, or operation of horse-drawn passenger-carrying vehicles, automobile mail wagon, including exchange of same, street-car tickets not exceeding $250, freight, expressage, postage, typewriters and computing machines and exchange of same, and other absolutely necessary expenses of the Navy Department and its various bureaus and offices, $42,000; it shall not be lawful to expend, for any of the offices or bureaus of the Navy Department at Washington, any sum out of appropriations made for the Naval Establishment for any of the purposes mentioned or authorized in this paragraph. (39 Stat.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above.

See note to preceding section.

CHAPTER B

The Hydrographic Office

The Hydrographic Office, which, by R. S. § 431, was attached to the Bureau of Navigation in the Navy Department, was afterwards attached to the Bureau of Equipment, by a provision of Act May 4, 1898, c. 234, § 1, post, § 658. But provisions have been made for the distribution of the duties of the Bureau of Equipment among other Bureaus and offices of the Department, and for the discontinuance of that Bureau thereupon. See note to R. S. § 419, ante, § 623, and provisions of Act March 4, 1913, c. 148, ante, § 625.

This chapter includes R. S. §§ 431–433, and subsequent laws which relate to the Hydrographic Office only.

Sec.
656. Hydrographic Office.
657. Hydrographic Office attached to Bureau of Equipment.
657a. Detail of naval officers to Hydrographic Office.
658. Maps, charts, etc.
659. Charts to be furnished to persons not in Government service at cost.
660. Money received from sale of maps, charts, etc.

§ 656. (R. S. § 431.) Hydrographic Office.

There shall be a Hydrographic Office attached to the Bureau of Navigation in the Navy Department, for the improvement of the means for navigating safely the vessels of the Navy and of the mercantile marine, by providing, under the authority of the Secretary of the Navy, accurate and cheap nautical charts, sailing directions, navigators, and manuals of instructions for the use of all vessels of the United States, and for the benefit and use of navigators generally.

Act June 21, 1866, c. 129, § 1, 14 Stat. 69.

The Hydrographic Office was attached to the Bureau of Equipment by a provision of Act May 4, 1898, c. 234, § 1, post, § 658. But provisions for the distribution of the duties of that Bureau among other Bureaus and offices of the Department, and the discontinuance of the Bureau thereupon, were made by Act June 24, 1910, c. 378, 36 Stat. 613, and subsequent acts, including Act June 30, 1914, c. 130, ante, § 624.

Recent appropriations for the Hydrographic Office are accompanied by a provision restricting expenditures under the office to those authorized by ap-

propriations under the Navy Department or for printing and binding. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

Provisions relating to the application of appropriations for publication of foreign hydrographic surveys were made by R. S. § 3686, post, § 6794.

The printing and distribution of publications of the Office of Naval Intelligence were provided for by Res. March 21, 1900, No. 14, post, § 7165.

Notes of Decisions

Detail to Hydrographic Office of officer of Navy.—The office of draftsman in the Hydrographic Office was incompatible with that of cadet engineer in the Navy, and the detail of a cadet engineer to duty as such draftsman did not entitle him to additional pay. Winchell v. U. S. (1892) 28 Ct. Cl. 30.

§ 657. (Act May 4, 1898, c. 234, § 1.) Hydrographic Office attached to Bureau of Equipment.

The Hydrographic Office shall hereafter be attached to and be a part of the Bureau of Equipment. (30 Stat. 374.)

This was a provision of the naval service appropriation act for the fiscal year 1899, cited above.

See note to R. S. § 431, ante, § 656.

§ 657a. (Act Aug. 29, 1916, c. 417.) Detail of naval officers to Hydrographic Office.

The Secretary of the Navy is authorized to detail such naval officers not exceeding four as may be necessary to the Hydrographic Office. (39 Stat.)

This was a provision of the naval service appropriation act for the fiscal year 1917, cited above. It was repeated in the naval service appropriation acts for previous years.

§ 658. (R. S. § 432.) Maps, charts, etc.

The Secretary of the Navy is authorized to cause to be prepared, at the Hydrographic Office attached to the Bureau of Navigation in the Navy Department, maps, charts, and nautical books relating to and required in navigation, and to publish and furnish them to navigators at the cost of printing and paper, and to purchase the plates and copyrights of such existing maps, charts, navigators, sailing directions and instructions, as he may consider necessary, and when he may deem it expedient to do so, and under such regulations and instructions as he may prescribe.

Act June 21, 1866, c. 129, § 2, 14 Stat. 69.

This section and R. S. § 433, were re-enacted, without substantial change, as part of the Printing and Binding Act of Jan. 12, 1895, c. 23, § 77, post, § 7147.

A further provision for furnishing charts to mariners or others at cost, made by Act May 4, 1878, c. 91, § 1, is set forth post, § 659.

The annual appropriations for the Hydrographic Office provide for the preparation and publication of the Pilot Charts and supplements, and for the expenses of collecting information therefor; and, by a separate appropriation, for a monthly Pilot Chart of the North Pacific Ocean. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat., from which the appropriation for the monthly pilot chart was omitted.

Notes of Decisions

Nautical Almanac.—The Nautical Almanac is a "nautical book," of the sort mentioned in this section. (1878) 16 Op. Atty. Gen. 127.

§ 659. (Act May 4, 1878, c. 91, § 1.) Charts to be furnished to persons not in Government service at cost.

All charts hereafter furnished to mariners or others not in the government service shall be paid for at the cost price of paper and printing paid by the government. (20 Stat. 51.)

This was a proviso, annexed to appropriations for expenses of preparing charts, etc., in the naval appropriation act for the fiscal year 1879, cited above. It was repeated in the same connection in the appropriation act of the next year, Act Feb. 14, 1879, c. 68, 20 Stat. 286. The sale of surplus charts of the Northwestern lakes by the Secretary of War was provided for by R. S. § 226, ante, § 328. The distribution of charts issued by the Coast Survey was regulated by provisions collected under Title LVI, "The Coast and Geodetic Survey."

§ 660. (R. S. § 433.) Money received from sale of maps, charts, etc.

All moneys which may be received from the sale of maps, charts, and nautical books shall be returned by the Secretary of the Navy into the Treasury of the United States, to be used in the further preparation and publication of maps, charts, navigators, sailing directions, and instructions for the use of seamen, to be sold at the rates as set forth in the preceding section.

Act June 21, 1866, c. 129, § 3, 14 Stat. 69.
See notes to R. S. § 432, referred to in this section, ante, § 658.

CHAPTER C

The Naval Observatory and the Nautical Almanac Office

This chapter includes R. S. §§ 434, 436, and subsequent provisions, which relate to the Naval Observatory and the Nautical Almanac only.

Sec.
661. Naval Observatory.
662. Board of visitors to Naval Observatory; eligibility for office of Superintendent.
663. Nautical Almanac.
664. Exchange of data with foreign almanac offices, and employment of office force during continuance of arrangement therefor.

§ 661. (R. S. § 434.) Naval Observatory.

The officer of the Navy employed as superintendent of the Naval Observatory at Washington shall be entitled to receive the shore-duty pay of his grade, and no other.

Act March 3, 1865, c. 114, 13 Stat. 533.
The Superintendent of the Naval Observatory was required to be a line officer of the Navy of a rank not below that of captain, by a provision of Act March 3, 1901, c. 852, § 1, post, § 662.

§ 662. (Act March 3, 1901, c. 852, § 1.) Board of visitors to Naval Observatory; eligibility for office of Superintendent.

There shall be appointed by the President, by and with the advice and consent of the Senate, from persons not officers of the United States a board of six visitors to the Naval Observatory, four to be astronomers of high professional standing and two to be eminent citizens of the United States. Appointments to this board shall be made for periods of three years, but provision shall be made by initial appointments for shorter terms so that two members shall retire in each year. Members of this board shall serve without compensation, but the Secretary of the Navy shall pay the actual expenses necessarily incurred by members of the board in the discharge of such duties as are assigned to them by the Secretary of the Navy or are otherwise imposed upon them. The board of visitors shall make an annual visitation to the Observatory at a date to be determined by the Secretary of the Navy, and may make such other visitations not exceeding two in number annually by the full board or by a duly appointed committee as may be deemed needful or expedient by a majority of the board. The board of visitors shall report to the Secretary of the Navy at least once in each year the result of its examinations of the Naval Observatory as respects the condition of buildings, instruments, and apparatus, and the efficiency with which its scientific work is prosecuted, and shall also report as respects the expenditures in the administration of the Observatory. The board of visitors shall prepare and submit to the Secretary of the Navy regulations prescribing the scope of the astronomical and other researches of the Observatory and the duties

of its staff with reference thereto. When an appointment or detail is to be made to the office of astronomical director, director of the Nautical Almanac, astronomer, or assistant astronomer, the board of visitors may recommend to the Secretary of the Navy a suitable person to fill such office, but such recommendation shall be determined only by a majority vote of the members present at a regularly called meeting of the board held in the city of Washington. The Superintendent of the Naval Observatory shall be, until further legislation by Congress, a line officer of the Navy of a rank not below that of captain. (31 Stat. 1122.)

These were provisions accompanying an appropriation for expenses of the Board of Visitors in the naval service appropriation act for the fiscal year 1902, cited above.

(R. S. § 435. Repealed.)

This section of the Revised Statutes provided that the meridian of the Observatory at Washington should be adopted and used for all astronomical purposes, and the meridian of Greenwich for all nautical purposes. It was repealed by Act Aug. 22, 1912, c. 335, 37 Stat. 342.

§ 663. (R. S. § 436.) Nautical Almanac.

The Secretary of the Navy may place the supervision of the Nautical Almanac in charge of any officer or professor of mathematics in the Navy who is competent for that service. Such officer or professor, when so employed, shall be entitled to receive the shore-duty pay of his grade, and no other.

Act March 3, 1857, c. 111, § 3, 11 Stat. 246.

Provisions for exchange of data with foreign almanac offices, with a view to reducing the amount of duplication of work in preparing the different national nautical, etc., almanacs, made by Act Aug. 22, 1912, c. 335, are set forth post, § 664.

Provisions for the printing and distribution of the Nautical almanac and the Observations of the Naval Observatory were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, pars. 5, 6, post, §§ 7057, 7058.

Notes of Decisions

Employment of retired officer.—The Secretary of the Navy was not precluded by the provision of Act July 31, 1894, § 2, post, § 3231, against an officer holding any other lucrative office, from employing a retired officer to supervise the completion of certain tables of planets, under the appropriation therefor by Act Feb. 19, 1897, c. 265, § 1, 29 Stat. 565, as that act does not create an office or contemplate any formalities in the selection of such employé. (1897) 21 Op. Atty. Gen. 507.

§ 664. (Act Aug. 22, 1912, c. 335.) Exchange of data with foreign almanac offices, and employment of office force during continuance of arrangement therefor.

The Secretary of the Navy is hereby authorized to arrange for the exchange of data with such foreign almanac offices as he may from time to time deem desirable with a view to reducing the amount of duplication of work in preparing the different national nautical and astronomical almanacs and increasing the total data which may be of use to navigators and astronomers available for publication in the American Ephemeris and Nautical Almanac: Provided, That any such arrangement shall be terminable on one year's notice: Provided further, That the work of the Nautical Almanac Office during the continuance of any such arrangement shall be conducted so that in case of emergency the entire portion of the work intended for the use of navigators may be computed by the force employed by that office, and without any foreign cooperation whatsoever: Provided further, That any employee of the Nautical Almanac Office who may be authorized in any annual appropriation bill and whose services in whole or in part can be spared from the duty of preparing for publication the annual volumes of the American Ephemeris and Nautical Almanac may be

employed by said office in the duty of improving the tables of the planets, moon, and stars, to be used in preparing for publication the annual volumes of the office. (37 Stat. 342.)

These were provisions accompanying an appropriation for the Naval Observatory in the naval service appropriation act for the fiscal year 1913, cited above.

A further proviso, following those set forth here, repealed R. S. § 435.

TITLE XI

THE DEPARTMENT OF THE INTERIOR

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CHAPTER ONE

The Department

Sec.
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§ 665. (R. S. § 437.) Establishment of Department of the Interior. There shall be at the seat of Government an Executive Department to be known as the Department of the Interior, and a Secretary of the Interior, who shall be the head thereof.

Act March 3, 1849, c. 108, § 1, 9 Stat. 395.

A Council of National Defense, composed of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor, was created by Act Aug. 29, 1916, c. 418, § 2, set forth post, under Title XVIIa, "The Council of National Defense and the Advisory Committee on Aeronautics."

Notes of Decisions

Act establishing Department.—The Department of the Interior was made one of the Executive Departments of the government by Act March 3, 1849, c. 108, 9 Stat. 395. U. S. v. Allison (1875) 91 U. S. 303, 304, 23 L. Ed. 372.

Power of Secretary to disbar attorneys practicing before his department.—See (1880) 16 Op. Atty. Gen. 488, approving (1869) 13 Op. Atty. Gen. 150.

Cited without definite application, Butterworth v. Hill (1885) 5 Sup. Ct. 796, 798, 114 U. S. 128, 29 L. Ed. 119.

§ 666. (R. S. § 438.) Assistant Secretary of the Interior.

There shall be in the Department of the Interior an Assistant Secretary of the Interior, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of [six thousand dollars] a year, to be paid monthly.

Act March 14, 1862, c. 41, § 6, 12 Stat. 369. Act March 3, 1873, c. 226, § 1, 17 Stat. 486.

The salary of the Assistant Secretary, having been increased from $3,500 to $6,000 by the provision of Act March 3, 1873, c. 226, § 1, incorporated into this section of the Revised Statutes and cited above, was reduced to $3,500, and the words of this section inclosed in brackets, "six thousand dollars," were superseded by the repeal of so much of that act as increased the amount, by Act Jan. 20, 1874, c. 11, 18 Stat. 3. Subsequent appropriations were for $4,000. An additional Assistant Secretary, designated as First Assistant Secretary of the Interior, with a salary of $4,500, was provided for by Act March 3, 1885, c. 360, post, § 668. Recent appropriations for the Assistant Secretaries are: For First Assistant Secretary, $5,000; Assistant Secretary, $4,500. The provisions for the fiscal year 1917, were by Act May 10, 1916, c. 117, § 1, 39 Stat.

In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof is required, unless otherwise directed, to perform the duties of the head of such Department until a successor is appointed, or such absence or sickness shall cease, by R. S. § 177, set forth ante, § 259. In case of the death, resignation, absence, or sickness of the head of any Department, except where the Attorney General is concerned, the President may authorize and direct the head of any other Department or any officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease, by R. S. § 179, also set forth ante, § 261.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Cited without definite application, Turner v. Seep (C. C. 1909) 167 Fed. 646, modified 179 Fed. 74, 102 C. C. A. 368.

§ 667. (R. S. § 439.) Duties of Assistant Secretary.

The Assistant Secretary of the Interior shall perform such duties in the Department of the Interior as shall be prescribed by the Secretary, or may be required by law.

Act March 14, 1862, c. 41, § 6, 12 Stat. 369.

Notes of Decisions

Duties which may be prescribed by the Secretary.—This section empowers the Secretary to make the Assistant Secretary his deputy in all things, and so long as a power so delegated is not revoked, the authority of the Assistant is co-ordinate and concurrent with that of the Secretary. Turner v. Seep (C. C. 1909) 167 Fed. 646, 650 (modified 1910) 179 Fed. 74, 102 C. C. A. 368); (1886) 18 Op. Atty. Gen. 432; (1888) 19 Op. Atty. Gen. 133.

The Secretary may delegate to the Assistant Secretary authority to approve leases of Indian lands and assignments thereof. Turner v. Seep (C. C. 1909) 167 Fed. 646, 650, decree modified (1910) 179 Fed. 74, 102 C. C. A. 368. See, also, post, §§ 4217–4221, and notes thereunder.

As to duties prescribed under this section to the Assistant Secretary, he has the full power of the Secretary himself; and the Secretary can lawfully devolve the authority conferred on him by R. S. § 3683, post, § 6784, to direct

purchases from the contingent fund of the Department, upon the Assistant Secretary. (1886) 18 Op. Atty. Gen. 432.

The consideration and determination of appeals to the Secretary of the Interior from the Commissioner of the General Land Office may be made by the Assistant Secretary of the Interior, under a regulation prescribed by the Secretary, pursuant to this section. (1888) 19 Op. Atty. Gen. 133.

Signing instruments in exercise of powers prescribed.—When the Assistant Secretary acts at a time the Secretary is not absent or sick, under a regulation made by the Secretary prescribing his powers, he should sign with his own proper official designation. When the Secretary is absent or sick, etc., if the Assistant is in charge of the Department, in pursuance of R. S. § 177, or § 179, ante, §§ 259, 261, he should sign as Acting Secretary. (1888) 19 Op. Atty. Gen. 133.

§ 668. (Act March 3, 1885, c. 360.) First Assistant Secretary of the Interior.

For an additional Assistant Secretary of the Interior, who shall be known and designated as First Assistant Secretary of the Interior, four thousand five hundred dollars. (23 Stat. 497.)

This was a provision of the sundry civil appropriation act for the fiscal year 1886, cited above.

Current appropriations for the First Assistant Secretary are $5,000. See Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to R. S. § 438, ante, § 666.

§ 669. (R. S. § 440, as amended, Act Feb. 15, 1916, c. 22, § 3.) Clerks and employés.

There shall also be in the Department of the Interior:

One chief clerk, at a salary of two thousand two hundred dollars a year.

A superintendent of the building, to be designated from the fourth-class clerks, who shall be paid two hundred dollars a year additional.

Three disbursing clerks.

The Secretary may, if he deem it necessary and proper, pay two hundred dollars a year additional to any four clerks of the fourth class.

Three messengers, at a salary of nine hundred dollars a year each.

One engineer, at a salary of one thousand four hundred dollars a year.

One captain of the watch, at one thousand two hundred dollars a year.

Twenty-eight watchmen for the general service of the Department building and all the bureaus therein, to be allotted to day or night service, as the Secretary may direct.

* * * * * * * * *

In the General Land-Office:

One chief clerk, at a salary of two thousand dollars a year.

One principal clerk, on account of military bounty-lands, at a salary of two thousand dollars a year.

One draughtsman, at a salary of one thousand six hundred dollars a year.

One assistant draughtsman, at a salary of one thousand four hundred dollars a year.

Two packers, at a salary of seven hundred and twenty dollars a year each.

In the office of the Commissioner of Indian Affairs:

One chief clerk, at a salary of two thousand dollars a year.

In the office of the Commissioner of Pensions:

One chief clerk, at a salary of two thousand dollars a year.

One engineer, at one thousand four hundred dollars a year.

One assistant engineer, at one thousand dollars a year.

In the Patent Office:

One chief clerk, who shall be qualified to act as a principal examiner.

One librarian, who shall be qualified to act as an assistant examiner.

Five law examiners.

One examiner of classification.

One examiner of interferences.

One examiner of trade-marks and designs.

One first assistant examiner of trade-marks and designs.

Six assistant examiners of trade-marks and designs.

Forty-three principal examiners.

Eighty-six first assistant examiners.

Eighty-six second assistant examiners.

Eighty-six third assistant examiners.

Eighty-six fourth assistant examiners; and such other examiners and assistant examiners in the various grades as the Congress shall from time to time provide for.

In the Office of Education:

One chief clerk, at a salary of two thousand dollars a year.

One statistician, at a salary of eighteen hundred dollars a year.

One translator, at a salary of one thousand six hundred dollars a year.

Act March 3, 1849, c. 108, 9 Stat. 395, 396. Act April 25, 1812, c. 68, 2 Stat. 716. Act July 4, 1836, c. 352, 5 Stat. 107, 111. Act March 3, 1853, c. 97, 10 Stat. 189, 209. Act March 2, 1867, c. 158, 14 Stat. 434. Act March 3, 1873, c. 226, § 1, 17 Stat. 502, 503, 504. Act July 8, 1870, c. 230, 16 Stat. 198. Act Feb. 15, 1916, c. 22, § 3, 39 Stat.

This section enumerated the subordinate officers in the Department and their salaries at the time of the compilation of the Revised Statutes, as authorized by the then existing statutes, cited above. But the officers, clerks, and others actually appointed or employed, and their respective salaries and other compensation, depend on the specific provisions made in the annual appropriation acts, each providing for the fiscal year next following; the employment or payment of others being forbidden by Act Aug. 5, 1882, c. 389, § 4, ante, § 249. Subsequent appropriation acts provide for officers and clerks and for salaries different from those fixed by the above section; and in addition to the changes made in this section by the appropriation acts, as above stated, it was also expressly amended by Act Feb. 15, 1916, c. 22, § 3. This amendment consisted in a change in the enumeration of the officers and employés in the Patent Office, so as to make the enumeration of such officers and employés read as set forth above. Prior to this amendment that part of this section which dealt with the officers and employés of the Patent office read as follows:

"In the Patent Office:

"One chief clerk, at a salary of two thousand five hundred dollars a year.

"One examiner in charge of interferences, at a salary of two thousand five hundred dollars a year.

"One examiner in charge of trade marks, at a salary of two thousand five hundred dollars a year.

"Twenty-four principal examiners, at a salary of two thousand five hundred dollars a year each.

"Twenty-four first assistant examiners, at a salary of one thousand eight hundred dollars a year each.

"Twenty-four second assistant examiners, (two of whom may be women), at a salary of one thousand six hundred dollars a year each.

"Twenty-four third assistant examiners, at a salary of one thousand four hundred dollars a year each.

"One librarian, at a salary of two thousand dollars a year.

"One machinist, at a salary of one thousand six hundred dollars a year.

"Three skilled draughtsmen, at a salary of one thousand two hundred dollars a year each.

"Thirty-five copyists of drawings, at a salary of one thousand dollars a year each.

"One messenger and purchasing clerk, at a salary of one thousand dollars a year.

"One skilled laborer, at a salary of one thousand and two hundred dollars a year.

"Eight attendants in the model room, at a salary of nine hundred dollars a year each."

The appropriations for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat., and as to the officers and employés in the Patent Office con-

formed to the provisions of this section as amended, with the following additional officers and employés: Five examiners in chief, at $3,500 each; financial clerk, required to give bond in such amount as the Secretary of the Interior may determine, $2,250; six chiefs of divisions, at $2,000 each; three assistant chiefs of divisions, at $1,800 each; private secretary, to be selected and appointed by the commissioner, $1,800; translator of languages, $1,800; and clerks, draftsmen, copyists and messengers. Said Act May 10, 1916, c. 117, § 1, also fixed the salaries of the other officers and employés in the Patent Office, as set forth above, as follows: Chief clerk, $2,750; librarian, $2,000; law examiners, $2,750 each; examiner of classifications, $3,600; examiner of interferences, $2,700; examiner of trade marks and designs, $2,700; first assistant examiner of trade marks and designs, $2,400; assistant examiners of trade marks and designs, $1,500 each; principal examiners, $2,700 each; first assistant examiners, $2,400 each; second assistant examiners, $2,100 each; third assistant examiners, $1,800 each; fourth assistant examiners, $1,500 each.

A provision of this section, "Public Documents: One superintendent at a salary of two thousand five hundred dollars a year," was superseded by the provisions of the Printing and Binding Act of Jan. 12, 1895, c. 23, referred to in note under chapter 7 of this Title, and is omitted here.

Provisions subsequent to the Revised Statutes for additional Assistant Commissioners and similar officers in the several offices of the Department are set forth in subsequent chapters of this title, under the headings of the respective offices, etc.

Recent appropriations for chief clerk of the Department and superintendent of buildings are: "Chief clerk, including $500 as superintendent of buildings, who shall be chief executive officer of the department and who may be designated by the Secretary of the Interior to sign official papers and documents during the temporary absence of the Secretary and the Assistant Secretaries of the department, $4,000." The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

Recent appropriations provide, in the office of the Secretary, for a "female clerk, to be designated by the President, to sign land patents, $1,200." The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

Recent appropriations for the General Land-Office provide for a "depositary acting for the Commissioner as receiver of public moneys, $2,000," who may, with the approval of the commissioner, designate a clerk of the General Land Office to act as such depositary in his absence. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

A provision of the legislative, executive, and judicial appropriation act for the fiscal year 1901, Act April 17, 1900, c. 192, § 1, 31 Stat. 121, for a librarian for the law library of the General Land-Office, "to be selected by the Secretary of the Interior wholly with reference to his special fitness for such work," was repeated in the subsequent similar acts down to 1912. The provision for the fiscal year 1917, under the heading "General Land-Office," for "clerk and librarian, $1,000," was by Act May 10, 1916, c. 117, § 1, 39 Stat.

A provision for a private secretary in the office of Commissioner of Indian Affairs, made by Act Feb. 27, 1906, c. 510, § 1, is set forth post, § 715.

A provision for a private secretary to the Commissioner of Pensions, made by Act March 3, 1905, c. 1484, § 1, is set forth post, § 730.

The detail from the Department of two clerks, to act as assistant clerks to the House Committees on Pensions and on Invalid Pensions, respectively, was authorized by Res. Feb. 1, 1884, No. 4, post, § 674.

The Board of Pension Appeals was established in the Department by provisions of Act July 7, 1884, c. 331, § 1, 23 Stat. 185, and subsequent acts, but the duties performed by it were transferred to the office of the Assistant Attorney-General for the Department, by Act March 4, 1911, c. 237, § 1, 36 Stat. 1214, and said provisions relating to the Board are therefore omitted.

Provisions for a board of appeals in the office of the Solicitor for the Department of the Interior are contained in a provision in Act May 10, 1916, c. 117, § 1, post, § 672a.

Provisions for a disbursing clerk for payment of pensions, and for clerks and other employés in his office, were made, in connection with the abolition of the office of pension agent and the existing pension agencies, by provisions of Act Aug. 17, 1912, c. 301, §§ 1, 5, post, §§ 671, 672.

A provision for a financial clerk in the Patent Office, made by Act June 19, 1878, c. 329, § 1, is set forth post, § 673.

A provision for a private secretary to the Commissioner of Patents, made by Act June 27, 1909, c. 297, § 1, is set forth post, § 739.

The office of Auditor of Railroad Accounts was established, as a bureau of the Department, by Act June 19, 1878, c. 316, 20 Stat. 169. The Auditor was styled Commissioner of Railroads, by Act March 3, 1881, c. 130, § 1, 21 Stat. 409. The office was terminated June 30, 1904, and the duties of the Commissioner were transferred to the Secretary of the Interior, with the

records and files of the office, by Act March 3, 1903, c. 1007, § 1, 32 Stat. 1119. But said Act June 19, 1878, c. 316, as amended by said subsequent acts, was repealed by Act Aug. 24, 1912, c. 374, 37 Stat. 503, and all the provisions so repealed are therefore omitted.

Provisions applicable to all the Departments, relating to the employment of clerks and others were made by R. S. § 169, and Act Aug. 5, 1882, c. 389, § 4, ante, §§ 248, 249.

Provisions applicable to all the Departments, relating to the duties of chief clerks and disbursing clerks, were made by R. S. §§ 173, 174, 176, ante, §§ 255, 256, 258.

See notes to § 666, ante.

Notes of Decisions

Authority of chief clerk during absence of Secretary and Assistant Secretaries.—Under Act March 4, 1911, c. 237, 36 Stat. 1213, authorizing the designation of the chief clerk of the Department to sign official papers and documents during the temporary absence of the Secretary and Assistant Secretaries, the chief clerk so designated has authority to sign a communication designating a special disbursing agent, although ordinarily such appointments must be made by the head of the Department, as directed by R. S. § 3614 post, § 6603. (1912) 29 Op. Atty. Gen 273.

§ 670. (Act Aug. 22, 1912, c. 350.) Estimates for personal services in Indian Office; employment of such services only as specifically appropriated for, except temporary details of field employés.

For the fiscal year nineteen hundred and fourteen and annually thereafter estimates in detail shall be submitted for all personal services required in the Indian Office, and after the end of the fiscal year nineteen hundred and thirteen it shall not be lawful to employ in said office any personal services other than those specifically appropriated for in the legislative, executive, and judicial appropriation Acts, except temporary details of field employees for service connected solely with their respective employments. (37 Stat. 396.)

This was a provision accompanying appropriations for the Indian Office in the legislative, executive, and judicial appropriation act for the fiscal year 1913, cited above.

§ 671. (Act Aug. 17, 1912, c. 301, § 1.) Disbursing clerk for payment of pensions; appointment; salary.

For salary of one disbursing clerk for the payment of pensions, to be selected and appointed by the Secretary of the Interior, at the rate of four thousand dollars per annum, during the last five months of the fiscal year nineteen hundred and thirteen, * *; and from and after the thirty-first day of January, nineteen hundred and thirteen, there shall be one disbursing clerk in the Bureau of Pensions to be appointed as aforesaid and who shall receive a salary at the rate of four thousand dollars per annum. (37 Stat. 312.)

These were provisions of section 1 of the pensions appropriation act for the fiscal year 1913, cited above.

Further provisions of this section repealed R. S. §§ 4778, 4780, authorizing the appointment of pension agents and the establishment of agencies, said repeal to take effect after January 31, 1913, and also abolished existing pension agencies from and after said date.

Recent legislative, executive, and judicial appropriation acts contain appropriations for the disbursing clerk for payment of pensions, for a deputy disbursing clerk, and for supervising clerks in the disbursing division. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Provisions for annual statements for clerk hire in the office of the disbursing clerk for the payment of pensions were made by Act Aug. 17, 1912, c. 301, § 1, post, § 6716.

Provisions for the payment of pensions by the disbursing clerk were made by sections 2, 3, 6, of this act, post, §§ 9107, 9108, 9110.

§ 672. (Act Aug. 17, 1912, c. 301, § 5.) Acting disbursing clerk for payment of pensions; designation of clerks to sign checks; bond of disbursing clerk.

In case of sickness or unavoidable absence of the disbursing clerk

for the payment of pensions from his office, the Commissioner of Pensions may, with the approval of the Secretary of the Interior, authorize the chief clerk of his office or some other clerk employed therein to temporarily act as such disbursing clerk for payment of pensions.

With the approval of the Commissioner of Pensions and the Secretary of the Interior, the disbursing clerk for the payment of pensions may designate and authorize the necessary number of clerks to sign the name of the disbursing clerk for the payment of pensions to official checks.

The disbursing clerk shall give bond with good and sufficient surety for such amount and in such form as the Secretary of the Interior may approve, and such bond shall be held to cover and apply to the acts of the persons authorized to act in his place. (37 Stat. 313.)

This section was part of the pensions appropriation act for the fiscal year 1913, cited above.

See notes to provisions of section 1 of the act, ante, § 671.

§ 672a. (Act May 10, 1916, c. 117, § 1.) Board of appeals in office of Solicitor.

Office of Solicitor: Three members of a board of appeals, to be appointed by the Secretary of the Interior, at $4,000 each. (39 Stat.)

This section was a provision in the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above. It was repeated in the prior appropriation acts for the years 1916 and 1915.

See notes to §§ 666, 669, ante.

§ 673. (Act June 19, 1878, c. 329, § 1.) Financial clerk in Patent Office.

United States Patent Office. * * One financial clerk, two thousand dollars, who shall give bond in such amount as the Secretary of the Interior may determine. (20 Stat. 200.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1879, cited above. It was continued in the subsequent similar acts. The appropriation for the financial clerk for the fiscal year 1917 was $2,250 by Act May 10, 1916, c. 117, § 1, 39 Stat. See notes to §§ 666, 669, ante.

§ 674. (Res. Feb. 1, 1884, No. 4.) Detail of clerks as assistant clerks to committees on pensions of House of Representatives.

That the Secretary of the Interior, be, and is hereby authorized, if in his opinion the public interests will not suffer thereby, upon the request of either of the Committees hereinafter named, to detail from that department, one clerk to act as assistant-clerk to the House Committee on Pensions, and one clerk to act as assistant-clerk to the House Committee on Invalid Pensions. (23 Stat. 266.)

This was a resolution entitled "Joint resolution authorizing the Secretary of the Interior to detail from that Department two clerks to act as assistant clerks to certain house committees."

§ 675. (Act Aug. 24, 1912, c. 370, § 1.) Copies of records, etc., to be furnished; fees; authentication; authenticated copies of rules, etc.

The Secretary of the Interior, the head of any bureau, office, or institution, or any officer of that department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of any official books, records, papers, documents, maps, plats, or diagrams within his custody, and charge therefor the following fees: For all written copies, at the rate of fifteen cents for each hundred words therein; for each photolithographic copy, twenty-five cents where such copies are authorized by law; for photographic copies, fifteen cents for each sheet; and for tracings or blue prints the cost of the production thereof to

be determined by the officer furnishing such copies, and in addition to these fees the sum of twenty-five cents shall be charged for each certificate of verification and the seal attached to authenticated copies: Provided, That there shall be no charge for the making or verification of copies required for official use by the officers of any branch of the Government: Provided further, That only a charge of twenty-five cents shall be made for furnishing authenticated copies of any rules, regulations, or instructions printed by the Government for gratuitous distribution. (37 Stat. 497.)

This section and the five sections next following were an act entitled "An act to make uniform charges for furnishing copies of records of the Department of the Interior and of its several bureaus."

§ 676. (Act Aug. 24, 1912, c. 370, § 2.) Inspection and copying of records.

Nothing in this Act shall be construed to limit or restrict in any manner the authority of the Secretary of the Interior to prescribe such rules and regulations as he may deem proper governing the inspection of the records of said department and its various bureaus by the general public, and any person having any particular interest in any of such records may be permitted to take copies of such records under such rules and regulations as may be prescribed by the Secretary of the Interior. (37 Stat. 498.)

§ 677. (Act Aug. 24, 1912, c. 370, § 3.) Authenticated copies of records, etc., as evidence.

All authenticated copies furnished under this Act shall be admitted in evidence equally with the originals thereof. (37 Stat. 498.)

§ 678. (Act Aug. 24, 1912, c. 370, § 4.) Authenticated copies to be attested by official seal.

All officers who furnish authenticated copies under this Act shall attest their authentication by the use of an official seal, which is hereby authorized for that purpose. (37 Stat. 498.)

§ 679. (Act Aug. 24, 1912, c. 370, § 5.) Repeal of Act April 19, 1904, c. 1396; other provisions not repealed; fee for certificate of official character of officer of Department.

The Act of Congress approved April nineteenth, nineteen hundred and four, chapter thirteen hundred and ninety-six, be, and the same is hereby, repealed; but nothing in this Act shall be so construed as to repeal the provisions of sections four hundred and ninety to four hundred and ninety-three, inclusive, and forty-nine hundred and thirty-four of the Revised Statutes, fixing the rates for patent fees; or the Act approved March third, eighteen hundred and ninety-one, chapter five hundred and forty-one, fixing a rate for certifying printed copies of specifications and drawings of patents; or of section fourteen of the Act of February twentieth, nineteen hundred and five, chapter five hundred and ninety-two, to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same; nor shall anything in this Act be construed to repeal any of the provisions of section eight of the Act approved April twenty-sixth, nineteen hundred and six, chapter eighteen hundred and seventy-six, authorizing the officer having charge of the custody of any records pertaining to the enrollment of members of the Five Civilized Tribes of Indians to furnish certified copies of such records and charge for that service such fees as the Secretary of the Interior may prescribe; nor shall anything herein contained prevent the Secretary of the Interior, under his general power of supervision over Indian affairs, from prescribing such charges or fees for furnishing certified copies of the rec-

ords of any Indian agency or Indian school as he may deem proper; and the said Secretary is hereby authorized to charge a fee of twenty-five cents for each certified copy issued by him as to the official character of any officer of his department. (37 Stat. 498.)

Act April 19, 1904, c. 1396, 33 Stat. 185, repealed by this section, provided that copies of patents, records, etc., in the General Land Office authenticated by the seal and certified by the Recorder of such Office should be evidence equally with the originals thereof to the same force and effect as when certified by the Commissioner of said Office.

R. S. §§ 490–493 and 4934, mentioned in this section as not repealed thereby, are set forth post, §§ 753–756, 9482.

The provision of Act March 3, 1891, c. 541, mentioned in this section as not repealed thereby, is set forth post, § 757.

Act Feb. 20, 1905, c. 592, § 14, mentioned in this section as not repealed thereby, is set forth post, § 9499.

§ 680. (Act Aug. 24, 1912, c. 370, § 6.) Disposition of receipts under act.

All sums received under the provisions of this Act shall be deposited in the Treasury to the credit of miscellaneous receipts. (37 Stat. 498.)

CHAPTER TWO

The Secretary of the Interior

Sec.
681. Duties of Secretary.
682. Powers of Secretary.
683. Expenditures of the Department.
684. Rules for government of agents, attorneys, etc., representing claimants before Department; suspension or disbarment.
685. Report of expenditure of general Indian education fund.
686. Account of cost of survey and allotment work on Indian reservations.
687. Report of expenditure for Indian school and agency buildings, etc.
688. Account of use of appropriations for agricultural experiments on Indian schools or agency farms.
689. Statement of fiscal affairs of Indian tribes for whose benefit expenditures are made.

§ 681. (R. S. § 441.) Duties of Secretary.

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

First. [Superseded.]
Second. The public lands, including mines.
Third. The Indians.
Fourth. Pensions and bounty-lands.
Fifth. Patents for inventions.
Sixth. [Superseded.]
Seventh. Education.
Eighth. Government Hospital for the Insane.
Ninth. Columbia Asylum for the Deaf and Dumb.

Act March 3, 1849, c. 108, §§ 3, 5–9, 9 Stat. 395. Act July 8, 1870, c. 230, § 1, 16 Stat. 198. Act Feb. 5, 1859, c. 22, § 1, 11 Stat. 379. Act July 20, 1868, c. 176, § 1, 15 Stat. 92, 100.

The first subdivision under this section included therein "The Census; when directed by law." It was superseded by the transfer of the Census Office, "and all that pertains to the same," to the Department of Commerce and Labor, by the act establishing that Department, Act Feb. 14, 1903, c. 552, § 4, post, § 857.

The sixth subdivision of the section included "The custody and distribution of publications." It was superseded by the provisions of the Printing and Binding Act, Act Jan. 12, 1895, c. 23, referred to in note under chapter 7 of this Title.

The Commissioner of the General Land Office is required to perform, under the direction of the Secretary of the Interior, all executive duties relating to the public lands, etc., by R. S. § 453, as amended, post, § 699.

The Commissioner of Indian Affairs is given the management of all Indian

affairs, and of all matters arising out of Indian relations, under the direction of the Secretary of the Interior, by R. S. § 463, post, § 716.

The Freedmen's Hospital and Asylum was continued under the direction of the Secretary of the Interior by a provision of Act June 23, 1874, c. 455, § 1, post, § 3975; but the expenditures therefor were to be under the supervision and control of the Commissioners of the District of Columbia, by a provision of Act March 3, 1893, c. 199, § 1, post, § 3976; and estimates for the expenses were to be submitted by the Secretary of the Interior, by a provision of Act March 3, 1905, c. 1483, § 1, post, § 3978.

Former powers of the Mayor of the City of Washington to convey certain low grounds in that city were vested in the Secretary of the Interior, by Act July 1, 1879, c. 62, post, § 6945.

The Secretary of the Interior was authorized to prescribe rules governing agents representing claimants before his department, and to suspend or disbar such agents, by Act July 4, 1884, c. 181, § 5, post, § 684.

Powers and duties in connection with the execution of Act June 17, 1902, c. 1093, providing for the construction of irrigation works for the reclamation of arid lands, were conferred and imposed on the Secretary of the Interior by various sections of that act, post, §§ 4700–4708.

The execution of all laws affecting public lands reserved as forest reserves, after such lands have been so reserved, excepting such laws as affect the surveying, etc., entering, etc., or patenting of any of such lands, was transferred from the Secretary of the Interior to the Secretary of Agriculture, by Act Feb. 1, 1905, c. 288, § 1, post, § 823.

Notes of Decisions

1. Census—"When directed by law."
2. Powers conferred administrative only.
3. Supervision of matters relating to public lands, in general.
4. Conclusiveness of decisions of Secretary as to matters relating to public lands.
5. Supervision of and appeals from action and decisions of Commissioner of General Land Office.
6. Power to make regulations for enforcement of land laws.
7. Employment of special agents to enforce land laws.
8. Supervision of business relating to Indians through Commissioner of Indian Affairs.
9. Power to make regulations relating to Indian affairs.
10. Assignment of additional duties to Indian inspectors.
11. Powers as to Indian allotments.
12. Supervision and review of action of Commissioner of Patents.
13. Government Printing Office not under jurisdiction of the Department.

1. Census—"When directed by law."—This phrase formerly used in the first subdivision applies alone to that subdivision. (1899) 22 Op. Atty. Gen. 413, 419.

2. Powers conferred administrative only.—This section, and R. S. §§ 161, 453, 2478, ante, § 235, and post, §§ 699, 5120, confer administrative power only, and legislative power cannot be exercised under the guise of regulation. U. S. v. George (1913) 33 Sup. Ct. 412, 414, 228 U. S. 14, 57 L. Ed. 712.

3. Supervision of matters relating to public lands, in general.—Under this section and R. S. § 453, post, § 699, the land department, including in that term, the Secretary of the Interior, the Commissioner of the General Land Office, and subordinate officers, constitutes a special tribunal, vested with judicial power to hear and determine claims to public lands, and having power to execute its judgments by conveyances to the parties entitled. U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 955, 15 C. C. A. 96 (affirmed [1897] 17 Sup. Ct. 368, 165 U. S. 463, 41 L. Ed. 789); New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116; King v. McAndrews (1901) 111 Fed. 860, 863, 50 C. C. A. 29; Neff v. U. S. (1908) 165 Fed. 273, 277, 91 C. C. A. 241.

The Secretary of the Interior has power to inquire into and determine rights claimed in public lands until the legal title has passed out of the government. U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630.

The provisions of this section, charging the Secretary with the supervision of public business relating to the public lands, and of R. S. §§ 453, 2478, post, §§ 699, 5120, that the Commissioner of the General Land Office shall perform the duties prescribed to him therein under the direction of the Secretary, mean that, in matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States. Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 262, 142 U. S. 161, 177, 35 L. Ed. 974; Orchard v. Alexander (1895) 15 Sup. Ct. 635, 638, 157 U. S. 372, 39 L. Ed. 937; Hawley v. Diller (1900) 20 Sup. Ct. 986, 993, 178 U. S. 476, 44 L. Ed. 1157.

In the administration of such large and varied interests as are intrusted to the land department, matters not foreseen, equities not anticipated, and which are therefore not provided for by

express statute, may sometimes arise, and therefore the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice. Williams v. U. S. (1891) 11 Sup. Ct. 457, 461, 138 U. S. 514, 524, 34 L. Ed. 1026.

The general supervision of the affairs of the land department is vested in the Secretary of the Interior, and unless Congress clearly designates some other officer to act in respect to such matters it will be assumed that he is the officer to represent the government. Johanson v. State of Washington (1903) 23 Sup. Ct. 825, 827, 190 U. S. 179, 47 L. Ed. 1008.

This section, either alone or taken with others, conferred no authority on the Secretary of the Interior to withdraw from allotment a portion of lands of an Indian reservation, after Congress had authorized the allotment thereof. Leecy v. U. S. (1911) 190 Fed. 289, 111 C. C. A. 254.

The authority to determine to which of two grants to a state land belongs is vested in the Secretary by this section, and in the absence of fraud or mistake such determination is final. Pengra v. Munz (C. C. 1887) 29 Fed. 830, 835; California & O. Land Co. v. Munz, Id. 837.

The Secretary of the Interior has no authority under his general power of supervision and control of the public domain to lease any part of it, unless authorized to do so by an act of Congress. Clyde v. Cummings (Utah, 1909) 101 P. 106.

4. Conclusiveness of decisions of Secretary as to matters relating to public lands.—See note under § 699, post.

5. Supervision of and appeals from action and decisions of Commissioner of General Land Office.—The powers of supervision and appeal vested by this section in the Secretary of the Interior, in matters relating to the General Land Office, are co-extensive with the powers to adjudge of the Commissioner. Magwire v. Tyler (1861) 1 Black, 195, 201, 17 L. Ed. 137; Magwire v. Tyler (1869) 8 Wall. 650, 661, 19 L. Ed. 320; Snyder v. Sickles (1878) 98 U. S. 203, 211, 25 L. Ed. 97.

In the exercise of his supervisory power, the Secretary has authority to set aside a survey of a tract under a confirmed Spanish grant, order another survey to be made, and issue a patent thereon. Magwire v. Tyler (1861) 1 Black, 195, 201, 17 L. Ed. 137.

The Secretary of the Interior is by law given supervision of the entire business of the Land Department, and he is invested with authority to review, reverse, amend, or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands, which supervision may be exercised by direct orders, or by review on appeal, or on his own motion. Orchard v. Alexander (1895) 15 Sup. Ct. 635, 637, 157 U. S. 372, 39 L. Ed. 737 (affirming [1891] 26 Pac. 196, 2 Wash. 108); Hays v. Steiger (1888) 76 Cal. 555, 18 Pac. 670.

A protestant to the grant of a patent on a mining claim to lands which were agricultural may appeal from the local land officer to the commissioner of the general land office, and to the secretary of the interior. German Ins. Co. v. Hayden (1895) 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206; (1896) Paine v. Foster, 53 P. 109, 9 Okl. 213, affirmed (1899) 59 P. 252, 9 Okl. 257.

Nothing in Act March 5, 1872, 17 Stat. 37, directing the Commissioner of the General Land Office to receive and examine selections of swamp lands in Iowa, and to allow or disallow them, puts the decisions of the Commissioner, under the act, on a footing different from his other decisions, and an appeal lies therefrom to the Secretary of the Interior. Buena Vista County v. Iowa Falls & Sioux City R. R. Co. (1884) 5 Sup. Ct. 84, 89, 112 U. S. 165, 175, 28 L. Ed. 680.

The Secretary may exercise his power to set aside an order of the Commissioner of the General Land Office approving a survey of land included in a confirmed claim and order a new survey, on formal notice or appeal, according to the rules of the department, or on his own motion; and his action is not assailable in a collateral proceeding in the court. Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 262, 142 U. S. 161, 35 L. Ed. 974.

A decision of the Commissioner of the General Land Office, rejecting and canceling for fraud an entry under the timber and stone act, made under his general authority, and not under the exceptional authority given by R. S. §§ 2450–2457, post, §§ 5106–5112, is subject to the appellate or supervisory authority of the Secretary of the Interior under this section and R. S. §§ 453, 2478, post, §§ 699, 5120. Hawley v. Diller (1900) 20 Sup. Ct. 986, 993, 178 U. S. 476, 44 L. Ed. 1157.

Findings of the Secretary of the Interior to the effect that a designated party to a controversy in the Land Department had the right to enter the land as a homestead does not prevent such Department, if patent has not issued, from instituting further inquiry, and, upon such inquiry, finally awarding the land to the party held to have a better right. Love v. Flahive (1907) 27 Sup. Ct. 486, 487, 205 U. S. 195, 51 L. Ed. 768, affirming judgment (1905) 83 Pac. 882, 33 Mont. 348, and rehearing denied (1907) 27 Sup. Ct. 729, 206 U. S. 356, 51 L. Ed. 1092. But see Johnson v. Towsley (1871) 13 Wall. 72, 82, 20 L. Ed. 485.

The consideration and determination of appeals to the Secretary from the Commissioner of the General Land Office may be made by an Assistant Sec-

retary, under a regulation prescribed by the Secretary, pursuant to R. S. § 439, ante, § 667. (1888) 19 Op. Atty. Gen. 133.

The secretary of the interior, in reviewing the decisions of the commissioner of the general land office in relation to the sale of public lands, exercises a supervisory rather than an appellate power in the sense in which the term "appellate" is employed in defining the powers of courts of justice. In the exercise of such supervisory power, he may approve, modify, or annul the acts, proceedings, and decisions of the commissioner of the general land office, whenever certified to him, without the formality of an appeal. Hestres v. Brennan (1875) 50 Cal. 211.

As to right and procedure for review see note under § 699, post.

6. Power to make regulations for enforcement of land laws.—This section and R. S. §§ 453, 2478, post, §§ 699, 5120, empower the Commissioner of the General Land Office, under the direction of the Secretary, to enforce, "by appropriate regulations," every part of the public land laws, as to which it is not otherwise specially provided. Leonard v. Lennox (1910) 181 Fed. 760, 767, 104 C. C. A. 296; U. S. v. Nelson (D. C. 1912) 199 Fed. 464.

Congress has power to place the control of the occupancy and use of the forest lands in the hands of the secretary of the interior for their preservation, and to provide that any occupancy in violation of the rules and regulations adopted by him shall be punishable criminally. (1901) 23 Op. Atty. Gen. 589.

The secretary of the interior cannot without express authority of law prescribe rules and regulations by which the national forest reservations may be made refuges for game or by which the hunting, killing, and capturing of game thereon may be forbidden. Id.

A rule by the Secretary of the Interior, the import of which is to carry into effect the provisions of an act relating to the public lands, is valid, and has the same binding force as the law itself. Clyde v. Cummings (Utah, 1909) 101 P. 106.

7. Employment of special agents to enforce land laws.—The duty imposed on the Secretary to have supervision over public lands, and the duty imposed on the Commissioner of the General Land Office under the general supervision of the Secretary, necessarily require those officers to act by and through the agency of others, and the right to employ such agents is incidental to the obligation to enforce the law. U. S. v. Schlierholz (D. C. 1904) 133 Fed. 333, 335.

8. Supervision of business relating to Indians through Commissioner of Indian affairs.—The secretary of the interior and his subordinates, the Indian inspector and Indian agent, may lawfully close the business of noncitizens of the Creek nation who refuse to pay their permit taxes fixed by its law. Buster v. Wright (1905) 135 Fed. 947, 957, 68 C. C. A. 505.

Under the provisions of this section for supervision by the Secretary of public business relating to the Indians, and of R. S. § 463, post, § 716, for management by the Commissioner of Indian affairs, under direction of the Secretary, of all Indian affairs, a general order signed by the Commissioners stating that it was made by direction of the Secretary, which authorized a superintendent of Indian affairs to publish advertisements inviting proposals for supplies, was authorized by the head of the department, within the meaning of the requirement thereof in R. S. § 3828, post, § 7187, notwithstanding it was not signed by the Secretary. U. S. v. Odeneal (C. C. 1882) 10 Fed. 616, 618.

9. Power to make regulations relating to Indian affairs.—Regulations made under this section and under R. S. § 465, post, § 723, for the purpose of carrying into effect the statutes relating to Indian affairs, have the force of statutory enactments. U. S. v. Thurston County (1906) 143 Fed. 287, 291, 74 C. C. A. 425.

The president is authorized by the treaty of June 9, 1855 (12 Stat. 948), and this section and sections 716, 723, post, to make rules for the government of the Indians on the Umatilla reservation, including the establishment of an Indian court and police, and the definition of "Indian offenses" and the measure of punishment therefor. U. S. v. Clapox (D. C. 1888) 35 Fed. 575.

10. Assignment of additional duties to Indian inspectors.—The Secretary, being charged by this section with the supervision of public business concerning the Indians, may lawfully assign to Indian inspectors other duties relating to that business in addition to those prescribed by R. S. § 2045, post, § 3989, wherever the exigencies of the public service require it. (1881) 17 Op. Atty. Gen. 391, 392.

11. Powers as to Indian allotments.—The Secretary of the Interior could not, by virtue of his general control over the affairs of the Indians, segregate land for townsite purposes to the deprivation of an Indian's right to a patent which had become vested by selection of allotment and certificate from the tribal commission, after expiration for the time for contest. Ballinger v. U. S. ex rel. Frost (1910) 30 Sup. Ct. 338, 340, 216 U. S. 240, 54 L. Ed. 464.

12. Supervision and review of action of Commissioner of Patents.—The power of supervision and direction given by this and other sections to the Secretary, over the public business relat-

ing to patents for inventions, does not extend to a review of the action of the Commissioner of Patents in those cases in which he is by law appointed to exercise his discretion judicially. Butterworth v. U. S. (1884) 5 Sup. Ct. 25, 27, 112 U. S. 50, 28 L. Ed. 656.

The Commissioner of Patents, in issuing or withholding patents, in reissues, interferences, and extensions, exercises quasi judicial functions, and the Secretary has no power to revise the action of the Commissioner in awarding to an applicant for a patent priority of invention, and adjudging him entitled to a patent. Id. See (1881) 17 Op. Atty. Gen. 205.

13. Government Printing Office not under jurisdiction of the Department.—The government printing office has never been placed under the jurisdiction of the department, as the jurisdiction of that department is defined by this section. U. S. v. Allison (1875) 91 U. S. 303, 304, 23 L. Ed. 372.

Cited without definite application, Caha v. U. S. (1894) 14 Sup. Ct. 513, 515, 152 U. S. 211, 38 L. Ed. 415; Corporation of the Catholic Bishop of Nesqually v. Gibbon (1895) 15 Sup. Ct. 779, 784, 158 U. S. 155, 39 L. Ed. 931; Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966; Warner Valley Stock Co. v. Smith (1897) 17 Sup. Ct. 225, 227, 165 U. S. 28, 41 L. Ed. 621; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1903) 23 Sup. Ct. 692, 696, 190 U. S. 301, 47 L. Ed. 1064; U. S. ex rel. West v. Hitchcock (1907) 27 Sup. Ct. 423, 425, 205 U. S. 80, 51 L. Ed. 718; Johnston v. Morris (1896) 72 Fed. 890, 897, 19 C. C. A. 229; James v. Germania Iron Co. (1901) 107 Fed. 597, 600, 46 C. C. A. 476; Rainbow v. Young (1908) 161 Fed. 835, 88 C. C. A. 653; Robinson v. Lundrigan (1910) 178 Fed. 230, 101 C. C. A. 590, dissenting opinion (affirmed 33 Sup. Ct. 255, 227 U. S. 173, 57 L. Ed. 468); U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 498, 111 C. C. A. 323; Cahn v. Barnes (C. C. 1881) 5 Fed. 326, 331; Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20, 43; U. S. v. Rea-Read Mill & Elevator Co. (C. C. 1909) 171 Fed. 501, 508; Southern Development Co. v. Endersen (D. C. 1912) 200 Fed. 272; Altschul v. Clark (Or. 1901) 65 P. 991.

§ 682. (R. S. § 442.) Powers of Secretary.

The Secretary of the Interior shall hereafter exercise all the powers and perform all the duties in relation to the Territories of the United States that were, prior to March first, eighteen hundred and seventy-three, by law or by custom exercised and performed by the Secretary of State.

Act March 1, 1873, c. 217, 17 Stat. 484.

The duties of the office of Commissioner of Railroads, formerly Auditor of Railroad Accounts, were transferred to the Secretary of the Interior, with the records and files of the office, on the termination of that office, by a provision of Act March 3, 1903, c. 1007, § 1, 32 Stat. 1119. But the act creating said office and prescribing its duties, etc., Act June 19, 1878, c. 316, as amended by subsequent acts, was repealed by Act Aug. 24, 1912, c. 374, 37 Stat. 503.

Cited without definite application, Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 825, 158 U. S. 240, 39 L. Ed. 966.

(R. S. § 443. Transferred to Title XII A, c. A.)

This section of the Revised Statutes provided that the Secretary of the Interior should exercise supervisory and appellate powers in relation to all acts of marshals and others in taking and returning the census. But said powers were vested in the head of the Department of Commerce, on the transfer of the Census Office to that Department under the act establishing it, by provisions of that act that duties, powers, etc., possessed or exercised by the head of any executive department in and over any bureau, office, etc., so transferred, "whether of an appellate or revisory character or otherwise," shall be vested in and exercised by the head of the Department of Commerce. Act Feb. 14, 1903, c. 552, § 10, post, § 859. As this provision may be regarded as applicable to the Secretary of Commerce, it is placed under Title XII A, "Department of Commerce," c. A, post, § 866.

§ 683. (R. S. § 444.) Expenditures of the Department.

The Secretary of the Interior shall sign all requisitions for the advance or payment of money, out of the Treasury, upon estimates or accounts for expenditures upon business assigned by law to his Department; subject, however, to adjustment and control by the proper accounting officers of the Department of the Treasury.

Act March 3, 1849, c. 108, § 2, 9 Stat. 395.

Cited without definite application, Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966.

§ 684. (Act July 4, 1884, c. 181, § 5.) Rules for government of agents, attorneys, etc., representing claimants before Department; suspension or disbarment.

The Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents, and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his department any such person, agent or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud in any manner deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, letter, or by advertisement. (23 Stat. 101.)

This section was part of the pension appropriation act for the fiscal year 1885, cited above.

As to similar powers conferred by statute on the Secretary of the Treasury, see ante, § 385.

As to the power of the Commissioner of Patents to refuse to recognize any person as a patent agent, see R. S. § 487, post, § 750.

Notes of Decisions

Validity of provisions.—So much of this section as provides that the Secretary of the Interior may disbar an agent or attorney practicing before his department, who is shown to be "disreputable," is not void because of the word "disreputable" not being defined by the common law, and having no common or general signification. Phillips v. Ballinger (1911) 37 App. D. C. 46.

(R. S. § 445. Superseded.)

This section required the Secretary to make annual reports to Congress:

First. Of all claims presented to him during the preceding year under laws or treaty stipulations for compensation for depredations committed by Indians.

Second. Of copies of public journals, books, and documents received by him for distribution, and the distribution thereof during the preceding year.

The first requirement, of a report of Indian depredation claims, was superseded by the transfer of such claims to the Court of Claims by the Indian Depredations Act, Act March 3, 1891, c. 538, 26 Stat. 854, section 13 of which provided that the investigation and examination of such claims, under acts previously in force, should cease on the taking effect of the act.

The second requirement, of a report of the receipt and distribution of public documents, was superseded by the provisions of the Printing and Binding Act of Jan. 12, 1895, c. 23, §§ 61–64, post, §§ 7040–7043, section 64 of which, post, § 7043, repealed all laws providing for the delivery to the Department of the Interior of public documents for distribution, other than such as are for the use of that Department.

The provisions of R. S. § 683, and of Act Feb. 12, 1889, c. 135, 25 Stat. 661, for the distribution by the Secretary of copies of the reports of the Supreme Court, were repealed by Jud. Code, § 297, post, § 1274; the distribution of said reports by the Attorney-General being provided for by Jud. Code, § 227, post, § 1203.

An annual report by the Secretary of expenditure of the general Indian education fund for each preceding year was required by a provision of Act March 2, 1887, c. 320, § 1, post, § 685.

Other provisions requiring reports of the expenditure of funds and appropriations for the benefit of Indians, and of the fiscal affairs of Indian tribes are made by Act May 18, 1916, c. 125, § 27, ante, § 398, post, § 4077a, Act April 4, 1910, c. 140, § 1, post, § 686, Act March 3, 1911, c. 210, §§ 1, 27 post, §§ 687–689, 4124, and Act June 30, 1913, c. 4, §§ 1, 26, post, §§ 4125, 6789.

Provisions applicable to all the Departments, relating to the time of making annual reports, and the time of furnishing copies thereof to the printer, were made by R. S. §§ 195, 196, and Act July 1, 1916, c. 209, § 3, ante, §§ 278, 279, 279a.

General provisions relating to the submission by the heads of Departments to Congress of estimates of expenditures and appropriations are contained in Title XLI, "Appropriations."

§ 685. (Act March 2, 1887, c. 320, § 1.) Report of expenditure of general Indian education fund.

For support of Indian day and industrial schools, and for other educational purposes not hereinafter provided for, * * The Secretary of the Interior shall report annually, on or before the first Monday of December of each year, in what manner and for what purposes the general education fund for the preceding fiscal year has been expended; and said report shall embrace the number and kind of school-houses erected, and their cost, as well as cost of repairs, names of every teacher employed, and compensation allowed, the location of each school, and the average attendance at each school. (24 Stat. 465.)

This was a provision of the Indian appropriation act for the fiscal year 1888, cited above.

A provision in the same language was made by each of the similar acts for the two years preceding, Act March 3, 1885, c. 341, § 1, 23 Stat. 381, and Act May 15, 1886, c. 333, § 1, 24 Stat. 44.

§ 686. (Act April 4, 1910, c. 140, § 1.) Account of cost of survey and allotment work on Indian reservations.

Hereafter the Secretary of the Interior shall transmit to Congress annually on the first Monday in December a cost account for the preceding fiscal year of all survey and allotment work on Indian reservations. (36 Stat. 370.)

This was a proviso, annexed to a requirement that the Secretary should cause to be stated annual accounts between the United States and each tribe of Indians arising under reimbursable appropriations, in the Indian appropriation act for the fiscal year 1911, cited above.

Said preceding provision of this act, requiring statements of such annual accounts, is set forth, post, § 4080.

Subsequent provisions for reports of the expenditure of funds and appropriations for benefit of Indians made by Act March 3, 1911, c. 210, § 1, are set forth, post, §§ 687–689, and post, §§ 4124, 4125.

§ 687. (Act March 3, 1911, c. 210, § 1.) Report of expenditure for Indian school and agency buildings, etc.

For construction, lease, purchase, repairs, and improvements of school and agency buildings, and for sewerage, water supply, and lighting plants, and for purchase of school sites, * * Provided, That the Secretary of the Interior shall report annually to Congress the amount expended at each school and agency for the purposes herein authorized. (36 Stat. 1060.)

This paragraph and the paragraph next following were provisions of the Indian appropriation act for the fiscal year 1912, cited above.

§ 688. (Act March 3, 1911, c. 210, § 1.) Account of use of appropriations for agricultural experiments on Indian schools or agency farms.

To conduct experiments on Indian school or agency farms designed to test the possibilities of soil and climate in the cultivation of trees, grains, vegetables, and fruits, for the purposes of preserving living and growing timber on Indian reservations and allotments, and to advise the Indians as to the proper care of forests: * * Provided still further, That hereafter the Secretary of the Interior shall transmit to Congress annually on the first Monday in December a cost account for the preceding fiscal year relating to the use of appropriations made for the purposes herein provided for. (36 Stat. 1060.)

See note to preceding paragraph of this section, ante, § 687.

A further proviso, annexed to an appropriation in this section for a fund for encouraging agricultural industry among Indians, requiring the Secretary to submit annually a detailed report of the use of the fund, is set forth, with said provisions as to said fund and subsequent similar provisions of Act June 30, 1913, c. 4, § 1, post, §§ 4124, 4125.

§ 689. (Act March 3, 1911, c. 210, § 27.) Statement of fiscal affairs of Indian tribes for whose benefit expenditures are made. Annually, on the first Monday in December, the Secretary of the Interior shall transmit to the Speaker of the House of Representatives a statement of the fiscal affairs of all Indian tribes for whose benefit expenditures from either public or tribal funds shall have been made by any officer, clerk, or employee in the Interior Department during the preceding fiscal year; and such statement shall show (1) the total amount of all moneys, from whatever source derived, standing to the credit of each tribe of Indians, in trust or otherwise, at the close of such fiscal year; (2) an analysis of such credits, by funds, showing how and when they were created, whether by treaty stipulation, agreement, or otherwise; (3) the total amount of disbursements from public or trust funds made on account of each tribe of Indians for such fiscal year; and (4) an analysis of such disbursements showing the amounts disbursed (a) for per capita payments in money to Indians, (b) for salaries or compensation of officers and employees, (c) for compensation of counsel and attorney's fees, and (d) for support and civilization. (36 Stat. 1077.)

This section was part of the Indian appropriation act for the fiscal year 1912, cited above.

The Secretary of the Treasury is required to annually transmit to the Speaker of the House of Representatives estimates of the amounts of the receipts to, and expenditures which the Secretary of the Interior recommends to be made for the benefit of Indians from, all tribal funds of Indians for the ensuing year, by a provision in Act May 18, 1916, c. 125, § 27, ante, § 398a.

Expenditures from Indian tribal funds without specific appropriations by Congress, except in certain specified cases, are prohibited by another provision in Act May 18, 1916, c. 125, § 27, post, § 4077a.

The Secretary of the Interior is to install in the Bureau of Indian affairs a system of bookkeeping, which will afford a ready analysis of expenditures by appropriations and allotments and by units of the service, by Act June 30, 1916, c. 4, § 26, post, § 6789. Said section also provides that a detailed statement of expenditures as described in said system shall be incorporated in the annual report of the Commissioner of Indian Affairs. Said section also provides that before any appropriation for the Indian service is obligated or expended the Secretary of the Interior shall make allotments thereof in conformity with the intent and purposes of the act (the Indian appropriation act), and that such allotments shall not be modified or altered except with the approval of the Secretary of the Interior. Said section further provides that the estimates for appropriations for the Indian Service submitted by the Secretary of the Interior shall be accompanied by a detailed statement, classified in accordance with the said system of bookkeeping, showing the purposes for which the appropriations are required.

CHAPTER THREE

The General Land-Office

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§ 690. (R. S. § 446.) Commissioner of the General Land-Office.

There shall be in the Department of the Interior a Commissioner of the General Land-Office, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of [four thousand dollars] a year.

Act April 25, 1812, c. 68, § 11, 2 Stat. 717. Act July 4, 1836, c. 352, § 1, 5 Stat. 107. Act March 3, 1873, c. 226, § 3, 17 Stat. 508.

The salary of the Commissioner, having been increased from $3,000 to $4,000, by the provision of Act March 3, 1873, c. 226, § 3, incorporated into this section of the Revised Statutes, and cited above, was reduced to $3,000, and the words of this section inclosed in brackets, "four thousand dollars," were superseded, by the repeal of so much of that act as increased the amount, by Act Jan. 20, 1874, c. 11, 18 Stat. 4. Subsequent appropriations were for increased amounts. The appropriation for the Commissioner for the fiscal year 1917, was $5,000, by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said Act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Establishment of the office.—The General Land Office, when first established by Act April 25, 1812, c. 68, 2 Stat. 716, was made a bureau in the Department of the Treasury. Act July 4, 1836, c. 352, 5 Stat. 107, reorganizing the office, enacted that the executive duties appertaining to the surveys and sale of the public lands, etc., should be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President. Section 3 of Act March 3, 1849, c. 108, 9 Stat. 395, establishing the Department of the Interior, provided that the Secretary of the Interior should perform all the duties of supervision and appeal, in relation to the General Land Office, theretofore discharged by the Secretary of the Treasury. Snyder v. Sickles (1878) 98 U. S. 210. And see Patterson v. Tatum (C. C. 1874) Fed. Cas. No. 10,830; (1836) 3 Op. Atty. Gen. 137.

Cited without definite application, Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966; U. S. v. Schlierholz (D. C. 1904) 133 Fed. 333.

§ 691. (Act July 11, 1890, c. 667, § 1.) Assistant Commissioner of the General Land-Office.

General Land Office: * * One assistant commissioner, to be appointed by the President, by and with the advice and consent of the Senate, who shall be authorized to sign such letters, papers, and documents, and to perform such other duties as may be directed by the Commissioner, and shall act as Commissioner in the absence of that officer, or in case of a vacancy in the office of Commissioner, three thousand five hundred dollars. (26 Stat. 257.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1891, cited above. It was repeated in the similar acts

for each year following, down to 1911. The subsequent acts contain merely the appropriation, "Assistant Commissioner," $3,500. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 690, ante.

A provision of R. S. § 448, that the chief clerk of the General Land-Office should perform the duties of the Commissioner in case of a vacancy in that office, or of the absence or sickness of the Commissioner, may be regarded as superseded by this provision; and that section was repealed by Act March 2, 1895, c. 177, § 3, 28 Stat. 807.

By the same act the Assistant Commissioner was to perform the duties of the Recorder, which had been imposed, by R. S. § 459, on the Principal Clerk on Private Land Claims, in case of vacancy in the office or sickness or absence of the Recorder; the office of Principal Clerk on Private Land Claims being abolished by that act. But all these provisions may be regarded as superseded by the provisions for designation of an officer or employé to perform temporarily the duties of Recorder, contained in Act May 22, 1908, c. 186, § 1, post, § 694.

Recent appropriations provide for a "depositary acting for the Commissioner as receiver of public moneys, $2,000," who may, with the approval of the commissioner, designate a clerk of the General Land Office to act as such depositary in his absence. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 692. (Act May 22, 1908, c. 186, § 1.) Designation of temporary Assistant Commissioner.

Hereafter the Secretary of the Interior be, and he is hereby, authorized to designate an officer or employee of the General Land Office to act temporarily as Assistant Commissioner of that Office during the absence of the Assistant Commissioner, or in case of a vacancy in the office of such Assistant Commissioner, or when such Assistant Commissioner is acting as Commissioner, and all acts performed by any officer or employee while acting under such designation shall have the same force and effect as if performed by said Commissioner or Assistant Commissioner. (35 Stat. 225.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1909, cited above.

§ 693. (R. S. § 447.) Recorder of General Land-Office.

There shall be in the General Land-Office an officer called the Recorder of the General Land-Office, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of two thousand dollars a year.

Act July 4, 1836, c. 352, § 4, 5 Stat. 111. Act March 3, 1837, c. 33, § 1, 5 Stat. 163, 164.

The designation of an officer or employé to perform temporarily the duties of the Recorder was authorized by a provision of Act May 22, 1908, c. 186, § 1, post, § 694.

See notes to § 690, ante.

Cited without definite application, Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966; U. S. v. Schlierholz (D. C. 1904) 133 Fed. 333.

§ 694. (Act May 22, 1908, c. 186, § 1.) Designation of temporary Recorder.

Hereafter the Secretary of the Interior be, and he is hereby, authorized to designate an officer or employee of the General Land Office to perform temporarily the duties of the Recorder of that office in the absence of that officer and in the case of a vacancy in the office of such Recorder, and the acts of any person so designated shall have all the force and effect of an act performed by the Recorder. (35 Stat. 225.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1909, cited above.

Before this provision the duties of the office of Recorder, in case of a vacancy, or of his sickness or absence, were to be performed by the Assistant Commissioner, by provisions of R. S. § 459, and Act March 2, 1895, c. 177, § 3, 28 Stat. 807, which may be regarded as superseded by this provision.

(R. S. §§ 448, 449. Repealed.)

These sections provided for the offices, in the General Land-Office, of Principal Clerk of the Public Lands, Principal Clerk on Private Land Claims, and Principal Clerk of the Surveys, and prescribed their salaries and duties. Both sections, with R. S. § 2452, were repealed by Act March 2, 1895, c. 177, § 3, 28 Stat. 807.

§ 695. (R. S. § 450.) Secretary to the President to sign land patents.

The President is authorized to appoint, from time to time, by and with the advice and consent of the Senate, a secretary, at a salary of one thousand five hundred dollars a year, whose duty it shall be, under the direction of the President, to sign in his name, and for him, all patents for land sold or granted under the authority of the United States.

Act July 4, 1836, c. 352, § 6, 5 Stat. 111.

The duties prescribed by this section are to be discharged by an executive clerk, under a provision of Act June 19, 1878, c. 329, § 1, post, § 697.

Recent appropriations provide, in the office of the Secretary of the Interior, for a "female clerk, to be designated by the President, to sign land patents, $1,200." The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 690, ante.

Notes of Decisions

Repeal of provision for appointment of Secretary to sign patents.—The provision of Act June 19, 1878, § 1, post, § 697, for the discharge of the duties prescribed by this section by one of the executive clerks, did not wholly repeal this section. The provision in respect to the duty of signing, for the President, his name to patents for land, was not repealed; but in respect to the officer who was to perform that duty, it was repealed, being repugnant to the later statute. (1882) 17 Op. Atty. Gen. 305.

Mode of signing patents.—The provision of Act July 4, 1836, § 6, incorporated in this section, was sufficiently complied with when the name of the President was written by the clerk who engrossed the patent, and the signature of the secretary was subscribed in his own handwriting. (1841) 3 Op. Atty. Gen. 623.

Proof of execution of patent.—The patent is admissible in evidence without proof of its execution. Steeple v. Downing (1878) 60 Ind. 478.

Cited without definite application, Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966; U. S. v. Schlierholz (D. C. 1904) 133 Fed. 333.

§ 696. (R. S. § 451.) Assistant secretary to sign land patents.

If at any time the number of patents for lands sold or granted under the authority of the United States, is such that they cannot be signed within a reasonable time by the secretary appointed under the preceding section, the President may appoint an assistant secretary to sign the same, but such assistant shall be employed by the express direction of the President, and only for such time as may be necessary to bring up the arrears of patents which may be ready for signature.

Act Jan. 26, 1848, c. 4, 9 Stat. 209.

An executive clerk, designated by the President, is authorized to sign land patents, by Act June 19, 1878, c. 329, § 1, post, § 697.

Notes of Decisions

See (1857) 9 Op. Atty. Gen. 17.

Effect of provision for executive clerk to sign patents.—This section was not materially affected by the provision of Act June 19, 1878, § 1, for designation of an executive clerk to discharge the duties prescribed by R. S. § 450, ante, § 695. If the condition set forth in this section exists, the President may appoint an assistant to aid in the work. (1882) 17 Op. Atty. Gen. 305.

Compensation of Assistant Secretary.—A clerk in the General Land Office, receiving an annual salary, was not entitled to additional compensation for services as assistant secretary to sign land patents, by appointment of the President. (1863) 10 Op. Atty. Gen. 442.

Cited without definite application, Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966; U. S. v. Schlierholz (D. C. 1904) 133 Fed. 333.

§ 697. (Act June 19, 1878, c. 329, § 1.) Executive clerk to sign land patents.

The duties prescribed by section of the Revised Statutes numbered four hundred and fifty shall devolve upon and be discharged by one of the executive clerks, to be designated by the President for that purpose. (20 Stat. 183.)

This was a provision, accompanying appropriations for compensation to officers, clerks, etc., in the office of the President, in the legislative, executive, and judicial appropriation act for the fiscal year 1879, cited above.

See notes to R. S. § 450, ante, § 695.

Notes of Decisions

Assistant to aid executive clerk.—Under this provision and so much of R. S. §§ 450, 451, ante, §§ 695, 696, as are not repugnant thereto, the President has power to designate one of his executive clerks to sign for him, and in his name, all patents for land, etc.; and, should an exigency of the public service require it, he is authorized to appoint an assistant to aid in performing that duty, so long as the exigency exists. (1882) 17 Op. Atty. Gen. 305. See (1857) 9 Op. Atty. Gen. 17.

Cited without definite application, Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966.

§ 698. (R. S. § 452.) Restriction upon officers, clerks, and employés.

The officers, clerks, and employés in the General Land-Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

Act April 25, 1812, c. 68, § 10, 2 Stat. 717. Act July 4, 1836, c. 352, § 14, 5 Stat. 112.

Similar restrictions were imposed on officers and clerks in the Treasury Department, as to engaging in trade or business, by R. S. §§ 243, 244, ante, §§ 377, 378.

Notes of Decisions

Repeal.—This section must be construed with section 4614, post, and is not repealed. Lavagnino v. Uhlig, (1853) 26 Utah, 1, 71 Pac. 1046, 99 Am. St. Rep. 808, affirmed (1905) 25 Sup. Ct. 716, 719, 198 U. S. 443, 49 L. Ed. 1119.

Officers, clerks, etc., within the prohibition.—The location of a place or mining claim by a United States deputy mineral surveyor is within the prohibition. Waskey v. Hammer (1912) 32 Sup. Ct. 187, 189, 223 U. S. 85, 56 L. Ed. 359; Waskey v. Hammer (1909) 170 Fed. 31, 35, 95 C. C. A. 305 (motion to recall mandate denied [1910] 179 Fed. 273, 102 C. C. A. 629, affirmed [1912] 32 Sup. Ct. 187, 223 U. S. 85, 56 L. Ed. 359); U. S. v. Havenor (D. C. 1913) 209 Fed. 988. See Hand v. Cook (Nev. 1907) 92 P. 3.

A special agent is within the prohibition of this section, and his continuing in possession, after ceasing to be such agent is not the equivalent of a new entry. Prosser v. Finn (1908) 28 Sup. Ct. 225, 227, 208 U. S. 67, 52 L. Ed. 392.

Reliance on the opinion of the Commissioner of the General Land Office can confer no interest which will prevent the government from canceling an entry made in violation of the statute. Id.

This section shows a legislative assumption that there must be clerks and employés of the general land office as well as officers, and that the clerks and employés are not officers within the Constitution. U. S. v. Schlierholz (D. C. 1904) 133 Fed. 333.

Public lands within the prohibition.—Town lots in Pocatello town site of the Ft. Hall Indian Reservation, ceded to the United States, held public lands within the prohibition of this section. U. S. v. Havenor (D. C. 1913) 209 Fed. 988.

Modes of acquiring land prohibited.—The word "purchasing" here is inclusive of the various modes of securing title to or rights in public lands under the laws regulating their disposal. Waskey v. Hammer (1912) 32 Sup. Ct. 187, 189, 223 U. S. 85, 56 L. Ed. 359.

Invalidity of prohibited act.—A location of a placer mining claim within the prohibition is void, and not merely voidable at the option of the government. Waskey v. Hammer (1912) 32 Sup. Ct. 187, 189, 223 U. S. 85, 56 L. Ed. 359.

Cited without definite application, Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966.

§ 699. (R. S. § 453, as amended, Act Feb. 18, 1875, c. 80, § 1.) Duties of Commissioner.

The Commissioner of the General Land-Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

Act April 25, 1812, c. 68, § 1, 2 Stat. 716. Act July 4, 1836, c. 352, § 1, 5 Stat. 107. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 317.

The amendment of this section by Act Feb. 18, 1875, c. 80, § 1, cited above, consisted in inserting the word "grants" in the last clause, instead of "agents," in the section as originally enacted.

A provision of Act June 6, 1874, c. 223, § 3, 18 Stat. 62, vested in the Commissioner the powers and duties of the office of Recorder of Land Titles in Missouri, when that office should be discontinued, as authorized by that act. The office was abolished by a provision of Act July 31, 1876, c. 246, § 1, 19 Stat. 121.

The Court of Private Land Claims having ceased on June 30, 1904, pursuant to the amendment of section 19 of the act by which it was established, by a provision of Act March 3, 1903, c. 1007, § 1, 32 Stat. 1144, all the powers exercised by that court in the approval of surveys executed under its decrees of confirmation were conferred upon the Commissioner of the General Land Office from and after that date, by a provision of Act April 28, 1904, c. 1762, § 1, 33 Stat. 485. These powers were of a temporary nature.

Section 18 of said Act March 3, 1891, c. 539, which was the act creating the Court of Private Land Claims, provided that all claims arising under §§ 16, 17, of the act, which related to claims by adverse possession to lands within township surveys in New Mexico, Arizona, Utah, Colorado, Nevada, and Wyoming, should be filed with the surveyor general of the proper state or territory within two years after the passage of the act, and that no claim not so filed should be valid. Said section further provided that all of the cases provided for by §§ 16, 17, of the act should not be considered or adjudicated by the Court of Private Land Claims created by the act, and that no such tract of land should be subject to entry under the land laws of the United States. Said § 18 was amended by Act Feb. 21, 1893, c. 149, 27 Stat. 471, by extending the time for the filing of such claims to December 1, 1892. It was again amended by Act June 27, 1898, c. 504, 30 Stat. 495, by extending the time to March 4, 1901. It was again amended by Act Feb. 26, 1906, c. 212, 35 Stat. 655, by extending the time to March 4, 1910. It was again amended by Act July 3, 1916, c. 216, 39 Stat., by extending the time to March 4, 1917.

The Commissioner was required, by R. S. § 2452, to report to Congress adjudications by him under R. S. §§ 2450, 2451. But said section 2452 was repealed by Act March 2, 1895, c. 177, § 3, 28 Stat. 807.

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1. **Powers conferred administrative only.**—This section and R. S. §§ 161, 441, ante, §§ 235, 681, and R. S. § 2478, post, § 5120, confer administrative power only, and legislation cannot be exercised under the guise of regulation. U. S. v. George (1913) 33 Sup. Ct. 412, 414, 228 U. S. 14, 57 L. Ed. 712.

2. **Executive duties of Commissioner, in general.**—A clerical mistake in the patentee's name may be corrected by the commissioner. Bell v. Hearne (1856) 19 How. 252, 262, 15 L. Ed. 614.

Surveys under confirmations of Spanish titles are as to their correctness within the jurisdiction of the Commissioner, who may determine the question of accuracy preliminary to the issuing of a patent. Magwire v. Tyler (1861) 1 Black, 195, 201, 17 L. Ed. 137.

As a general rule, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner, under the supervision and direction of the Secretary of the Interior. Corporation of the Catholic Bishop of Nesqually v. Gibbon (1895) 15 Sup. Ct. 779, 784, 158 U. S. 155, 39 L. Ed. 931.

The "executive duties," which by this section the Commissioner is authorized to perform, must be prescribed by law. U. S. v. Chaplin (C. C. 1887) 31 Fed. 890, 894.

The Commissioner, with respect to the discharge of his duties in such matter, is subject only to the direction of the Secretary of the Interior. (1886) 18 Op. Atty. Gen. 450.

The First Comptroller has no power to direct the Commissioner of the General Land Office forthwith to audit any particular account relating to the public lands, where in his opinion further delay would be injurious to the Government. Id.

3. **Employment of special agents to enforce land laws.**—The duty imposed on the Secretary of the Interior, by R. S. § 441, ante, § 681, to have supervision over public lands, and the duties imposed by this section on the Commissioner, under the general supervision of the Secretary, necessarily require those officers to act by and through the agency of others, and the right to employ such agents is incidental to the obligation to enforce the law. U. S. v. Schlierholz (D. C. 1904) 133 Fed. 333, 335.

4. **Land Department as special tribunal.**—Under this section and R. S. § 441, ante, § 681, the land department, including in that term, the Secretary of the Interior, the Commissioner of the General Land Office, and their subordinate officers, constitutes a special tribunal, vested with judicial power to hear and determine claims to public lands, and having power to execute its judgments by conveyances to the parties entitled. U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 955, 15 C. C. A. 96 (affirmed 17 Sup. Ct. 368, 165 U. S. 463, 41 L. Ed. 789); New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116; King v. McAndrews (1901) 111 Fed. 860, 862, 50 C. C. A. 29; Neff v. U. S. (1908) 165 Fed. 273, 277, 91 C. C. A. 241; Cameron v. Weedin (D. C. 1915) 226 Fed. 44; Gage v. Gunther (1902) 136 Cal. 338, 68 Pac. 710, 89 Am. St. Rep. 141.

The land department is a quasi judicial tribunal. James v. Germania Iron Co. (1901) 107 Fed. 597, 600, 46 C. C. A. 476 (appeal dismissed 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); Le Marchel v. Teegarden (C. C. 1904) 133 Fed. 826; Warnekros v. Cowan (Ariz. 1910) 108 P. 238.

Under the general grant of authority as represented in this section, together with the authority granted in a specific act of Congress authorizing contests, the local land officers, in hearing a contest, constitute a competent tribunal authorized to administer oaths on which prosecutions for perjury can be predicated. Caha v. U. S. (1894) 14 Sup. Ct. 513, 515, 152 U. S. 211, 38 L. Ed. 415.

5. **Scope of authority of Land Department.**—The land department was established to supervise the various proceedings whereby a conveyance of the title of the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with, and pass upon the qualifications of the applicant, his acts performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Steel v. St. Louis, S. & R. Co. (1882) 1 Sup. Ct. 389, 392, 106 U. S. 447, 27 L. Ed. 226.

The Land Department had full jurisdiction over matters involving the right of parties to a patent for public lands selected under Act June 4, 1897, c. 2, 30 Stat. 36, in lieu of lands relinquished in a forest reservation. Cosmos Exploration Co. v. Gray Eagle Oil Co. (1903) 23 Sup. Ct. 692, 696, 190 U. S. 301, 47 L. Ed. 1064 (affirming decree [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230); Pacific Land & Improvement Co. v. Elwood Oil Co. (1903) 23 S. Ct. 698, 190 U. S. 316, 47 L. Ed. 1073 (affirming decree [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230).

The test of jurisdiction of the land department is whether or not it has power to enter upon the inquiry, not whether its conclusions are right or wrong. New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116.

The jurisdiction and power of dispo-

sition of public lands by the Land Department is not arbitrary or discretionary, but is subject to and must be exercised in accordance with law, and any disregard of the law by the Land Department is remediable in the courts. (1908) Hoyt v. Weyerhaeuser, 161 Fed. 324, 88 C. C. A. 404, decree reversed (1911) Weyerhaeuser v. Hoyt, 31 S. Ct. 300, 219 U. S. 380, 55 L. Ed. 258.

The Land Department cannot devest the equitable title to lands vested in persons who have made final proof and payment in accordance with the acts of Congress. Hemmer v. U. S. (1912) 204 Fed. 898, 123 C. C. A. 194, reversing decree (D. C.) U. S. v. Hemmer, 195 Fed. 790.

The land department cannot enlarge the limits of a grant of lands, and its action in issuing patents thereunder for lands lying outside the boundary fixed by the act itself is without validity. U. S. v. Coos Bay Wagon-Road Co. (C. C. 1898) 89 Fed. 151.

Executive officers of the United States cannot, without express authority, waive conditions imposed by Congress in a grant of lands. U. S. v. Oregon & C. R. Co. (C. C. 1911) 186 Fed. 861.

Where Congress has provided for the disposition of any portion of the public domain of a particular character, and has authorized the officers of the Land Department to issue a patent for such land on the ascertainment of certain facts, such department has jurisdiction to inquire into and determine the existence of those facts. Roberts v. Southern Pac. Co. (C. C. 1911) 186 Fed. 934.

6. —— Nature of duties of Commissioner.—In respect to the relation of the general land office to the Department of the Interior, the duties of the land commissioner under R. S. § 453, incorporated in this section, are described as executive duties, while those which relate to the decision of private rights under the pre-emption laws, being quasi judicial, are by former R. S. § 2273, expressly made subject to an appeal, first from the register and receiver to the commissioner, and from him to the secretary. Butterworth v. U. S. (1884) 5 Sup. Ct. 25, 28, 112 U. S. 50, 28 L. Ed. 656.

As to the power of the commissioner of the general land office, relative to private claims to land and the issuing of patents therefor, see Le Roy v. Jamison (C. C. 1875) Fed. Cas. No. 8,271.

The administration of any particular grant of public land is wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior, in the absence of any specific provision to the contrary. U. S. v. Hitchcock (1906) 28 App. D. C. 338.

In the absence of a specific act of Congress to the contrary, the entire administration of the disposition of the public lands of the United States is within the jurisdiction of the Commissioner of the General Land Office, under the direction and supervision of the Secretary of the Interior. Fisher v. U. S. (1911) 37 App. D. C. 436.

7. —— Seizure of timber unlawfully cut.—The land department has authority to seize timber unlawfully cut on the public lands, and to dispose of the same according to its discretion. (1886) 18 Op. Atty. Gen. 434. See, also, (1890) 19 Op. Atty. Gen. 710.

8. —— Supervision and control of the Commissioner.—The provision of Act July 4, 1836, § 1, incorporated in this section, placed the executive duties relating to public lands under the "supervision and control" of the Commissioner of the General Land Office under the direction of the President, and provided for direct supervision by the Commissioner over registers and receivers of the Land Office, and therefore their judgment was not conclusive in a case where additional proceedings were had before them in 1837. Prior to this, under the pre-emption laws of May 29, 1830, and June 19, 1834, the power of deciding on facts entitling a party to the right of pre-emption was in the register and receiver of the particular district with no direct appeal, though the proof was to be made "agreeably" to the rules to be prescribed by the Commissioner. Barnard v. Ashley (1855) 18 How. 43, 45, 15 L. Ed. 285.

The phrase "under the direction of the Secretary of the Interior" is not meaningless but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the land department, of which he is the head. It means that in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereof and the administration of the trusts devolving on the government by reason of laws or treaties respecting public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people. As was said by the Secretary of Interior (4 Dec. Dep. Int. 494), the statutes in placing the whole business of the department under the supervision of the Secretary invest him with authority to review, reverse, amend, annul, or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands or the adjustment of private claims to lands with a just regard to the rights of the public and of private parties. Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 262, 142 U. S. 161, 35 L. Ed. 974. See, also, Stone-

road v. Stoneroad (1895) 15 Sup. Ct. 822, 826, 158 U. S. 240, 39 L. Ed. 966; Warner Valley Stock Co. v. Smith (1897) 17 Sup. Ct. 225, 227, 165 U. S. 28, 41 L. Ed. 621. Such phrase does not require a specific direction in each grant of public lands that the administration of the same shall be by the land department. Catholic Bishop of Nesqually v. Gibbon (1895) 15 Sup. Ct. 779, 158 U. S. 155, 167, 39 L. Ed. 931.

The secretary had authority to set aside an order of a commissioner confirming a survey of public lands, though no appeal was taken from the order. To rule otherwise would deprive the secretary of the supervisory power vested in him by this section. Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 262, 142 U. S. 161, 35 L. Ed. 974.

The performance of "executive duties" vests in the commissioner and secretary a right to review an action of the register and receiver in accepting proofs of settlement under the pre-emption laws and former R. S. § 2263, requiring the proofs to be made "to the satisfaction of the register and receiver," does not make their action final. The use of the phrase "executive duties" does not include the action of the register and receiver in passing on the evidence offered. A half century of practice by which the right of review has been exercised is a matter worthy of consideration in the construction. Orchard v. Alexander (1895) 15 Sup. Ct. 635, 157 U. S. 372, 39 L. Ed. 737.

The Secretary of the Interior exercises a supervision rather than an appellate power, and such power may be exercised without formal appeal, but, even if the power is appellate, its exercise may be regulated by rules of the department. Hestres v. Brennan (1875) 50 Cal. 211.

9. —— Making and correction of surveys.—Power to make and correct surveys of the public lands belongs exclusively to the political department of the government. Cragin v. Powell (1888) 9 Sup. Ct. 203, 128 U. S. 691, 32 L. Ed. 566; Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 262, 142 U. S. 161, 35 L. Ed. 974.

From the earliest days, matters appertaining to the survey of public or private lands, have devolved on the commissioner of the general land office under the supervision of the Secretary of the Interior, and the commissioner is clothed with large powers of control over surveyors and other subordinates. Cragin v. Powell (1888) 9 Sup. Ct. 203, 206, 128 U. S. 691, 32 L. Ed. 566.

The Commissioner of the General Land Office may, in his discretion, direct a resurvey of patented land where a substantial allegation of fraud or mistake is made, the sustaining of which will restore to the public domain land wrongfully patented, or subserve the public interest or protect the public right, although a survey made under the circumstances stated would not be conclusive, but on allegation of fraud in the original running of the lines, with other facts, would be evidential. (1888) 19 Op. Atty. Gen. 126.

10. —— Contests between claimants.—Until a patent has been issued, the legal title remains in the government, and the Land Department has power to hear and determine conflicting claims to same. Van Patten v. Boyd (N. M. 1915) 150 P. 917.

The enumeration of certain causes for a contest does not preclude the land department from hearing contests for other causes. Wiseman v. Eastman (1899) 57 P. 398, 21 Wash. 163; Lawrence v. Potter (1900) 60 P. 147, 22 Wash. 32.

11. Departmental rules and regulations—Authority to make regulations.—This section, and R. S. § 441, ante, § 681, and R. S. § 2478, post, § 5120, empower the Commissioner, under the direction of the Secretary of the Interior, to enforce, "by appropriate regulations," every part of the public land laws, as to which it is not otherwise specially provided. Leonard v. Lennox (1910) 181 Fed. 760, 767, 104 C. C. A. 296; U. S. v. Nelson (D. C. 1912) 199 Fed. 464, 472.

The commissioner of the general land office has authority to make regulations respecting the disposal of public lands, and such regulations when not repugnant to the acts of congress, have the force and effect of laws. Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, affirmed (1903) 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064.

12. —— Force and effect of rules.—Jurisdiction of the courts is not ousted by regulations of the commissioner of the general land office. Garland v. Wynn (1857) 20 How. 6, 8, 15 L. Ed. 801.

A charge of perjury cannot be based upon false statements as to residence and cultivation in an affidavit of a homestead claimant under a regulation of the Land Department adopted pursuant to this section. U. S. v. George (1913) 33 Sup. Ct. 412, 228 U. S. 14, 57 L. Ed. 712.

It is essential to the just and impartial exercise of the powers conferred on the land department in disposing of the public lands that it should adopt, and steadily maintain, rules and regulations governing the practice as to making entries; and such rules, when promulgated, become a law of property, and cannot be ignored by the department to the subversion of rights acquired in accordance with their requirements. Germania Iron Co. v. James (1898) 89 Fed. 811, 32 C. C. A. 348, reversing decree (C. C. 1897) 82 Fed. 807.

A rule that after a decision by the

secretary has been made, canceling an entry, no subsequent entry of the same lands can be made until the decision has been officially communicated to the local land officers, and a notation of the cancellation made on their plats and records, is a proper, just, and reasonable rule, as is also a rule that applications for entry can only be received by the local officers at their offices, and during the prescribed office hours. Id.

The rule that, after the local land officers made their reports to the commissioner of a contest over an entry of land, they should "thereafter take no further action affecting the disposal of the land in contest until instructed by the commissioner," was in force in 1889. (1901) James v. Germania Iron Co., 107 Fed. 597, 46 C. C. A. 476, appeal dismissed (1904) 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356.

The regulations of the general land office department have the force of enactments of which the courts may take judicial notice. Nurnberger v. U. S. (1907) 156 Fed. 721, 730, 84 C. C. A. 377.

Regulation concerning disposition of lands made by the commissioner within the scope of his authority is presumed to have been made under the direction and with the sanction of the secretary, and for all practical purposes such regulation is not only the act of the secretary, but of the president, and is therefore an "executive act" of which the courts take judicial notice. U. S. v. Barnhart (D. C. 1887) 33 Fed. 459. 461, 462.

Under the department's rules a field survey of a township held insufficient to designate school sections, so as to vest title thereto in the state prior to the filing of certified and approved duplicate plats in the local land office. U. S. v. Cowlishaw (D. C. 1913) 202 Fed. 317.

13. —— Effect upon equitable titles of subsequent rules or modifications.—The equitable title to land acquired by a lawful entry cannot be devested or affected by subsequent decisions of the land department, or subsequent rules or modification of rules of practice therein. Germania Iron Co. v. James (1898) 89 Fed. 811, 32 C. C. A. 348; James v. Germania Iron Co. (1901) 107 Fed. 597, 46 C. C. A. 476 (appeal dismissed [1904] 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); Howe v. Parker (1911) 190 Fed. 738, 111 C. C. A. 466.

14. —— Judicial notice of rules.—The courts take judicial notice of the rules and regulations of the general land office, and such rules need not be pleaded or proven. Leonard v. Lennox (1910) 181 Fed. 760, 104 C. C. A. 296; U. S. v. Bedgood (D. C. 1891) 49 Fed. 54; Peters v. U. S. (1894) 33 Pac. 1031, 2 Okl. 116; Stansbury v. U. S. (1894) 37 Pac. 1083, 2 Okl. 151; Dempsey v. U. S. (1894) 44 Pac. 382, 2 Okl. 151.

15. —— Repeal or abrogation.—Neither the Secretary of the Interior nor the commissioner of the general land office has power to make a retroactive decision abrogating rules of the land department. Germania Iron Co. v. James (1898) 89 Fed. 811, 813, 817, 32 C. C. A. 348.

Rules of practice of the land department of the United States formally established and promulgated by authority of the secretary of the interior can be repealed or abrogated by like formal action and publication only. Decisions or opinions of the secretary and the commissioner in contests between claimants for specific tracts of land ignoring or violating rules neither repeal nor modify them. James v. Germania Iron Co. (1901) 107 Fed. 597, 46 C. C. A. 476, appeal dismissed (1904) 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356.

16. Presumption of regularity.—The presumption of law is in favor of the regularity of all proceedings in the land office anterior to the issuance of the patent. Harkrader v. Carroll (D. C. 1896) 76 Fed. 474; Hestres v. Brennan (1875) 50 Cal. 211; Rierson v. St. Louis & S. F. Ry. Co. (1898) 51 P. 901, 59 Kan. 32; Newport v. Cooper (1836) 10 La. 155.

It will be presumed that a decision by the Secretary of the Interior that certain lands were within reserved territory, and not subject to private entry, was based upon facts which it was his duty to ascertain and determine the effect of, and upon reasons which he deemed adequate. McKenzie v. Fisher (1913) 40 App. D. C. 74.

When it appears that the commissioner has withdrawn railroad land from pre-emption, it will be presumed that it was withdrawn by the direction of the secretary of the interior. Weaver v. Fairchild (1875) 50 Cal. 360.

Where nothing appears to the contrary, every intendment must be that the local land officers did their duty. Randall v. Edert (1862) 7 Minn. 450 (Gil. 359).

The presumption is in favor of the correctness of the action of the officers designated to execute the laws made for that purpose in canceling a pre-emption entry for fraud. Hill v. Miller (1865) 36 Mo. 182.

No presumption will arise in favor of the validity of an award of land by the Commissioner of the General Land Office during the life of a lease as against the validity of his action in making the lease. Buchanan v. Barnsley (Tex. Civ. App. 1908) 112 S. W. 118.

In a proceeding to review a decision of the secretary of the interior on a question of title to land, it will be presumed that the secretary found as proved sufficient facts to support his judgment, where his findings of fact are not set out, but the evidence on which the judgment is based is outlin-

ed. Wiseman v. Eastman (1899) 57 P. 398, 21 Wash. 163.

17. Cancellation of entry—Power to cancel.—The Commissioner of the General Land Office has power to cancel entry. Harkness v. Underhill (1861) 1 Black, 316, 323, 17 L. Ed. 148; U. S. v. Steenerson (1892) 50 Fed. 504, 1 C. C. A. 552; Bates v. Herron (1859) 35 Ala. 117; Bellows v. Todd (1872) 34 Iowa, 18; Darcy v. McCarthy (1886) 35 Kan. 722, 12 Pac. 104; Bettis v. Amonett (1849) 4 La. Ann. 363; Scuddy v. Shaffer (1855) 10 La. Ann. 133; Forman v. Healey (N. D. 1909) 121 N. W. 1122; Pierce v. Frace (1891) 2 Wash. St. 81, 26 Pac. 192; Orchard v. Alexander (1891) 2 Wash. St. 108, 26 Pac. 196.

The land department may investigate the bona fides of a homestead claim, and cancel the same, if no patent has issued. Holmes v. State (1895) 108 Ala. 24, 18 South. 529.

If registers and receivers sell land not subject to sale by law, their acts are void for want of authority, and the commissioners of the general land office may suspend, if not annul, titles granted by them, until congress or the courts can act. Barton's Ex'x v. Hempkin (1841) 19 La. 510.

A register and receiver, with the approbation of the commissioner of the general land office, have power to cancel a certificate of entry. Dickinson v. Brown (1847) 17 Miss. (9 Smedes & M.) 130.

The commissioner of the general land office has no authority, where the receiver has taken the price of land, and given a receipt therefor, to cancel the entire entry, because of a conflict as to one of the tracts embraced therein, without first giving the party in interest the right of election as to whether he desires to retain the tract not in controversy. Cornelius v. Kessel (1883) 58 Wis. 237, 16 N. W. 550.

18. —— Power to cancel as affected by subsequent transfer.—The power of the commissioner to cancel an entry is not affected by a transfer of the land by the entryman. Swigart v. Walker (1892) 49 Kan. 100, 30 Pac. 162; Fernald v. Winch (1892) 50 Kan. 79, 31 Pac. 665; Parsons v. Venzke (1894) 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669.

19. —— Time for cancellation.—A homestead entry of public lands of the United States may be canceled for fraud by the officers of the land department, even after final proof has been made, but before the issuing of the patent. American Mortg. Co. of Scotland v. Hopper (1894) 64 Fed. 553, 12 C. C. A. 293 (affirming judgment [C. C. 1893] 56 Fed. 67); Jones v. Meyers (1891) 2 Idaho, 793, 26 Pac. 215, 35 Am. St. Rep. 259; Sorrenson v. Same (1891) 2 Idaho, 802, 26 Pac. 218; Judd v. Randall (1886) 36 Minn. 12, 29 N. W. 589; Pfund v. Valley Loan & Trust Co. (1897) 72 N. W. 480, 52 Neb. 473; Caldwell v. Bush (1896) 6 Wyo. 342, 45 Pac. 488.

The land department has jurisdiction to cancel an original entry for public lands at any time before a patent is issued. Hawley v. Diller (1900) 20 Sup. Ct. 986, 989, 178 U. S. 476, 44 L. Ed. 1157 (affirming decree, Diller v. Hawley [1897] 81 Fed. 651, 26 C. C. A. 514); Freese v. Rusk (1894) 54 Kan. 274, 38 Pac. 255; Haydel v. Nixon (1850) 5 La. Ann. 558.

The commissioner may declare void a certificate of a purchase of lands the law forbids to be sold. Wilson v. Fine (C. C. 1889) 40 Fed. 52, 54, 5 L. R. A. 141; Garfield v. United States (1908) 31 App. D. C. 338; Guidry v. Woods (1841) 19 La. 334, 36 Am. Dec. 677.

The power of the commissioner of the general land office to cancel entries of public lands after final proof has been made and a final certificate issued extends only to cases of entries made upon false testimony or without authority of law. Stimson v. Clarke (C. C. 1891) 45 Fed. 760.

The land department has no authority of its own motion to set aside or cancel the final certificate of a settler under the pre-emption law. American Mortg. Co. of Scotland v. Hopper (C. C. 1891) 48 Fed. 47.

The commissioner of the general land office or the secretary of the interior had power to cancel a pre-emption entry after the local land officers have approved the evidences of settlement and improvement, received the purchase money, and issued the receiver's final receipt. Parsons v. Venzke (1894) 61 N. W. 1036, 4 N. D. 452, 50 Am. St. Rep. 669, affirmed (1896) 17 Sup. Ct. 27, 164 U. S. 89, 41 L. Ed. 360.

20. —— Grounds for cancellation.—Fraud in the entry or selection, or any mistake of law or lack of authority on the part of the officers of the Land Department to make the entry, sale, or exchange, as the case may be, of the public lands, may be inquired into and determined by that department at any time prior to the issuance of patent. Northern Pac. Ry. Co. v. U. S. (1910) 176 Fed. 706, 101 C. C. A. 117, affirming judgment U. S. v. Northern Pac. Ry. Co. (C. C. 1909) 170 Fed. 498, and appeal dismissed (1912) 32 Sup. Ct. 533, 223 U. S. 746, 56 L. Ed. 640.

Where, before a patent is issued, the commissioner of the general land office is advised that the assignment of a bounty warrant which has been located by the assignee is a forgery, he has power to suspend further proceedings under the entry, and, upon a proper showing, to vacate it. Durham v. Hussman (1893) 88 Iowa, 29, 55 N. W. 11.

21. —— Necessity for notice and hearing.—The power of the Land Department to review its prior rulings,

and to cancel existing entries, while the legal title remains in the United States, is not unlimited or arbitrary, and can be exercised only after notice to parties in interest and due opportunity for a full hearing. Peyton v. Desmond (1904) 129 Fed. 1, 63 C. C. A. 651.

The decision of the Land Department on questions of fact involving the cancellation of an entry and in awarding the land to a party entitled thereto is final and conclusive, if the parties interested had an opportunity to be heard. Forman v. Healey (N. D. 1909) 121 N. W. 1122.

Disregard of rules as to a hearing on the question of the cancellation of an entry, if any, which does not result in the loss of an opportunity to be heard, will not affect the decision of the Land Department. Id.

Though the land department may cancel a desert land entry for fraud, or on the ground that the land is nondesert land, after a hearing, of which the entryman has notice, a cancellation without such hearing and notice is a nullity. Delles v. Second Nat. Bank (1897) 50 P. 190, 7 Wyo. 66, 75 Am. St. Rep. 875.

22. —— **Form of judgment of cancellation.**—A letter of the secretary of the interior to the commissioner of the general land office saying, "Your judgment from which an appeal has been taken * * * is affirmed," is a judgment of cancellation, being relative to a protest against issuance of a patent, on the ground of fraud in obtaining receipts for entry on land, in which matter the commissioner had rendered a decision of cancellation of the entry. Murray v. Polglase (1896) 17 Mont. 455, 43 Pac. 505.

23. —— **Effect of cancellation.**—As to the conclusiveness of cancellation see line "Finality and conclusiveness of decisions," post, under this section.

The land department has jurisdiction to permit an amended entry to be made and to cancel an entry on the ground of fraud, and, having done so in a particular proceeding, and determined that a fraud was perpetrated on the government by one making an entry conflicting with an amended entry permitted to be made, and that his entry was fraudulent, his alleged rights thereunder were void ab initio. Baldwin Star Coal Co. v. Quinn (1909) 105 P. 1101, 46 Colo. 590.

The cancellation of an entry by the commissioner of the general land office does not vacate the entry, he not being a judicial officer, and his determination as to the validity of the sale concludes no one in his rights. Brill v. Stiles (1864) 35 Ill. 305, 85 Am. Dec. 364.

A statement of the commissioner of the general land office in a letter, to the effect that he has canceled a certificate, does not amount to an eviction which should rescind a sale between third persons. McDonold v. Vaughan (1859) 14 La. Ann. 716.

24. **Appeal and review.**—Pending appeal from an order of the local land office rejecting a desert land entry, the local office's decision was suspended, and the officers thereof were without jurisdiction to deliver a patent to another under a homestead entry. Anderson v. Woodward (Colo. 1914) 140 Pac. 198.

There being no fixed time in which appeals from registers and receivers shall be taken to the department at Washington, a reasonable time will be understood. Moore v. Fields (1860) 1 Or. 317.

A party aggrieved by an erroneous decision of the federal Land Department must exhaust his remedies in that department before he can resort to the courts, and, where one instituting a contest in a local land office against a homestead entry did not appeal to the General Land Office or to the Secretary of the Interior from an order dismissing the contest because not sufficiently regular to constitute a valid contest, he was bound thereby, and he could not resort to the courts. Kendall v. Long (Wash. 1911) 119 P. 9.

On certiorari a finding by the commissioner of public lands, based on evidence, cannot be upheld because he was not confined to evidence taken at the hearing. Crouch v. Ross (Wash. 1914) 145 Pac. 87.

25. —— **Matters reviewable.**—The jurisdiction of the Land Department over public lands continues so long as the legal title remains in the United States, and the decisions and rulings of that department in proceedings to acquire title to such lands, prior to the act which passes the legal title from the government, are interlocutory, and are as much open to review or reversal by the Land Department, while the legal title remains in the United States, as are the interlocutory decrees of a court open to review upon the final hearing. Peyton v. Desmond (1904) 129 Fed. 1, 63 C. C. A. 651.

The decision of the register and receiver, upon a pre-emption claim, is examinable by the commissioner of the general land office, for fraud, if not for mistake. Wynn v. Garland (1855) 16 Ark. 440.

A decision of the United States land department cannot be reviewed because of fraud, where an issue as to the existence of the fraud was made before the department, and evidence was offered in support thereof. Wiseman v. Eastman (1899) 57 P. 398, 21 Wash. 163.

26. —— **Notice of motion for review.**—See Acers v. Snyder (1899) 8 Okl. 659, 58 Pac. 780.

27. —— **Review by succeeding secretary.**—The decision of a secretary of

the interior on a contest preliminary to the issuance of patent to public lands cannot be invoked to preclude a re-examination by a successor, on the principle of res judicata. Beley v. Naphtaly (1898) 18 S. Ct. 354, 169 U. S. 353, 42 L. Ed. 775 (affirming [1896] 19 C. C. A. 392, 73 Fed. 120); Gage v. Gunther (1902) 68 Pac. 710, 136 Cal. 338, 89 Am. St. Rep. 141.

The Secretary of the Interior, having complete jurisdiction of a contest before the Land Department, is not bound by prior findings of fact made by his predecessor. Beley v. Naphtaly (1898) 18 Sup. Ct. 354, 358, 169 U. S. 353, 42 L. Ed. 775; Greenameyer v. Coate (1909) 29 S. Ct. 345, 348, 212 U. S. 434, 53 L. Ed. 587, affirming decree (1907) 88 Pac. 1054, 18 Okl. 160.

The ruling of a secretary of the interior finally disposing of an application to purchase public land may, on a reasonable application, be reconsidered and reversed by his successor, when no steps have been taken looking to the conclusion of the proceedings, in accordance with the original decision. Beley v. Naphtaly (1896) 73 Fed. 120, 19 C. C. A. 392, distinguishing Noble v. Union River Logging R. Co. (1893) 13 Sup. Ct. 271, 147 U. S. 165, 37 L. Ed. 123, and U. S. v. Stone (1864) 2 Wall. 525, 17 L. Ed. 765, and following City of New Orleans v. Paine (1893) 13 Sup. Ct. 303, 147 U. S. 261, 37 L. Ed. 162.

A secretary of the interior has no power to annul a decision of his predecessor which determines the rights of the parties to a contest for entry of public lands; such determination being a judicial act, which can only be reviewed by the courts. Emblem v. Lincoln Land Co. (1900) 102 Fed. 559, 42 C. C. A. 499, affirming order (1899) 94 Fed. 710, and decree affirmed (1902) 22 S. Ct. 523, 184 U. S. 660, 46 L. Ed. 736.

A decision of a Secretary of the Interior concerning the public lands, general in its intention and application, and covering all lands within the description of certain statutes, is obligatory upon his successors, who can neither reverse his rulings nor reopen the controversy by transferring a claim fairly covered by the decision to the Court of Claims, under the Bowman Act. State of Illinois v. U. S. (1885) 20 Ct. Cl. 342.

Rules of procedure of the United States land department pertaining to a re-review of a decision of the secretary of the interior cannot deprive a succeeding secretary of authority to review a decision of his predecessor. Gage v. Gunther (1902) 68 P. 710, 136 Cal. 338, 89 Am. St. Rep. 141.

Under R. S. § 453, incorporated in this section, the decision of a secretary reversing the commissioner's decision on a contest preliminary to issuance of a patent to public lands is not such a final determination of the controversy as to preclude his successor from a re-examination of the decision. Id.

28. —— **Review by succeeding Commissioner.**—Commissioner of the General Land Office cannot annul or cancel the act of his predecessor. Lane v. Watts (1913) 41 App. D. C. 139, decree affirmed (1914) 34 S. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440.

Irregularity of proceeding warrants the Commissioner of the General Land Office in reviewing the decision of his predecessor. Morse v. Odell (Or. 1907) 89 Pac. 139.

29. **Finality and conclusiveness of decisions.**—The decisions of the general land office are unassailable by the courts, except by direct proceedings. Cragin v. Powell (1888) 9 Sup. Ct. 203, 206, 128 U. S. 691, 32 L. Ed. 566; Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 262, 142 U. S. 161, 35 L. Ed. 974; Hartman v. Warren (1896) 76 Fed. 157, 22 C. C. A. 30; New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116; James v. Germania Iron Co. (1901) 107 Fed. 597, 46 C. C. A. 476 (appeal dismissed [1904] 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); Mora v. Foster (C. C. 1875) Fed. Cas. No. 9,784; Le Marchel v. Teegarden (C. C. 1904) 133 Fed. 826; U. S. v. Cain-Bonness Lumber & Timber Co. (D. C. 1914) 215 Fed. 212; Rogers v. De Cambra (1900) 60 P. 863, 132 Cal. 502, affirmed (1901) 64 P. 894, 132 Cal. 502; Missouri, K. & T. Ry. Co. v. Pratt (1902) 67 P. 464, 64 Kan. 118; Kinney v. Degman (1882) 12 Neb. 237, 11 N. W. 318; Abbott v. Perry (Okl. 1915) 149 Pac. 202.

Decision of Secretary of Interior that patents to public lands should issue held not conclusive against the government, suing to cancel such patents for fraud. Linn & Lane Timber Co. v. U. S. (1915) 35 Sup. Ct. 440, 236 U. S. 574, 59 L. Ed. 725, affirming decrees (1912) 196 Fed. 593, 116 C. C. A. 267, and (1913) 203 Fed. 394, 121 C. C. A. 498.

Judgments of the land department permitting entries of land and the patents based thereon bind all the parties to the proceedings, but do not estop those who were not, and were not required to be, parties from establishing the truth as to any facts material to their claims in any litigation between them and the holders under the patents. Uinta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co. (1902) 119 Fed. 164, 57 C. C. A. 200, judgment affirmed (1905) Creede & Cripple Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co., 25 Sup. Ct. 266, 196 U. S. 337, 49 L. Ed. 501.

The rulings of the Land Department are persuasive and should not be overruled without good reason, but they are not conclusive upon the courts. Hem-

mer v. U. S. (1912) 204 Fed. 898, 123 C. C. A. 194, reversing decree U. S. v. Hemmer (D. C. 1912) 195 Fed. 790.

The doctrine of the conclusiveness of judgments and decrees of courts, as between those who are parties to the litigation, is not applicable to the United States in regard to the proceedings before the land officers in granting patents for the public land. U. S. v. Rose (C. C. 1885) 24 Fed. 196.

While the Land Decisions of the Interior Department are not binding on the federal courts, yet, when the construction of a doubtful or obscure statute by the department has been uniform, the court will accept such interpretation as the proper one. U. S. v. Burkett (D. C. 1907) 150 Fed. 208.

As between the government and those seeking to become purchasers or grantees of the public lands, the final action of the Land Office has always been regarded as final by the judiciary. Hale v. U. S. (1874) 10 Ct. Cl. 289.

On the determination of a contest in the land office, there is no error in admitting in evidence the decision of the land department, in a suit to quiet title, though such decisions have not the formalities of judgments. Potter v. Randolph (1899) 58 Pac. 905, 126 Cal. 458.

The decision of the general land office being subject to an appeal to the secretary of the interior is not technically res judicata. Butler v. Watts (1858) 13 La. Ann. 390.

United States grant of land over opposition in which the question of possession alone was considered held not res judicata in subsequent possessory action by the parties who had opposed the grant. Smith v. Grant Timber & Mfg. Co. (1912) 58 South. 153, 130 La. 471.

Though the action of the land office in issuing a patent to public land be considered as conclusive as the judgment of a judicial tribunal, it may be overthrown where the circumstances indicate a lack of jurisdiction of the subject-matter or of the person whose rights are involved which would render a judgment void. Tonopah & G. R. Co. v. Fellanbaum (Nev. 1910) 107 Pac. 882.

The proceedings before the secretary in matters pertaining to the disposal of the public lands are not void by reason of failure to give notice to interested parties. The secretary has power to determine all such matters on his own motion, and mere irregularities will not render such proceedings void. Acers v. Snyder (1899) 58 Pac. 780, 8 Okl. 659.

A finding by the Secretary of the Interior that a subsequent contest is not a separate action, but merely a proceeding supplemental to the original contest brought before him, will in a collateral action be adopted by the courts of the territory. Best v. Frazier (1906) 85 P. 1119, 16 Okl. 523.

The findings of the secretary of the interior under former Act Cong. March 14, 1864, approving the selections of land sold by territorial authorities prior to its passage, are, in the absence of fraud, conclusive. Keane v. Brygger (1891) 3 Wash. St. 338, 28 Pac. 653.

30. —— Judicial or discretionary acts.—The land officers of the United States, on the hearing and determination of a contest between two rival claimants of the right to purchase a tract of public land under the land laws of the United States, act judicially, and their judgment is conclusive at law. Litchfield v. Register (C. C. 1868) Fed. Cas. No. 8,388; Plummer v. Brown (1886) 70 Cal. 544, 12 Pac. 464; Lewis v. Lewis (1845) 9 Mo. 183, 43 Am. Dec. 540.

Where the power of the officers of the land department of the United States is judicial or purely discretionary, their acts and decisions are conclusive. State v. Bachelder (1861) 5 Minn. 223 (Gil. 178), 80 Am. Dec. 410; Garton v. Cannada (1867) 39 Mo. 357.

Neither injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. U. S. v. Hitchcock (1903) 23 Sup. Ct. 698, 701, 190 U. S. 316, 47 L. Ed. 1074.

The question whether certain land is open for settlement or has passed under a railroad grant requires the exercise of judicial power and discretion by the land department, with which the courts of the United States cannot interfere by injunction or otherwise. Sioux City & St. P. R. Co. v. U. S. (C. C. 1888) 34 Fed. 835.

The act of the Secretary of the Interior in approving or rejecting a railroad indemnity land selection is not merely formal or ministerial, but judicial and not subject to review by judicial mandate. Southern Pac. R. Co. v. Arnold (1912) 124 Pac. 829, 162 Cal. 726.

The action of the register and receiver of a United States land office, in accepting the proofs furnished by a preemptioner as satisfactory, and receiving his money and issuing to him the usual duplicate, is a judicial determination of his rights, which is conclusive in all collateral proceedings. Boyce v. Danz (1874) 29 Mich. 146.

The allowance of an application to contest the final entry of public land is, by rule of the Land Office, vested with the Commissioner of the General Land Office, and the courts will not interfere with his discretion unless it is a denial of a clear right. Parryman v. Cunningham (1905) 82 Pac. 822, 16 Okl. 94.

31. —— Jurisdiction to receive applications.—The refusal of subordinate officials of the Land Department, acting under instructions, to accept an application to purchase coal lands in the United States, is not subject to review in the courts. Plested v. Abbey, 33

Sup. Ct. 503, 228 U. S. 42, 57 L. Ed. 724.

The decision of the Land Department holding that a local land office had no jurisdiction to receive an application for a patent is binding in an action in which the validity of the patent is involved. McKnight v. El Paso Brick Co. (N. M. 1911) 120 Pac. 694.

32. —— **Questions of fact in general.**—In matters passed on by the land office, and which are open for review by the courts, the findings of fact made in the land department are final, and will not be reviewed in the courts, in the absence of fraud, imposition, or mistake. Carr v. Fife (1895) 15 Sup. Ct. 427, 430, 156 U. S. 494, 39 L. Ed. 508 (affirming decree [C. C. 1891] 44 Fed. 713, and [C. C. 1891] 45 Fed. 209); Johnson v. Drew (1898) 18 Sup. Ct. 800, 171 U. S. 93, 43 L. Ed. 88 (affirming [1894] 15 So. 780, 34 Fla. 130); De Cambra v. Rogers (1903) 23 Sup. Ct. 519, 520, 189 U. S. 119, 47 L. Ed. 734 (affirming Rogers v. De Cambra [1901] 64 Pac. 894, 132 Cal. 502, which affirmed [1900] 60 Pac. 863, 132 Cal. 502); Hartwell v. Havighorst (1904) 25 Sup. Ct. 793, 196 U. S. 635, 49 L. Ed. 629 (affirming decree [1901] 66 Pac. 337, 11 Okl. 189); Greenameyer v. Coate (1909) 29 Sup. Ct. 345, 348, 212 U. S. 434, 53 L. Ed. 587 (affirming decree [1907] 88 Pac. 1054, 18 Okl. 160); Daniels v. Wagner (1915) 35 S. Ct. 740, 237 U. S. 547, 59 L. Ed. 1102, L. R. A. 1916A, 1116 (reversing decree [1913] 205 Fed. 235, 125 C. C. A. 93); Same v. Merrithew (1915) 35 S. Ct. 747, 237 U. S. 570, 59 L. Ed. 1113 (reversing decree Same v. Wagner [1913] 205 Fed. 235, 125 C. C. A. 93); Same v. Craddock (1915) 35 S. Ct. 749, 237 U. S. 574, 59 L. Ed. 1118 (reversing decree Same v. Wagner [1913] 205 Fed. 235, 125 C. C. A. 93); Sawyer v. Gray (1915) 35 S. Ct. 842, 237 U. S. 674, 59 L. Ed. 1170; U. S. v. Northern Pac. R. Co. (1899) 95 Fed. 864, 37 C. C. A. 290 (decree affirmed [1900] 20 S. Ct. 706, 177 U. S. 435, 44 L. Ed. 836); Peyton v. Desmond (1904) 129 Fed. 1, 63 C. C. A. 651; Le Marchal v. Tegarden (1909) 175 Fed. 682, 99 C. C. A. 236 (reversing judgment Le Marchel v. Teagarden [C. C. 1907] 152 Fed. 662); McGoldrick Lumber Co. v. Kinsolving (1915) 221 Fed. 819, 137 C. C. A. 377; Aiken v. Ferry (C. C. 1879) Fed. Cas. No. 112; Bear v. Luse (C. C. 1879) Fed. Cas. No. 1,179; Pengra v. Munz (C. C. 1887) 29 Fed. 830, 836; Carr v. Fife (C. C. 1891) 44 Fed. 713; Stimson v. Clarke (C. C. 1891) 45 Fed. 760; Puget Mill Co. v. Brown (C. C. 1893) 54 Fed. 987 (judgment and decree affirmed [1893] 59 Fed. 35, 7 C. C. A. 643); McKenna v. Atherton (C. C. 1908) 160 Fed. 547; Emmons v. U. S. (C. C. 1909) 175 Fed. 514; Sullivan v. Damon (D. C. 1913) 202 Fed. 285; West v. Edward Rutledge Timber Co. (D. C. 1913) 210 Fed. 189; Ayres v. U. S. (1907) 42 Ct. Cl. 385; Jeffords v. Hine (Ariz. 1886) 11 Pac. 351; Hosmer v. Wallace (1874) 47 Cal. 461; Rutledge v. Murphy (1876) 51 Cal. 388; Hays v. Steiger (1888) 76 Cal. 555, 18 Pac. 670; Grant v. Oliver (1891) 91 Cal. 158, 27 Pac. 596; Thompson v. Basler (1906) 84 Pac. 161, 148 Cal. 646, 113 Am. St. Rep. 321; Mineral Farm Min. Co. v. Barrick (1905) 80 P. 1055, 33 Colo. 410; O'Reilly v. Noxon (Colo. 1910) 113 P. 486; White v. Whitcomb (1907) 90 P. 1080, 13 Idaho, 490; Jackson v. Wilcox (1837) 2 Ill. (1 Scam.) 344; Tatro v. French (1885) 33 Kan. 49, 5 Pac. 426; Cooke v. Blakely (1897) 50 P. 981, 6 Kan. App. 707; Latt Lumber Co. v. Faircloth (1913) 61 So. 866, 132 La. 906; Louisville & N. R. Co. v. Penn (1915) 68 South. 859, 137 La. 526; Leech v. Rauch (1859) 3 Minn. 448; State v. Batchelder (1861) 5 Minn. 223 (Gil. 178), 80 Am. Dec. 410; State v. Stevens (1861) 5 Minn. 521 (Gil. 416); O'Connor v. Gertgens (1902) 89 N. W. 866, 85 Minn. 481 (affirmed Gertgens v. O'Connor [1903] 24 S. Ct. 94, 191 U. S. 237, 48 L. Ed. 163); Sage v. Maxwell (1904) 99 N. W. 42, 91 Minn. 527; Rush v. Valentine (1882) 12 Neb. 513, 11 N. W. 746; Van Sant v. Butler (1886) 19 Neb. 351, 27 N. W. 299; Whitehill v. Victorio Land & Cattle Co. (N. M. 1914) 139 Pac. 184; Van Patten v. Boyd (N. M. 1915) 150 Pac. 917; Parsons v. Venzke (1894) 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669; Milliken v. Starling's Lessee (1847) 16 Ohio, 61; Calhoun v. Violet (1896) 47 P. 479, 4 Okl. 221; Paine v. Foster (1896) 53 P. 109, 9 Okl. 213 (affirmed [1899] 59 P. 252, 9 Okl. 257); Id. (1900) 60 P. 24, 9 Okl. 259; Thornton v. Peery (1898) 54 P. 649, 7 Okl. 441; Acers v. Snyder (1899) 58 P. 780, 8 Okl. 659; Cook v. McCord (1899) 60 Pac. 497, 9 Okl. 200; Bertwell v. Haines (1900) 63 P. 702, 10 Okl. 469; Jordan v. Smith (1903) 73 P. 308, 12 Okl. 703; Forney v. Dow (1903) 73 P. 1101, 13 Okl. 258; Parryman v. Cunningham (1905) 82 P. 822, 16 Okl. 94; Ross v. Stewart (Okl. 1910) 106 P. 870; Abbott v. Perry (Okl. 1915) 149 Pac. 202; Pacific Live Stock Co. v. Isaacs (Or. 1908) 96 P. 460; Harrington v. Wilson (1898) 74 N. W. 1055, 10 S. D. 606; Wiseman v. Eastman (1899) 57 P. 398, 21 Wash. 163; Great Northern Ry. Co. v. Hower (1912) 125 P. 159, 69 Wash. 380.

33. —— **Qualifications for entry and patent.**—The determination of the officers of the Land Department as to the existence of facts upon which the right to a patent is based is conclusive against collateral attack in the absence of fraud, imposition, or mistake. Steel v. St. Louis, S. & R. Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 27 L. Ed. 226; Barden v. Northern Pac. R. Co. (1894) 14 Sup. Ct. 1030, 1038, 154 U. S. 288, 38 L. Ed. 992; Johnson v. Drew (1898)

18 Sup. Ct. 800, 802, 171 U. S. 93, 43 L. Ed. 88; U. S. v. Oregon & C. R. Co. (C. C. 1911) 186 Fed. 861; Roberts v. Southern Pac. Co. (C. C. 1911) 186 Fed. 934; Gage v. Gunther (1902) 68 Pac. 710, 136 Cal. 338, 89 Am. St. Rep. 141; Danforth v. Morrical (1877) 84 Ill. 456; Ard v. Pratt (1890) 43 Kan. 419, 23 Pac. 646; Clark v. Hall (1869) 19 Mich. 356; Castner v. Gunther (1861) 6 Minn. 119 (Gil. 63); Same v. Echard (1861) 6 Minn. 149 (Gil. 92); Village of Mankato v. Meagher (1871) 17 Minn. 265 (Gil. 243); Hill v. Miller (1865) 36 Mo. 182; Stucker v. Duncan (1866) 37 Mo. 160; Smiley v. Sampson (1871) 1 Neb. 56.

The allowance of a homestead entry is a determination of the qualifications of an applicant for such entry by the land department, and is binding upon the courts, so long as the entry remains intact. Hill v. McCord (1904) 25 Sup. Ct. 96, 99, 195 U. S. 395, 49 L. Ed. 251 (affirming decree McCord v. Hill [1903] 94 N. W. 65, 117 Wis. 306); Brown v. Donnelly (1899) 59 Pac. 975, 9 Okl. 32; Reservation State Bank v. Holst (1903) 95 N. W. 931, 17 S. D. 240, 70 L. R. A. 799.

In controversies as to conflicting claims for patents, depending on the question of the use and occupation of a located claim, the decision of the land commissioner is not binding on the court. Edwards v. Begole (1903) 121 Fed. 1, 57 C. C. A. 245; Dilla v. Bohall (1879) 53 Cal. 709; Powers v. Leith (1879) Id. 711; Hartman v. Smith (1887) 7 Mont. 19, 14 Pac. 648.

A finding by the land department that an applicant for a patent is disqualified as a pre-emptor because he had filed a former declaratory statement as to other lands is a finding of fact, and conclusive. Where fraud has been practiced, or there has been a mistake as to the law applicable to the facts, a court of equity may give relief, but the mere question of fact, depending on conflicting evidence, cannot be reviewed. Baldwin v. Starks (1883) 2 Sup. Ct. 473, 107 U. S. 463, 27 L. Ed. 526.

The decision of the officers of the land department that an applicant for a patent is entitled thereto, based solely upon the ex parte statements and affidavits of the applicant that he has fulfilled all the requirements of the land law, does not conclude the United States from instituting proceedings in equity to set aside the patent on the ground that such statements and affidavits were false. U. S. v. Minor (1885) 5 Sup. Ct. 836, 838, 114 U. S. 233, 29 L. Ed. 110.

In a proceeding in equity to have the holder of a patent to public land declared a trustee for the benefit of complainant, the findings of the secretary of the interior as to the character and purpose of a settlement by complainant is a finding of fact, and, in the absence of fraud and imposition, is conclusive. Lee v. Johnson (1885) 6 Sup. Ct. 249, 116 U. S. 48, 29 L. Ed. 570.

A state court has no jurisdiction to re-examine the conclusions of the United States land department as to whether one's residence on land was such as to entitle him to claim an additional farm homestead in adjoining land under R. S. §§ 2289, 2290, post, §§ 4530, 4531, in the absence of a clear showing that the decision was procured by fraud or imposition. Stewart v. McHarry (1895) 16 Sup. Ct. 117, 159 U. S. 643, 40 L. Ed. 290, affirming McHarry v. Stewart (Cal. 1893) 35 Pac. 141.

The finding of the secretary of the interior as a fact that an entry was made for speculative purposes, and not in good faith for the exclusive use and benefit of the entryman, is conclusive. Diller v. Hawley (1897) 81 Fed. 651, 26 C. C. A. 514, reversing decree Hawley v. Diller (C. C. 1896) 75 Fed. 946, and decree affirmed Hawley v. Diller (1900) 20 Sup. Ct. 986, 993, 178 U. S. 476, 44 L. Ed. 1157. And see McGoldrick Lumber Co. v. Kinsolving (1915) 221 Fed. 819, 137 C. C. A. 377.

Where a patent for agricultural land has issued to one who entered it under "additional soldiers' homestead" scrip, the determination of the land department that the land was of the character described, and that the patentee was entitled to enter it under such scrip, is final, and will not be reviewed by the courts. Scott v. Lockey Inv. Co. (C. C. 1893) 60 Fed. 34.

Whether one making a homestead entry took the land in good faith is a question for the land office, and will not be inquired into by the courts. Reaves v. Oliver (1895) 3 Okl. 62, 41 Pac. 353.

The question as to whether or not a lot has been abandoned by the claimant is a question of fact, and the findings of the proper officers of the land department are, in the absence of fraud, imposition, or mistake, final upon that question. Cook v. McCord (1899) 60 Pac. 497, 9 Okl. 200.

34. —— Character and status of lands.—The decision of the Land Department on the question of the character of public lands is conclusive on the courts. Johnston v. Morris (1896) 72 Fed. 890, 897, 898, 19 C. C. A. 229; Heckman v. Mumford (Alaska 1911) 4 Alaska, 299; Potter v. Randolph (1899) 58 Pac. 905, 126 Cal. 458; Jameson v. James (Cal. 1909) 100 Pac. 700; Van Ness v. Rooney (Cal. 1911) 116 P. 392; Le Fevre v. Amonson (1905) 81 P. 71, 11 Idaho, 45; Earl v. Morrison (Nev. 1915) 154 Pac. 75; Johnson v. Bridal Veil Lumbering Co. (1893) 24 Or. 182, 33 Pac. 528; Ferry v. Street (1886) 4 Utah, 521, 11 Pac. 571; Gauthier v. Morrison (Wash. 1911) 114 Pac. 501. See, also, Behrends v. Goldsteen (1902) 1 Alaska, 518.

The decision of the department as to whether the land was subject to disposal is conclusive. Germania Iron Co.

v. James (C. C. 1897) 82 Fed. 807 (decree reversed [1898] 89 Fed. 811, 32 C. C. A. 348); Harvey v. Holles (C. C. 1908) 160 Fed. 531; Hart v. Delphey (Iowa, 1912) 136 N. W. 702.

A finding of land officers in proceedings resulting in the issuance of patents on commuted homestead entries, that such lands were agricultural and not coal lands, is not conclusive against the government in a suit to cancel the patents as fraudulently procured by misrepresenting their character. Washington Securities Co. v. United States (1914) 34 Sup. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220, affirming decree (1912) 194 Fed. 59, 114 C. C. A. 79.

The decisions of the land department in contested cases are not conclusive as to title, but the question whether land included in a patent was subject to disposition, at the time of the issue thereof, is always open for consideration. Northern Pac. R. Co. v. McCormick (1896) 72 Fed. 736, 19 C. C. A. 165.

Whether lands are within the limits or subject to the operation of a grant for public improvements is not a question of fact, within the rule that the judgment of the land department is final upon questions of fact. U. S. v. Coos Bay Wagon Road Co. (C. C. 1898) 89 Fed. 151.

The issuance of a patent to certain lands by the United States was not a conclusive adjudication that the lands were nonmineral, where the patent itself contained an exception of all mineral lands should any be found in the tract described. Eastern Oregon Land Co. v. Willow River Land & Irrigation Co. (C. C. 1910) 187 Fed. 466, decree reversed (C. C. A. 1912) 201 Fed. 203.

A finding by the Commissioner of the General Land Office, of the vacant and nonmineral character of land located under a grant by Congress of vacant and nonmineral land, and his confirmation of the location, cannot be disturbed by the Land Office when the land is subsequently found to possess mineral-bearing qualities. Lane v. Watts, 41 App. D. C. 139, decree affirmed 34 Sup. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440.

Plaintiff settled upon a tract of land in Alaska under the homestead laws. Subsequently the defendant filed on the same land under the mining law, and thereafter applied for patent. Plaintiff filed an adverse in the United States Land Office, and brought a suit in support thereof. Thereafter plaintiff filed a supplemental complaint, alleging that, since the beginning of the suit, the Land Office had adjudged the contest and held that the land is not mineral in character. Defendant replied thereto, setting up a new discovery of mineral and a new location subsequent to the nonmineral decision in the Land Office. Held, that the decision of the Land Office that the land in controversy is not mineral land is binding on this court, and the character of the land fixed thereby will control the court until reversed by the Land Office. Sheldon v. Seatter (1910) 4 Alaska, 95.

Where land is patented to a railroad company as public land, under a grant providing for its disposal as agricultural land, without any reservation in the grant except a general one of mineral lands, and no reservation in the patent, the patent is a conclusive determination by the government that the land is agricultural. Gale v. Best (1889) 78 Cal. 235, 20 Pac. 550, 12 Am. St. Rep. 44. Compare McLaughlin v. Powell (1875) 50 Cal. 64; Chicago Quartz Min. Co. v. Oliver (1888) 75 Cal. 194, 16 Pac. 780, 7 Am. St. Rep. 143.

In an action at law to recover real estate, the plaintiff claimed under a railroad grant, and produced, as evidence of his title, the certificate of the commissioner of the general land-office, approved by the secretary of the interior. Held, that the defendant could not prove by parol the swampy character of the land, to show that it passed to him under the swamp-land grant. Iowa R. Land Co. v. Antoine (1879) 52 Iowa, 429, 3 N. W. 468.

A register and receiver of the land office are the proper tribunals for determining whether land claimed by a party is embraced in the exception inserted in the act of June 13, 1832, authorizing the inhabitants of Louisiana to enter back lands, and their decision is not subject to revisal by the state tribunals. Morancy v. Ford (1847) 2 La. Ann. 299.

In pre-emption cases upon school lands, under the joint resolution of congress of March 3, 1857, the land offices have the right and jurisdiction to determine whether the lands had been settled prior to the survey; and their decision is as conclusive as upon any other question of fact properly arising before them. State v. Batchelder (1862) 7 Minn. 121 (Gil. 79).

A finding by the Secretary of the Interior that lands in controversy were abandoned and subject to allotment when entered by the person from whom defendant took title, being a finding of fact, is conclusive on the Supreme Court. Reynolds v. Hill (1914) 143 Pac. 1155, 43 Okl. 749.

A decision of the Secretary of the Interior, directing the issuance of a patent to a homestead claimant, cannot be collaterally attacked, in an action to recover the land from the owners of a placer claim. Olson v. Kirk (1915) 153 N. W. 893, 35 S. D. 620.

35. —— **Boundaries and surveys.**— The official survey made of a Mexican land grant, after the grant has been confirmed by congress, is conclusive as against any collateral attack in the courts. Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 825, 158 U. S. 240, 39 L. Ed. 966; Russell v. Maxwell Land-

Grant Co. (1895) 15 Sup. Ct. 827, 828, 158 U. S. 253, 39 L. Ed. 971.

Determinations of the land department against the claim that certain land is included within a Mexican grant which has been surveyed and patented to the claimant, and also that he is not a bona fide purchaser from the original grantee, are conclusive in a private action. Gardner v. Bonestell (1901) 21 Sup. Ct. 399, 180 U. S. 362, 45 L. Ed. 574, affirming judgment (1899) 125 Cal. 316, 58 Pac. 20.

Rulings of the Land Department as to the tract covered by a lode mining claim are as free from collateral attack where final entry has been made as though patent had issued. Brown v. Gurney (1906) 26 Sup. Ct. 509, 201 U. S. 184, 50 L. Ed. 717, affirming judgment Gurney v. Brown (1904) 77 Pac. 357, 32 Colo. 472.

An adjudication by the land department that an individual claimant is entitled to land within the limits of a railroad grant is not sufficient to overcome the presumption in favor of the railroad company arising from its compliance with the terms of the grant before any steps were taken by such claimant to enter the land. Northern Pac. R. Co. v. McCormick (1896) 72 Fed. 736, 19 C. C. A. 165.

The action of the land department in defining the limits of a grant to a railroad company, pursuant to its duty, on the line of the road being located, and the map showing the location being furnished to it, is final, as between persons claiming land within such limits,—one under the homestead law, the other as purchaser from the road. Brett v. Meisterling (C. C. 1902) 117 Fed. 768.

A determination by the Interior Department, approved by the Secretary, that a patent to certain public land to plaintiff railroad company was based on the supplement to an indemnity list, and not on the original selection, and covered the land in controversy, held conclusive on the courts. Southern Pac. R. Co. v. Jackson Oil Co. (1913) 129 Pac. 276, 164 Cal. 392.

The performance by the Secretary of the Interior of the duty of ascertaining whether a private entry of land is within reserved territory is not a matter of judicial inquiry. McKenzie v. Fisher (1913) 40 App. D. C. 74.

The affirmance by the interior department of a resurvey is not binding on the courts, when it appears that by patent under a prior legal survey title to the lands passed from the government. Kean v. Roby (1896) 145 Ind. 221, 42 N. E. 1011.

The determination of land department as to a meander line held conclusive. Barringer v. Davis (Iowa, 1907) 112 N. W. 208.

Where survey and location are made under an order from the land office, and are approved by the survey or general and commissioner of the general land office, unless they are shown to deviate from the order, they are conclusive. Boatner v. Scott (La. 1842) 1 Rob. 546; Kittridge v. Hebert (1854) 9 La. Ann. 154.

When the land department has acted and fixed the boundaries of conflicting claims, in the absence of fraud on the part of the party claiming under such action, or any particular equity in favor of any other party, effect must be given to the action of the department. Sandoz v. Ozenne (1858) 13 La. Ann. 616.

The decisions of the register and receiver in the land office, and other federal tribunals, on questions involving the conflict of titles emanating from the federal government, are not subject to the revision of the state courts. Ford's Heirs v. Morancy (1859) 14 La. Ann. 77.

The decisions of the United States land officers, in disputes between owners of half-breed scrip as to its location, are final and conclusive. Monette v. Cratt (1862) 7 Minn. 234 (Gil. 176).

A decision of the secretary of the interior that certain land was not included within a grant to a corporation is conclusive until reversed in a direct proceeding for that purpose, and cannot be collaterally attacked in an action to recover the purchase price of the land by one to whom it has been conveyed by such corporation. Moore v. Northern Pac. R. Co. (1896) 18 Mont. 290, 45 Pac. 215, following Colburn v. Northern Pac. R. Co. (1893) 13 Mont. 476, 34 Pac. 1017.

A motion to strike from the record all testimony relating to a line of survey, and improvements made on land in reference thereto, is properly granted, since it appears that the line has been previously established, and the question of improvements determined, by the interior department. Harrington v. Wilson (1898) 74 N. W. 1055, 10 S. D. 606.

36. —— **Questions of law.**—Decisions of the land department upon questions of law are not conclusive. Wisconsin Cent. R. Co. v. Forsythe (1895) 15 Sup. Ct. 1020, 1025, 159 U. S. 46, 40 L. Ed. 71 (reversing judgment [C. C. 1890] 43 Fed. 867); Southern Pac. R. Co. v. Wiggs (C. C. 1890) 43 Fed. 333 (appeal dismissed Wiggs v. Southern Pac. R. Co. [1895] 15 Sup. Ct. 1044, 40 L. Ed. 147); West v. Edward Rutledge Timber Co. (D. C. 1913) 210 Fed. 189; Ayres v. U. S. (1907) 42 Ct. Cl. 385; Denny v. U. S. (1910) 45 Ct. Cl. 162; Hosmer v. Wallace (1874) 47 Cal. 461; Hays v. Steiger (1888) 76 Cal. 555, 18 Pac. 670; Sanders v. Dutcher (Cal. 1914) 143 Pac. 599; Iatt Lumber Co. v. Faircloth (1913) 61 South. 866, 132 La. 906.

While the decision of the Land Department on matters of law are not binding on courts, they should not be overruled unless they are clearly erroneous. Lamson v. Coffin (1907) 114 N. W. 248, 102 Minn. 493; Hand v. Cook

(Nev. 1907) 92 Pac. 3; Ross v. Wright (Okl. 1911) 116 Pac. 949.

A decision by the Secretary of the Interior that the mere occupation and cultivation of land creates such a claim as will prevent it from passing under a grant by Congress to a railroad company is a decision on a question of law, which does not conclude the parties, but may be reviewed in a collateral proceeding to recover the purchase money, by one to whom the company had agreed to convey title. Northern Pac. R. Co. v. Colburn (1896) 17 Sup. Ct. 98, 99, 164 U. S. 383, 41 L. Ed. 479, reversing Colburn v. Northern Pac. R. Co. (1893) 34 Pac. 1017, 13 Mont. 476.

Where findings by the General Land Office, approved and adopted by the Secretary of the Interior, were not made on any controverted facts, the conclusions of the officers were not really conclusions of fact, but of law, and subject to revision by the courts. Strong v. Buffalo Land & Exploration Co. (1907) 27 Sup. Ct. 780, 203 U. S. 582, 51 L. Ed. 327, affirming judgment Buffalo Land & Exploration Co. v. Strong (1903) 97 N. W. 575, 91 Minn. 84.

A bill attacking a decision of the land department for error of law cannot be sustained unless the findings of fact are disclosed, or enough undisputed facts are disclosed to make it plain that an error of law was committed. Durango Land & Coal Co. v. Evans (1897) 80 Fed. 425, 25 C. C. A. 523, appeal dismissed (1898) 19 Sup. Ct. 875, 43 L. Ed. 1178.

Whether or not there is any evidence to sustain a charge, a claim, or a finding of fact in a controversy before the Land Department over the title to the public land is a question of law, and an error in the decision of that question which results in the issue of a patent to the wrong party is remediable in equity. Howe v. Parker (1911) 190 Fed. 738, 111 C. C. A. 466.

Whether there is any substantial evidence to sustain a claim of a finding of fact determinative of a question relative to the issuance of a patent held a question of law, so that an injurious error of the Secretary of the Interior in deciding same presents good cause for relief in a court of equity. United States v. Debell (1915) 227 Fed. 760, 142 C. C. A. 284.

The decisions of the register and receiver under the pre-emption and donation laws, though conclusive as to principal matters within their jurisdiction, in the absence of fraud, is not conclusive as to a decision that the improvement of an actual settler and pre-emption claimant had been legally located by a donation claim. Nick's Heirs v. Rector (1842) 4 Ark. (4 Pike) 251.

A decision by the federal Land Department on an application for a reservoir site can be reviewed and annulled for erroneous application of the law. O'Reilly v. Noxon (Colo. 1910) 113 P. 486.

To justify a review of a decision of the United States Land Department for a misconstruction of the law, the law must be applicable to the case as established; and the attacking party must set forth in his complaint the facts as found by the department, or allege that such facts were undisputed. Van Patten v. Boyd (N. M. 1915) 150 Pac. 917.

A decision of the United States land department on a disputed question as to whom a patent should be issued can be reviewed in the courts only on the grounds of an erroneous construction of law. Wiseman v. Eastman (1899) 57 P. 398, 21 Wash. 163.

37. —— Interpretation of grants.—The construction put on a railroad grant by the Land Department as excepting certain lands for Indian purposes cannot prevail against a correct legal interpretation to the contrary. U. S. v. Grand Rapids & I. R. Co. (C. C. 1907) 154 Fed. 131, decree affirmed (1908) 165 Fed. 297, 91 C. C. A. 265.

Where the question as to whether the government had a title to land which it could pass to a homestead claimant was purely a question of law arising on undisputed facts, the decision of the land department is not binding on the court. Sousa v. Pereira (1901) 64 P. 90, 132 Cal. 77.

The supreme court will not regard the decisions of the land department and of the secretary of the interior, relative to the interpretation of the land grants of congress, and the rights of pre-emption and homestead settlers under them as conclusive. Emslie v. Young (1881) 24 Kan. 732.

38. —— Contests in general.—The land department's finding in favor of a homestead entry against persons claiming to have been occupants of the premises as a town site, which rests, not solely on the fact that application for such entry was filed a few hours before that of the trustee for the town site occupants, but rather chiefly on priority of the homesteader's equitable rights, must be held conclusive by the Supreme Court, especially where reinforced by judgments of the state courts, unless there is the clearest and most convincing evidence of mistake or injustice. Whitcomb v. White (1909) 29 Sup. Ct. 599, 600, 214 U. S. 15, 53 L. Ed. 889, affirming judgment White v. Whitcomb (1907) 90 Pac. 1080, 13 Idaho, 490.

The decisions of the land department on questions of law arising between conflicting claims under the pre-emption, homestead, or swamp land acts are not conclusive, but the rulings thereon may be re-examined by the courts after the title has been vested by the land department in an individual.

Sloan v. U. S. (C. C. 1899) 95 Fed. 193, 195.

The facts on which a pre-emption claim rests cannot be proved by recitals in opinions of the commissioners of the general land office or the secretary of the interior, as against a person claiming under the United States by another title. Megerle v. Ashe (1867) 33 Cal. 74.

In ejectment, plaintiff's title was founded on a United States patent issued by the interior department after hearing and appeal through the land department. Defendant, in a cross complaint, alleged the same facts that had been heard in the land department. The parties in ejectment were the same as in the former proceedings before the land department. Held, that the judgment of the land department in favor of plaintiff was conclusive. Rogers v. De Cambra (1900) 60 P. 863, 132 Cal. 502, affirmed (1901) 64 P. 894, 132 Cal. 502.

In contests before the land department as to entries of land made under the homestead laws, where only questions of fact, or mixed questions of law and fact, are involved, the decision of the secretary of the interior is final. Porter v. Bishop (1889) 25 Fla. 749, 6 South. 863.

Where, in the alienation of the public land, there are no conflicting claims, the land officers exercise part of the administrative power of the government. Their decision against a claim does not prevent its renewal at any subsequent time. Foley v. Harrison (1850) 5 La. Ann. 75.

A decision by the commissioner of the general land office of the United States, or of any other officer, in respect to conflicting claims to land after entry and certificate, does not affect the power of the courts to decide on the facts and law of a case involving them; and such decision has no binding force upon the courts. Shelton v. Keirn (1871) 45 Miss. 106.

A second contest will not be entertained by the Interior Department against an entry of public lands on a charge which has once been investigated or decided by the Department. Parryman v. Cunningham (1905) 82 P. 822, 16 Okl. 94.

A decision of the Secretary of the Interior in a land contest over a homestead entry carried up to him should be sustained by the courts in the absence of clear and cogent reasons for overthrowing it. Sanford v. King (1905) 103 N. W. 28, 19 S. D. 334.

A finding of the land department that certain land claimed was within the indemnity limits of a railroad grant was conclusive in a subsequent suit for possession of such lands. Gray's Harbor Co. v. Drumm (1901) 63 Pac. 530, 23 Wash. 706.

39. —— Rights of parties to pre-emption.—The decisions of the land department of the general government, as to the rights of parties to pre-emption of homestead claims, must be treated as final. Mitchell v. Cobb (1848) 13 Ala. 137; Stewart v. Sutherland (1892) 93 Cal. 270, 28 Pac. 947; McHarry v. Stewart (Cal. 1893) 35 Pac. 141; Gray v. McCance (1853) 14 Ill. (4 Peck) 343; McGhee v. Wright (1855) 16 Ill. (6 Peck) 555; Robbins v. Bunn (1870) 54 Ill. 48, 5 Am. Rep. 75; Stewart v. Haynes (Ind. 1842) 6 Blackf. 354; Bird v. Ward (1823) 1 Mo. 398, 13 Am. Dec. 506; Lewis v. Lewis (1845) 9 Mo. 183, 43 Am. Dec. 540; Couch v. Hughes (1846) 9 Mo. 777; Graham v. Great Falls Water Power & Town-Site Co. (1904) 76 P. 808, 30 Mont. 393; Bracken v. Parkinson (1846) 1 Pin. 685.

The courts have no jurisdiction of a controversy to determine a pre-emption right until after patent issues. Forbes v. Driscoll (1887) 4 Dak. 336, 31 N. W. 633.

The decision of the register and receiver acting as land commissioners as to the rights of two parties claiming under different pre-emption laws is final, and the courts cannot revise it. Henry's Widow and Heirs v. Welsh (1832) 4 La. 547.

40. —— Cancellation of entries.—The court cannot revise the decision of the commissioner of the general land office canceling a certificate of entry, the government not being devested of title until the patent issues. Shank v. Holmes (Ariz. 1914) 137 P. 871; Roberts v. Gebhart (1894) 104 Cal. 67, 37 Pac. 782; Baldwin Star Coal Co. v. Quinn (1909) 105 P. 1101, 46 Colo. 590; Quinn v. Baldwin Star Coal Co. (1904) 76 P. 552, 19 Colo. App. 497; Freese v. Rusk (1894) 54 Kan. 274, 38 Pac. 255; Haydel v. Nixon (1850) 5 La. Ann. 558; Parsons v. Venzke (1894) 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669.

An order of the land department canceling an entry, if based upon a misconstruction of the law, can be corrected by the courts. Hawley v. Diller (1900) 20 Sup. Ct. 986, 991, 178 U. S. 476, 44 L. Ed. 1157, affirming decree Diller v. Hawley (1897) 81 Fed. 651, 26 C. C. A. 514.

The action of the land department in canceling an entry is not binding, if based on testimony extorted by threats of criminal prosecution, and promises of immunity in consideration of testimony satisfactory to the agent of the department. Stimson Land Co. v. Hollister (C. C. 1896) 75 Fed. 941.

The refusal by the commissioner of the general land office of an application by an entryman for the refunding of the money paid for public lands, after his entry was canceled, does not render his claim res judicata so as to bar an action thereon in the courts, nor is his right to maintain such action affected by his conveyance of the land. Em-

mons v. U. S. (C. C. 1900) 103 Fed. 771.

A decision of the department of the interior to cancel inchoate rights acquired by homestead entry is prima facie correct; and a party who assails the correctness of such a decision must show affirmatively that it is illegal and unauthorized. Holmes v. State (1893) 100 Ala. 291, 14 South. 51.

A decision of the register and receiver of the land office who make the first examination of a protest against issuance of a patent, on the ground that a receipt for entry thereon was obtained by fraud, cannot be objected to, in an action to determine right to proceed for a patent, on the ground that it is not a decision canceling the receipt, but simply recommends the cancellation; they having concluded that the entry should be canceled, and having, pursuant to their duty and jurisdiction, and the practice of the land office, certified that fact to the commissioner of the general land office. Nor can the decision of the commissioner of the general land office, that "said entry is hereby held for cancellation," be objected to as not canceling the entry. Nor is such decision of the commissioner affected by the addition of the words, "subject to the right of further appeal." Murray v. Polglase (1896) 17 Mont. 455, 43 Pac. 505.

A person having entered land under a pre-emption act, his entry was afterwards canceled by the commissioner of the general land office. Held, that if, in such case, it should appear that the cancellation thus made was not authorized by law, it would be regarded as a nullity. Perry v. O'Hanlon (1848) 11 Mo. 585, 45 Am. Dec. 100.

While after the issue of a final receipt, and before patent, the power of the commissioner of the general land office to investigate and cancel for fraud is not unlimited, or to be exercised arbitrarily, and is in some cases subject to judicial review, still in such cases the claimant seeking relief in the courts assumes the burden of showing that he has in fact earned a patent. Pfund v. Valley Loan & Trust Co. (1897) 72 N. W. 480, 52 Neb. 473.

A decision by the commissioner of a general land office in a contest between an occupying claimant of public lands and a contestant, canceling the claimant's homestead entry for alleged abandonment, which decision became final by reason of the entryman's failure to appeal, is not a conclusive adjudication that the defeated claimant had no right to the land as against a subsequent homestead applicant, who was not a party to the first contest, nor in privity with the successful contestant. Martinson v. Marzolf (1906) 108 N. W. 801, 15 N. D. 471.

Proceedings in which the commissioner of the general land office attempts to cancel an entry and final receipt of purchase, without notice to the entryman, as required by the rules of the interior department, are void for want of jurisdiction and may be attacked collaterally. Risdon v. Davenport (1894) 4 S. D. 555, 57 N. W. 482.

41. Judicial Interference with Land Department.—A court is without jurisdiction to entertain a suit to determine the rights of the parties in land the title to which remains in the United States, and in regard to which a contest between the parties is still pending in the land department. Ripinsky v. Hinchman (1910) 181 Fed. 786, 105 C. C. A. 462 (decree modified on rehearing [1911] 186 Fed. 151, 108 C. C. A. 263); Moses v. Long-Bell Lumber Co. (1913) 206 Fed. 51, 124 C. C. A. 185; Casey v. Vassor (C. C. 1882) 50 Fed. 258 applying Marquez v. Frisbie (1879) 101 U. S. 473, 25 L. Ed. 800; Savage v. Worsham (C. C. 1892) 104 Fed. 18; La Chapelle v. Bubb (C. C. 1895) 69 Fed. 481; Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20 (judgment affirmed [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, which is affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); Pacific Land & Improvement Co. v. Elwood Oil Co. (C. C. 1900) 104 Fed. 20 (judgment affirmed [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, which is affirmed [1903] 23 Sup. Ct. 698, 24 Sup. Ct. 861, 190 U. S. 316, 47 L. Ed. 1073); Humbird v. Avery (C. C. 1901) 110 Fed. 465; Northern Lumber Co. v. O'Brien (C. C. 1903) 124 Fed. 819; U. S. v. Reese (C. C. 1909) 166 Fed. 347; Alaska Pacific Ry. & Terminal Co. v. Copper River & N. E. Ry. Co. (1907) 3 Alaska, 343; Warnekros v. Cowan (Ariz. 1910) 108 Pac. 238; Jimmerson v. Fordyce Lumber Co. (Ark. 1913) 152 S. W. 1022; Wood v. Murray (1892) 85 Iowa, 505, 52 N. W. 356; Andrews v. Same (1892) 85 Iowa, 736, 52 N. W. 357; People v. Kidd (1871) 23 Mich. 440; Mathews v. O'Brien (1901) 88 N. W. 12. 84 Minn. 505; Sims v. Morrison (1904) 100 N. W. 88, 92 Minn. 341; Morton v. Green (1872) 2 Neb. 441; McDonald v. Union Pac. Ry. Co. (1903) 97 N. W. 440, 70 Neb. 346; Rupke v. Moran (Neb. 1910) 127 N. W. 127; Grandin v. La Bar (1893) 3 N. D. 446, 57 N. W. 241; Healey v. Forman (1905) 105 N. W. 233, 14 N. D. 449; Zimmerman v. McCurdy (1906) 106 N. W. 125, 15 N. D. 79; Adams v. Couch (1891) 1 Okl. 17, 26 Pac. 1009; Herbien v. Warren (1894) 2 Okl. 4, 35 Pac. 575; Twine v. Carey (1894) 2 Okl. 249, 37 Pac. 1096; Matthews v. Young (1895) 2 Okl. 616, 39 Pac. 387; Harris v. McClung (1901) 64 Pac. 4, 10 Okl. 701; Jordan v. Smith (1903) 73 Pac. 308, 12 Okl. 703; Frink v. Thomas (1891) 20 Or. 265, 25 Pac. 717, 12 L. R. A. 239.

While matters affecting the disposition of public lands are undetermined in

the land office the courts have no jurisdiction thereof. Johnson v. Towsley (1871) 13 Wall. 72, 82, 20 L. Ed. 485; McDaid v. Oklahoma (1893) 14 Sup. Ct. 59, 62, 150 U. S. 209, 37 L. Ed. 1055; Kirwan v. Murphy (1903) 23 Sup. Ct. 590, 603, 189 U. S. 35, 47 L. Ed. 698 (reversing decree [1901] 109 Fed. 354, 48 C. C. A. 399); Bockfinger v. Foster (1903) 23 Sup. Ct. 836, 840, 190 U. S. 116, 47 L. Ed. 975; Oregon v. Hitchcock (1906) 26 Sup. Ct. 568, 570, 202 U. S. 60, 50 L. Ed. 935; Allen v. Pedro (1902) 68 Pac. 99, 136 Cal. 1; Le Fevre v. Amonson (1905) 81 P. 71, 11 Idaho, 45; Copley v. Dinkgrave (1873) 25 La. Ann. 577; Marks v. Martin (1875) 27 La. Ann. 527; Hall & Legan Lumber Co. v. Jeter (La. 1910) 53 South. 533; St. Paul, M. & M. Ry. Co. v. Olson (1902) 91 N. W. 294, 87 Minn. 117, 94 Am. St. Rep. 693; Commager v. Dicks (1892) 1 Okl. 82, 28 Pac. 864; Proctor v. Stuart (1896) 46 Pac. 501, 4 Okl. 679; Wilbourne v. Baldwin (1897) 47 P. 1045, 5 Okl. 265; Fitzgerald v. Keith (1897) 48 Pac. 110, 5 Okl. 260; Hammer v. Hermann (1901) 65 P. 943, 11 Okl. 127; Hebeisen v. Hatchell (1902) 69 Pac. 888, 12 Okl. 29; Best v. Frazier (1906) 85 Pac. 1119, 16 Okl. 523; Pin v. Morris (1856) 1 Or. 230; Moore v. Fields (1860) 1 Or. 317; Empey v. Plugert (1885) 64 Wis. 603, 25 N. W. 560.

A contest in the land office over conflicting homestead entries is adjudicated and closed when the motion for review is denied and overruled by the secretary of the interior. Cope v. Braden (1901) 67 Pac. 475, 11 Okl. 291; Howe v. Parker (1907) 90 Pac. 15, 18 Okl. 282.

Where a patent to public land was issued by inadvertence or by mistake while an appeal and contest of the right of the patentee was pending, the question of the rights of the parties becomes one of private right, which the courts have jurisdiction to settle in an action to quiet the title. Duluth & I. R. R. Co. v. Roy (1899) 19 Sup. Ct. 549, 550, 173 U. S. 587, 43 L. Ed. 820, affirming judgment (1897) 72 N. W. 794, 69 Minn. 547.

The Secretary of the Interior and Commissioner of the General Land Office may be enjoined from exercising jurisdiction and control over former public land whose title has passed from the government to claimants. Lane v. Watts (1913) 41 App. D. C. 139, decree affirmed (1914) 34 Sup. Ct. 965, 234 U. S. 525, 58 L. Ed. 1440.

A court cannot take jurisdiction on an allegation that the protests filed against complainant's entry in the land office were insufficient to warrant the ordering of a hearing, that being a matter for determination by the land department. Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20 (judgment affirmed [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, which is affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); Pacific Land & Improvement Co. v. Elwood Oil Co. (C. C. 1900) 104 Fed. 20 (judgment affirmed [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, which is affirmed [1903] 23 Sup. Ct. 698, 24 Sup. Ct. 861, 190 U. S. 316, 47 L. Ed. 1073.

A court of equity has jurisdiction to grant appropriate relief to a complainant, who has been deprived of land to which he is entitled under the public land laws through an erroneous construction of the law by the land department as applied to the facts found, although as to the facts the findings of the department are conclusive. Manley v. Tow (C. C. 1901) 110 Fed. 241.

A court of equity held to have jurisdiction to determine conflicting rights between a prior entryman and a patentee of public land. Gildner v. Hall (D. C. 1915) 227 Fed. 704.

The state courts have jurisdiction of an action to quiet title, pending the determination of a contest of plaintiff's title before the United States land department, dependent on whether the lands are agricultural or mineral, and of which question only the land department has jurisdiction, and the court will delay its judgment until the decision of such question by the land department. Potter v. Randolph (1899) 58 Pac. 905, 126 Cal. 458.

If the United States, at the moment of the adjudication, had no title to the land in question, the action of the officers of the land department in transferring title gave the plaintiff none; and the question whether the United States had any title at the time of the adjudication is a question for the courts of justice, and not for the land officers, to decide. Copley v. Dinkgrave (1873) 25 La. Ann. 577; Marks v. Martin (1875) 27 La. Ann. 527.

A state court will not interfere with a decision of the register and receiver of the land office as to pre-emption rights except in case of fraud or a trust. Lewis v. Lewis (1845) 9 Mo. 183, 43 Am. Dec. 540.

The right of the courts to interfere in proceedings for the disposition of public lands arises from the inherent power to correct wrongs done to individuals by an erroneous administration of the law, and, where the wrong involves the transfer of property from one person to another, the proceeding is equitable, and the party claiming the right must show superior equities. Kendall v. Long (Wash. 1911) 119 Pac. 9.

42. —— Adequacy of remedy at law.—See notes under § 1244, post.

43. —— Protection of possessory rights.—While the courts will not encroach on the jurisdiction of the land

department in settling the rights of conflicting claimants under the preemption laws, they will protect a possessor against a trespass. Gauthier v. Morrison (1914) 34 Sup. Ct. 384, 232 U. S. 452, 58 L. Ed. 680; Northern Lumber Co. v. O'Brien (C. C. 1903) 124 Fed. 819; Colwell v. Smith (1860) 1 Wash. T. 92.

The state courts have nothing to do with questions with regard to the entry, but may in a proper case determine who were occupants. Jones v. Hoover (C. C. 1906) 144 Fed. 217; Leech v. Rauch (1859) 3 Minn. 448 (Gil. 332); Laramie Nat. Bank v. Steinhoff (1903) 71 P. 992, 11 Wyo. 290, judgment modified (1903) 73 P. 209, 11 Wyo. 290.

Before title has passed the court will inquire into the status of the parties as determined by the land department sufficiently to furnish protection for their possessory rights. Zimmerman v. McCurdy (1906) 106 N. W. 125, 15 N. D. 79; McQuiston v. Walton (1902) 69 P. 1048, 12 Okl. 130; Reservation State Bank v. Holst (1903) 95 N. W. 931, 17 S. D. 240, 70 L. R. A. 799.

Where, pending a controversy in the land office between parties as to their right to public lands, the party who has been in peaceful possession of the land is forcibly ejected by the other, the state courts have jurisdiction of an action to restore the possession to the ejected party. Fulmele v. Camp (1895) 20 Colo. 495, 39 Pac. 407.

The courts will carry into effect the decisions of the officers of the land department and protect the possessory rights of the successful litigant while the title remains in the United States. Woodruff v. Wallace (1895) 3 Okl. 355, 41 Pac. 357; Cox v. Garrett (1898) 54 P. 546, 7 Okl. 375; McQuiston v. Walton (1902) 69 Pac. 1048, 12 Okl. 130; Brown v. Hartshorn (1902) 69 P. 1049, 12 Okl. 121; Smith v. Finger (1905) 79 P. 759, 15 Okl. 120.

44. —— **Acquisition of title.**—Courts will not restrain the issue of patents for land, but will relieve against fraud practiced to procure them. Leitensdorfer v. Campbell (C. C. 1878) Fed. Cas. No. 8,225.

A state court has no jurisdiction to enjoin defendant from proceeding to obtain title to public lands, for which he has filed an entry in the proper land office, and to require him to file a relinquishment of his claims thereto and to appoint a commissioner to file a relinquishment on defendant's failure to do so; the court being powerless to grait relief until the title passes from the government. Columbia Canal Co. v. Benham (Wash. 1907) 91 P. 961.

45. —— **Regularity of proceedings before Land Department.**—Courts will not entertain an inquiry as to the extent of the investigation by the Secretary of the Interior and his knowledge of the points involved in his decision of a contest in the land department, nor as to the methods by which he reached his determination. De Cambra v. Rogers (1903) 23 Sup. Ct. 519, 521, 189 U. S. 119, 47 L. Ed. 734, affirming judgment Rogers v. De Cambra (1900) 60 Pac. 863, 64 Pac. 894, 132 Cal. 502.

The courts can look no further into the question of the right of a pre-emptioner than to ascertain that he has pursued his claim before the proper tribunal. The adjudication cannot be inquired into. McGhee v. Wright (1855) 16 Ill. (6 Peck) 555.

It is well settled that one without a prior equitable right to the land cannot attack in the courts the claims of the pre-emptor, who holds a title from the United States. The land department at Washington may cancel the entry, but the courts have no right to examine into the regularity of the proceedings before the register and receiver, unless the claimant shows a prior equitable right to the land when the pre-emptor entered it. Mumford v. McKinney (1869) 21 La. Ann. 547.

46. —— **Fraud.**—Where fraud or imposition has been practiced upon an interested party in a proceeding before the Land Department or upon its officers, a court of equity will grant relief. Johnson v. Towsley (1871) 13 Wall. 72, 82, 20 L. Ed. 485; Hoyt v. Weyerhaeuser (1908) 161 Fed. 324, 88 C. C. A. 404 (decree reversed [1911] 31 Sup. Ct. 300, 219 U. S. 380, 55 L. Ed. 258); Kennedy v. Dickie (1906) 85 P. 982, 34 Mont. 205; Paine v. Foster (1896) 53 Pac. 109, 9 Okl. 213 (affirmed [1899] 59 Pac. 252, 9 Okl. 257); Thornton v. Peery (1898) 54 P. 649, 7 Okl. 441; Lamont v. Stimson, 3 Wis. 545, 62 Am. Dec. 696.

A fraud, justifying a court of equity in interfering in a collateral proceeding with a finding of the Land Department of the federal government in a land contest, must have been extrinsic and collateral to the matter tried by the department and not in a matter tried on its merits and on which the decision was rendered. Kennedy v. Dickie (1906) 85 P. 982, 34 Mont. 205.

A court of equity will not re-examine findings of fact by the Land Department for fraud, perjury, or imposition, unless the unsuccessful party has been thereby prevented from fully prosecuting his case or the officers from fully considering it. Paine v. Foster (1896) 53 P. 109, 9 Okl. 213, affirmed (1899) 59 P. 252, 9 Okl. 257.

It is only when fraud, imposition, or perjury has prevented the unsuccessful party from fully prosecuting his case, or the officers from fully considering it, that a court of equity will re-examine and pass upon the questions of fact decided by the land department. It must appear that the fraud affected its determination, which otherwise would

have been in his favor. Thornton v. Peery (1898) 54 P. 649, 7 Okl. 441.

47. —— **Perjury.**—It is not sufficient, in a bill which seeks to show that a decision of the land department was procured by fraud and imposition, to allege that an affidavit was filed in a land office containing false allegations as to facts in issue in the proceeding in which the decision was made, but, in order that the complainant in such a bill may have a re-examination of such issues, it must be alleged and proved that such false testimony has affected the decision, and led to a result that otherwise would not have been reached; it must be shown that some trick, artifice, or deceit was practiced, preventing a full and fair trial in the land department, or preventing the officers thereof from considering the issues, and reaching a proper decision. Durango Land & Coal Co. v. Evans (C. C. A. 1897) 80 Fed. 425, 25 C. C. A. 523, appeal dismissed (1898) 19 Sup. Ct. 875, 43 L. Ed. 1178.

That false testimony was given at a contest as to the character of a claimant's entry on the land in controversy will not justify the interference of the court. Kennedy v. Dickie (1906) 85 Pac. 982, 34 Mont. 205.

Assuming that a judgment of the Land Department of the federal government might be overturned in a court of equity on the ground that false testimony was given at the contest, the allegations and proof must be something more than a mere rehearing on substantially the same case submitted at the hearing which resulted in the judgment of which complaint is made. Id.

Where due notice is given the parties to a controversy in the Land Department of the United States, and they appear and submit the case on a full hearing to the department, equity will not set aside such decision on an allegation that perjury was committed by the parties or the witnesses in the course of the trial in the Land Department. Cagle v. Dunham (1904) 78 P. 561, 14 Okl. 610.

48. —— **Mistake.**—Where the officers of the department have clearly mistaken the law applicable to the facts, equity may grant relief. Hoyt v. Weyerhaeuser (1908) 161 Fed. 324, 88 C. C. A. 404 (decree reversed [1911] 31 Sup. Ct. 300, 219 U. S. 380, 55 L. Ed. 258); Snider v. Ostrander (Colo. App. 1915) 145 Pac. 283; Kennedy v. Dickie (1906) 85 Pac. 982, 34 Mont. 205; Van Patten v. Boyd (N. M. 1915) 150 Pac. 917; King v. Thompson (1895) 3 Okl. 644, 39 Pac. 466; Thornton v. Peery (1898) 54 Pac. 649, 7 Okl. 441; U. S. v. Citizens' Trading Co. (Okl. 1907) 93 P. 448.

The complainant must allege and prove, not only that there was a mistake in the findings, but the evidence before the department from which the mistake resulted, the particular mistake that was made, the way in which it occurred, and the fraud, if any, which induced it. Le Marchel v. Teagarden (C. C. 1907) 152 Fed. 662, decree reversed (1909) 175 Fed. 682, 99 C. C. A. 236.

Where the United States land department, in determining the facts, disregards the law, or errs in its construction thereof, or by mistake has issued a patent for land which on the undisputed facts should have been issued to another, who has contested his claim, and has shown himself entitled to the patent, the person to whom the patent has been issued holds the land for the benefit of the one to whom it should have been issued, and proceedings therefor may be taken in a court of equity. Gage v. Gunther (1902) 68 P. 710, 136 Cal. 338, 89 Am. St. Rep. 141.

A court of equity will not inquire into any question of a misapplication of law by the officers of the land department to a controverted question of fact before them, unless the findings of fact and conclusions of such officers are set out fully in the pleading of the complaining party. Thornton v. Peery (1898) 54 P. 649, 7 Okl. 441.

Cited without definite application, Robinson v. Lundrigan (1910) 178 Fed. 230, 101 C. C. A. 590, dissenting opinion (affirmed 33 Sup. Ct. 255, 227 U. S. 173, 57 L. Ed. 468); U. S. v. Fickett (1913) 205 Fed. 134, 136, 123 C. C. A. 366; Cahn v. Barnes (C. C. 1881) 5 Fed. 326, 331; Southern Development Co. v. Endersen (D. C. 1912) 200 Fed. 272, 277; Medkirk v. U. S. (1909) 44 Ct. Cl. 469, 481; Altschul v. Clark (Or. 1901) 65 Pac. 991; Pierce v. Frace (1891) 26 Pac. 807, 2 Wash. 81.

§ 699a. (Act March 3, 1915, c. 75, § 1.) Hearings by order of Commissioner; fees for taking, etc., depositions.

Hearings in land entries: For hearings or other proceedings held by order of the Commissioner of the General Land Office to determine the character of lands; whether alleged fraudulent entries are of that character or have been made in compliance with law; and of hearings in disbarment proceedings, $35,000: Provided, That where depositions are taken for use in such hearings the fees of the officer taking them shall be 20 cents per folio for taking

and certifying same and 10 cents per folio for each copy furnished to a party on request. (38 Stat. 855.)

This was a provision of the sundry civil appropriation act for the fiscal year 1916, cited above. It was repeated in the subsequent appropriation act for the fiscal year 1917, Act July 1, 1916, c. 209, § 1, 39 Stat.

§ 700. (R. S. § 454.) Custody of seal, books, records, etc.

The Commissioner of the General Land-Office shall retain the charge of the seal heretofore adopted for the office, which may continue to be used, and of the records, books, papers, and other property appertaining to the Office.

Act April 25, 1812, c. 68, §§ 4, 5, 2 Stat. 717.

Original papers on file in the General Land Office, on which a patent to land was issued, may be transmitted and authenticated for use as evidence in the courts, by Act April 19, 1904, c. 1398, post, § 701.

Provisions for furnishing copies of papers filed in the Department, exemplifications of patents, etc., and copies of records, books, etc., in the General Land Office, and for the use of such copies, etc., as evidence, were made by R. S. § 460, post, § 708, R. S. § 461, amended by Act April 2, 1888, c. 54, and by Act May 29, 1908, c. 220, § 15, post, § 711, R. S. § 891, post, § 1503, and R. S. §§ 2469, 2470, post, §§ 709, 710.

Subsequent general provisions for furnishing copies of official books, records, papers, etc., within the custody of the Secretary of the Interior, the head of any bureau, office, etc., or any officer of the Department, were made by Act Aug. 24, 1912, c. 370, ante, §§ 675–680.

§ 701. (Act April 19, 1904, c. 1398.) Use as evidence of original papers on file.

Whenever the register of any United States land office shall be served with a subpœna duces tecum or other valid legal process requiring him to produce, in any United States court or in any court of record of any State, the original application for entry of public lands or the final proof of residence and cultivation or any other original papers on file in the General Land Office of the United States on which a patent to land has been issued or which furnish the basis for such patent, it shall be the duty of such register to at once notify the Commissioner of the General Land Office of the service of such process, specifying the particular papers he is required to produce, and upon receipt of such notice from any register of a United States land office the Commissioner of the General Land Office shall at once transmit to such register the original papers specified in such notice, and which such register is required to produce, and to attach to such papers a certificate, under seal of his office, properly authenticating them as the original papers upon which patent was issued; and such papers so authenticated shall be received in evidence in all courts of the United States and in the several State courts of the States of the Union: Provided, That the Secretary of the Interior shall make rules and regulations to secure the return of such documents to the General Land Office, after use in evidence, without cost to the United States. (33 Stat. 186.)

This act was entitled "An act to authorize the Commissioner of the General Land Office to transmit original papers to be used as evidence."

See notes to R. S. § 454, ante, § 700.

Act April 19, 1904, c. 1396, 33 Stat. 185, which provided that copies of patents, records, books or papers in the General Land Office, authenticated by the seal and certified by the Recorder of the office, should be evidence, equally with the originals, to the same force and effect as when certified by the Commissioner, was repealed by Act Aug. 24, 1912, c. 370, § 5, ante, § 678, other sections of which act made different provisions for the same purpose.

§ 702. (R. S. § 455.) Plats of land surveyed.

The Commissioner of the General Land-Office shall, when required by the President or either House of Congress, make a plat of any land surveyed under the authority of the United States, and

give such information respecting the public lands and concerning the business of his office as shall be directed.

Act April 25, 1812, c. 68, § 6, 2 Stat. 717.

Notes of Decisions

Necessity of filing copy of plat.— Lands are not surveyed lands by the United States until a certified copy of the official plat of survey has been filed in the local land office. U. S. v. Curtner (C. C. 1889) 38 Fed. 1, decree reversed Curtner v. U. S. (1893) 13 Sup. Ct. 985, 149 U. S. 662, 37 L. Ed. 890.

§ 703. (R. S. § 456, as amended, Act July 31, 1894, c. 174, § 7.) Returns relative to lands.

All returns relative to the public lands shall be made to the Commissioner of the General Land-Office.

Act April 25, 1812, c. 68, § 9, 2 Stat. 717. Act July 31, 1894, c. 174, § 7, 28 Stat. 207.

The amendment of this section by Act July 31, 1894, c. 174, § 7, cited above, consisted in the omission of provisions for the settlement of accounts relative to the public lands, which followed the words of the section set forth above, thus: "And he shall have power to audit and settle all public accounts relative to the public lands; and upon the settlement of any such account, he shall certify the balance, and transmit the account with the vouchers and certificate to the First Comptroller of the Treasury, for his examination and decision thereon." The portions of the section thus omitted were superseded by provisions for the settlement of such accounts by the accounting officers of the Treasury Department, in Act July 31, 1894, c. 174.

Regulations by the Commissioner to prevent duplication of returns were provided for by Act March 2, 1895, c. 177, § 3, post, § 707.

Cited without definite application, U. S. v. Brindle (1884) 4 Sup. Ct. 180, 182, 110 U. S. 688, 28 L. Ed. 286; Iowa v. McFarland (1884) 4 Sup. Ct. 210, 211, 110 U. S. 471, 28 L. Ed. 198; Scully v. U. S. (D. C. 1912) 197 Fed. 327.

§ 704. (R. S. § 457.) Warrants for military lands.

In all cases in which land has heretofore or shall hereafter be given by the United States for military services, warrants shall be granted to the parties entitled to such land by the Secretary of the Interior; and such warrants shall be recorded in the General Land-Office, in books to be kept for the purpose, and shall be located as is or may be provided by law; and patents shall afterwards be issued accordingly.

Act April 25, 1812, c. 68, § 7, 2 Stat. 717.

§ 705. (R. S. § 458.) Issue of patents for lands.

All patents issuing from the General Land-Office shall be issued in the name of the United States, and be signed by the President, and countersigned by the Recorder of the General Land-Office; and shall be recorded in the Office, in books to be kept for the purpose.

Act April 25, 1812, c. 68, § 8, 2 Stat. 717. Act March 3, 1841, c. 26, § 2, 5 Stat. 417.

The signature of patents in the name of the President by a secretary or executive clerk was provided for by R. S. §§ 450, 451, and Act June 19, 1878, c. 239, § 1, ante, §§ 695–697.

Notes of Decisions

1. Nature of patent.
2. Necessity of patent.
3. Propriety and purpose of issuance of patent.
4. Execution and form.
5. —— Signature and seal.
6. —— Description.
7. —— Grantees.
8. Issuance of second patent.
9. Issuance of patent to one of several purchasers or for part of land.
10. Alteration of patent after delivery.
11. Delivery and acceptance.
12. —— Delivery to heirs, representatives or assigns.
13. Construction and operation.
14. —— Title conveyed.
15. —— Effect of issuance of patent upon powers of land department.
16. —— Relation back.
17. —— Property and rights included.
18. —— Quantity and boundaries of land conveyed.
19. —— Conditions and exceptions.
20. —— Issuance of fictitious person.
21. —— Senior and junior patents.
22. —— Rights of purchasers.
23. —— Recordation.
24. —— Patents as evidence.
25. —— Presumptions.

26. —— Recitals.
27. —— Validity.
28. —— Conclusiveness.
29. —— Collateral attack.
30. Equitable remedies.
31. —— Right to maintain suit.
32. —— Trust in lands granted in general.
33. —— Mistake or misapplication of law.
34. —— Mistake of fact.
35. —— Fraud or imposition.
36. —— Patentee's knowledge of infirmity.
37. —— Lands previously granted.
38. —— Pleadings and proof.
39. Cancellation of patents.
40. —— Necessity of suit.
41. —— Who may bring suit.
42. —— Jurisdiction of courts.
43. —— Jurisdiction of land department.
44. —— Grounds for cancellation.
45. —— Parties.
46. —— Evidence and burden of proof.
47. —— Decree.
48. Correction of patents.

1. Nature of patent.—A "patent" is an instrument by which the United States conveys, to persons entitled thereto, the legal fee-simple title to public lands. McCarty v. Helbling (Or. 1914) 144 Pac. 499.

2. Necessity of patent.—A patent is necessary to convey the legal title to public lands. Carter v. Ruddy (1897) 17 Sup. Ct. 640, 641, 166 U. S. 493, 41 L. Ed. 1090.

Purchasers of lands reserved by the Creek Treaty of March 24, 1832, arts. 2, 3, must have patents to complete their title. (1836) 3 Op. Atty. Gen. 40.

Patents must issue under the Choctaw Treaty of 1830, arts. 14, 19, and the Chickasaw Treaty of 1834, in order to divest the United States of title in the reservations. (1836) 3 Op. Atty. Gen. 49.

Patents are requisite to divest the title of the United States to the Ottawa, Chippewa, and Pottowatomie reserves, and should be so issued as to disclose the estate granted. (1836) 3 Op. Atty. Gen. 55.

The United States may transfer its lands by a special act, without the issuance of a patent. Hall v. Jarvis (1872) 65 Ill. 302.

The legal title to lands does not vest until a patent is issued. Roads v. Symmes (1824) 1 Ohio (1 Ham.) 281, 13 Am. Dec. 621.

3. Propriety and purpose of issuance of patent.—Patents should not issue for lands inadvertently sold. (1828) 2 Op. Atty. Gen. 186.

A patent from the United States may grant title to land, or merely ratify or confirm, or constitute evidence of, a previous grant. McArthur v. Brue (Ala. 1914) 67 South. 249.

4. Execution and form.—All the duties respecting the execution of patents, except the attestation, are ministerial, and may be performed either by the clerks or by the Secretary. (1841) 3 Op. Atty. Gen. 623; Moyer v. McCullough (1849) 1 Ind. 339.

Each and every one of the integral parts of the execution is essential to perfect a patent, and all are mandatory. McGarrahan v. New Idria Min. Co. (1877) 96 U. S. 316, 321, 24 L. Ed. 630.

The issuing of a patent is not so purely a ministerial act as to follow a patent certificate as a matter of course. (1825) 2 Op. Atty. Gen. 15.

5. —— Signature and seal.—The president may sign by his secretary, but the recorder must sign himself. McGarrahan v. New Idria Min. Co. (1877) 96 U. S. 316, 320, 321, 24 L. Ed. 630.

A patent of public lands issued by the United States is not invalid because it is signed, "By the President, Abraham Lincoln. By W. P. S., Secretary." Bonds v. Hickman (1866) 29 Cal. 460.

Neither the president nor any officer of the government has any power to dispose of the public domain, or to sign or cause the seal of the United States to be affixed to a patent, except such as is conferred by a statute of the United States. McGarrahan v. New Idria Min. Co. (1874) 49 Cal. 331.

B. & C. Comp. Or. § 788, subd. 15, enacts that it is to be presumed that official duty has been regularly performed. Held, in view of the federal act, that where an abstract of title shows a patent, though it does not show it countersigned by the Recorder, it will be presumed that it was so countersigned. McLeod v. Lloyd (1903) 71 Pac. 795, 43 Or. 260.

A patent which appears to be regular on its face will be presumed, in the absence of any evidence to the contrary, to have been signed according to law; and the court will not say, from an examination of the handwriting only, that the name of the president was not signed by the proper person. Parkison v. Bracken (Wis. 1842) 1 Pin. 174, 39 Am. Dec. 296.

6. —— Description.—By the Act of March 1, 1800, c. 13, the Secretary of the Treasury was required to number the 100-acre lots of the fifty quarter-townships progressively, and that the patent issued for each should inter alia give the number of the lot located. Such description cannot be departed from, for no form of description varying therefrom will pass the title of the United States; nor can any patent be issued until the lots shall have been numbered. "The system which has been adopted for the arrangement and appropriation of these lands is beautiful and perfect as it stands; no ministerial officer should be permitted to touch or alter it in any of its parts." (1819) 1 Op. Atty. Gen. 323.

The description of land in a certificate of entry and patent, though somewhat general, will be good if the land can be located by it, in connection with the field notes of the original survey, which enter into and form a part of the en-

try or patent, as if copied into them. Hunt v. Rowley (1877) 87 Ill. 491.

In a patent from the United States, a description, "the west half of the southwest quarter of section nine, in township fifteen north, range ten west, in the district of lands offered for sale at Springfield, Illinois," is sufficiently certain. Mapes v. Scott (1880) 94 Ill. 379.

It is a sufficient description of land in a patent from the United States that the number of the section, township, and range, according to the public surveys, be given. Bledsoe v. Little (1839) 5 Miss. (4 How.) 13.

Where the patents from the United States all refer to the official plat of the survey returned by the surveyor general to the General Land Office for a description of the land granted, the plat, with all of its marks and figures, and the field notes, became a part of the patent for all purposes of identifying the land granted. Goltermann v. Schiermeyer (1892) 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

7. —— **Grantees.**—A patent for lands paid for by the father, but delivered to his son of the same name, who was described, by his residence, as the grantee, is valid until vacated for the mistake of description. Babcock v. Pettibone (C. C. 1874) Fed. Cas. No. 700.

A patent of land, describing the grantees as "the heirs" of M., deceased, is not void for uncertainty. Payne v. Mathis (1890) 92 Ala. 585, 9 South. 605.

A patent for land issued by the United States to "J. S., administrator of R. S. deceased," vests the legal title to the land in J. S. Bonds v. Hickman (1867) 32 Cal. 202.

Where the wife, as heir of the husband, applied for a patent which was issued to her as his assignee, a title in her, independent of her husband, cannot be inferred, and the patent must inure to the benefit of the husband's vendee. Beauvais v. Wall (1859) 14 La. Ann. 199.

The issuing of a patent for lands by the United States does not affect any rights subsisting between third persons and the patentee, growing out of contracts in relation to the land covered by the patent. The patent, to whomever issued, inures to the benefit of the party to whom the patentee is bound to convey it, or for whose use he ought in law to hold it. Hennen v. Wood (1861) 16 La. Ann. 263.

If a party disposes of lands to which he is entitled by an entry and survey, a patent subsequently issued to himself or his heirs will inure to the benefit of his grantees. Douglas v. McCoy (1832) 5 Ohio (5 Ham.) 522.

8. **Issuance of second patent.**—A second patent should not issue for the same land so long as the prior patent remains unrevoked by a judicial tribunal. (1843) 4 Op. Atty. Gen. 150; (1847) 4 Op. Atty. Gen. 558; (1871) 13 Op. Atty. Gen. 457.

9. **Issuance of patent to one of several purchasers or for part of land.**—A patent cannot issue to one of two purchasers of a quarter section of land, or for any unspecified portion of the same. Where such conditions exist as will permit a partition of the land held in common, a patent may be issued to the purchaser entitled after the division. (1844) 4 Op. Atty. Gen. 319.

10. **Alteration of patent after delivery.**—When a patent for land has been executed by the president, and recorded in the general land office, all power of the executive department over it has ceased, and the return of a patent to the land office by order of the commissioner of that office, the tearing from it of the seals by him, his erasing the president's name from it, and mutilating the record of it, are all nugatory acts. Bicknell v. Comstock (1885) 5 Sup. Ct. 399, 113 U. S. 149, 28 L. Ed. 962.

It is not competent or proper for the Commissioner of the General Land Office to make alterations in the dates of patents for lands, after the delivery thereof to the grantees. (1844) 4 Op. Atty. Gen. 329.

A patent does not convey the title to land, the description of which is inserted after its issuance and delivery. Doe ex dem. Alabama State Land Co. v. McCullough (Ala. 1908) 46 So. 472.

11. **Delivery and acceptance.**—Delivery of the patent for public land is not essential to its validity. Le Roy v. Clayton (C. C. 1874) Fed. Cas. No. 8,-268; U. S. v. Laam (C. C. 1906) 149 Fed. 581; Houghton v. Hardenberg (1878) 53 Cal. 181; Cruz v. Martinez (1878) 53 Cal. 239; Gilmore v. Sapp (1881) 100 Ill. 297; Rogers v. Clark Iron Co. (1908) 116 N. W. 739, 104 Minn. 198; Hammond v. Johnston (1887) 93 Mo. 198, 6 S. W. 83 (appeal dismissed [1891] 142 U. S. 73, 12 Sup. Ct. 141, 35 L. Ed. 941); Hedrick v. Stohl (1891) 105 Mo. 43, 16 S. W. 835; Sayward v. Thompson (1895) 11 Wash. 706, 40 Pac. 379.

Where an applicant for land under a homestead entry has made due proof, paid the fees, and received a final certificate, and his proofs and papers were forwarded to the commissioner of the general land office, who found them to be in all respects in compliance with the law, and that relator was entitled to a patent, and a patent was duly signed, sealed, and countersigned by the recorder of the general land office, and recorded in the land records, and was transmitted to the local land officers with instructions to deliver, but such officers refused to deliver it because they had been instructed by the commissioner to return it, that the patent was returned and deposited in the Department of the Interior, subject to

the control of the Secretary of the Interior, mandamus will lie to compel the secretary to deliver the patent. U. S. ex rel. McBride v. Schurz (1880) 102 U. S. 378, 405, 26 L. Ed. 167.

Persons having land allotted to them under resolve of Congress of Aug. 29, 1787, are not entitled to patents till provision is made for issuing them. (1794) 1 Op. Atty. Gen. 45.

Patents, under Act of June 9, 1794, c. 62, for lands in Virginia, cannot be issued until the claimant shall have first complied with the laws of Virginia to which the act refers. (1797) 1 Op. Atty. Gen. 79.

Receipt by the patentee of a patent for land issued to him by the United States is not necessary to pass title. Eltzroth v. Ryan (1891) 89 Cal. 135, 26 Pac. 647.

Where a patent of land bore date subsequent to the death of the patentee, but was proved to have been received by him, it will be presumed to have been delivered in his lifetime and valid. Carter v. Blanton (1857) 33 Miss. 291.

12. —— Delivery to heirs, representatives or assigns.—A patent certificate, or patent issued, or confirmation made to an original grantee or his legal representatives, embraces representatives of the grantee by contract, as well as by operation of law. Hogan v. Page (1864) 2 Wall. 605, 607, 17 L. Ed. 854.

Where the local law authorizes a transfer of the right to a patent at sheriff's sale, a patent may issue to the purchaser at such sale. (1816) 1 Op. Atty. Gen. 191.

Patents, under the Act of Feb. 17, 1815, c. 45, must issue to the owner at the date of the act, if alive, and if dead to the heirs or devisees. The act attaches no assignable quality to the charity which it bestows, and, being the only authority for issuing a patent, its terms must be strictly pursued. (1820) 1 Op. Atty. Gen. 361.

The Commissioner of the General Land Office is bound to issue the patent to the original beneficiary, his heirs or assigns, and must, therefore, have satisfactory evidence of assignment before he issues to assigns. (1829) 2 Op. Atty. Gen. 276.

On a certificate to A. & Co. assigned by A. alone, a patent may issue to A.'s assignees; and his partners must seek relief, if they shall be entitled to any, in the courts. (1842) 4 Op. Atty. Gen. 96.

After land has been sold by the United States by certificate, the United States holds the legal title until the patent issues, but only in trust for the purchaser. The officers can only act ministerially and issue it to him, and cannot act judicially and determine that another claimant is entitled to it. Arnold v. Grimes (1856) 2 Iowa (2 Clarke) 1.

A granting of a patent certificate or patent to the original grantee or his legal representatives embraces representatives by contract, such as assignee or grantee, as well as by operation of law, and leaves open to inquiry the question to whom the certificate or patent shall inure. McQueen v. Flasdick-Black Land & Lumber Co. (1912) 58 South. 886, 130 La. 1071.

13. Construction and operation.—Until the patent issues, the fee of the land is in the United States. Bagnell v. Broderick (1839) 13 Pet. 436, 450, 10 L. Ed. 235; Jones v. Inge (1837) 5 Port. 327; Pepper v. Dunlap (1844) 9 Rob. 283; Foley v. Harrison (1850) 5 La. Ann. 75; Sweatt v. Corcoran (1859) 37 Miss. 513; Carman v. Johnson (1854) 20 Mo. 108, 61 Am. Dec. 593.

A patent to land is the judgment of the land department and a conveyance of legal title. James v. Germania Iron Co. (1901) 107 Fed. 597, 46 C. C. A. 476 (appeal dismissed [1904] 195 U. S. 638, 25 Sup. Ct. 786, 49 L. Ed. 356); King v. McAndrews (1901) 111 Fed. 860, 50 C. C. A. 29 (reversing judgment [C. C. 1900] 104 Fed. 430); Neff v. U. S. (1908) 165 Fed. 273, 277, 91 C. C. A. 241; Le Marchel v. Teegarden (C. C. 1904) 133 Fed. 826; (C. C. 1907) Le Marchel v. Teagarden, 152 Fed. 662, decree reversed (1909) 175 Fed. 682, 99 C. C. A. 236.

A patent appropriates the land it describes without reference to the regularity of the proceedings preliminary to its issue, and vests title in the patentee. U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 15 C. C. A. 96; Ayres v. U. S. (1907) 42 Ct. Cl. 385; Carroll v. Draughon (Ala. 1911) 56 South. 207; Hall v. Prindle (1859) 2 Ohio Dec. 261; Smith v. City of Beloit (1904) 100 N. W. 877, 122 Wis. 396.

Where an act of congress is in itself a grant, the purpose of a patent is merely confirmation of a title already bestowed, and ejectment may be maintained without the patent. Whitney v. Morrow (1885) 5 Sup. Ct. 333, 112 U. S. 693, 28 L. Ed. 871; Northern Pac. R. Co. v. Majors (1884) 5 Mont. 111, 2 Pac. 322.

A patent becomes effective when it is executed and recorded with the recorder of the General Land Office at Washington, and no other act will be necessary to pass title. Lonabaugh v. U. S. (1910) 179 Fed. 476, 103 C. C. A. 56 (reversing judgment U. S. v. Lonabaugh [D. C. 1907] 158 Fed. 314); U. S. v. Laam (C. C. 1906) 149 Fed. 581.

Under R. S. § 441, ante, § 681, and this section, the land department, including in that term the Secretary of the Interior, the commissioner of the general Land Office, and their subordinate officers, constitutes a special tribunal vested with judicial power to hear claims to public lands, and having power to execute its judgments by conveyances to the partes entitled. U. S. v. Winona & St. P. R. Co. (1895) 67

Fed. 948, 955, 15 C. C. A. 96 (affirmed [1897] 17 Sup. Ct. 368, 165 U. S. 463, 41 L. Ed. 789); King v. McAndrews (1901) 111 Fed. 860, 863, 50 C. C. A. 29.

In construing public grants, issued in great numbers by the officers of the government, and in accordance with a certain formulary deliberately adopted by those officers, the courts may resort to contemporaneous documents on file in the proper department, for the purpose of ascertaining the intent of the grantors. (1836) 3 Op. Atty. Gen. 111.

Whether patents irregularly issued shall have effect from their date or time of delivery may be determined by parol testimony. (1844) 4 Op. Atty. Gen. 329.

A patent of lands does not pass the title, but is only evidence that it has before passed. Goodlet v. Smithson (1837) 5 Port. 245, 30 Am. Dec. 561.

The patent of the government is to be construed strictly, and not most strongly against the grantor. McManus v. Carmichael (1856) 3 Iowa (3 Clarke) 1.

A patent from the government to certain land was signed, sealed, and recorded August 30, 1859; but, as there was a question as to who was legally entitled to a patent for the land, it was not delivered until November 12, 1860. Held, that the patent took effect, so as to vest the legal title in the grantee, on August 30, 1859. Hammond v. Johnston (1887) 93 Mo. 198, 6 S. W. 83.

14. —— Title conveyed.—Where patents were issued, the government is estopped from setting up a claim for waste committed by the patentees on the ceded lands. Thayer v. U. S (1885) 20 Ct. Cl. 137.

A patent from the United States, issued in pursuance of, and based solely and exclusively upon, a prior entry accompanied by full payment of the purchase price, does not convey to the entryman a new or independent title disconnected with his equitable title derived from such entry and final payment, but converts the imperfect or equitable title into a perfect legal one, enabling the patentee to seek and maintain legal remedies where theretofore he was, in the absence of statute, confined to equitable ones. Hagan v. Ellis (1897) 22 South. 727, 39 Fla. 463, 63 Am. St. Rep. 167.

On the sale of lands by the United States, the patent transfers to the purchaser the entire legal estate and seisin to as full an extent as the government held them. Cook v. Foster (1845) 7 Ill. (2 Gilman) 652; Vansickle v. Haines (1872) 7 Nev. 249.

The federal government can convey no greater title than it has. Hough v. Porter (1909) 98 Pac. 1083, 51 Or. 318; Id. (1908) 95 Pac. 732, 51 Or. 318, rehearing denied (1909) 102 Pac. 728, 51 Or. 318.

Equities subject to which one holds legal title to land under a United States patent may be enforced by the courts; so, where the patent is silent as to the respective interests of the grantees, their rights may be settled. Kimball v. McIntyre (1881) 3 Utah, 77, 1 Pac. 167.

15. —— Effect of issuance of patent upon powers of land department.—The issuance of a patent, or such other act as passes the legal title from the government, is the final act, and the expression and entry of the final judgment, of the officers of the Land Department, and marks the termination of the jurisdiction of these officers. Peyton v. Desmond (1904) 129 Fed. 1, 63 C. C. A. 651.

A patent signed, sealed, and recorded takes effect from such time, and it cannot be recalled while en route to the local officer for delivery to the patentee, without consent of the patentee. Le Roy v. Clayton (C. C. 1874) Fed. Cas. No. 8,268; Same v. Jamison (C. C. 1874) Fed. Cas. No. 8,271.

Where the identical land, by the same metes and bounds, has been previously granted according to law by the United States to other individuals, no subsequent act on the part of the United States can possibly affect the prior title to the premises derived from their own patent. (1807) 1 Op. Atty. Gen. 159.

After a patent has issued, no further departmental interference is legally possible; the jurisdiction of the Secretary of the Interior being limited to a request that proceedings be instituted to annul the patent. Southern Pac. R. Co. v. Jackson Oil Co. (1913) 129 Pac. 276, 164 Cal. 392; Sage v. Rudnick (1904) 100 N. W. 106, 91 Minn. 325 (reversing judgment on rehearing [1904] 98 N. W. 89, 91 Minn. 325); Northern Pac. Ry. Co. v. Spray (1901) 67 Pac. 377, 27 Wash. 1.

Though a patent to public land has been erroneously issued, it terminates the authority and control of the land department over the title, which does not again attach until the patent has been set aside by the courts. Anderson v. Woodward (Colo. 1914) 140 Pac. 198.

The moment a patent passes the great seal, it is beyond the power of the government officers. Lott v. Prudhomme (1842) 3 Rob. 293.

16. —— Relation back.—The patent relates to and takes effect from the date of the entry. Pacific Coast Min. & Mill. Co. v. Spargo (C. C. 1883) 16 Fed. 348; Coleman v. Peshtigo Lumber Co. (C. C. 1887) 30 Fed. 317; Birmingham Coal & Iron Co. v. Doe ex dem. Arnett (Ala. 1913) 62 South. 26; Quinn v. Baldwin Star Coal Co. (1904) 76 Pac. 552, 19 Colo. App. 497; King v. Great Northern Ry. Co. (1911) 119 Pac. 709,

20 Idaho, 687; (1875) Waters v. Bush, 42 Iowa, 255; (1876) Rankin v. Miller, 43 Iowa, 11; Steinspring v. Bennett (1861) 16 La. Ann. 201; Clark v. Hall (1869) 19 Mich. 356; Magruder v. Esmay (1878) 35 Ohio St. 221; Washington Rock Co. v. Young (1905) 80 Pac. 382, 29 Utah, 108, 110 Am. St. Rep. 666.

A patent to public lands relates back to the time when they were purchased, and gives the patentee title as of that date. Cavender v. Smith's Heirs (1857) 5 Iowa (5 Clarke) 157; Fisher v. Hallock (1883) 15 N. W. 552, 50 Mich. 463; Nicholson v. Congdon (1905) 103 N. W. 1034, 95 Minn. 188.

The issue of a patent does not cause the patentee's legal title to relate back to the date of his certificate of purchase. Redfield v. Parks (1889) 10 Sup. Ct. 83, 132 U. S. 239, 33 L. Ed. 327.

A land patent relates back to the original land office certificate, and the purchaser's title dates from that time. Cavender v. Smith (1856) 3 G. Greene, 349, 56 Am. Dec. 541.

A patent for lands issued on a prior certificate operates to vest the title in the patentee, and by relation back to the date of the certificate of location cuts off an intermediate certificate. Klein's Heirs v. Argenbright (1869) 26 Iowa, 493.

A patent will not be held to take effect as of the date of the initial step taken by the patentee to obtain title, where the rights by him acquired by such initial step were lost by his lack of diligence, and the effect of such an application of the doctrine of relation would be to render a party accountable for coal mined, who had made a cash entry after the patentee's right to the land had apparently been abandoned, and who had developed mines, and had worked them for several years, with the knowledge of the patentee. Evans v. Durango Land & Coal Co. (1897) 80 Fed. 433, 25 C. C. A. 531, appeal dismissed Durango Land & Coal Co. v. Evans (1898) 19 Sup. Ct. 875, 43 L. Ed. 1178.

A patent to public lands may be shown to be connected with and to relate back to a previous inchoate legal title. Jones v. Inge (Ala. 1837) 5 Port. 327.

The doctrine of legal title relating back to the inception of the grantee's equity is a legal fiction, adopted to protect the legal title. Price v. Dennis (Ala. 1909) 49 South. 248.

A vested right to a patent of public lands is treated as a patent in fact issued; the patent, when issued, relating back to the inception of the patentee's right. Stoneroad v. Beck (N. M. 1912) 120 P. 898.

17. —— Property and rights included.—A patent carries all mines in the lands patented, to which no right has attached at the time the patent issues. Pacific Coast Min. & Mill. Co. v. Spargo (C. C. 1883) 16 Fed. 348.

A patent from the United States of public lands, without any reservations or exceptions, passes to the patentee everything anywise connected with the soil, forming any portion of its bed, or fixed to its surface—in short, everything included in the term "land." Moore v. Smaw (1861) 17 Cal. 199, 79 Am. Dec. 123.

What rights go to a patentee of land depend, not upon any supposed adjudication contained in the patent, but upon the general law of the state where the land is situated. City of Los Angeles v. Los Angeles Farming & Milling Co. (Cal. 1908) 93 Pac. 869, rehearing denied Id. 1135.

A purchaser of a tract of government land, which has on it a mill and dam, which cause the water of a stream running through it to overflow other public lands, the entry being made and a patent received in the usual form, has no right to continue the dam so as to overflow such other lands after they have been entered by individuals. Wilcoxon v. McGhee (1851) 12 Ill. (2 Peck) 381, 54 Am. Dec. 409.

Where a patent for land, on which stood a mill and dam, whereby adjoining public lands were overflowed, was issued in the usual form, it was held that the right to overflow such adjoining lands belonging to the government was not annexed to the grant, as an appurtenance, by any natural or legal necessity. Id.

A grantee by patent of a legal subdivision of land cannot thereby derive title to land in another legal subdivision. Kinsella v. Stephenson (1914) 106 N. E. 950, 265 Ill. 369.

A transfer by the government of its title to public lands passes title to a fence that had been built on the land by the maker. Burlerson v. Teeple (Iowa 1850) 2 G. Greene, 542.

A patent to land covers all right to the use of water thereon, though another, before the patent, had attempted to divert the water. Vansickle v. Haines (1872) 7 Nev. 249.

18. —— Quantity and boundaries of land conveyed.—The quantity of land granted to a patentee must in an action at law be ascertained from the description in the patent, and cannot be controlled by any supposed original equity to a quarter section to which a claim might have been made before the register and receiver. Gazzam v. Phillips (1857) 20 How. 372, 376, 15 L. Ed. 958.

Whether a survey and patent rightfully or wrongfully excludes certain lands, the patent is conclusive as to title in a law action, and the patent including the lands must prevail over a patent excluding them, and the decree of con-

firmation on which it is issued. Mora v. Nunez (C. C. 1882) 10 Fed. 634.

Certain boundaries are of more importance than quantity in designating lands. Therefore, where a patent calls for a subdivision of a fractional quarter section, described as lying north of a certain creek, and containing a specified number of acres, it embraces all the land in the subdivision north of the creek, although the actual number of acres exceeds the number specified in the patent. Stein v. Ashby (1854) 24 Ala. 521.

The lands formerly occupied by Old Fort Charlotte, as shown by the map and plat returned to the general land office by the surveyor general, were separated from the river by a narrow strip of land. Held, that a patent from the United States for such lands did not pass this strip nor adjacent land on the river front, since reclaimed from the water. Boulo v. New Orleans, M. & T. R. Co. (1876) 55 Ala. 480.

A patent describing land as the S. E. ¼ of the S. W. ¼ of a section, "according to the official plat of survey," held to convey all of the S. ½ of the quarter section, surveyed in a single tract, as shown by the official plat, except a portion beyond the banks of a navigable stream. Perry v. Board of Com'rs of Caddo Levee Dist. (1913) 61 South. 511, 132 La. 415.

Where a patent to an island was regular on its face and conveyed a tract containing "about one hundred acres" for a consideration of $125, it was not subject to collateral attack because the island in fact contained 127 acres, and was therefore conveyed for a price less than that authorized by law. Frank v. Goddin (1906) 91 S. W. 1057, 193 Mo. 390, 112 Am. St. Rep. 493.

In order to determine the extent of a title included in a conveyance from the government, the courts must consider all acts in force at the time affecting the public domain, to ascertain what interests remain subject to transfer. Hough v. Porter (1909) 98 Pac. 1083, 51 Or. 318; Id. (1908) 95 Pac. 732, 51 Or. 318, rehearing denied (1909) 102 P. 728, 51 Or. 318.

The fact that a patent describes the land as "the northeast quarter of the southeast quarter of section 8," instead of as lot 4, does not exclude from the grant any of the land that would properly be in lot 4, when it appears by the government plat that it was intended to pass lot 4, which was marked as containing the same number of acres as were granted by the patent. Sheppard v. Wilmott (1891) 79 Wis. 15, 47 N. W. 1054.

The fact that lot 4 is in two quarter sections is immaterial, as a given fractional lot may be crossed by quarter section lines, when the lines of the plat show that it was not intended to extend the intersecting line of the adjoining quarter section so as to exclude from lot 4 the land in controversy, which is necessary to make up the number of acres as called for in the plat for lot 4. Id.

Where the proofs, together with the maps filed with a patent, and the surveys and field notes, including the records of the general land office, conclusively show that a certain piece of land was intended to be included in a patent describing the land as "lot 1, section 6," it will pass by the patent, though the land extends beyond section 6. Lyon v. Fairbanks (1891) 79 Wis. 455, 48 N. W. 492, 24 Am. St. Rep. 732.

19. —— Conditions and exceptions.—When public lands are conveyed to private individuals, no especial rights or exemptions, which might have been, but were not, prescribed by Congress, pass to the patentee. Empire Water & Power Co. v. Cascade Town Co. (1913) 205 Fed. 123, 123 C. C. A. 355, reversing decree in part Cascade Town Co. v. Empire Water & Power Co. (C. C. 1910) 181 Fed. 1011.

Where a patent to public land reserves the right of a proprietor of a mining vein or lode to extract and remove his ore therefrom, should it be found to penetrate or intersect the lands granted by the patent, the reservation refers only to parties who are proprietors at the time when the right of the patentee attaches to the land, or the date of the entry or patent. Pacific Coast Min. & Mill. Co. v. Spargo (C. C. 1883) 16 Fed. 348.

An exception inserted in a patent, which is not authorized by the statute to be inserted, is void. Francoeur v. Newhouse (C. C. 1889) 40 Fed. 618.

A condition superadded to a patent certificate by the register of a land office, which was not required by the law directing its issuance by him, is void, and the patentee takes it discharged of the condition. Innerarity v. Mims' Heirs (1840) 1 Ala. 660.

Where a patent to agricultural land contained a clause that it should be subject to the right of the proprietor of a vein or lode to abstract and remove his ore therefrom should the same be found to penetrate or intersect the premises granted, such exception only subjected the land to the right of the proprietor of a vein or lode the apex of which lay outside of the land patented, but penetrated into the same on its dip or downward course, to abstract and remove his ore therefrom as provided by law. Paterson v. Ogden (1903) 74 Pac. 443, 141 Cal. 43, 99 Am. St. Rep. 31.

20. —— Issuance to fictitious person.—A patent for land issued to a fictitious person passes no title. Moffat v. U. S. (1884) 5 Sup. Ct. 10, 14, 112 U. S. 24, 28 L. Ed. 623; U. S. v. Southern Colorado Coal & Town Co. (C. C. 1883) 18 Fed. 273 (decree reversed Colorado Coal & Iron Co. v. U. S. [1887] 8 Sup. Ct. 131, 123 U. S. 307, 31 L. Ed. 182);

Thomas v. Wyatt (1857) 25 Mo. 24, 69 Am. Dec. 446; Same v. Boerner (1857) 25 Mo. 27; Same v. Wyatt (1864) 35 Mo. 127.

21. —— **Senior and junior patents.**—Where two conflicting patents have been issued by the United States, each purporting to confirm the same tract of land to a different party, the senior patent is conclusive of the title; and, if the question is solely between the two patents, the junior patent is void. Gallipot v. Manlove (1834) 2 Ill. (1 Scam.) 156; Garner v. Willett (1857) 18 Ill. (8 Peck) 455; Magwire v. Tyler (1867) 40 Mo. 406; Parkison v. Bracken (1842) 1 Pin. 174, 39 Am. Dec. 296.

In equity a junior patent or a certificate of purchase of a tract of land will prevail over an older one, if the right on which it is based is prior. Isaacs v. Steel (1841) 4 Ill. (3 Scam.) 97; Pujo v. Fouchy (La. 1880) Man. Unrep. Cas. 154.

22. —— **Rights of purchasers.**—A purchaser in good faith for a valuable consideration from a patentee of United States lands, without notice of adverse claims, is entitled to rely on the record; and the patent, if valid on its face, will not be vacated, as to him, for matters dehors the record. Neff v. U. S. (1908) 165 Fed. 273, 91 C. C. A. 241; U. S. v. Keleno (1915) 226 Fed. 180, 141 C. C. A. 178; U. S. v. Debell (C. C. A. 1915) 227 Fed. 760; U. S. v. Minor (C. C. 1886) 29 Fed. 134; U. S. v. Sierra Nevada Wood & Lumber Co. (C. C. 1897) 79 Fed. 691.

A purchaser need not go behind the patent, but may rely on its presumptive validity. U. S. v. Laam (C. C. 1906) 149 Fed. 581; State v. Hewitt Land Co. (1913) 134 Pac. 474, 74 Wash. 573.

A purchaser of public lands is not affected with notice of latent defects in a chain of assignments recited in his patent, when such assignments purport to have been made by the proper persons. Bell v. Duncan (1842) 11 Ohio, 192.

23. —— **Recordation.**—Failure to record a patent does not defeat the grant. McGarrahan v. New Idria Min. Co. (1877) 96 U. S. 316, 323, 24 L. Ed. 630; McQueen v. Flasdick-Black Land & Lumber Co. (1914) 65 South. 900, 135 La. 698; Sands v. Davis (1879) 40 Mich. 14.

The record of a United States patent for land in the government office at Washington has the same force as the patent. Sands v. Davis (1879) 40 Mich. 14.

A government title to land, recorded under the acts of Congress in books kept for that purpose at the seat of government, is sufficient to pass title and impart notice without being recorded in the county where the land is situated, though it may be so recorded under Rev. St. Mo. 1909, § 10390. Wilcox v. Phillips (Mo. 1914) 169 S. W. 55.

24. —— **Patents as evidence.**—A patent under the seal of the United States is conclusive proof of the act of granting by its authority; its exemplification is a record of absolute verity. U. S. v. Arredondo (1832) 6 Pet. 691, 728, 8 L. Ed. 547.

The court will take judicial notice of the fact that patents for public lands are frequently dated several years after the payment of the purchase money and the issuance of the certificate of entry, and therefore the production of a patent dated in 1888 is no proof that the patentee did not have an interest in the lands which was subject to attachment and judicial sale in 1885. Bigelow v. Chatterton (1892) 51 Fed. 614, 2 C. C. A. 402.

The pendency of a suit by the United States to set aside a patent for fraud is not ground for refusing to admit the patent in evidence. Ely v. Frisbie (1861) 17 Cal. 250.

A patent appearing to be signed by the president and countersigned by the commissioner of the general land office, and verified by the seal thereof, is admissible without proof of its execution. Bowser v. Warren (Ind. 1838) 4 Blackf. 522.

The sufficiency of the authentication of records and papers of the federal land department is controlled by the regulations of that department and the federal laws, and not by state laws. Gilman v. Riopelle (1869) 18 Mich. 145.

A patent may be shown in evidence without proof that the same was recorded in the land department, or memorandum of such record. Callaway v. Fash (1872) 50 Mo. 420.

The record of a patent is admissible; Comp. Laws Nev. § 324, making special provisions for recording such patents and the use of such records as evidence. Reno Brewing Co. v. Packard (Nev. 1900) 103 P. 415, rehearing denied 104 P. 801.

25. —— **Presumptions.**—It will be presumed from the issuance of a patent for government land that all necessary steps prior to the issuance thereof were taken. King v. McAndrews (1911) 111 Fed. 860, 50 C. C. A. 29; Carroll v. Draughon (Ala. 1911) 56 So. 207; Collins v. Bartlett (1872) 44 Cal. 371; Southern Pac. R. Co. v. Purcell (1888) 77 Cal. 69, 18 Pac. 886; Hooper v. Young (1903) 74 P. 140, 140 Cal. 274, 98 Am. St. Rep. 50; People's Water Co. v. Lewis (1912) 127 P. 506, 19 Cal. App. 622; Smith v. Pipe (1877) 3 Colo. 187; Oregon Short Line R. Co. v. Stalker (1908) 94 P. 56; Webber v. Pere Marquette Boom Co. (1886) 30 N. W. 469, 62 Mich. 626; Fulton v. McAfee (1841) 6 Miss. (5 How.) 751; Surget v. Little (1852) 24 Miss. (2 Cushm.) 118; Carter v. Blanton (1857) 33 Miss. 291; Barry v. Gamble (1843) 8 Mo. 88; Allison v. Hunter (1846) 9 Mo. 749;

Hill v. Miller (1865) 36 Mo. 182; Gibson v. Chouteau (1867) 39 Mo. 536; Bradshaw v. Edelen (1906) 92 S. W. 691, 194 Mo. 640; Green v. Barker (1896) 47 Neb. 934, 66 N. W. 1032; Warner Valley Stock Co. v. Morrow (1906) 86 P. 369, 48 Or. 258; Knight v. Leary (1882) 54 Wis. 459, 11 N. W. 600; Demars v. Hickey (1905) 80 P. 521, 13 Wyo. 371, rehearing denied (1905) 81 P. 705, 13 Wyo. 371.

A patent of land issued by the proper officers of the United States is presumed valid, and to pass title. Minter v. Crommelin (1855) 18 How. 87, 88, 15 L. Ed. 279; Jenkins v. Trager (C. C. 1889) 40 Fed. 726 (writ of error dismissed Trager v. Jenkins [1890] 10 S. Ct. 1074, 136 U. S. 651, 34 L. Ed. 557); U. S. v. Laam (C. C. 1906) 149 Fed. 581; Hooper v. Young (1903) 74 P. 140, 140 Cal. 274, 98 Am. St. Rep. 50; Schnee v. Schnee (1868) 23 Wis. 377, 99 Am. Dec. 183.

Patents for lands issued by the United States carry the presumption of verity, and can only be set aside on the most clear and convincing proof; and the rule applies, although they are attacked by the United States in defense of a suit to restrain their cancellation by the department. La Clair v. U. S. (C. C. 1910) 184 Fed. 128.

There is no presumption in favor of a patent to lands issued by the Land Department as against a claim that the land was within an Indian reservation and not subject to disposal as public land. Northern Pac. Ry. Co. v. U. S. (1911) 191 Fed. 947, 112 C. C. A. 359, decree affirmed (1913) 33 S. Ct. 368, 227 U. S. 355, 57 L. Ed. 544.

Issuance of a patent by the federal land department is an adjudication that grantee has performed acts necessary to entitle him to a patent, if the land belongs to the United States and provision has been made for its sale; the adjudication having the same force in his favor as any adjudication by a tribunal having jurisdiction, and not being subject to collateral attack. Jameson v. James (Cal. 1909) 100 P. 700.

Where the preamble of a patent describes the applicant as the "legal representative" of the entryman, but the grant is to the applicant "and to his heirs and assigns," the presumption is that the register properly discharged his duty. McQueen v. Flasdick-Black Land & Lumber Co. (1914) 65 South. 900, 135 La. 698.

A patent is conclusive evidence that the patentee has complied with the act of Congress as concerns improvements on the land, etc. Jenkins v. Gibson (1848) 3 La. Ann. 203.

The principle that, when a patent is issued by the government, all necessary prerequisites are presumed to exist, is applicable to an assignment when the patent issues to an assignee. Clark v. Hall (1869) 19 Mich. 356.

Where the United States government has issued a patent for land, it will be presumed that it held the title to and the possession of the land at the time that the patent was issued. Long v. McDow (1885) 87 Mo. 197.

In a suit by one claiming to be the rightful claimant to public land, to enforce his remedy against a person to whom the patent has been issued by the Land Department, all reasonable presumptions will be indulged in support of the department officers. Johnson v. Riddle (Okl. 1914) 139 Pac. 1143.

26. —— Recitals.—A mere stranger has no right to dispute the truth of the recitals in a patent. Jones v. Inge (1837) 5 Port. 327.

While the recitals of fact contained in a patent are binding on all concerned, an opinion of the executive officers as to matters of law indicated either by the act of issuing the patent or by the recitals contained therein is not conclusive. McGarrahan v. New Idria Min. Co. (1874) 49 Cal. 331.

When a patent of land recites that it was purchased by the patentees in trust for beneficiaries named, and nothing appears to contradict the recital, it will be conclusive, as to the facts recited, that a trust only is conveyed by the patent. Dean v. Long (1887) 122 Ill. 447, 14 N. E. 34.

The recitals of the patent are to be taken as true. In this case the recital was that A. had got a certificate of entry and assigned to B., and that the United States got a judgment against B., had his rights sold on execution, and bought them, and thereupon patented the land to M., the present patentee. Held, that on its face, which was to be taken as true, it appeared that the United States had good right to patent the land to M. Sweatt v. Corcoran (1859) 37 Miss. 513.

The acts of Congress control the force of patents, which cannot be varied in their effect by the omission from them of statutory provisions, or the insertion of others. Tonopah & G. R. Co. v. Fellanbaum (Nev. 1910) 107 Pac. 882.

An owner of land is chargeable with notice of facts recited in a patent to which he traces his title. Bonner v. Ware (1841) 10 Ohio, 465.

27. —— Validity.—A patent issued for lands reserved from sale by law is void. Stoddard v. Chambers (1844) 43 U. S. (2 How.) 284, 11 L. Ed. 269; Garrard v. Silver Peak Mines (C. C. 1897) 82 Fed. 578 (judgment affirmed [1899] 94 Fed. 983, 36 C. C. A. 603); Eastern Oregon Land Co. v. Brosnan (C. C. 1906) 147 Fed. 807; Mille Lac Band of Chippewas v. U. S. (1911) 46 Ct. Cl. 424; (1900) 23 Op. Atty. Gen. 283; Hit-tuk-ho-mi v. Watts (1846) 7 Smedes & M. (Miss.) 363, 45 Am. Dec. 308; Perry v. O'Hanlon (1848) 11 Mo. 585, 49 Am. Dec. 100; Wright v. Rutgers (1851) 14 Mo. 585; Cummings v.

Powell (1893) 116 Mo. 473, 21 S. W. 1079, 38 Am. St. Rep. 610; Whitehill v. Victorio Land & Cattle Co. (N. M. 1914) 139 Pac. 184; Ferry v. Street (1886) 4 Utah, 521, 11 Pac. 571.

Where land has been previously disposed of, a patent issued by the federal officers is invalid. Francoeur v. Newhouse (C. C. 1889) 40 Fed. 618; King v. McAndrews (C. C. 1900) 104 Fed. 430; King v. McAndrews (C. C. 1900) 104 Fed. 430, 432; Daggett v. Bonewitz (1886) 107 Ind. 276, 7 N. E. 900; Rankin v. Miller (1876) 43 Iowa, 11; Butler v. Grand Rapids & I. R. Co. (1891) 48 N. W. 569, 85 Mich. 246, 24 Am. St. Rep. 84.

A patent for land obtained through error or fraud is void. Lott v. Prudhomme (La. 1842) 3 Rob. 293; Carter v. Monetti (La. 1843) 6 Rob. 82; McGill v. McGill (1849) 4 La. Ann. 262; Pujo v. Fouchy (1880) Man. Unrep. Cas. 156; Wright v. Rutgers (1851) 14 Mo. 585.

A land patent from the United States may be shown to be void by extrinsic evidence of a want of authority to issue it. Lakin v. Dolly (C. C. 1891) 53 Fed. 333 (judgment affirmed Lakin v. Roberts [1893] 54 Fed. 461, 4 C. C. A. 438); Cummings v. Powell (1893) 116 Mo. 473, 21 S. W. 1079, 38 Am. St. Rep. 610; Kahn v. Old Telegraph Min. Co. (1877) 2 Utah, 174.

A patent purporting to grant lands in which the government has no title is void as an evidence of title and may be so declared in an action at law at the instance of any one in possession lawfully or under color of title. Tapia v. Williams (Ala. 1911) 54 So. 613; Kahn v. Old Telegraph Min. Co. (1877) 2 Utah, 174.

Patents procured from the United States by fraud are not void, but voidable, and the government may elect to rescind the patent or ratify and sue for damages. U. S. v. Koleno (C. C. A. 1915) 226 Fed. 180.

A patent issued upon a survey not approved by the surveyor general is void. Dalles City v. Missionary Soc. of the M. E. Church (D. C. 1879) 6 Fed. 356, decree affirmed Missionary Society of M. E. Church v. City of Dalles City (1883) 2 S. Ct. 672, 107 U. S. 336, 27 L. Ed. 545.

A patent is prima facie valid; and, if its validity can be attacked at all, the burden of proof is on the assailant. Leviston v. Ryan (1888) 75 Cal. 293, 17 Pac. 239.

The fact that on publication of a notice by the United States surveyor general of a survey on which a patent had been issued the patentee filed objections which were overruled does not show that the patent was rejected by the patentee, or that it did not convey the legal title, or that it was recalled and canceled with the consent of the patentee. Alvarado v. Nordholt (1892) 95 Cal. 116, 30 Pac. 211.

The title conveyed by a patent will not be disturbed where the proof of its invalidity is not clear and convincing. Graham v. Great Falls Water Power & Town-Site Co. (1904) 76 P. 808, 30 Mont. 393.

A patent of land, founded on a void entry and survey, nevertheless passes the legal title from the government to the patentee, but the commencement of the title is the patent. Stubblefield v. Boggs (1853) 2 Ohio St. 216.

28. —— **Conclusiveness.**—A patent issued by the United States is superior and conclusive evidence of legal title. U. S. v. Stone (1864) 2 Wall. 525, 535, 17 L. Ed. 765; Gibson v. Choutcau (1871) 13 Wall. 92, 102, 20 L. Ed. 534; Mora v. Nunez (C. C. 1882) 10 Fed. 634; Stringfellow v. Tennessee Coal, Iron & Railroad Co. (1898) 22 So. 997, 117 Ala. 250; Wiggins v. Lusk (1850) 12 Ill. (2 Peck) 132; Barringer v. Davis (1907) 112 N. W. 208; Foley v. Harrison (1850) 5 La. Ann. 75; Haggerty v. Annison (La. 1913) 62 So. 946, 133 La. 338; Carter v. Spencer (1839) 5 Miss. (4 How.) 42, 34 Am. Dec. 106; Sweatt v. Corcoran (1859) 37 Miss. 513; Silver Bow Min. & Mill. Co. v. Clark (1885) 5 Mont. 378, 5 Pac. 570; Sharp v. City of Guthrie (Okl. 1915) 152 P. 403.

A patent is a title from its date conclusive against those whose rights did not commence prior to its emanation. Hoofnagle v. Anderson (1822) 7 Wheat. 212, 215, 5 L. Ed. 437.

A patent is conclusive against all persons whose rights did not commence previous to its issuance, and the fact that it may have been issued through fraud, error, or irregularity does not subject it to attack by one who at the time had no interest in the land. Bateman v. Southern Oregon Co. (1914) 217 Fed. 933, 133 C. C. A. 605.

A patent of the United States is conclusive as to the description of the land granted, and the proceedings on which its issuance was based are not admissible in evidence to impeach or vary it on collateral attack. Miller v. Grunsky (1901) 66 P. 858, 141 Cal. 441, reversed (1903) 75 P. 48, 141 Cal. 441.

When the claim of one of two settlers on the public lands has been recognized by the United States, which has issued a patent to him, the state courts cannot, in the absence of any equities or evidence taking the case out of the general rule, revise the decision. Jones v. Wheelis (1849) 4 La. Ann. 541.

A patent to land from the United States is not conclusive on the courts, but it may be examined at the instance of one showing an interest in the land. Ford's Heirs v. Morancy (1859) 14 La. Ann. 77.

The effect of a patent in passing title may be questioned in a suit at law.

Carswell v. Swindell (1906) 62 A. 956, 102 Md. 636.

29. —— Collateral attack.—A patent regular upon its face cannot be attacked collaterally. Bagnell v. Broderick (1839) 38 U. S. (13 Pet.) 436, 10 L. Ed. 235; U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 15 C. C. A. 96; Neff v. U. S. (1908) 165 Fed. 273, 91 C. C. A. 241; Le Roy v. Clayton (C. C. 1874) Fed. Cas. No. 8,268; Cowell v. Lammers (C. C. 1884) 21 Fed. 200; United States v. Cain-Bonness Lumber & Timber Co. (D. C. 1914) 215 Fed. 212; Masters v. Eastis (Ala. 1836) 3 Port. 368; Turner v. Donnelly (1886) 70 Cal. 597, 12 Pac. 469; Alvarado v. Nordholt (1892) 95 Cal. 116, 30 Pac. 211; Irvine v. Tarbat (1894) 105 Cal. 237, 38 Pac. 896; Dreyfus v. Badger (1895) 108 Cal. 58, 41 Pac. 279; Poire v. Wells (1882) 6 Colo. 406; U. S. v. Lane (1915) 43 App. D. C. 494; Harmon v. Steinman (1859) 9 Iowa, 112; Chavez v. Chavez de Sanchez (1893) 7 N. M. 58, 32 Pac. 137; Parley's Park Silver Min. Co. v. Kerr (1883) 3 Utah, 235, 2 Pac. 709; Parkison v. Bracken (Wis. 1842) 1 Pin. 174, 39 Am. Dec. 296.

A patent for lands issued by the United States cannot be avoided or impeached for fraud in a collateral action. Boggs v. Merced Min. Co. (1859) 14 Cal. 279; Yount v. Howell, 14 Cal. 465; Miller v. Dale (1872) 44 Cal. 562; Klein's Heirs v. Argenbright (1869) 26 Iowa, 493; Bruckner's Lessee v. Lawrence (Mich. 1843) 1 Doug. 19; Hittuk-ho-mi v. Watts (1841) 15 Miss (7 Smedes & M.) 363, 45 Am. Dec. 308; Dixon v. Porter (1851) 23 Miss. (1 Cushm.) 84; Sanford v. Sanford (1887) 19 Or. 1, 13 Pac. 602.

A patent on its face void may be attacked collaterally. King v. McAndrews (1901) 111 Fed. 860, 863, 50 C. C. A. 29; Ledbetter v. Borland (1901) 29 So. 579, 128 Ala. 418; Doll v. Meador (1860) 16 Cal. 295; Schwenke v. Union Depot & R. Co. (1884) 7 Colo. 512, 4 Pac. 905; State v. Bachelder (1861) 5 Minn. 223 (Gil. 178), 80 Am. Dec. 410.

Where a patent to land is issued without any authority of law, its validity may be attacked in any proceeding. Webber v. Pere Marquette Boom Co. (1886) 62 Mich. 626, 30 N. W. 469; State v. Bachelder (1861) 5 Minn. 223 (Gil. 178), 80 Am. Dec. 410; Dixon v. Porter (1851) 1 Cush. (Miss.) 84; Rose v. Richmond Min. Co. (1882) 17 Nev. 25, 27 Pac. 1105; Northern Pac. Ry. Co. v. Miller (1898) 54 P. 603, 20 Wash. 21.

In ejectment the legal title must prevail, and a patent of the United States to public lands passes that title. It cannot be assailed collaterally on the ground that false and perjured testimony was used to secure it. Steel v. St. Louis Smelting & Refining Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 27 L. Ed. 226.

A patent from the United States may be collaterally attacked by showing that the land covered by it was a portion of a Mexican grant which had previously been conveyed by the Mexican authorities to a private person, and that said conveyance had been confirmed by the United States land commissioners, and, on appeal, by the district and supreme courts, and that, therefore, the officers of the government had no authority to issue the patent. Doolan v. Carr (1888) 8 Sup. Ct. 1228, 1231, 125 U. S. 618, 31 L. Ed. 844.

A person cannot defend against a patent issued on an entry in a local land office for public land which was subject to disposal by the land department, on the ground that he was in actual possession at the time of its issuance, where he had taken no steps to secure the title. 15 South. 780, 34 Fla. 130 (1894) affirmed. Johnson v. Drew (1898) 18 Sup. Ct. 800, 171 U. S. 93, 43 L. Ed. 88.

A patent is impervious to collateral attack for errors of law committed by the land department. King v. McAndrews (1901) 111 Fed. 860, 50 C. C. A. 29, reversing judgment (C. C. 1900) 104 Fed. 430.

A patent is conclusive evidence of title in the grantee, in any collateral attack thereon, as against those not connecting themselves with the government title. Thompson v. Doaksum (1886) 68 Cal. 593, 10 Pac. 199.

The title to land which one deraigns from the government by patent cannot be questioned, except by one bringing himself within the saving provisions of the patent. Town of Red Bluff v. Walbridge (1911) 116 Pac. 77, 15 Cal. App. 770.

In an action involving conflicting claims to land, each claimant basing his title on government grant, defendant cannot say that plaintiff's patent from government was void for excess; that being a matter between the government and the patentee in which third parties are not concerned. Webber v. Pere Marquette Boom Co. (1886) 62 Mich. 626, 30 N. W. 469.

In ejectment a party may show that the interior department had no jurisdiction to issue a patent to land which had been previously patented to another. Crapo v. Troy Tp. (1894) 98 Mich. 635, 57 N. W. 806.

A patent issued by mistake to the wrong person cannot be collaterally attacked. Williams v. Carpenter (1864) 35 Mo. 52.

A patent from the United States for swamp or mineral lands, or lands subject to pre-emption or homestead entry, cannot be impeached in an action at law. Mendota Club v. Anderson (1899) 78 N. W. 185, 101 Wis. 479.

30. Equitable remedies.—After title has passed from the government to individuals the jurisdiction of courts of equity may be invoked to ascertain if

the patentee does not hold in trust for others. Johnson v. Towsley (1871) 13 Wall. 72, 20 L. Ed. 485.

Equity has no jurisdiction to affect a patent except upon the ground of an antecedent equity in the plaintiff, disregarded in the issuing thereof. Bear v. Luse (C. C. 1879) Fed. Cas. No. 1,179.

The applicant should seek relief in the court of chancery, which has full jurisdiction of the case, and ample power to administer the remedy to which he shall be entitled. (1847) 4 Op. Atty. Gen. 553.

Equities prior to the patent may be examined. Kittridge v. Breaud (La. 1843) 4 Rob. 79, 39 Am. Dec. 512.

The fact that a person perfecting the title to scrip land was acting as trustee for another, and that both he and his cestui que trust intended to conceal from the federal land office their true relations, does not preclude the enforcement of the trust, where all the facts were known to and considered by the government officials before issuing the patent, and the government knowingly and willingly conveyed the land to the trustee, leaving him and his cestui que trust to settle the equities between themselves. Keely v. Gregg (1906) 83 Pac. 222, 33 Mont. 216, modifying judgment on rehearing (1905) 82 Pac. 27, 33 Mont. 216.

When the petition, in an action to have the holder of the legal title to land charged as the trustee of another, sets out all the evidence taken before the land department, the decision of the register and receiver, and of the superior officers on appeal, and contains the allegation that the final decision of the Secretary of the Interior, adverse to the claimant, had not evidence or facts of any character for its basis, but that such decision was rendered without any evidences or circumstances whatever to warrant the same, a court of equity will review the evidence sufficiently to determine whether there was any evidence tending to support the secretary's conclusions, or from which a reasonable inference could be properly drawn, warranting his findings. Paine v. Foster (1896) 53 Pac. 109, 9 Okl. 213, affirmed (1899) 59 Pac. 252, 9 Okl. 257.

An action to declare a resulting trust by an occupant of government land against a successful contestant does not lie until the title to the land has passed from the government to such contestant. Jordan v. Smith (1903) 73 Pac. 308, 12 Okl. 703.

31. —— **Right to maintain suit.**—To charge the holder of the legal title to lands under a patent as a trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the government, and that, in consequence of erroneous rulings of the officers of the Land Department upon the law applicable to the facts found, it was refused him. Puget Mill Co. v. Brown (1893) 59 Fed. 35, 37, 7 C. C. A. 643; Pierson v. Loveland (1909) 102 Pac. 340; Leblanc v. Ludrique (1859) 14 La. Ann. 772; Nowlen v. Hall (1901) 87 N. W. 222, 8 Detroit Leg. N. 665, 128 Mich. 274; Johnson v. Fluetsch (1903) 176 Mo. 452, 75 S. W. 1005; Paine v. Foster (1896) 53 P. 109, 9 Okl. 213 (affirmed [1899] 59 Pac. 252, 9 Okl. 257); Baldwin v. Keith (1904) 75 Pac. 1124, 13 Okl. 624; Morrow v. Warner Valley Stock Co. (Or. 1909) 101 Pac. 171; Dixon v. Same, Id. 189; Greene v. Same, Id.; Harrington v. Same, Id., Foskett v. Same, Id. 190; Temple v. Osburn (Or. 1910) 106 Pac. 16.

A party seeking to attack a patent must show that he is connected in some way with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent. Hartman v. Warren (1896) 76 Fed. 157, 22 C. C. A. 30; Campbell v. Weyerhaeuser (1908) 161 Fed. 332, 88 C. C. A. 412 (decree affirmed [1911] 31 Sup. Ct. 321, 219 U. S. 424, 55 L. Ed. 279); Cucamonga Fruit Land Co. v. Moir (1890) 83 Cal. 101, 22 Pac. 55; Johnson v. Drew (1894) 34 Fla. 130, 15 South. 780, 43 Am. St. Rep. 172; Corbett v. Wood (1884) 32 Minn. 509, 21 N. W. 734; Lee v. Summers (1868) 2 Or. 260.

A suit to quiet title to a mining claim may be maintained in a federal court, though the complainant has not yet obtained the legal title from the United States. Gillis v. Downey (1898) 85 Fed. 483, 29 C. C. A. 286.

In some cases, where a party has acquired some actual and definite legal right to lands under acts of Congress, the grantee of land under a patent has been declared in equity to be a trustee for the use of another having the better legal right; but the party seeking the relief must bring himself within the provisions of the acts of Congress under which he claims his right. Fenwick v. Gill (1866) 38 Mo. 510.

A person, by filing a contest against a homestead entry, which is rejected by the land department, though his grounds named therein were valid, and the contest should have been entertained, and a hearing granted, acquires no interest in the land embraced in the entry, so as to be able to sue to declare the patentee, who was the entryman at the time he offered his contest, a trustee for his use and benefit. Parker v. Lynch (1898) 56 Pac. 1082, 7 Okl. 631.

An action to declare a resulting trust cannot be maintained against one who has made final proof for government land and received a final receipt therefor until he has received a patent from the government conveying title to the land in question. Hamilton v. Foster (1905) 82 Pac. 821, 16 Okl. 220.

32. —— **Trust in lands granted in general.**—The principle that, where one

furnishes the consideration for the purchase of land and the deed is taken in the name of another, the grantee is a trustee of a resulting trust for the person furnishing the purchase price, is applicable to a title acquired by a patent from the government. Stephenson v. Smith (1842) 7 Mo. 610; Boyd v. Mammoth Spring Imp. Co. (1897) 137 Mo. 482, 38 S. W. 964.

A court of equity may in a proper case adjudge the patentee of lands to hold as trustee for one having greater equities. Rector v. Gibbon (1884) 4 Sup. Ct. 605, 612, 111 U. S. 276, 28 L. Ed. 427; Smith v. Love (1905) 38 South. 376, 49 Fla. 230; Boyce v. Danz (1874) 29 Mich. 146; Carman v. Johnson (1854) 20 Mo. 108, 61 Am. Dec. 593; Sensenderfer v. Kemp (1884) 83 Mo. 581; Smith v. Townsend (1892) 29 Pac. 80, 1 Okl. 117; Smith v. Kennedy (Okl. 1915) 149 Pac. 197.

United States is not a necessary party to a suit by entryman whose entry has been rejected by the land department in favor of the subordinate entryman, to charge the latter with a trust in his favor, because a patent from the United States is involved. Daniels v. Wagner (1915) 35 Sup. Ct. 740, 237 U. S. 547, 59 L. Ed. 1102, L. R. A. 1916A, 1116 (reversing decree [1913] 205 Fed. 235, 125 C. C. A. 93); Same v. Merrithew (1915) 35 Sup. Ct. 747, 237 U. S. 570, 59 L. Ed. 1113 (reversing decree Same v. Wagner [1913] 205 Fed. 235, 125 C. C. A. 93); Same v. Craddock (1915) 35 Sup. Ct. 749, 237 U. S. 574, 59 L. Ed. 1118 (reversing decree Same v. Wagner [1913] 205 Fed. 235, 125 C. C. A. 93); Sawyer v. Gray (1915) 35 Sup. Ct. 842, 237 U. S. 674, 59 L. Ed. 1170.

A prior entryman is not precluded by the issuance of a patent to a subordinate entryman from seeking to impose a trust on the title which the patent represents. Daniels v. Johnston (1915) 35 Sup. Ct. 748, 237 U. S. 568, 59 L. Ed. 1110, reversing decree Same v. Wagner (1913) 205 Fed. 235, 125 C. C. A. 93.

Mandamus is not the sole remedy of a private entryman whose entry has been unlawfully rejected by the Secretary of the Interior in favor of a subordinate entryman, but he can sue to charge the latter with a trust. Daniels v. Bernhard (1915) 35 Sup. Ct. 749, 237 U. S. 572, 59 L. Ed. 1115, reversing decree Same v. Wagner (1913) 205 Fed. 235, 125 C. C. A. 93.

Where a patent is absolutely void, its holder cannot be adjudged to hold it in trust for the party entitled to the land. Rose v. Richmond Min. Co. (1882) 17 Nev. 25, 27 Pac. 1105.

33. —— **Mistake or misapplication of law.**—Equity will interfere whenever it is clear that the land officers have, by mistake of the law, given to one man the land which, on the undisputed facts, belonged to another. U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 15 C. C. A. 96; Moss v. Dowman (1898) 88 Fed. 181, 31 C. C. A. 447 (affirming decree [C. C. 1897] 82 Fed. 810, appeal to Supreme Court allowed [1898] 90 Fed. 831, 32 C. C. A. 610, decree affirmed [1900] 20 S. Ct. 429, 176 U. S. 413, 44 L. Ed. 526); Howe v. Parker (1911) 190 Fed. 738, 111 C. C. A. 466; Aiken v. Ferry (C. C. 1879) Fed. Cas. No. 112; Buckley v. Howe (1890) 86 Cal. 596, 25 Pac. 132; Parsons v. Venzke (1894) 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669; Paine v. Foster (1896) 53 Pac. 109, 9 Okl. 213 (affirmed [1899] 59 Pac. 252, 9 Okl. 257); Sanford v. Sanford (1887) 19 Or. 3, 13 Pac. 602.

A resulting trust of public land will be declared against a patentee, where it appears that the Land Office has erred in its application of the law to the facts. Hoyt v. Weyerhaeuser (1908) 161 Fed. 324, 88 C. C. A. 404 (decree reversed [1911] 31 Sup. Ct. 300, 219 U. S. 380, 55 L. Ed. 258); Greenameyer v. Coate (1907) 88 P. 1054, 18 Okl. 160; Gourley v. Countryman (1907) 90 Pac. 427, 18 Okl. 220; Fearnow v. Jones (Okl. 1912) 126 Pac. 1015.

Where, in a contest between conflicting claimants of public land, the secretary of the interior found facts which would entitle one claimant to a patent, but by an erroneous application of the law to the facts found such secretary issued a patent to the other, the ultimate rights of the claimant equitably entitled to the patent are not changed thereby, but the claimant receiving the patent will be held as a constructive trustee of the legal title thereby acquired for the benefit of the claimant equitably entitled thereto, which trust may be enforced in the state courts. McCord v. Hill (1900) 84 N. W. 27, 85 N. W. 145, 111 Wis. 499, affirmed on rehearing (1901) 87 N. W. 481, 111 Wis. 499.

34. —— **Mistake of fact.**—Equity may relieve against mistake in the issuance of a patent. Meader v. Norton (1870) 11 Wall. 442, 457, 20 L. Ed. 184; Bogan v. Edinburgh American Land Mortg. Co. (1894) 63 Fed. 192, 11 C. C. A. 128; U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 15 C. C. A. 96; James v. Germania Iron Co. (1901) 107 Fed. 597, 46 C. C. A. 476 (appeal dismissed [1904] 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); Hoyt v. Weyerhaeuser (1908) 161 Fed. 324, 88 C. C. A. 404 (decree reversed Weyerhaeuser v. Hoyt [1911] 31 Sup. Ct. 300, 219 U. S. 380, 55 L. Ed. 258); Johnson v. Pacific Coast S. S. Co. (1904) 2 Alaska, 224; Green v. Clyde (1906) 97 S. W. 437, 80 Ark. 391; Moyer v. McCullough (1849) 1 Ind. (1 Cart.) 339; Stark's Heirs v. Mather (Miss. 1824) Walk. 181, 12 Am. Dec. 553.

Decisions of the Land Department of the United States may be avoided and the legal title under them charged with a trust in favor of the rightful owner of the equitable title to the land on account of a gross mistake of fact, by a direct suit in a court of equity for this purpose. Howe v. Parker (1911) 190 Fed. 738, 111 C. C. A. 466; Johnson v. Riddle (Okl. 1914) 139 Pac. 1143.

Where an equitable right to land originated before the date of the patent thereto issued by the government to another, the equitable right will be enforced as against the patentee. Climer v. Selby (1855) 10 La. Ann. 182.

35. —— **Fraud or imposition.**—Where a patent to land is issued by the land officers of the United States by fraud, or imposition to a party not entitled to it, the patentee will be declared a trustee for the true owner. Meader v. Norton (1870) 11 Wall. 442, 457, 20 L. Ed. 184; Bogan v. Edinburgh American Land Mortg. Co. (1894) 63 Fed. 192, 194, 11 C. C. A. 128; U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 15 C. C. A. 96; James v. Germania Iron Co. (1901) 107 Fed. 597, 46 C. C. A. 476 (appeal dismissed [1904] 25 S. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); United States v. Collett (1908) 159 Fed. 932, 87 C. C. A. 460; Howe v. Parker (1911) 190 Fed. 738, 111 C. C. A. 466; Green v. Clyde (1906) 97 S. W. 437, 80 Ark. 391. Bird v. Wilcox (1873) 45 Cal. 686; Lynch v. Brigham (1876) 51 Cal. 491; Plummer v. Brown (1886) 70 Cal. 544, 12 Pac. 464; Buckley v. Howe (1890) 86 Cal. 596, 25 Pac. 132; Smith v. Love (1905) 38 So. 376, 49 Fla. 230; Carman v. Johnson (1859) 29 Mo. 84; Johnson v. Riddle (Okl. 1914) 139 Pac. 1143. Sanford v. Sanford (1887) 19 Or. 1, 13 Pac. 602.

A person who has obtained a patent to land under false representations or through the fraud, bribery, and corruption of United States officials will not be permitted, when his claim is questioned in a court of equity, to derive any benefit thereby, and the patent will inure to the party entitled to recover the land. Phillips v. George (1877) 17 Kan. 419.

Persons who obtain patents by a suppression of part of the facts of the case will not be permitted to derive any benefit thereby, and such patents will inure to the parties entitled to recover the lands thus patented. Cannon v. White (1861) 16 La. Ann. 85.

Where a patent is obtained through bribery and perjury, equity will not grant relief, when the United States has not been injured and will not be benefited, and owes no duty to any other person having an interest in the land. Lynch v. U. S. (1903) 73 P. 1095, 13 Okl. 142.

Where title to land is acquired under the homestead law after a contest before the Land Department with an adverse claimant, such adverse claimant cannot have the title so acquired adjudged a trust on the ground of fraud on the trial of such contest, where the only fraud stated is that the successful party procured the judgment on testimony which is alleged to be untrue, and that he was deceived thereby, where a full hearing was given the parties. Greenameyer v. Coate (1907) 88 P. 1054, 18 Okl. 160.

36. —— **Patentee's knowledge of infirmity.**—An entryman's equity in land misdescribed may be enforced against one who afterwards, with knowledge of the facts, obtains the legal title from the United States for the same land. Widdicombe v. Childers (1884) 84 Mo. 382; Hedrick v. Beeler (1892) 110 Mo. 91, 19 S. W. 492.

Where land belonging to the United States is duly entered and paid for at the land office, but the entry is wrongly canceled by the land officers, a person making a subsequent entry with knowledge of the first, and acquiring the legal title to the land, will be held as trustee for the first occupant. Forbes v. Hall (1864) 34 Ill. 159, 85 Am. Dec. 301.

If the government cancels an entry without proper cause, and issues the patent to another, who has notice of the first purchaser's rights, equity will direct the conveyance of the legal title to the rightful owner. Aldrich v. Aldrich (1865) 37 Ill. 32.

One who takes out a patent for a section of public land with knowledge that the records of the land office relative to such section show alterations and erasures is not a taker in good faith. Hedrick v. Atchison, T. & S. F. R. Co. (1894) 120 Mo. 516, 25 S. W. 759.

If the United States has given to any one any right or equitable title to land which it is bound to respect, a person subsequently taking a patent with notice of that right is bound by it. Strong v. Lehmer (1859) 10 Ohio St. 93.

37. —— **Lands previously granted.**—A complainant who acquired the equitable title to or a vested interest in land while the title remained in the United States is entitled to maintain a suit to determine his right to the legal title against one to whom the land was subsequently patented through an error of law on the part of the officers of the land department without regard to whether the transaction was attended by fraud or mistake of fact. Kerns v. Lee (C. C. 1906) 142 Fed. 985.

Where land already belongs to an individual by an act of the government, subsequent issue of patent to another person inures to the benefit of the real

owner. Dufresne v. Haydel (1852) 7 La. Ann. 660.

38. —— Pleadings and proof.—One who would attack a patent of the interior department for mistake of fact must plead and prove the evidence before the department from which the mistake resulted, the particular mistake, the way in which it occurred, and the fact that, but for mistake, the decision would have been otherwise, before the court can consider the original issue of fact determined by the department. James v. Germania Iron Co. (1901) 107 Fed. 597, 46 C. C. A. 476 (appeal dismissed [1904] 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); Ross v. Wright (Okl. 1911) 116 P. 949.

When the holder of a certificate of purchase of public land, based on an entry which has been canceled for fraud, asserts title to the land as against the holder of a patent issued on a different title, the burden of proof rests upon him to show affirmatively that he is entitled to a patent. California Redwood Co. v. Litle (C. C. 1897) 79 Fed. 854.

Where it was claimed that land was entered by a particular person, and that, in issuing the certificate of entry and patent to him, a wrong name was used, there must be shown such a state of facts as will warrant the court in inferring that the one mentioned in the certificate and patent was the entryman, before the court can vest the title in the entryman. Martin v. Brand (1904) 81 S. W. 443, 182 Mo. 116.

A complaint, to hold the patentee of public land a trustee thereof for plaintiff, alleging merely that plaintiff made application to purchase it as coal land, filing a declaratory statement in the land office, and went into possession and improved it; that defendant caused a forged relinquishment of plaintiff's rights to be filed in the land office, of which she did not know till five months after expiration of the time within which she might have made proof and payment; and that defendant then purchased the land, and a patent was issued to him—does not state a cause of action; it not showing that plaintiff did not also make a voluntary relinquishment, by failure to prosecute work on the land, or to make, or offer to make, seasonable proof and payment. Geho v. Clarke Fork Coal Min. Co. (1904) 75 P. 859, 30 Mont. 87.

When the petition in an action to have the holder of the legal title to land charged as the trustee of another is accompanied by all the pleadings and evidence in the Land Department, and alleges that there is no evidence whatever in support of the finding and decision of the Secretary of the Interior, and the record discloses the fact that there was some evidence tending to support such finding, then it is not error to sustain a demurrer to such petition on the ground that it does not state facts sufficient to constitute a cause of action. Paine v. Foster (1896) 53 P. 109, 9 Okl. 213, affirmed (1899) 59 P. 252, 9 Okl. 257.

A petition in an action to declare a resulting trust, not alleging that plaintiff has a better right to the land than the patentee, such as should have been respected by the officers of the Land Department, and which would have given him the patent, does not state a cause of action. Baldwin v. Keith (1904) 75 P. 1124, 13 Okl. 624.

In an action to declare a resulting trust, where plaintiff claims the land under a homestead lease, an essential averment of the petition is that plaintiff has resided upon, cultivated, and improved the land for a period of time so that, on final proof, he would be entitled to a patent. Id.

A complaint which seeks to have the court adjust equities between rival claimants to public lands is fatally defective if it fails to show that the United States has parted with its title, and it has become vested in the individual against whom it is sought to enforce the supposed equities. McCord v. Hill (1899) 80 N. W. 735, 104 Wis. 457.

39. Cancellation of patents.—The fact that land patents were fraudulently issued by the officers of the government will not preclude the government from maintaining a suit to cancel the patents. Moffat v. U. S. (1884) 5 Sup. Ct. 10, 14, 112 U. S. 24, 28 L. Ed. 623.

A bill to cancel patents issued to fictitious persons need not offer to return the consideration for the patent. Id.

Where the United States files a bill to set aside a patent, on the ground that it was obtained upon false testimony, it should at least offer to return the purchase money paid by the patentee for the land. U. S. v. White (C. C. 1883) 17 Fed. 561.

Where the officers of the land department have been induced to issue a patent to the wrong party, either by an erroneous view of the law or by gross or fraudulent mistake of the facts, the party entitled to the land may have the patent set aside on proof either that on the facts found, conceded, or established, without dispute at the hearing before the department, its officers erred in the construction of the law applicable to the case, which caused them to refuse to issue the patent to complainant, or that through fraud or gross mistake they fell into a misapprehension of the facts proved before them, which had the like effect. Le Marchel v. Teagarden (C. C. 1907) 152 Fed. 662, decree reversed (1909) 175 Fed. 682, 99 C. C. A. 236.

A suit to vacate a patent is equitable in its nature. U. S. v. Smith (C. C. 1910) 181 Fed. 545, affirmed (1912)

Linn & Lane Co. v. U. S., 196 Fed. 593, 116 C. C. A. 267.

The proper mode of proceeding to vacate an erroneous land patent is by bill in equity. (1842) 4 Op. Atty. Gen. 120.

It was not the duty of the government to institute proceedings to vacate a patent, where it is in no wise responsible for the act which embarrassed the settler's pre-emption and caused the existing difficulty. (1847) 4 Op. Atty. Gen. 558.

The United States will not sue to cancel a patent for the benefit of third persons to whom it owes no duty. Lynch v. U. S. (1903) 73 P. 1095, 13 Okl. 142.

40. —— **Necessity of suit.**—When the government has issued its patent for public lands, it can exercise no further control over them. If it has been wronged or defrauded, it must seek relief through the courts. Kirwan v. Murphy (1897) 83 Fed. 275, 28 C. C. A. 348, appeal dismissed (1898) 18 S. Ct. 592, 170 U. S. 205, 42 L. Ed. 1009.

Where a patent for public land has once issued, it cannot afterward be canceled or annulled by the mere act of the Department; the intervention of a court is necessary for that purpose. (1871) 13 Op. Atty. Gen. 457.

41. —— **Who may bring suit.**—Only the government can proceed to have a patent annulled for fraud in procuring it. Lee v. Johnson (1885) 6 Sup. Ct. 249, 116 U. S. 48, 29 L. Ed. 570; Scott v. Lockey Inv. Co. (C. C. 1893) 60 Fed. 34; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1900) 106 Fed. 241; Boggs v. Merced Min. Co. (1859) 14 Cal. 279; Jameson v. James (1909) 100 P. 700; Lamprey v. Head (1893) 54 Minn. 290, 55 N. W. 132, 40 Am. St. Rep. 328; Meyendorf v. Frohner (1879) 3 Mont. 282; Hall v. Prindle (1859) 2 Ohio Dec. 261.

A private individual cannot maintain a suit for the cancellation of patents to public lands issued by the United States. Sawyer v. Gray (D. C. 1913) 205 Fed. 160. But he may be permitted to use the name of the United States in his proceedings, if the Secretary of the Treasury shall deem it discreet to authorize it. (1847) 4 Op. Atty. Gen. 558.

No one without a prior equitable right can question, in the courts, the claim of the pre-emptor who holds the title from the government. If the pre-emption was fraudulently obtained, the government may set it aside; but, if the government acquiesces in it, a third party, having at the time no interest or equity in the land, cannot disturb the title. Houck v. Kelsey (1876) 17 Kan. 333.

Where the United States land officers construe an entry of land to have been made by a party as administrator of a deceased person, on behalf of the heirs of such person, and that the entry was one which could be so made, and a patent issues accordingly, no one but the United States, or some one having an interest in the land, can complain of error or mistake on the part of such officers. Dawson v. Mayall (1891) 45 Minn. 408, 48 N. W. 12.

If a patent to land is valid under any assumed state of circumstances, it cannot be attacked in a collateral proceeding, or in any manner, except by direct action to set it aside either by the United States, or by persons who have succeeded to its rights. Ferry v. Street (1886) 4 Utah, 521, 7 Pac. 712.

42. —— **Jurisdiction of courts.**—The United States courts have jurisdiction to vacate a patent to lands, in a proper case, on the ground of fraud. U. S. v. White (C. C. 1883) 17 Fed. 561.

See notes under §§ 991 and 1233, post.

43. —— **Jurisdiction of Land Department.**—The department has no power to set aside or cancel a patent. Johnson v. Pacific Coast S. S. Co. (1904) 2 Alaska, 224; Lott v. Prudhomme (La. 1842) 3 Rob. 293; Miller v. Donahue (1897) 71 N. W. 900, 96 Wis. 498.

The commissioner of the general land office has authority to recall an erroneously issued patent before its delivery to the patentee, and cancel it. Phillips v. Sherman (1860) 36 Ala. 189.

The holder of a certificate of entry issued by the United States made affidavit that he had made a mistake in respect to the land he intended to purchase and thought he was entering. The entry was set aside, the certificate surrendered and canceled, and the purchase money refunded to him. Afterwards a patent was inadvertently made out, and sent to the local land office, but before any acceptance on the part of such entryman the mistake was discovered, and the patent was recalled and canceled. Held, that the title did not pass from the United States. Wood v. Pittman (1896) 20 So. 972, 113 Ala. 207.

A land patent from the United States cannot be impeached by a letter from the assistant commissioner of the general land office to a local register, written 20 years after the issuance of the patent, and directing the register to note in his records that the pre-emption of the patentee had been canceled in pursuance of a decision of the United States supreme court. Oregon Ry. & Nav. Co. v. Hertzberg (1894) 26 Or. 216, 37 Pac. 1019.

44. —— **Grounds for cancellation.**—If the officers of the land department have acted within the general scope of their power, and without fraud, a patent issued after contest in the land office will not be interfered

with or canceled by the courts, unless there has been a gross mistake or violation of law. U. S. v. Marshall Silver-Min. Co. (1889) 9 S. Ct. 343, 129 U. S. 579, 32 L. Ed. 734.

When it appears on the face of a patent that it was issued contrary to law, it is void, and a court of law will so pronounce; but, nevertheless, the United States is entitled to maintain a suit in equity to have such void patent canceled. U. S. v. Tichenor (C. C. 1882) 12 Fed. 415.

The United States may sue in equity in their own name in the circuit court to set aside a patent issued without authority of law. U. S. v. Stone (1864) 2 Wall. 525, 535, 17 L. Ed. 765; U. S. v. Leavenworth, L. & G. R. Co. (C. C. 1874) Fed. Cas. No. 15,582.

A patent for land from the United States may be set aside for fraud. U. S. v. Williams (C. C. 1886) 30 Fed. 309; (1824) 1 Op. Atty. Gen. 699; Lynch v. U. S. (1903) 73 P. 1095, 13 Okl. 142; Starr v. Stark (1865) 2 Or. 118.

The frauds for which courts will set aside a patent granted by the United States in the regular course of proceedings in the land office are frauds extrinsic or collateral to the matter tried and determined upon which the patent issued, and not fraud consisting of perjury in the matter on which the determination was made. U. S. v. White (C. C. 1883) 17 Fed. 561.

Perjury in proceedings to obtain a patent to public land is not fraud extrinsic or collateral to the matter tried and determined in the land office, and will not justify setting aside the patent at suit of the United States. U. S. v. Minor (C. C. 1884) 26 Fed. 672.

Newly discovered evidence on the issue of fraud made before the Land Department, which complainant had abundance of time and opportunity to discover and present, is not ground for relief in equity from its final action, where no fact is alleged that anything was done to prevent complainant from discovering or presenting such evidence except the general allegation that cunning and deceit were practiced on him. Greenameyer v. Coate (1909) 29 Sup. Ct. 345, 348, 212 U. S. 434, 53 L. Ed. 587, affirming decree (1907) 88 Pac. 1054, 18 Okl. 160.

45. —— **Parties.**—In a suit to cancel a patent, where no confederacy, nor conspiracy, nor possession, nor title is alleged as to a person, and no case set out for relief against him, or for discovery or accounting, or any other thing, he should not be made a party. U. S. v. Pratt Coal & Coke Co. (C. C. 1883) 18 Fed. 708.

Where a patent was issued by mistake for a whole instead of a quarter section of land, and the patentee sold the same, the vendee should be immediately notified of the mistake, and both should be made parties to a suit for the canceling of the patent. (1827) 2 Op. Atty. Gen. 53.

46. —— **Evidence and burden of proof.**—To warrant the cancellation of a patent for land issued by the United States for fraud, the evidence must be clear, unequivocal, and convincing, and it cannot be done on a bare preponderance of evidence which leaves the issue in doubt. U. S. v. Maxwell Land-Grant Co. (1887) 7 Sup. Ct. 1015, 121 U. S. 325, 30 L. Ed. 949 (affirming decree [C. C. 1886] 26 Fed. 118); Colorado Coal & Iron Co. v. U. S. (1887) 8 Sup. Ct. 131, 123 U. S. 307, 31 L. Ed. 182 (reversing decree U. S. v. Colorado Coal & Town Co. [C. C. 1883] 18 Fed. 273); U. S. v. Maxwell Land Grant Co. (1887) 7 Sup. Ct. 1271, 122 U. S. 365, 30 L. Ed. 1211; U. S. v. Barber Lumber Co. (1912) 194 Fed. 24, 114 C. C. A. 44 (affirming decree [C. C. 1909] 172 Fed. 948).

In a suit by the United States, directly assailing a patent and seeking its cancellation for fraud in the conduct of their officers, the burden of proof is on the government to show a fatal irregularity or corrupt conduct on their part. Moffat v. U. S. (1884) 5 Sup. Ct. 10, 14, 112 U. S. 24, 28 L. Ed. 623.

On a proceeding by the United States to cancel a patent inadvertently issued pending appeals by other claimants, the government is not bound to show that the other claimants would be successful in their appeal, but is entitled to have the patent canceled, unless the patentee proves that by the law properly administered he would be entitled to the patent. U. S. v. Reed (C. C. 1892) 53 Fed. 405.

In a suit for the cancellation of a patent to land, where it is shown that the entry was fraudulent, defendant has the burden of proof to establish the defense that he was a bona fide purchaser for value without notice. U. S. v. Hill (D. C. 1914) 217 Fed. 841.

47. —— **Decree.**—On a bill by the United States to cancel a patent wrongfully issued through mistake pending a contest, a decree canceling the patent, so as to leave the determination of disputed questions of fact to the land department, is proper. Germania Iron Co. v. U. S. (1897) 17 Sup. Ct. 337, 340, 165 U. S. 379, 41 L. Ed. 754, affirming decree (1893) 58 Fed. 334, 7 C. C. A. 256.

48. **Correction of patents.**—The remedy for errors of law, as well as for mistakes of fact, in the issue of a patent to land within the jurisdiction of the land department of the United States is a direct proceeding by bill in equity to correct them. King v. McAndrews (1901) 111 Fed. 860, 50 C. C. A. 29, reversing judgment (C. C. 1900) 104 Fed. 430.

A patent issued by mistake may be corrected before delivery. If delivered, and the patentee refuse to surrender

it for cancellation, the President may issue a new one, reciting the error committed in the former as the cause. (1826) 2 Op. Atty. Gen. 41.

Equity at the instance of patentees may correct mistakes in patents, whereby land has been given one claimant which belonged to another. Snider v. Ostrander (Colo. App. 1915) 145 Pac. 283.

Where one purchased from the government land previously located upon a void warrant, and his payment was received by the officers of the land department as if made in behalf of the prior entryman as a substitute for the warrant under the commissioner's circular to the registers and receivers of land offices (section 41), when in fact the payment was individual money of the purchaser, and was made solely in his own interest, and the patent subsequently issuing to the purchaser named the prior locator as patentee, equity would, as between the parties, reform the patent, by substituting the name of the purchaser for that of the prior locator. Boyd v. Mammoth Spring Imp. Co. (1897) 137 Mo. 482, 38 S. W. 964.

Where public land was patented under an erroneous description, and the patentee transferred same by a warranty deed under the same description, the land department properly issued a corrected patent to the patentee. Marshall v. Hill (1912) 151 S. W. 131, 246 Mo. 1.

§ 706. (R. S. § 459.) Duties of Recorder.

It shall be the duty of the Recorder of the General Land-Office, in pursuance of instructions from the Commissioner, to certify and affix the seal of the Office to all patents for public lands, and to attend to the correct engrossing, recording, and transmission of such patents. He shall prepare alphabetical indexes of the names of patentees, and of persons entitled to patents; and he shall prepare such copies and exemplifications of matters on file or recorded in the General Land-Office as the Commissioner may from time to time direct.

Act April 25, 1812, c. 68, § 8, 2 Stat. 717. Act July 4, 1836, c. 352, § 4, 5 Stat. 111.

This section, as enacted in the Revised Statutes, contained a further provision that "Whenever the office of Recorder shall become vacant, or in case of his sickness or absence, the duties of his office shall be performed ad interim by the principal clerk on private land claims." This provision was superseded by the repeal of R. S. § 448, which established the office of Principal Clerk on Private Land-Claims, and a provision that the duties imposed on said principal clerk by this section should thereafter be performed by the Assistant Commissioner of the General Land-Office, contained in Act March 2, 1895, c. 177, § 3, 28 Stat. 807. But the latter provision may also be regarded as superseded by the provision for designation of an officer or employé to perform temporarily the duties of the Recorder, contained in Act May 22, 1908, c. 186, § 1, ante, § 693.

The engrossing and recording of patents by means of typewriters or other machines was authorized by another provision of said Act March 2, 1895, c. 177, § 3, post, § 707.

Notes of Decisions

Signature and attestation.—The recorder of the General Land Office only has power to attest and seal patents for public lands; the former law in this respect having been repealed by Act July 4, 1836, incorporated herein. (1836) 3 Op. Atty. Gen. 140.

All patents emanating from the General Land Office, whether of land sold, or of lands in respect to which private claims are recognized by acts of Congress, must be certified or countersigned by the recorder. (1836) 3 Op. Atty. Gen. 167.

It is a sufficient compliance with the provisions of Act July 4, 1836, incorporated herein, for the engrossing clerks to write the name of the President to patents, and for the Secretary thereafter to attest them by his signature. (1841) 3 Op. Atty. Gen. 623.

The counter signature of the recorder of land patents, and seal of the office thereto attached, constitute a sufficient authentication of a patent for land. (1841) 3 Op. Atty. Gen. 630.

Recorder's certificate as evidence.—The official certificate of the recorder of the General Land Office showing the selection of certain land by the state, approved by the Secretary of the Treasury, is evidence that the selection by the surveyor of state school lands was approved by the Secretary of the Treasury, and is equivalent to proof of a selection by him as required by section 2, Act May 20, 1826, c. 83, 4 Stat. 179. Black v. Chicago, B. & Q. R. Co. (1909) 86 N. E. 1065, 237 Ill. 500.

Cited without definite application, McGarrahan v. New Idria Min. Co. (1877) 96 U. S. 316, 320, 24 L. Ed. 630.

§ 707. (Act March 2, 1895, c. 177, § 3.) Engrossing and recording of patents by typewriters, etc.

The engrossing and recording of patents for public lands may be done by means of typewriters or other machines, under regulations to be made by the Secretary of the Interior and approved by the President. (28 Stat. 807.)

This was a provision of section 3 of the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above.

§ 708. (R. S. § 460.) Copies of papers filed in the Department.

Whenever any person claiming to be interested in or entitled to land, under any grant or patent from the United States, applies to the Department of the Interior for copies of papers filed and remaining therein, in anywise affecting the title to such land, it shall be the duty of the Secretary of the Interior to cause such copies to be made out and authenticated, under his hand and the seal of the General Land-Office, for the person so applying.

Act Jan. 23, 1823, c. 6, 3 Stat. 721. Act July 4, 1836, c. 352, § 7, 5 Stat. 111.

Similar provisions for the making and certifying, by the Commissioner of the General Land Office, of copies of records, etc., on file in his office, for use as evidence in the courts, were made by R. S. §§ 2469, 2470, post, §§ 709, 710.

Subsequent general provisions for furnishing copies of official books, records, papers, etc., within the custody of the Secretary of the Interior, the head of any bureau, office, etc., or any officer of the Department, were made by Act Aug. 24, 1912, c. 370, ante, §§ 675–680.

The Commissioner was authorized to transmit and authenticate for use as evidence in the courts original papers on file in the office, on which any patent to land has been issued, by Act April 19, 1904, c. 1398, ante, § 701.

Registers and receivers of land offices were authorized to make transcripts of records in their offices for individuals, and such transcripts when duly certified were made admissible in evidence, by Act March 22, 1904, c. 748, post, § 4474.

Cited without definite application, Taylor v. U. S. (C. C. 1891) 45 Fed. 531, reversed (1893) 13 Sup. Ct. 479, 147 U. S. 695, 37 L. Ed. 335.

§ 709. (R. S. § 2469.) Copies of records, etc., in General Land-Office.

The Commissioner of the General Land-Office shall cause to be prepared, and shall certify, under the seal of the office, such copies of records, books, and papers on file in his office, as may be applied for, to be used in evidence in courts of justice.

Act July 4, 1836, c. 352, § 7, 5 Stat. 111.

See notes to R. S. § 460, ante, § 708.

Copies of records, etc., in the General Land-Office, authenticated and certified as prescribed, were made evidence equally with the originals, by R. S. § 890, post, § 1503.

Notes of Decisions

Certificate as evidence.—A certificate of the Commissioner of the General Land Office, from which it does not appear that the fact that a map was made from actual surveys is shown by any paper, document, or record in the Land Office, is not admissible as evidence of such fact; the rule being that the certificate of the Commissioner is admissible only as to facts contained in papers, documents, or records of his office, and cannot be used as evidence of any fact otherwise known to the officer. Wilkins v. Clawson (Tex. Civ. App. 1908) 110 S. W. 103.

Certified copies.—A book prepared by the Commissioner to supply burned records of a local land office is an official book, and need not be certified to render it admissible in evidence. Jesse D. Carr Land & Live Stock Co. v. U. S. (1902) 118 Fed. 821, 55 C. C. A. 433.

The exemplification of the books and records of the General Land Office certified by the recorder is competent evidence of the truth of its recitals. Black v. Chicago, B. & Q. R. Co. (1909) 86 N. E. 1065, 237 Ill. 500.

A transcript of the record of a United States patent of lands, certified by the Commissioner of the General Land Office to be "a true and literal exemplification from the record in this office," is sufficiently certified under R. S. § 891, post, § 1504, and this and the following

section, to be admitted in evidence. Boyce v. Stambaugh (1876) 34 Mich. 348.

Copies of documents which were archives of the General Land Office were properly admitted in evidence. Keith v. Guedry (Tex. Civ. App. 1908) 114 S. W. 392.

In an action to recover land donated to a settler who had settled thereon under the Oregon donation act, to the territory of Washington, the fact that the notification to the Surveyor General by the claimant of his intent to claim the land was not found in the Oregon land offices, the land being a part of Oregon Territory at the time the notification was given, but in the General Land Office at the city of Washington, did not detract from its character as evidence, and, where a certified copy of this notification which bore on its face evidences its genuineness showed when it was given and that the land had been surveyed prior to that time was introduced in evidence, it was proper to find that the notification was given on the date stated in the certified copy thereof. Sylvester v. State (Wash. 1907) 91 Pac. 15.

Proof of documents.—Where original documents of the United States Land Office and Department of Interior were identified by the register of the local land office, who produced them in court, a sufficient foundation was laid for their introduction in evidence. Harmening v. Howland (N. D. 1913) 141 N. W. 131.

Exclusiveness of method of proof.—Rev. Codes N. D. 1905, § 7300, subsec. 8, and this and the following section, provide merely an easy, and not an exclusive, method by which certain public documents may be proved, and do not preclude the introduction in evidence of the original documents when properly identified. Harmening v. Howland (N. D. 1913) 141 N. W. 131.

Cited without definite application, Hartman v. Warren (1896) 76 Fed. 157, 161, 22 C. C. A. 30.

§ 710. (R. S. § 2470.) Exemplifications valid without names of officers signing and countersigning.

Literal exemplifications of any records which have been or may be granted in virtue of the preceding section shall be deemed of the same validity in all proceedings, whether at law or in equity, wherein such exemplifications are adduced in evidence, as if the names of the officers signing and countersigning the same had been fully inserted in such record.

Act March 3, 1843, c. 95, § 1, 5 Stat. 627.

See notes to R. S. §§ 460, 2469, ante, §§ 708, 709.

Provisions similar to those of this section were contained in R. S. § 890, post, § 1503.

Notes of Decisions

Proof of documents.—A transcript of the record of a United States patent of lands, certified by the Commissioner of the General Land Office to be "a true and literal exemplification from the record in this office," is sufficiently certified under R. S. § 891, post, § 1504, and this and the preceding section, to be admitted in evidence. Boyce v. Stambaugh (1876) 34 Mich. 348.

Rev. Codes N. D. 1905, § 7300, subsec. 8, and this and the preceding section, provide merely an easy, and not an exclusive method by which certain public documents may be proved, and do not preclude the introduction in evidence of the original documents when properly identified. Harmening v. Howland (N. D. 1913) 141 N. W. 131.

Where original documents of the United States Land Office and Department of Interior were identified by the register of the local land office, who produced them in court, a sufficient foundation was laid for their introduction in evidence. Id.

§ 711. (R. S. § 461, as amended, Act April 2, 1888, c. 54, and Act May 29, 1908, c. 220, § 15.) Fees for exemplifications of patents, etc., and for photolithographed copies of township plats, etc.

All exemplifications of patents or papers on file or of record in the General Land Office which may be required by parties interested shall be furnished by the Commissioner upon payment by such parties at the rate of fifteen cents per hundred words, and thirty cents each for photolithographic copies of township plats or diagrams unverified, not to exceed ten copies to any one person, and twenty-five cents each for all copies in excess of ten, with an additional sum of one dollar for the Commissioner's certificate of verification, with the General Land Office seal; and the amount so received shall, under the direction of the Commissioner, be paid into the Treas-

ury; but fees shall not be demanded for such authenticated copies as may be required by the officers of any branch of the Government, nor for such unverified copies as the Commissioner, in his discretion, may deem proper to furnish; but said Commissioner may, if he deem it advisable, make such charge for unverified copies as will, in his judgment, cover the cost of the preparation thereof.

Act July 2, 1864, c. 224, 13 Stat. 375. Act April 2, 1888, c. 54, 25 Stat. 76. Act May 29, 1908, c. 220, § 15, 35 Stat. 469.

This section, as enacted in the Revised Statutes, contained, following the provision at the beginning for furnishing exemplifications of patents, etc., "at the rate of fifteen cents per hundred words," the words "and two dollars for copies of township plats or diagrams." The amendment by Act April 2, 1888, c. 54, cited above, inserted, instead of the words last quoted, the provision of the section as set forth here, "and thirty cents each for photolithographed copies of township plats or diagrams, unverified, not to exceed ten copies to any one person, and twenty-five cents each for all copies in excess of ten."

The section also contained, after the clause next following, "with an additional sum of one dollar for the Commissioner's certificate of verification, with the General Land Office seal." By the amendment by Act May 29, 1908, c. 220, § 15, cited above, this provision was omitted; and at the end of the original section was added the provision, "but said Commissioner may, if he deem it advisable, make such charge for unverified copies as will, in his judgment, cover the cost of the preparation thereof," making the section read as set forth here.

The sale of photolithographic township plats or maps of States, etc., was authorized by Act Oct. 12, 1888, c. 1098, post, § 712.

§ 712. (Act Oct. 12, 1888, c. 1098.) Sale of township plats or maps of States, etc.

From and after the passage of this act the Secretary of the Interior, through the Commissioner of Public Lands, be, and he is hereby, authorized to sell the photolithographic township plats or maps of the States and Territories now remaining on hand in that Department to citizens of the United States at the following prices: Authenticated copies, fifty cents per copy; unauthenticated copies, tweny-five cents per copy; the proceeds of said sales to be covered into the Treasury of the United States by the Secretary of the Interior. (25 Stat. 557.)

This was an act entitled "An act to authorize the Secretary of the Interior to sell township maps or plats remaining on hand in his office."

CHAPTER FOUR

The Commissioner of Indian Affairs

Sec.
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725. Designation of employé or employés to sign approval of Secretary of tribal deeds, etc., of any of Five Civilized Tribes.
726. Agent to negotiate with Indians for commutation of perpetual annuities.

§ 713. (R. S. § 462.) Commissioner of Indian Affairs.

There shall be in the Department of the Interior a Commissioner of Indian Affairs, who shall be appointed by the President, by and

th the advice and consent of the Senate, and who shall be en-
led to a salary of three thousand dollars a year.

Act July 9, 1832, c. 174, § 1, 4 Stat. 564.

Subsequent appropriations provided an increased salary for the Commissioner. The current appropriations are $5,000. See Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1915, c. 417, post, § 3230a.

Cited without definite application,
U. S. v. Brindle (1884) 4 Sup. Ct. 180,
182, 110 U. S. 688, 28 L. Ed. 286.

14. (Act March 4, 1913, c. 142, § 1.) Assistant Commissioners of Indian Affairs.

Indian Office: Commissioner, $5,000; assistant commissioner, $500; second assistant commissioner, who shall also perform the duties of chief clerk, $2,750. (37 Stat. 773.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1914, cited above.

A previous provision for an "Assistant Commissioner, who shall also perform the duties of chief clerk, three thousand dollars," in the legislative, executive, and judicial appropriation act for the fiscal year 1887, was repeated in the subsequent similar acts down to the fiscal year 1907. For each of the three years following, down to 1910, appropriations were made for "Assistant Commissioner," $3,000, and for "chief clerk," $2,250. For 1911, the appropriation for Assistant Commissioner was continued, and instead of the appropriation for a chief clerk, provision was made for a "Second Assistant Commissioner, who shall also perform the duties of chief clerk," $2,250. For subsequent years, the provisions were repeated, with increased salaries. The legislative, executive, and judicial appropriation acts for the fiscal years 1916, 1917, Act March 4, 1915, c. 141, 38 Stat. 1031, and Act May 10, 1916, c. 117, § 1, 39 Stat., omitted the provision for a "second assistant commissioner who shall perform the duties of chief clerk," and contained only the provision for a chief clerk at $2,750.

An appropriation for a private secretary in the office of the Commissioner, made by Act Feb. 27, 1906, c. 510, § 1, and repeated in subsequent acts, is set forth, post, § 715.

See notes to § 713, ante.

15. (Act Feb. 27, 1906, c. 510, § 1.) Private secretary to Commissioner of Indian Affairs.

For salary of private secretary, now appropriated for as confidential clerk in office of Commissioner of Indian Affairs at the rate of one thousand eight hundred dollars per annum. (34 Stat. 36.)

This was a provision of the urgent deficiency appropriation act for the fiscal year 1906, cited above. Appropriations for the salary of the private secretary at the same rate were made by the legislative, executive, and judicial appropriation acts for subsequent years. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 713, ante.

16. (R. S. § 463.) Duties of Commissioner.

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as

the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.

Act July 9, 1832, c. 174, § 1, 4 Stat. 564. Act July 27, 1868, c. 259, § 1, 15 Stat. 228.

Notes of Decisions

Nature and scope of Commissioner's authority.—While there is no express power given to the secretary to hear and determine appeals from the Commissioner of Indian Affairs, such power has not been questioned. Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 264, 142 U. S. 161, 35 L. Ed. 974.

A general order to the predecessor in office of the superintendent of Indian affairs by the commissioner of Indian affairs, stating that it was made by the direction of the secretary of the interior, was sufficient to authorize the superintendent to publish advertisements in newspapers inviting proposals for supplies. Neither was it necessary for the secretary to sign the order. U. S. v. Odeneal (C. C. 1882) 10 Fed. 616, 618.

Order of brigadier general in command of a department of the army that to preserve the peace a tract of land should be protected against settlement by others than certain Indians, until surveyed or until further instructions, held not to reserve such land from sale or other disposition, so as to prevent railroad company from acquiring right of way thereover, in view of this section. Northern Pac. Ry. Co. v. Mitchell (D. C. 1913) 208 Fed. 469.

The action of the Commissioner of Indian Affairs must be presumed to be the action of the President. Belt's Executrix v. U. S. (1879) 15 Ct. Cl. 92.

Effect of regulations.—The rules and regulations of the Indian Department, promulgated under the authority of law, have the force and effect of statutes, of which the court will take judicial notice. Bridgeman v. U. S. (1905) 140 Fed. 577, 583, 72 C. C. A. 145.

Authority of subagents.—A sub-Indian agent has no authority to draw bills of exchange so as to bind the government. Jackson v. U. S. (1865) 1 Ct. Cl. 260; Fremont v. U. S. (1866) 2 Ct. Cl. 461.

When the Commissioner of Indian affairs, being informed of the course which a sub-Indian agent intended to pursue, approved it, his approval was a ratification of the agent's acts, rendering them valid. Belt's Executrix v. U. S. (1879) 15 Ct. Cl. 92.

Where a contract for the delivery of certain supplies at an Indian agency provided for the acceptance of goods inferior in quality to the sample where the emergency demanded it, the question whether the necessities of the service compelled acceptance of the articles offered was a question determinable only by the Commissioner of Indian Affairs or his agents, under the direction of the Secretary of the Interior. (1882) 17 Op. Atty. Gen. 384.

Adoption into tribe.—This section and R. S. § 441, ante, § 681, authorized a regulation of the department of the interior that adoption into an Indian tribe must be subject to approval by the Indian office. U. S. v. Hitchcock (1907) 27 Sup. Ct. 423, 425, 205 U. S. 80, 51 L. Ed. 718.

Exclusion of collectors on pay days.—The commissioner of Indian affairs may, with the approval of the secretary of the interior, cause collectors to be excluded and removed from a tribal Indian reservation on days when payments are being made to the Indians, if in his judgment the presence of collectors therein at such times is detrimental to the peace and welfare of the Indians, though the reservation be within a state and the Indians are holders under trust patents of allotments adjacent to the reservation and are therefore citizens of the United States and of the state. Rainbow v. Young (1908) 161 Fed. 835, 88 C. C. A. 653.

Indian offenses.—The general authority given by this section and R. S. §§ 441, 465, ante, § 681, and post, § 723, authorized rules of government for the Indians on the Umatilla reservation, including establishment of an Indian court and police for the enforcement of police regulations, and to take cognizance of offenses designated "Indian offenses," and gave authority to define such offenses. U. S. v. Clapox (D. C. 1888) 35 Fed. 575, 577.

Though the Indians are the wards of the United States, acting through executive officers pursuant to regulations promulgated under the authority of the president, pursuant to this section and R. S. § 465, post, § 723, yet, in the absence of such regulations defining what conduct of Indians shall be deemed reprehensible and subject them to correction, it does not rest in executive discretion to administer corrective punishment, as to members of a tribe having a treaty with the United States, covenanting that bad Indians shall not be punished by the United States except pursuant to laws defining their offenses, and prescribing the punishments therefor. Ex parte Bi-a-lil-le (Ariz. 1909) 100 Pac. 450.

Regulation of liquor traffic.—Regulations and practices having the force of regulations, under which special officers for the suppression of the liquor traffic among the Indians are charged with the duty of rendering true reports to the Commissioner of Indian Affairs, and of making recommenda-

: with respect to the advisability of ing executive or judicial clemency ose convicted of selling liquor to ns, could be established by the missioner. U. S. v. Birdsall (1914) up. Ct. 512, 233 U. S. 223, 58 L. 930.

act of congress or rule of the de- nent of the interior adopted under rity of this section and R. S. § ante, § 235, and R. S. § 465, post, 3, for the suppression of the liq- traffic among Indians, imposed any al duty to make recommendations punishments therefor, and an in- nent for bribery under Pen. Code, § 117, post, § 10287, relating to bribes accepted "by an officer of the United States," was ineffectual. U. S. v. Van Wert (D. C. 1912) 195 Fed. 974.

Withdrawal of allotments.—The power to withdraw land allotted by acts of Congress is not conferred by this section. Leecy v. U. S. (1911) 190 Fed. 289, 111 C. C. A. 254.

Cited without definite application, U. S. v. Brindle (1884) 4 Sup. Ct. 180, 182, 110 U. S. 688, 28 L. Ed. 286; U. S. v. Boyd (C. C. 1895) 68 Fed. 577, 580, 582, 583; (1848) 5 Op. Atty. Gen. 36, 39.

17. (Act May 17, 1882, c. 163, § 7.) Statutes regulating duties of Indian agents and inspectors to be compiled and furnished to them.

: shall be the duty of the Commissioner of Indian Affairs to se to be compiled and printed for the use of Indian agents and ectors the provisions of the statutes regulating the perform- e of their respective duties, and also to furnish said officers n time to time information of new enactments upon the same ject. (22 Stat. 88.)

This section was part of the Indian appropriation act for the fiscal year 1883, ited above.

18. (Act July 26, 1892, c. 256, § 1.) Recording of deeds and papers legalized.

he recording of all deeds and papers heretofore made and done the office of the Commissioner of Indian Affairs be, and is eby, confirmed, approved, and legalized; and said record here- re made shall be deemed, taken, and held to be good and valid shall have all the force and effect and be entitled to the same lit as if it had been made in pursuance of and in conformity to . But shall have no effect whatever upon the validity or in- dity of the deed or paper so recorded, and shall be no evidence constructive notice to any persons not actually knowing the tents. (27 Stat. 272.)

This section and the three sections next following were an act entitled "An ct to legalize the deed and other records of the Office of Indian Affairs, and o provide and authorize the use of a seal by said office."

The deed records legalized by this act begin in 1825. These deeds show the transfer of lands granted to individual Indians under the several treaties since 1817 whenever a restriction was made that the lands should not be sold without the consent of the President; also the transfer of those lands allotted to individual Indians, the patent for which contained a similar restrictive clause upon the sale of the land. The other records referred to are those of the current correspondence of the office, of treaties before ratification, of contracts made with special attorneys (R. S. §§ 2103–2106), and of similar papers. Some of these records run back to 1800, and a few even prior to that date, when the office was under the War Department, but it was not until the year 1824 that a regular record of all the correspondence of the office was inaugurated and kept up.

19. (Act July 26, 1892, c. 256, § 2.) Record of deeds by Indians requiring approval.

he Commissioner of Indian Affairs is hereby empowered and ected to continue to make and keep a record of every deed ex- ted by any Indian, his heirs, representatives, or assigns, which y require the approval of the President of the United States or the Secretary of the Interior, whenever such approval shall have n given, and the deed so approved returned to said office. Stat. 272.)

See notes to preceding section of this act, ante, § 718.

§ 724. (Act March 3, 1909, c. 263.) Designation of employé to sign letters for Commissioner or Assistant Commissioner.

Hereafter the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may designate an employee of the Indian Office to sign letters of that office requiring the signature of the commissioner or assistant commissioner, and all signatures of such employee while acting under such designation shall have the same force and effect as if made by said commissioner or assistant commissioner. (35 Stat. 783.)

This was a provision of the Indian appropriation act for the fiscal year 1910, cited above.

§ 725. (Act March 3, 1911, c. 210, § 17.) Designation of employé or employés to sign approval of Secretary of tribal deeds, etc., of any of Five Civilized Tribes.

That the Secretary of the Interior be, and he is hereby, authorized to designate an employee or employees of the Department of the Interior to sign, under the direction of the Secretary, in his name and for him, his approval of tribal deeds to allottees, to purchasers of town lots, to purchasers of unallotted lands, to persons, corporations, or organizations for lands reserved to them under the law for their use and benefit, and to any tribal deeds made and executed according to law for any of the Five Civilized Tribes of Indians in Oklahoma. (36 Stat. 1069.)

This was a provision of the Indian appropriation act for the fiscal year 1912, cited above.

The legislative, executive, and judicial appropriation acts make appropriations for the salary of the above named employé. The appropriation for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 726. (Act April 30, 1908, c. 153.) Agent to negotiate with Indians for commutation of perpetual annuities.

The Commissioner of Indian Affairs is hereby authorized to send a special Indian agent, or other representative of his office, to visit any Indian tribe for the purpose of negotiating and entering into a written agreement with such tribe for the commutation of the perpetual annuities due under treaty stipulations, to be subject to the approval of Congress; and the Commissioner of Indian Affairs shall transmit to Congress said agreements with such recommendations as he may deem proper. (35 Stat. 73.)

This was a provision of the Indian appropriation act for the fiscal year 1909, cited above.

Cited without definite application, Campbell v. U. S. (1909) 44 Ct. Cl. 488; Hayes v. U. S. (1909) 44 Ct. Cl. 493; Byrd v. U. S. (1909) 44 Ct. Cl. 498.

(R. S. § 466. Superseded.)

This section, as enacted in the Revised Statutes, provided for regulations by the Secretary of the Interior, of the presentation and proof of claims under laws or treaty stipulations for compensation for depredations committed by Indians, the investigation by him of claims presented, and payment of them. It was superseded by the transfer of such claims to the Court of Claims by the Indian Depredation Act, Act March 3, 1891, c. 538, 26 Stat. 854, section 13 of which provided that the investigation and examination of such claims, under acts previously in force, should cease on the taking effect of that act.

(R. S. § 467. Transferred.)

This section was transferred to Title XXVIII, "Indians," c. 4, post, § 4133.

(R. S. §§ 468, 469. Repealed.)

These sections, which required the Commissioner to report annually to Congress the expenditures for the Indian service, prescribing the form and contents of such reports, were repealed, with R. S. § 2091, by Act June 25, 1910, c. 431, § 19, 36 Stat. 860.

A provision, subsequent to these sections, that, in the annual report of the Commissioner, there should be embodied "a detailed and tabular statement of all bids and proposals received for any services, supplies, or annuity goods for the Indian service, together with a detailed statement of all awards of con-

tracts made for any such services, supplies, and annuity goods for which said bids or proposals were received," made by Act Aug. 15, 1876, c. 289, § 3, 19 Stat. 199, was repealed, before the repeal of R. S. §§ 468, 469, mentioned above, by Act June 21, 1906, c. 3504, 34 Stat. 328, which act further provided that the Commissioner should "embody in his annual report only a detailed statement of the awards of contracts made for any services, supplies, and annuity goods for the Indian service." But this provision, also, may be regarded as repealed by necessary implication from the repeal, as mentioned above, of R. S. §§ 468, 469, and of Act March 3, 1875, c. 132, § 8, 18 Stat. 450, and other provisions requiring reports by the Commissioner, by Act June 25, 1910, c. 431, §§ 19, 20, 36 Stat. 860, 861.

A further provision of the deficiency appropriation act of March 8, 1892, c. 12, 27 Stat. 5, required the commissioner to include in his annual report to Congress the names, with other particulars, of all employés under the Indian Bureau. And the Indian appropriation act of the same year, Act July 13, 1892, c. 164, § 9, 27 Stat. 145, provided that the Commissioner should report annually to Congress the number, with other particulars, of employés at each agency, industrial, and boarding school, supported out of the appropriations in the act; also number, with other particulars, of employés in his office in Washington. These provisions were repeated, in substance, in the subsequent Indian appropriation acts down to that for the fiscal year 1897, and thereafter the provision for a report of employés at schools was repeated in the similar acts down to the act for the fiscal year 1904. But Act April 21, 1904, c. 1402, § 6, 33 Stat. 217, provided for a similar report of employés at schools, "to each Congress, at the first regular session thereof," instead of "annually," as required in the preceding acts; and the provision was not repeated in subsequent acts. The repeal of the provision for a report of all employés under the Indian Bureau, of Act March 8, 1912, c. 12, mentioned above, was evidently intended, notwithstanding the discrepancy in referring to it, by date of March 2, in the repeal of "so much of the Acts of March second, eighteen hundred and ninety-two, and April twenty-first, nineteen hundred and four, which require the Commissioner to report annually the names of all employés, in the Indian service," by Act June 21, 1906, c. 3504, 34 Stat. 328. And the subsequent repeal of the sections in which the provisions of Act July 13, 1892, c. 164, § 9, mentioned above, for reports of employés at schools and of employés in the Indian Bureau were re-enacted, Act March 2, 1895, c. 188, § 8, 28 Stat. 908, Act March 3, 1901, c. 832, § 8, 31 Stat. 1085, and Act May 27, 1902, c. 888, § 6, 32 Stat. 274, by Act June 25, 1910, c. 431, § 20, 36 Stat. 861, involving the repeal of all similar provisions in other acts requiring such reports, in connection with the repeal by said section and section 20 of the same act of R. S. §§ 468, 469, and other provisions relating to reports by the Commissioner, may be regarded as operating as a repeal of all provisions for such reports mentioned in this paragraph.

CHAPTER FIVE

The Commissioner of Pensions

Sec.
727. Commissioner of Pensions.
728. Duties of the Commissioner.
729. Deputy Commissioner.
730. Private Secretary to Commissioner of Pensions.
731. Medical referee and examining surgeons.
732. Person to sign bounty-land warrants.
733. Report of additions and reductions on pension rolls.
734. Report of pensioners and of payments for pensions on account of each war.

§ 727. (R. S. § 470.) Commissioner of Pensions.

There shall be in the Department of the Interior a Commissioner of Pensions, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to receive a salary of [four thousand dollars] a year.

Act March 2, 1833, c. 54, § 1, 4 Stat. 619, 622. Act March 3, 1835, c. 46, §§ 1, 2, 3, 4 Stat. 779. Act March 3, 1837, c. 43, 5 Stat. 187. Act March 4, 1840, c. 4, §§ 1, 2, 3, 5 Stat. 369. Act March 4, 1840, c. 4, § 4, 5 Stat. 370. Act Jan. 20, 1843, c. 4, 5 Stat. 597. Act Jan. 14, 1846, c. 4, § 1, 9 Stat. 3. Act Jan. 19, 1849, c. 20, § 1, 9 Stat. 341. Act March 3, 1873, c. 226, § 3, 17 Stat. 508.

The salary of the Commissioner, having been increased from $3,000 to $4,000, by the provision of Act March 3, 1873, c. 226, § 3, incorporated into this

section of the Revised Statutes, and cited above, was reduced to $3,000, and the words of this section inclosed in brackets, "four thousand dollars," were superseded, by the repeal of so much of that act as increased the amount, by Act Jan. 20, 1874, c. 11, 18 Stat. 4. Subsequent appropriations were for increased amounts. The appropriation for the Commissioner for the fiscal year 1917 was $5,000, by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés, appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1915, c. 417, post, § 3230a.

Notes of Decisions

Compelling attendance of witness before special examiner.—Since the pension bureau is not a court, a subpœna cannot issue out of the district court to compel attendance of a witness before a special examiner of the pension bureau. In re McLean (D. C. 1888) 37 Fed. 648.

Status of Commissioner.—The commissioner of pensions is an officer of the United States, though he is not the "head of a department" under Const. art. 2, § 2. His function is an "office." U. S. v. Van Leuven (D. C. 1894) 62 Fed. 62, 65; U. S. v. Germaine (1878) 99 U. S. 508, 25 L. Ed. 482.

Cited without definite application, Pooler v. U. S. (1904) 127 Fed. 509, 62 C. C. A. 307.

§ 728. (R. S. § 471.) Duties of the Commissioner.

The Commissioner of Pensions shall perform, under the direction of the Secretary of the Interior, such duties in the execution of the various pension and bounty-land laws as may be prescribed by the President.

Act March 2, 1833, c. 54, § 1, 4 Stat. 619, 622. Act March 3, 1835, c. 46, § 2, 4 Stat. 779. Act March 3, 1837, c. 43, § 2, 5 Stat. 187. Act March 4, 1840, c. 4, § 2, 5 Stat. 369. Act March 4, 1840, c. 4, § 4, 5 Stat. 370. Act Jan. 20, 1843, c. 4, § 2, 5 Stat. 597.

Notes of Decisions

Scope of Commissioner's authority.—The Commissioner of Pensions and Department of the Interior have sole jurisdiction to administer and construe the pension laws. U. S. v. Scott (C. C. 1885) 25 Fed. 470, 472; U. S. v. Raum (D. C. 1890) 7 Mackey, 556; (1891) 20 Op. Atty. Gen. 178; Stokely v. De Camp (Pa. 1849) 2 Grant, Cas. 17.

The commissioner of pensions is not a judicial officer, and his rulings in granting a pension upon improper or fraudulent testimony do not estop the government from recovering back moneys paid thereunder. U. S. v. Lalone (C. C. 1890) 44 Fed. 475.

It is the duty of the Commissioner of Pensions, in a case where money has been paid on a pension certificate alleged to have been fraudulently obtained, to furnish the Solicitor of the Treasury with all the material facts and evidence in the case at his command, or which he can obtain, including facts and evidence with regard to certificates of deposit and mortgages that have been made and purchased with part of such money, and in every way in his power to aid in the prosecution of such suits as may be brought. (1888) 19 Op. Atty. Gen. 210.

Mandamus to compel action by Commissioner.—See U. S. v. Black (1888) 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354.

Appeals from Commissioner.—While there is no express power given to the secretary to hear and determine appeals from the Commissioner of Pensions, such power has not been questioned. Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 264, 142 U. S. 161, 35 L. Ed. 974.

The matter of determining, and certifying who is entitled to a pension is confided to certain executive officers and not to the judiciary; and no right to a pension is fixed until those officers declare it to be; and if they decide

against the right there is no appeal except to Congress. Daily v. U. S. (1881) 17 Ct. Cl. 144.

There is no appeal from the Commissioner to the President. (1846) 4 Op. Atty. Gen. 515.

Authority of treasury officers.—It is not within the province of the accounting officers of the Treasury to construe the pension laws and give instructions to pension agents as to the payment of pensions. This properly belongs to the Commissioner of Pensions, whose duty is, under the direction of the Secretary of the Interior, to administer these laws. (1882) 17 Op. Atty. Gen. 9.

The power to audit and adjust accounts for the last sickness and burial deceased pensioners arising under R. S. § 4718, post, § 9015, belongs solely to the proper accounting officers of the treasury by virtue of R. S. § 236, post, § 368. (1882) 17 Op. Atty. Gen. 9.

The accounting officers of the Treasury have no power to disallow payments made by pension agents pursuant to an order made and within the jurisdiction of the Commissioner of Pensions. It is not within their province, upon learning of any order made by the Commissioner of Pensions to a pension agent for the payment of pensions, to notify such agent of what their decision will be upon his account when rendered. (1888) 19 Op. Atty. Gen. 214.

A person who for a time drew two pensions, one as the widow of a soldier in the war of the rebellion and the other as the widow of a soldier in the war of 1812, was required to make an election, and, having elected to hold the first-mentioned certificate, the Commissioner of Pensions ordered the amount which had been paid to her upon the other certificate to be withheld in installments of $6 per month from payments thereafter, and issued an order to the pension agent accordingly. Advised that the order made in this case, being within the general jurisdiction of the Commissioner, is obligatory on the pension agent, and that the accounting officers of the Treasury have no power to disallow payments made by the agent pursuant thereto. Id.

Reports to Secretary of the Interior.—Where reports are required for the action of the head of the department and they are ratified they become the act of the secretary. Medkirk v. U. S. (1910) 45 Ct. Cl. 395.

Supervision of clerks.—When the head of the Pension Office exercised discretion as to capacity between clerks in his office the exercise of his discretion cannot be reviewed in the courts. Medkirk v. U. S. (1909) 44 Ct. Cl. 469.

Jurisdiction of Court of Claims of claims founded on pensions.—See Cole v. U. S. (1894) 29 Ct. Cl. 47.

Cited without definite application, Pooler v. U. S. (1904) 127 Fed. 509, 62 C. C. A. 307.

§ 729. (R. S. § 472.) Deputy Commissioner.

There shall be in the Department of the Interior a Deputy Commissioner of Pensions, who shall be appointed by the President, by and with the advice and consent of the Senate, who shall be charged with such duties in the Pension Bureau as may be prescribed by the Secretary of the Interior, or may be required by law, and in case of death, resignation, absence, or sickness of the Commissioner, his duties shall devolve upon the Deputy Commissioner, until a successor is appointed or such absence or sickness ceases. The Deputy Commissioner shall be entitled to receive an annual salary of twenty-five hundred dollars.

Act March 3, 1873, c. 234, § 29, 17 Stat. 575.

Appropriations for the Deputy Commissioner were $2,400 each year until the fiscal year 1882, for which Act March 3, 1881, c. 130, § 1, 21 Stat. 408, provided for "First Deputy Commissioner," $3,600, and "Deputy Commissioner," $2,400. For the year next following, Act Aug. 5, 1882, c. 389, § 1, 22 Stat. 247, made appropriations for "First Deputy Commissioner," $3,600, and "Second Deputy Commissioner," $3,600, and made provisions as to the duties of said deputy commissioners, and the devolution upon one of them of the duties of the Commissioner in case of his death, absence, etc. Appropriations for both Deputy Commissioners, $3,600 for each, were continued until the fiscal year 1912. The appropriation for 1917 was "Deputy Commissioner," $3,600, by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 727, ante.

Cited without definite application, Pooler v. U. S. (1904) 127 Fed. 509, 62 C. C. A. 307; U. S. v. Scott (C. C. 1885) 25 Fed. 470, 471.

§ 730. (Act March 3, 1905, c. 1484, § 1.) Private Secretary to Commissioner of Pensions.

Pension Office: For private secretary to be selected and appointed

by the Commissioner of Pensions at the rate of two thousand dollars per annum. (33 Stat. 1233.)

This was a provision of the deficiency appropriation act for the fiscal year 1905, cited above. The appropriation was continued at the same rate by the legislative, executive, and judicial appropriation acts for subsequent years. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 727, ante.

§ 731. (R. S. § 4776.) Medical referee and examining surgeons.

The Secretary of the Interior is authorized to appoint a duly qualified surgeon as medical referee who, under the control and direction of the Commissioner of Pensions, shall have charge of the examination and revision of the reports of examining surgeons, and such other duties touching medical and surgical questions in the Pension-Office, as the interests of the service may demand; and his salary shall be two thousand five hundred dollars per annum. And the Secretary of the Interior is further authorized to appoint such qualified surgeons (not exceeding four) as the exigencies of the service may require, who may perform the duties of examining surgeons when so required, and who shall be borne upon the rolls as clerks of the fourth class; but such appointments shall not increase the clerical force of said Bureau.

Act March 3, 1873, c. 234, § 38, 17 Stat. 577.

Recent appropriations provide for the medical referee, $3,000, and assistant medical referee, $2,250, and for two qualified surgeons, at $2,000. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Notes of Decisions

Supervising examiners.—The special authority given by Act July 11, 1888 (25 Stat. 286), to appoint or detail five supervising examiners in the Bureau of Pensions, with headquarters in the District of Columbia, is prohibitory of the appointment or detail of a greater number for the District or for places other than the District. (1889) 19 Op. Atty. Gen. 327.

Salary of assistant medical referee.—An assistant medical referee is not entitled, in addition to his salary, to the fees of an examining surgeon while serving on an examining board under R. S. § 4775, post, § 9103. Graham v. U. S. (1894) 29 Ct. Cl. 404.

Civil service rules.—The medical referee, assistant medical referee, medical examiners and law clerk do not fall within the operation of the civil service law, but the principal examiners for the review board are not so excepted. (1885) 18 Op. Atty. Gen. 187.

Cited without definite application, U. S. v. Van Leuven (D. C. 1894) 62 Fed. 62, 65.

§ 732. (R. S. § 473.) Person to sign bounty-land warrants.

The Commissioner of Pensions is authorized, with the approval of the Secretary of the Interior, to appoint a person to sign the name of the Commissioner to certificates or warrants for bounty-lands; and certificates or warrants so signed shall be as valid as if signed by the Commissioner.

Act Feb. 20, 1856, c. 1, 11 Stat. 1.

Notes of Decisions

Former rule.—Heads of departments or of bureaus and other certifying officers cannot certify by delegation unless specially authorized so to do by act of Congress. (1855) 7 Op. Atty. Gen. 594.

Cited without definite application, Pooler v. U. S. (1904) 127 Fed. 509, 62 C. C. A. 307; U. S. v. Scott (C. C. 1885) 25 Fed. 470, 471.

(R. S. § 474. Superseded.)

This section authorized the Commissioner of Pensions to detail clerks in his office to investigate suspected attempts to defraud the United States in the administration ot the pension laws, and to aid in prosecuting any person implicated. Provisions substantially the same were contained in R. S. § 4744, which was amended by Act July 25, 1882, c. 349, § 2, to read as set forth post, § 9073, and this section may be regarded as superseded by said amended provisions.

§ 733. (Act Jan. 19, 1877, c. 27, § 1.) Report of additions and reductions on pension rolls.

In the annual report of Commissioner of Pensions; and hereafter he shall report the total annual amount paid for additions and reductions on the annual pension rolls. (19 Stat. 223.)

This was a provision, accompanying the appropriation for pensions including contingent expenses to be stated in his annual report, of the pension appropriation act for the fiscal year 1878, cited above.

734. (Act April 4, 1890, c. 63.) Report of pensioners and of payments for pensions on account of each war.

Hereafter the Commissioner of Pensions shall, so far as may be practicable, in his annual reports state the amount paid for pensions during the fiscal year for which the report is made, in such manner as will indicate, separately, the number of pensioners and the aggregate payments for pensions on account of each of the wars for which pensions have been authorized, and on account of military and naval services since the close of the late war. (26 Stat. 40.)

This was a proviso annexed to an appropriation for Army and Navy pensions of the urgent deficiency appropriation act for the fiscal year 1890, cited above.

CHAPTER SIX

The Patent-Office

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735. (R. S. § 475.) Establishment of the Patent-Office.

There shall be in the Department of the Interior an office known as the Patent-Office, where all records, books, models, drawings, specifications, and other papers and things pertaining to patents shall be safely kept and preserved.

Act July 8, 1870, c. 230, § 1, 17 Stat. 198.

Notes of Decisions

See Butterworth v. Hill (1885) 5 Sup. Ct. 796, 114 U. S. 128, 29 L. Ed. 99, note under next section.

Authority of Commissioner.—The commissioner of patents is not an officer in whom under the constitution judicial power can be vested, and his action is not res judicata. Odell v. Stout (C. C. 1884) 22 Fed. 159, 161.

The authority of the Secretary of the

Interior to supervise the Patent Office comprehends the power to appoint such temporary clerks to be employed therein as shall be authorized by law, and to cause their salaries to be paid out of any money appropriated for that purpose. (1850) 5 Op. Atty. Gen. 283.

The Commissioner of Patents, therefore, is subordinate to, under the superintendency of, and subject to the control of, the Secretary of the Interior in the appointment and payment of such clerks; and his authority is the same whether the money disbursed be appropriated from fees, or from the agricultural or from any other fund. Id.

§ 736. (R. S. § 476, as amended, Act Feb. 15, 1916, c. 22, § 1.) Officers and employees.

There shall be in the Patent Office a Commissioner of Patents, one first assistant commissioner, one assistant commissioner, and five examiners in chief, who shall be appointed by the President, by and with the advice and consent of the Senate. The first assistant commissioner and the assistant commissioner shall perform such duties pertaining to the office of commissioner as may be assigned to them, respectively, from time to time by the Commissioner of Patents. All other officers, clerks, and employees authorized by law for the office shall be appointed by the Secretary of the Interior upon the nomination of the Commissioner of Patents, in accordance with existing law.

Act July 8, 1870, c. 230, § 2, 16 Stat. 198. Act Feb. 15, 1916, c. 22, § 1, 39 Stat.

This section, as enacted in the Revised Statutes, was amended by Act Feb. 15, 1916, c. 22, § 1, cited above, to read as set forth above. Prior to its amendment said section read as follows: "There shall be in the Patent Office a Commissioner of Patents, one Assistant Commissioner, and three examiners-in-chief, who shall be appointed by the President, by and with the advice and consent of the Senate. All other officers, clerks, and employés authorized by law for the office shall be appointed by the Secretary of the Interior, upon nomination of the Commissioner of Patents."

Instead of one Assistant Commissioner, as authorized by this section as originally enacted, appropriations for a First Assistant Commissioner, and an Assistant Commissioner, for the fiscal year 1910, were made by a provision of Act March 4, 1909, c. 297, 35 Stat. 891, and were continued in subsequent appropriations. The provisions for the fiscal year 1916 were by Act March 4, 1915, c. 141, 38 Stat. 1032. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat., and were as follows; "Commissioner, $5,000; first assistant commissioner, $4,500; assistant commissioner, $3,500."

This section, as amended, superseded a provision in Act July 16, 1914, c. 141, § 1, 38 Stat. 491, which provided that the First Assistant Commissioner of Patents and the Assistant Commissioner of Patents should perform such duties pertaining to the office of the Commissioner of Patents as may be assigned to them, respectively, from time to time, by the Commissioner of Patents. It also superseded similar provisions in Act March 4, 1909, c. 297, § 1, 35 Stat. 891, and subsequent appropriation acts.

In connection with provisions for a revision of the classification of letters patent and publications in the Patent Office, contained in Act June 10, 1898, c. 423, 30 Stat. 440, an additional force of examiners, clerks, and other employés was provided, by section 2 of that act, to carry out its provisions, and an appropriation for their compensation was made by the deficiency appropriation act for that year, Act July 7, 1898, c. 571, § 1, 30 Stat. 672. These provisions may be regarded as temporary merely.

The grade of third assistant examiner was to cease, on and after July 1, 1876, by a provision of Act March 3, 1875, c. 129, § 1, 18 Stat. 365; but subsequent appropriations continued to provide for third assistant and fourth assistant examiners down to the fiscal year 1913. For the fiscal years 1914 and 1915 appropriations were made for a certain number of principal examiners and for a certain number of examiners, without any designation of grades, at four different rates of salaries, by Act March 4, 1913, c. 142, § 1, 37 Stat. 775, and Act July 16, 1914, c. 141, § 1, 38 Stat. 491. For the fiscal years 1916 and 1917 appropriations were made for a certain number of principal examiners, at $2,750 each, a certain number of first assistant examiners, at $2,400 each, a certain number of second assistant examiners, at $2,100 each, a certain number of third assistant examiners, at $1,800 each, and a certain number of fourth assistant examiners at $1,500 each, by Act March 4, 1915, c. 141, 38 Stat. 1032, and Act May 10, 1916, c. 117, § 1, 39 Stat.

The compensation of the officers mentioned in this section was prescribed by R. S. § 477, as amended, post, § 737.

A chief clerk in the Patent Office was authorized by a provision in Act rch 4, 1909, c. 297, § 1, post, § 738.

Provisions for law examiners, examiners in chief, etc., in the Patent Office e contained in a provision of Act May 10, 1916, c. 117, § 1, post, § 738a.

A private secretary in the Patent Office was authorized by a provision of t June 27, 1910, c. 297, § 1, post, § 739.

A financial clerk in the Patent Office was authorized by a provision of t May 10, 1916, c. 117, § 1, post, § 739a.

A librarian in the Patent Office was authorized by a provision of Act May 1916, c. 117, § 1, post, § 739b.

Provisions for chiefs of divisions in the Patent Office are contained in a vision of Act May 10, 1916, c. 117, § 1, post, § 739c.

Provisions applicable to all the Departments, relating to the employment of rks and others, were made by R. S. § 169, and Act Aug. 5, 1882, c. 389, § ante, §§ 248, 249.

Notes of Decisions

of Commissioner.—Under this e preceding section, the Commis- of Patents is by law located in tent office, and his official office e purpose of suits is therefore ngton, D. C. Butterworth v. 885) 5 Sup. Ct. 796, 798, 114 U. 29 L. Ed. 119.

intment and payment of em-—A person is in the employment government if she be appointed rer in the Patent Office by the ary of the Interior "to take effect he shall file the oath of office and on duty," and she files the oath e, and the Commissioner of Pat- rects that her work be sent to her residence. Palmer v. U. S. 17 Ct. Cl. 230.

nore clerks in the Patent Office employed and paid by the Secre- nan are particularly authorized acts of Congress; nor can any higher allowance be made to them than is authorized by Act April 20, 1818, c. 87. (1831) 2 Op. Atty. Gen. 455.

The Commissioner is subordinate to, and subject to the control of, the Secretary of the Interior in the appointment and payment of such temporary clerks in that office as are authorized by law; and it makes no difference whether the money so to be disbursed is appropriated from fees or from the agricultural or any other fund. (1850) 5 Op. Atty. Gen. 283.

Judicial notice of change of Commissioner.—The court is bound to take judicial notice of a change in the incumbency of the office of commissioner of patents pending a suit in equity against him for a cancellation and surrender of an alleged fraudulent assignment of a patent, and may properly dismiss the bill. Backus Portable Steam-Heater Co. v. Simonds (1894) 2 App. D. C. 290.

. (R. S. § 477, as amended, Act Feb. 15, 1916, c. 22, § 2.)

alaries.

e salaries of the officers mentioned in the preceding section be as follows:

e Commissioner of Patents, $5,000 a year.

e first Assistant Commissioner of Patents, $4,500 a year.

e Assistant Commissioner of Patents, $3,500 a year.

e examiners in chief, $3,500 a year each.

Act July 8, 1870, c. 230, § 4, 16 Stat. 199. Act Feb. 15, 1916, c. 22, § 2, 39 t.

This section, as enacted in the Revised Statutes, was amended by Act Feb. 1916, c. 22, § 2, cited above, to read as set forth above. The amendment sisted in an increase in the compensation of the officers enumerated, said nge conforming to the appropriations made for said officers in the recent islative, executive, and judicial appropriation acts. The provisions for the al year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat. See notes § 736, ante.

All laws or parts of laws inconsistent with rates of salaries or compensation propriated by the legislative, executive, and judicial appropriation acts are ealed, and the rates of salaries or compensation of officers or employés ap- priated for in said acts are to constitute the rate of salary or compensation such officers or employés, respectively, until otherwise fixed by an annual e of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 8a.

The officers and employés of the United States whose salaries are appro- ated for in the legislative, executive, and judicial appropriation act for the al year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and tinued from year to year to the extent that they are appropriated for by ngress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any shall be available for payment to any person receiving more than one

Interior to supervise the Patent Office comprehends the power to appoint such temporary clerks to be employed therein as shall be authorized by law, and to cause their salaries to be paid out of any money appropriated for that purpose. (1850) 5 Op. Atty. Gen. 283.

The Commissioner of Patents, therefore, is subordinate to, under the superintendency of, and subject to the control of, the Secretary of the Interior in the appointment and payment of such clerks; and his authority is the same whether the money disbursed be appropriated from fees, or from the agricultural or from any other fund. Id.

§ 736. (R. S. § 476, as amended, Act Feb. 15, 1916, c. 22, § 1.) Officers and employees.

There shall be in the Patent Office a Commissioner of Patents, one first assistant commissioner, one assistant commissioner, and five examiners in chief, who shall be appointed by the President, by and with the advice and consent of the Senate. The first assistant commissioner and the assistant commissioner shall perform such duties pertaining to the office of commissioner as may be assigned to them, respectively, from time to time by the Commissioner of Patents. All other officers, clerks, and employees authorized by law for the office shall be appointed by the Secretary of the Interior upon the nomination of the Commissioner of Patents, in accordance with existing law.

Act July 8, 1870, c. 230, § 2, 16 Stat. 198. Act Feb. 15, 1916, c. 22, § 1, 39 Stat.

This section, as enacted in the Revised Statutes, was amended by Act Feb. 15, 1916, c. 22, § 1, cited above, to read as set forth above. Prior to its amendment said section read as follows: "There shall be in the Patent Office a Commissioner of Patents, one Assistant Commissioner, and three examiners-in-chief, who shall be appointed by the President, by and with the advice and consent of the Senate. All other officers, clerks, and employés authorized by law for the office shall be appointed by the Secretary of the Interior, upon nomination of the Commissioner of Patents."

Instead of one Assistant Commissioner, as authorized by this section as originally enacted, appropriations for a First Assistant Commissioner, and an Assistant Commissioner, for the fiscal year 1910, were made by a provision of Act March 4, 1909, c. 297, 35 Stat. 891, and were continued in subsequent appropriations. The provisions for the fiscal year 1916 were by Act March 4, 1915, c. 141, 38 Stat. 1032. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat., and were as follows; "Commissioner, $5,000; first assistant commissioner, $4,500; assistant commissioner, $3,500."

This section, as amended, superseded a provision in Act July 16, 1914, c. 141, § 1, 38 Stat. 491, which provided that the First Assistant Commissioner of Patents and the Assistant Commissioner of Patents should perform such duties pertaining to the office of the Commissioner of Patents as may be assigned to them, respectively, from time to time, by the Commissioner of Patents. It also superseded similar provisions in Act March 4, 1909, c. 297, § 1, 35 Stat. 891, and subsequent appropriation acts.

In connection with provisions for a revision of the classification of letters patent and publications in the Patent Office, contained in Act June 10, 1898, c. 423, 30 Stat. 440, an additional force of examiners, clerks, and other employés was provided, by section 2 of that act, to carry out its provisions, and an appropriation for their compensation was made by the deficiency appropriation act for that year, Act July 7, 1898, c. 571, § 1, 30 Stat. 672. These provisions may be regarded as temporary merely.

The grade of third assistant examiner was to cease, on and after July 1, 1876, by a provision of Act March 3, 1875, c. 129, § 1, 18 Stat. 365; but subsequent appropriations continued to provide for third assistant and fourth assistant examiners down to the fiscal year 1913. For the fiscal years 1914 and 1915 appropriations were made for a certain number of principal examiners and for a certain number of examiners, without any designation of grades, at four different rates of salaries, by Act March 4, 1913, c. 142, § 1, 37 Stat. 775, and Act July 16, 1914, c. 141, § 1, 38 Stat. 491. For the fiscal years 1916 and 1917 appropriations were made for a certain number of principal examiners, at $2,750 each, a certain number of first assistant examiners, at $2,400 each, a certain number of second assistant examiners, at $2,100 each, a certain number of third assistant examiners, at $1,800 each, and a certain number of fourth assistant examiners at $1,500 each, by Act March 4, 1915, c. 141, 38 Stat. 1032, and Act May 10, 1916, c. 117, § 1, 39 Stat.

The compensation of the officers mentioned in this section was prescribed by R. S. § 477, as amended, post, § 737.

A chief clerk in the Patent Office was authorized by a provision in Act March 4, 1909, c. 297, § 1, post, § 738.

Provisions for law examiners, examiners in chief, etc., in the Patent Office are contained in a provision of Act May 10, 1916, c. 117, § 1, post, § 738a.

A private secretary in the Patent Office was authorized by a provision of Act June 27, 1910, c. 297, § 1, post, § 739.

A financial clerk in the Patent Office was authorized by a provision of Act May 10, 1916, c. 117, § 1, post, § 739a.

A librarian in the Patent Office was authorized by a provision of Act May 10, 1916, c. 117, § 1, post, § 739b.

Provisions for chiefs of divisions in the Patent Office are contained in a provision of Act May 10, 1916, c. 117, § 1, post, § 739c.

Provisions applicable to all the Departments, relating to the employment of clerks and others, were made by R. S. § 169, and Act Aug. 5, 1882, c. 389, § 1, ante, §§ 248, 249.

Notes of Decisions

Office of Commissioner.—Under this the preceding section, the Commissioner of Patents is by law located in the patent office, and his official office for the purpose of suits is therefore in Washington, D. C. Butterworth v. Hill (1885) 5 Sup. Ct. 796, 798, 114 U. S. 128, 29 L. Ed. 119.

Appointment and payment of employés.—A person is in the employment of the government if she be appointed a laborer in the Patent Office by the Secretary of the Interior "to take effect when she shall file the oath of office and enter on duty," and she files the oath of office, and the Commissioner of Patents directs that her work be sent to her at her residence. Palmer v. U. S. (1881) 17 Ct. Cl. 230.

No more clerks in the Patent Office can be employed and paid by the Secretary than are particularly authorized by the acts of Congress; nor can any higher allowance be made to them than is authorized by Act April 20, 1818, c. 87. (1831) 2 Op. Atty. Gen. 455.

The Commissioner is subordinate to, and subject to the control of, the Secretary of the Interior in the appointment and payment of such temporary clerks in that office as are authorized by law; and it makes no difference whether the money so to be disbursed is appropriated from fees or from the agricultural or any other fund. (1850) 5 Op. Atty. Gen. 283.

Judicial notice of change of Commissioner.—The court is bound to take judicial notice of a change in the incumbency of the office of commissioner of patents pending a suit in equity against him for a cancellation and surrender of an alleged fraudulent assignment of a patent, and may properly dismiss the bill. Backus Portable Steam-Heater Co. v. Simonds (1894) 2 App. D. C. 290.

§ 737. (R. S. § 477, as amended, Act Feb. 15, 1916, c. 22, § 2.) Salaries.

The salaries of the officers mentioned in the preceding section shall be as follows:

The Commissioner of Patents, $5,000 a year.

The first Assistant Commissioner of Patents, $4,500 a year.

The Assistant Commissioner of Patents, $3,500 a year.

Five examiners in chief, $3,500 a year each.

Act July 8, 1870, c. 230, § 4, 16 Stat. 199. Act Feb. 15, 1916, c. 22, § 2, 39 Stat.

This section, as enacted in the Revised Statutes, was amended by Act Feb. 15, 1916, c. 22, § 2, cited above, to read as set forth above. The amendment consisted in an increase in the compensation of the officers enumerated, said change conforming to the appropriations made for said officers in the recent legislative, executive, and judicial appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat. See notes to § 736, ante.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one

salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1915, c. 417, post, § 3230a.

§ 738. (Act March 4, 1909, c. 297, § 1.) Chief clerk.

Patent Office: * * chief clerk, who shall be qualified to act as a principal examiner, three thousand dollars. (35 Stat. 891.)

This was part of a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1910, cited above, the remainder of which made appropriations for other officers, clerks, employés, etc., in the Patent Office. This provision was continued in the appropriations for subsequent years. The appropriation for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat. See notes to §§ 736, 737, ante.

§ 738a. (Act May 10, 1916, c. 117, § 1.) Law examiners, examiners in chief, etc.

Patent Office: * * five law examiners, at $2,750 each; examiner of classification, $3,600; five examiners in chief, at $3,500 each; examiner of interferences, $2,700; examiners of trade-marks and designs—one $2,700, first assistant, $2,400, six assistants at $1,500 each. (39 Stat.)

This was part of a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above, the remainder of which made appropriations for other examiners, officers, clerks, employés in the Patent Office. Prior appropriation acts contained similar provisions, varying somewhat from this section.

See notes to §§ 736, 737, ante.

§ 739. (Act June 27, 1910, c. 297, § 1.) Private Secretary to Commissioner of Patents.

Patent Office: * * private secretary, to be appointed and selected by the Commissioner of Patents, one thousand eight hundred dollars. (36 Stat. 514.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1911, cited above. It was continued in the subsequent similar acts. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat. See notes to §§ 736, 737, ante.

§ 739a. (Act May 10, 1916, c. 117, § 1.) Financial clerk.

Patent Office: * * financial clerk, who shall give bond in such amount as the Secretary of the Interior may determine, $2,250. (39 Stat.)

This was part of a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above. It was repeated in prior appropriation acts.

See notes to §§ 736, 737, ante.

§ 739b. (Act May 10, 1916, c. 117, § 1.) Librarian.

Patent Office: * * librarian, who shall be qualified to act as an assistant examiner, $2,000. (39 Stat.)

This was part of a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above. It was repeated in prior appropriation acts.

See notes to §§ 736, 737, ante.

§ 739c. (Act May 10, 1916, c. 117, § 1.) Chiefs of divisions.

Patent Office: * * six chiefs of divisions, at $2,000 each; three assistant chiefs of divisions, at $1,800 each. (39 Stat.)

This was part of a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above. It was repeated in prior appropriation acts.

See notes to §§ 736, 737, ante.

§ 740. (R. S. § 478.) Seal.

The seal heretofore provided for the Patent-Office shall be the seal of the Office, with which letters-patent and papers issued from the Office shall be authenticated.

Act July 8, 1870, c. 230, § 12, 16 Stat. 200.

. (R. S. § 479.) **Bonds of Commissioner and chief clerk.**
e Commissioner of Patents and the chief clerk, before entering their duties, shall severally give bond, with sureties, to the urer of the United States, the former in the sum of ten thou- dollars, and the latter in the sum of five thousand dollars, tioned for the faithful discharge of their respective duties, and hey shall render to the proper officers of the Treasury a true nt of all money received by virtue of their offices.
Act July 8, 1870, c. 230, § 6, 16 Stat. 199.

Notes of Decisions

Form of bond.—See (1885) 18 Op. Atty. Gen. 274.

2. (R. S. § 480.) **Restrictions upon officers and employés.**
officers and employés of the Patent-Office shall be incapable, g the period for which they hold their appointments, to ac- or take, directly or indirectly, except by inheritance or bequest, right or interest in any patent issued by the Office.
Act July 8, 1870, c. 230, § 16, 16 Stat. 200.

Notes of Decisions

t of former employé to obtain —The commissioner of patents cquire a patent after his term of has expired, for an invention by him while holding such office. v. Frost (C. C. 1878) Fed. Cas. 910.

An employé is not disqualified from obtaining a patent, after such employment has ceased, for an invention made prior to the commencement of such employment. Page v. Holmes Burglar-Alarm Telegraph Co. (C. C. 1880) 1 Fed. 304, 325.

3. (R. S. § 481.) **Duties of Commissioner.**
e Commissioner of Patents, under the direction of the Secre- of the Interior, shall superintend or perform all duties respect- he granting and issuing of patents directed by law; and he have charge of all books, records, papers, models, machines, other things belonging to the Patent-Office.
Act July 8, 1870, c. 230, § 7, 16 Stat. 199.
A provision accompanying the appropriation for the Assistant Commissioner, at he "shall perform such duties pertaining to the office of commissioner may be assigned to him by the Commissioner," made by the legislative, ex- utive, and judicial appropriation act for the fiscal year 1891, Act July 11, 90, c. 667, § 1, 26 Stat. 259, was repeated in the subsequent similar acts wn to the fiscal year 1909. Similar provisions as the duties of the First ssistant Commissioner and Assistant Commissioner authorized by Act March 1909, c. 297, § 1, 35 Stat. 891, were made by that act, and were continued subsequent appropriations, and were carried into R. S. § 476, by the nendment thereof by Act Feb. 15, 1916, c. 22, § 1, ante, § 736.

Notes of Decisions

hority to issue patent.—This sec- equiring acts under the direction Secretary of the Interior do not d the supervision and direction e part of the head of the Interior rtment to a review of the action Commissioner in those cases in he is, by law, appointed to exer- his discretion judicially. Butter- v. U. S. (1884) 5 Sup. Ct. 25, 12 U. S. 50, 28 L. Ed. 656.
ere a particular authority is con- in a public officer to be exercised discretion upon an examination cts of which he is the appropriate his decision upon those facts, in sence of any controlling provision, olutely conclusive. Allen v. Blunt 1845) Fed. Cas. No. 216.
authority vested in the Commis- to issue patents exists in full force in each case for examination and final decision, until the patent shall have been actually issued. (1849) 5 Op. Atty. Gen. 220.

The Commissioner, in issuing letters patent of an alleged invention, does not warrant the same. Its validity remains open to inquiry, whether at the instance of private persons or of the United States. (1856) 8 Op. Atty. Gen. 270.

Legal advice.—The Commissioner of Patents should submit to the law officers assigned to the Department of the Interior questions arising in the administration of his Department upon which legal advice is desired. (1895) 21 Op. Atty. Gen. 174.

Effect of certificate.—A letter or certificate from the commissioner of patents of the United States is not ad-

missible to show the nonexistence of certain facts on the records of his office. Daniel v. Braswell (1901) 38 S. E. 829, 113 Ga. 372.

§ 744. (R. S. § 482.) Duties of examiners-in-chief.

The examiners-in-chief shall be persons of competent legal knowledge and scientific ability, whose duty it shall be, on the written petition of the appellant, to revise and determine upon the validity of the adverse decisions of examiners upon applications for patents, and for re-issues of patents, and in interference cases; and, when required by the Commissioner, they shall hear and report upon claims for extensions, and perform such other like duties as he may assign them.

Act July 8, 1870, c. 230, § 10, 16 Stat. 199.

The provision in the last sentence of this section relating to claims for extensions has become obsolete by the expiration of the terms of patents granted prior to March 2, 1861, extensions of which were allowed by R. S. §§ 4924–4928.

Notes of Decisions

Appeals.—An appeal from a decision of the primary examiner upon a motion to dissolve an interference, holding that the party had the right to make the interfering claims, may be prohibited by the rules of the Patent Office without infringing the right of appeal in interferences given by this section and R. S. §§ 483, 4904, 4909, post, §§ 745, 9449, 9454, since the appeal therein provided for must be deemed limited to final decisions upon the question of priority of invention, which, under these statutes, is the sole question for determination in interference cases. U. S. v. Allen (1906) 27 Sup. Ct. 141, 143, 203 U. S. 476, 51 L. Ed. 281.

Cited without definite application, U. S. ex rel. Steinmetz v. Allen (1904) 24 Sup. Ct. 416, 423, 192 U. S. 543, 48 L. Ed. 555.

§ 745. (R. S. § 483.) Establishment of regulations.

The Commissioner of Patents, subject to the approval of the Secretary of the Interior, may from time to time establish regulations, not inconsistent with law, for the conduct of proceedings in the Patent-Office.

Act July 8, 1870, c. 230, § 19, 16 Stat. 200.

Notes of Decisions

Appeals.—A suit involving the validity of a regulation established by the Commissioner of Patents under this section is one questioning the validity of "an authority exercised under the United States" within the meaning of Act Feb. 9, 1893, § 8, post, § 1227, giving an appeal in such cases from the final judgment or decree of the court of appeals of the District of Columbia to the federal Supreme Court. U. S. ex rel. Steinmetz v. Allen (1904) 24 Sup. Ct. 416, 419, 192 U. S. 543, 48 L. Ed. 555.

It is not unlawful for the Commissioner of Patents, with the approval of the Secretary of the Interior, to promulgate a rule limiting appeals to six months from the time when the matter is in condition for appeal. (1895) 21 Op. Atty. Gen. 122. See, also, note under section 743, ante.

Judicial notice of business of Patent Office.—The court will take judicial notice of the business of the patent office. In re Excelsior Shoe Co. (1913) 40 App. D. C. 480; A. Smith & Sons Carpet Co. v. Skinner (1895) 91 Hun, 641, 36 N. Y. Supp. 1000.

Force and effect of rules.—While rules and regulations established under this section are binding so far as regulating the conduct of proceedings in the patent office, they are inoperative to change the rules of evidence in courts of justice. A complainant in an action for infringement of a patent could not refuse obedience to a subpœna duces tecum to produce his application on the ground that the rule of the department is that applications are preserved in secrecy. Edison Electric Light Co. v. U. S. Electric Lighting Co. (C. C. 1890) 44 Fed. 294, 299.

The uniform practice of the Patent Office is entitled to weight in construing a statute relating to patents. Cheney Bros. v. Weinreb & Weinreb (C. C. 1910) 185 Fed. 531.

A rule or regulation made by the Commissioner of Patents and adopted and approved by the Secretary of the Interior is a regulation prescribed by the head of a Department, and as such, when not inconsistent with law, has the force of law and is taken judicial notice of by the courts. (1895) 21 Op. Atty. Gen. 122.

Cited without definite application, U. S. v. Allen (1906) 27 Sup. Ct. 141, 203 U. S. 476, 51 L. Ed. 281; Worswick Mfg. Co. v. Kansas (C. C. 1889) 38 Fed. 239, 251.

§ 746. (R. S. § 484.) Arrangement and exhibition of models, etc.

The Commissioner of Patents shall cause to be classified and arranged in suitable cases, in the rooms and galleries provided for that purpose, the models, specimens of composition, fabrics, manufactures, works of art, and designs, which have been or shall be deposited in the Patent-Office; and the rooms and galleries shall be kept open during suitable hours for public inspection.

Act July 8, 1870, c. 230, § 13, 16 Stat. 200.

All models of the Patent Office are to be retained until provision is made for their care by Congress, by a provision of Act March 4, 1909, c. 298, § 1, post, § 747.

Notes of Decisions

Cases for exhibition of models.—The necessary cases for the proper exhibition and arrangement of models and deposits intended for the Patent Office may be procured either by a contract for the whole or for part, or by purchases. (1852) 5 Op. Atty. Gen. 663.

§ 747. (Act March 4, 1909, c. 298, § 1.) All models to be retained.

That all models of the Patent Office be retained by the Interior Department until provision is made for their care by Congress. (35 Stat. 924.)

This was a provision of the deficiency appropriation act for the fiscal year 1909, cited above.

This provision appears to supersede a previous provision relating to the disposition of such models contained in Act May 22, 1908, c. 186, § 1, 35 Stat. 229, which was as follows:

"That a commission, which is hereby created, to consist of the Secretary of the Interior, the Commissioner of Patents, and the Secretary of the Smithsonian Institution, shall determine which of the models of the Patent Office may be of possible benefit to patentees or of historical value, such models thus selected to be cared for in the new National Museum building, the remainder of said models shall before January first, nineteen hundred and nine, be disposed of by sale, gift, or otherwise as the Commissioner of Patents, with the approval of the Secretary of the Interior, shall determine."

§ 748. (R. S. § 485.) Disposals of models on rejected applications.

The Commissioner of Patents may restore to the respective applicants such of the models belonging to rejected applications as he shall not think necessary to be preserved, or he may sell or otherwise dispose of them after the application has been finally rejected for one year, paying the proceeds into the Treasury, as other patent-moneys are directed to be paid.

Act July 8, 1870, c. 230, § 14, 16 Stat. 200.

§ 749. (R. S. § 486.) Library.

There shall be purchased for the use of the Patent-Office a library of such scientific works and periodicals, both foreign and American, as may aid the officers in the discharge of their duties, not exceeding the amount annually appropriated for that purpose.

Act July 8, 1870, c. 230, § 15, 16 Stat. 200.

The exchange of the Official Gazette for publications adapted to the needs and uses of the scientific library of the Patent Office was authorized by a provision of The Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 69 (3), post, § 7093.

Cited without definite application,
Saunders v. Allen (1894) 60 Fed. 610, 613, 9 C. C. A. 157.

§ 750. (R. S. § 487.) Patent-agents may be refused recognition.

For gross misconduct the Commissioner of Patents may refuse to recognize any person as a patent-agent, either generally or in any particular case; but the reasons for such refusal shall be duly recorded, and be subject to the approval of the Secretary of the Interior.

Act July 8, 1870, c. 230, § 17, 16 Stat. 200.

Notes of Decisions

Powers of Commissioner.—The power of disbarment given by this section is conferred on the commissioner. Only after he has made a decision can there

be a review by the Secretary of the Interior. In determining whether he shall make a reference, and if so to whom, he acts in the first instance upon his own responsibility, and not under the supervision of the Secretary of the Interior. (1893) 20 Op. Atty. Gen. 608, 610.

Cited without definite application, Butterworth v. U. S. (1884) 5 Sup. Ct. 25, 27, 112 U. S. 50, 28 L. Ed. 656.

§ 751. (R. S. § 488.) Printing of papers filed.

The Commissioner of Patents may require all papers filed in the Patent-Office, if not correctly, legibly, and clearly written, to be printed at the cost of the party filing them.

Act July 8, 1870, c. 230, § 18, 16 Stat. 200.

Cited without definite application, Chung Yune v. Kelly (C. C. 1882) 14 Fed. 639, 641.

§ 752. (R. S. § 489.) Printing copies of claims, laws, decisions, etc.

The Commissioner of Patents may print, or cause to be printed, copies of the claims of current issues, and copies of such laws, decisions, regulations, and circulars as may be necessary for the information of the public.

Act July 8, 1870, c. 230, § 20, 16 Stat. 200.

Provisions for continuing the printing of patents issued, copies of specifications and drawings of each patent, pamphlet copies of the rules of practice, the patent laws, etc., were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 69, post, § 7093.

Cited without definite application, Chung Yune v. Kelly (C. C. 1882) 14 Fed. 639, 641.

§ 753. (R. S. § 490.) Printing specifications and drawings.

The Commissioner of Patents is authorized to have printed, from time to time, for gratuitous distribution, not to exceed one hundred and fifty copies of the complete specifications and drawings of each patent hereafter issued, together with suitable indexes, one copy to be placed for free public inspection in each capitol of every State and Territory, one for the like purpose in the clerk's office of the district court of each judicial district of the United States, except when such offices are located in State or territorial capitols, and one in the Library of Congress, which copies shall be certified under the hand of the Commissioner and seal of the Patent-Office, and shall not be taken from the depositories for any other purpose than to be used as evidence.

Res. Jan. 11, 1871, No. 5, 16 Stat. 590.

See note to R. S. § 489, ante, § 752.

General provisions for furnishing copies of official books, records, paper, etc., within the custody of the Secretary of the Interior, the head of any bureau, office, etc., or any officer of the Department, were made by Act Aug. 24, 1912, c. 370, ante, §§ 673–680. But nothing in that act was to repeal the provisions of this section or the three sections of the Revised Statutes next following, or of R. S. § 4934, post, § 9482, fixing the rates for patent fees, by a provision of section 5 of said act, ante, § 677.

A provision that the Commissioner should furnish one copy of the bound volumes of specifications and drawings of patents to each of the Executive Departments, made by Act March 3, 1875, c. 130, § 12, 18 Stat. 402, was superseded by a similar provision of the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 69 (5) post, § 7093.

Notes of Decisions

Back issues of copies of drawings.— This and the two succeeding sections do not apply to and regulate the production of back issues described in the contract of July, 1872, as of date anterior to July 1, 1870. The authority to make contracts for the work provided for by the appropriation of March 3, 1875, is vested in the Commissioner of Patents. (1876) 15 Op. Atty. Gen. 539.

Cited without definite application, Saunders v. Allen (1894) 60 Fed. 610, 613, 9 C. C. A. 157.

4. (R. S. § 491.) Additional specifications and drawings.

ie Commissioner of Patents is authorized to have printed such ional numbers of copies of specifications and drawings, certi- as provided in the preceding section, at a price not to exceed contract price for such drawings, for sale, as may be warranted ie actual demand for the same; and he is also authorized to sh a complete set of such specifications and drawings to any c library which will pay for binding the same into volumes to espond with those in the Patent-Office, and for the transporta- of the same, and which shall also provide for proper custody he same, with convenient access for the public thereto, under regulations as the Commissioner shall deem reasonable.

Res. Jan. 11, 1871, No. 5, 16 Stat. 590.

See notes to R. S. §§ 489, 490, ante, §§ 752, 753.

Notes of Decisions

nishing copies.—Copies of specifi- is of a patented article may be hed to any applicant. (1812) 1 tty. Gen. 171.

entees, their assigns, and persons for violation of patent rights, l, upon demand and payment of nts per folio for the copy, be fur- l with copies of specifications. his privilege cannot be extended izens indiscriminately. (1825) 1 tty. Gen. 719.

ies of papers belonging to the t Office may not be made by individuals, but should be made by the proper officers, and fees received therefor and paid into the Treasury. (1831) 2 Op. Atty. Gen. 455.

Back issues of copies of drawings.—See note under § 753, ante.

Effect on appropriation of transfer of work from Commissioner of Patents to Superintendent of Public Printing.—See (1872) 14 Op. Atty. Gen. 58.

Cited without definite application, Saunders v. Allen (1894) 60 Fed. 610, 613, 9 C. C. A. 157.

5. (R. S. § 492.) Lithographing and engraving.

ie lithographing and engraving required by the two preced- sections shall be awarded to the lowest and best bidders for the ests of the Government, due regard being paid to the execution ie work, after due advertising by the Congressional Printer r the direction of the Joint Committee on Printing; but the Committee on Printing may empower the Congressional Print- make immediate contracts for engraving, whenever, in their ion, the exigencies of the public service will not justify waiting advertisement and award; or if, in the judgment of the Joint mittee on Printing, the work can be performed under the di- on of the Commissioner of Patents more advantageously than e manner above prescribed, it shall be so done, under such lim- ns and conditions as the Joint Committee on Printing may from to time prescribe.

Res. Jan. 11, 1871, No. 5, 16 Stat. 590. Act March 24, 1871, c. 5, § 1, Stat. 2.

See notes to R. S. §§ 489, 490, ante, §§ 752, 753.

Notes of Decisions

iver of advertisement.—The Com- on Printing have no power to an advertisement, except in case exigency of the public service. power is not implied in their power to prescribe rules for the action of the Commissioner of Patents. (1876) 15 Op. Atty. Gen. 539.

Back issues of copies of drawings.—See note under § 753, ante.

6. (R. S. § 493, as amended, Act May 19, 1896, c. 204.) Price of copies of specifications and drawings.

ie price to be paid for uncertified printed copies of specifications drawings of patents shall be determined by the Commissioner atents: Provided, That the maximum cost of a copy shall be ents.

Act March 24, 1871, c. 5, § 2, 17 Stat. 3. Act May 19, 1896, c. 204, 29 tat. 124.

The amendment of this section by Act May 19, 1896, c. 204, cited above,

consisted in the insertion of the proviso fixing the maximum cost of a copy at ten cents, instead of the words at the end of the section as originally enacted, "within the limits of ten cents as the minimum and fifty cents as the maximum price."

See notes to R. S. §§ 489, 490, ante, §§ 752, 753.

§ 757. (Act March 3, 1891, c. 541, § 1.) Certified copies of specifications and drawings, and fees therefor.

For photolithographing or otherwise producing copies of drawings of the weekly issues of patents, for producing copies of designs, trade marks, and pending applications; and for the reproduction of exhausted copies of drawings and specifications; * * And certified copies of such drawings and specifications may be furnished by the Commissioner of Patents to persons applying therefor upon payment of the present rates for uncertified copies, and twenty-five cents additional for each certification. (26 Stat. 939.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1892, cited above.

See notes to R. S. §§ 489, 490, ante, §§ 752, 753.

The provision of this act fixing a rate for certifying printed copies of specifications and drawings of patents, was not repealed by Act Aug. 24, 1912, c. 370, by a provision of section 5 of that act, ante, § 677.

§ 757a. (Res. Jan. 14, 1915, No. 3.) Exchange of printed copies of patents with Dominion of Canada.

That the Commissioner of Patents of the United States be, and he is hereby, authorized to exchange with the Dominion of Canada, under such terms of contract as may by him be deemed practicable, printed copies of patents now in the United States Patent Office and hereafter issued by the United States. (38 Stat. 1221.)

This was a joint resolution authorizing the Commissioner of Patents to exchange printed copies of United States patents with the Dominion of Canada, cited above.

§ 758. (R. S. § 494.) Annual report of the Commissioner.

The Commissioner of Patents shall lay before Congress, in the month of January, annually, a report, giving a detailed statement of all moneys received for patents, for copies of records or drawings, or from any other source whatever; a detailed statement of all expenditures for contingent and miscellaneous expenses; a list of all patents which were granted during the preceding year, designating under proper heads the subjects of such patents; an alphabetical list of all the patentees, with their places of residence; a list of all patents which have been extended during the year; and such other information of the condition of the Patent-Office as may be useful to Congress or the public.

Act July 8, 1870, c. 230, § 9, 16 Stat. 199.

Provisions applicable to all the Departments, relating to the time of making annual reports, and the time of furnishing copies thereof to the printer, were made by R. S. §§ 195, 196, ante, §§ 278, 279.

Provisions for the printing and distribution of the report of the Commissioner were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 69 (4), post, § 7093.

§ 759. (R. S. § 495.) Custody of collections of exploring expeditions.

The collections of the Exploring Expedition, now in the Patent-Office, shall be under the care and management of the Commissioner of Patents.

Act Aug. 4, 1854, c. 242, § 8, 10 Stat. 572.

§ 760. (R. S. § 496.) Disbursements for Patent-Office.

All disbursements for the Patent-Office shall be made by the disbursing clerk of the Interior Department.

Act July 8, 1870, c. 230, § 69, 16 Stat. 209.

CHAPTER SEVEN

The Superintendent of Public Documents

(R. S. §§ 497–511. Superseded.)

This chapter of the Revised Statutes included sections 497–511. It charged the Secretary of the Interior with the distribution of public documents, by various provisions therefor in §§ 497–506, 509; it provided for the appointment of a Superintendent of Public Documents and prescribed his duties, subject to the general direction of the Secretary, in §§ 507, 508; and it provided for the compilation by such Superintendent of the Biennial Register, afterwards designated the Official Register, its preparation and contents, and its distribution, in §§ 508, 510, 511.

It was entirely superseded by the different provisions, relating to the same subjects, of the Printing and Binding Act of Jan. 12, 1895, c. 23, §§ 61–64, post, §§ 7039–7043, which authorized the Public Printer to appoint a Superintendent of Documents, and prescribed his duties, and, on such appointment, abolished the office of Superintendent of Documents in the Department of the Interior, and also, by said section 64, expressly repealed all laws providing for the delivery to the Department of the Interior of public documents for distribution, other than such as are for the use of that Department; and further, by section 73, pars. 63–68, post, § 7092, provided for the preparation and contents of the Official Register, to be edited, indexed, and published by the chief clerk of the Interior Department, and for its printing and distribution. But the Director of the Census was required to edit, index, and publish the Official Register, and the provisions imposing that duty on the Interior Department were repealed, by a provision added to Act March 6, 1902, c. 139, § 7, 32 Stat. 52, by amendment by Act June 7, 1908, c. 3048, which is set forth post, § 912.

CHAPTER EIGHT

The Returns Office

Sec.
761. Returns Office.
762. Clerk to file returns.
763. Indexes.
764. Copies of returns.

761. (R. S. § 512.) Returns office.

The Secretary of the Interior shall from time to time provide a proper apartment, to be called the Returns Office, in which he shall cause to be filed the returns of contracts made by the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior, and shall appoint a clerk of the first class to attend to the same.

Act June 2, 1862, c. 93, § 4, 2 Stat. 412.

Provisions for the making of returns of contracts referred to in this section were made by R. S. §§ 3744–3747, post, §§ 6895–6899.

Notes of Decisions

Contracts by Navy Department to be in writing and signed.—The effect of sections 761–764 is to require that contracts by the navy department must be in writing and signed by the contracting parties. South Boston Iron Co. v. U. S. (1886) 6 Sup. Ct. 928, 118 U. S. 37, 30 L. Ed. 69.

762. (R. S. § 513.) Clerk to file returns.

The clerk of the Returns Office shall file all returns made to the office, so that the same may be of easy access, keeping all returns made by the same officer in the same place, and numbering them in the order in which they are made.

Act June 2, 1862, c. 93, § 4, 12 Stat. 412.

Notes of Decisions

Form of contracts by Navy Department.—South Boston Iron Co. v. U. S. (1886) 6 Sup. Ct. 928, 118 U. S. 37, 30 L. Ed. 69. See, also, note under § 761, ante.

§ 763. (R. S. § 514.) Indexes.

The clerk of the Returns Office shall provide and keep an index-book, with the names of the contracting parties, and the number of each contract opposite to the names; and shall submit the index-book and returns to any person desiring to inspect it.

Act June 2, 1862, c. 93, § 4, 12 Stat. 412.

Notes of Decisions

Form of contracts by Navy Department.—South Boston Iron Co. v. U. S. (1886) 6 Sup. Ct. 928, 118 U. S. 37, 30 L. Ed. 69. See note under § 761, ante.

§ 764. (R. S. § 515.) Copies of returns.

The clerk of the Returns Office shall furnish copies of such returns to any person paying therefor at the rate of five cents for every one hundred words, to which copies certificates shall be appended in every case by the clerk making the same, attesting their correctness, and that each copy so certified is a full and complete copy of the return.

Act June 2, 1862, c. 93, § 4, 12 Stat. 412.

Notes of Decisions

Form of contracts by Navy Department.—South Boston Iron Co. v. U. S. (1886) 6 Sup. Ct. 928, 118 U. S. 37, 30 L. Ed. 69. See note under § 761, ante.

CHAPTER NINE

The Office of Education

Sec.
765. Office of Education.
766. Commissioner of Education.
767. Duties of Commissioner; bulletin on educational topics.
768. Report of Commissioner.
769. Rooms for Office of Education.

§ 765. (R. S. § 516.) Office of Education.

There shall be in the Department of the Interior a Bureau called the Office of Education, the purpose and duties of which shall be to collect statistics and facts showing the condition and progress of education in the several States and Territories, and to diffuse such information respecting the organization and management of schools and school-systems, and methods of teaching, as shall aid the people of the United States in the establishment and maintenance of efficient school-systems, and otherwise promote the cause of education throughout the country.

Act March 2, 1867, c. 158, § 1, 14 Stat. 434. Act July 20, 1868, c. 176, § 1, 15 Stat. 92, 106.

§ 766. (R. S. § 517.) Commissioner of Education.

The management of the Office of Education shall, subject to the direction of the Secretary of the Interior, be intrusted to a Commissioner of Education, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of three thousand dollars a year.

Act March 2, 1867, c. 158, § 2, 14 Stat. 434. Act July 20, 1868, c. 176, § 1, 15 Stat. 92, 106.

Subsequent appropriations provided an increased salary for the Commissioner. Current appropriations are $5,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat. Said act further provides for a chief clerk, at $2,000, a specialist in higher education, at $3,000, an editor, at $2,000, a statistician, at $1,800, and other clerks and employés.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés

appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1915, c. 417, post, § 3230a.

§ 767. (Act May 28, 1896, c. 252, § 1.) **Duties of Commissioner; bulletin on educational topics.**

The Commissioner of Education is hereby authorized to prepare and publish a bulletin of the Bureau of Education as to the condition of higher education, technical and industrial education, facts as to compulsory attendance in the schools, and such other educational topics in the several States of the Union and in foreign countries as may be deemed of value to the educational interests of the States, and there shall be printed one edition of not exceeding twelve thousand five hundred copies of each issue of said bulletin for distribution by the Bureau of Education, the expense of printing and binding such bulletin to be charged to the allotment for printing and binding for the Department of the Interior. (29 Stat. 171.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1897, cited above.

Appropriations in the recent annual sundry civil appropriation acts for the education and support of the natives of Alaska provide that all expenditures of money appropriated therein for school purposes, for schools other than those for the education of white children under the jurisdiction of the Governor, shall be under the supervision and direction of the Commissioner of Education and in conformity with such conditions, rules, and regulations as to conduct and methods of instruction and expenditure of money as may from time to time be recommended by him and approved by the Secretary of the Interior. The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

§ 768. (R. S. § 518.) **Report of Commissioner.**

The Commissioner of Education shall present annually to Congress a report embodying the results of his investigations and labors, together with a statement of such facts and recommendations as will, in his judgment, subserve the purpose for which the office is established.

Act March 2, 1867, c. 158, § 3, 14 Stat. 434.

Provisions for the printing and distribution of the report of the Commissioner were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 14, post, § 7066.

§ 769. (R. S. § 519.) **Rooms for Office of Education.**

The Chief of Engineers shall furnish proper offices for the use of the Office of Education.

Act March 2, 1867, c. 158, § 4, 14 Stat. 434. Act March 2, 1867, c. 167, § 2, 14 Stat. 466.

Cited without definite application,
U. S. v. Ashfield (1875) 91 U. S. 317, 23 L. Ed. 396.

CHAPTER NINE A

The Geological Survey

A provision that there should be no further geological survey by the Government, unless thereafter authorized by law, contained in Act July 21, 1852, c. 66, § 1, 10 Stat. 21, was incorporated in R. S. § 2406, post, § 4818. But the office of Director of the Geological Survey, under the Interior Department was established by Act March 3, 1879, c. 182, § 1, 20 Stat. 394, and by further provisions of that act the Geological and Geographical Survey of the Territories, and the Geographical and Geological Survey of the Rocky Mountain Region, under the Department of the Interior, and the Geographical Surveys West of the One Hundredth Meridian, under the War Department, were discontinued. This chapter, inserted here as additional to the original chapters of Title XI of the Revised Statutes, includes the provisions of said Act March 3, 1879, c. 182, § 1, and subsequent acts, relating to the Geological Survey established and regulated thereby.

Sec.
770. Office of Director established; appointment; duties; restrictions on Director and Members of Survey.
771. Acting Director.
772. Detail of ordnance officers for survey.
773. Selection of scientific employés.
774. Assignments of pay by scientific and other employés and reimbursement of expenses.
775. Purchase of professional and scientific books, etc.
776. Irrigation surveys in arid regions; report of expenditures.
777. Topographic surveys; mode of marking elevations.
778. Reports of operations, etc.; special memoirs and reports, and publication, exchange, and sale thereof.
779. Distribution of topographic and geologic maps and atlases.
780. Distribution of maps and atlases to members of Congress.
781. Sale of copies of cartographic or other engraved or lithographic data.
782. Sale of copies of photographs or lantern slides.

§ 770. (Act March 3, 1879, c. 182, § 1.) Office of Director established; appointment; duties; restrictions on Director and members of survey.

For the salary of the Director of the Geological Survey, which office is hereby established, under the Interior Department, who shall be appointed by the President by and with the advice and consent of the Senate, six thousand dollars: Provided, That this officer shall have the direction of the Geological Survey, and the classification of the public lands and examination of the Geological Structure, mineral resources and products of the national domain; and that the Director and members of the Geological Survey shall have no personal or private interests in the lands or mineral wealth of the region under survey, and shall execute no surveys or examinations for private parties or corporations. (20 Stat. 394.)

These were provisions of the sundry civil appropriation act for the fiscal year 1880, cited above.

The work incident to the investigation of the arid regions of the United States, for the purpose of determining whether the same can be redeemed by irrigation, was to be performed by the Geological Survey, and the Director of the survey was required on the first Monday in December of each year to make a report to Congress showing how the money appropriated for said work had been expended, by Act Oct. 2, 1888, c. 1069, § 1, post, § 4696, and Act March 2, 1889, c. 411, § 1, post, § 776; but those provisions were to some extent superseded by provisions directing the Secretary of the Interior to make examinations and surveys for location of irrigation works, contained in the Reclamation Act of June 17, 1902, c. 1093, § 2, post, § 4701.

Surveys of lands designated as forest reserves by executive proclamation were required to be made under the supervision of the Director of the Geological Survey, by a provision of Act June 4, 1897, c. 2, § 1, post, § 5124.

Before any lands are purchased by the National Forest Reservation Commission, they are to be examined by the Geological Survey, and a report is to be made showing that the control of such lands will promote or protect the

avigation of streams on whose watersheds they lie, by Act March 1, 1911, 186, § 6, post, § 5179.

Surveys for the completion of surveys of the lands in the Indian Territory ere to be conducted under the supervision of the Director of the Geological urvey, by the provision for such surveys of Act June 10, 1896, c. 398, § 1, 9 Stat. 343.

Appropriations for the Director of the Geological Survey, and other officers, tc., are made by the annual sundry civil appropriation acts. The provisions or the fiscal year 1917 were by Act July 1, 1916, c. 209, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensa-ion appropriated by the legislative, executive, and judicial appropriation acts re repealed, and the rates of salaries or compensation of officers or employés ppropriated for in said acts are to constitute the rate of salary or compensa-ion of such officers or employés, respectively, until otherwise fixed by an nnual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, ost, § 3228a.

The officers and employés of the United States whose salaries are appropri-ted for in the legislative, executive, and judicial appropriation act for the scal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and ontinued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any ct shall be available for payment to any person receiving more than one alary, when the combined amount of said salaries exceeds $2,000 per annum, vith certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as mended by Act Aug. 29, 1915, c. 417, post, § 3230a.

Notes of Decisions

nt of offices.—The appropriation by Act June 16, 1880 (21 Stat. 274), "for the expenses of the gical Survey, and the classification e public lands, and examination of geological structures, mineral re-es, and products of the national in, to be expended under the di-on of the Secretary of the Interior," t applicable to the payment of rent e building in Washington, D. C., leased from Dr. J. W. Bulkley, July 9, 1880, and used as offices for the Geologi-cal Survey. (1881) 17 Op. Atty. Gen. 87.

That appropriation not being "in terms" made for the rent of any build-ing or part of any building in the Dis-trict of Columbia to be used by the Geo-logical Survey, and no provision there-for being made elsewhere, the lease of July 9, 1880, was void. Id.

71. (Act July 31, 1894, c. 174, § 1.) Acting Director.

he Secretary of the Interior may hereafter authorize one of the ogists to act as Director of the Geological Survey in the absence hat officer. (28 Stat. 197.)

This was a provision of the legislative, executive, and judicial appropriation ct for the fiscal year 1895, cited above.

72. (Act June 16, 1880, c. 235.) Detail of ordnance officers for survey.

he Secretary of War is hereby authorized to detail not exceed-two officers of the Ordnance Corps to serve with the Geological vey: Provided, That in his judgment it can be done without ry to the service. (21 Stat. 274.)

This was a provision of the sundry civil appropriation act for the fiscal ear 1881, cited above.

73. (Act July 7, 1884, c. 332.) Selection of scientific employés.

he scientific employees of the Geological Survey shall be se-ed by the Director, subject to the approval of the Secretary of Interior exclusively for their qualifications as professional ex-s. (23 Stat. 212.)

This was a provision of the sundry civil appropriation act for the fiscal ear 1885, cited above.

Appropriations for officers, clerks, and other employés, scientific assistants, nd general expenses of the Geological Survey are made by the annual Civil ervice appropriation acts. The provisions for the fiscal year 1917 were by Act July 1, 1916, c. 209, § 1, 39 Stat.

Notes of Decisions

ployé as United States officer.—ld assistant on the United States gical Survey designated as spe-cial agent, whose service is not con-tinuous, who is paid by the day when ac-tually employed, and who does not take

any oath of office, is not an officer under the United States within the meaning of article 1, § 9, par. 8, of the Constitution, and he may therefore accept from the King of Sweden the order of the "Knighthood of the North Star." (1911) 28 Op. Atty. Gen. 598.

§ 774. (Act June 30, 1906, c. 3914, § 1.) Assignments of pay by scientific and other employés and reimbursement of expenses.

The Secretary of the Interior is hereby authorized to permit scientific and other employees of the United States Geological Survey, employed in the field, to make assignments of their pay, under such regulations as he may prescribe, during such time as they may be in the employ of the United States Geological Survey. And the Secretary of the Interior is further authorized, in his discretion, under such regulations as he may prescribe, to reimburse the scientific and other employees for expenses incurred by them in the discharge of their duties in the field and paid from their personal funds. (34 Stat. 727.)

These were provisions of the sundry civil appropriation act for the fiscal year 1907, cited above.

§ 775. (Act June 28, 1902, c. 1301, § 1.) Purchase of professional and scientific books, etc.

The purchase of professional and scientific books and periodicals needed for statistical purposes hereafter by the scientific divisions of the United States Geological Survey is hereby authorized to be made and paid for out of appropriations made for the said Survey. (32 Stat. 455.)

This was a proviso annexed to an appropriation for the purchase of books, etc., in the sundry civil appropriation act for the fiscal year 1903, cited above.

§ 776. (Act March 2, 1889, c. 411, § 1.) Irrigation surveys in arid regions; report of expenditures.

Irrigation survey: For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation and the segregation of irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and for ascertaining the cost thereof, and the prevention of floods and overflows, and to make the necessary maps, including the pay of employees in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the Geological Survey under the direction of the Secretary of the Interior, * * and the Director of the Geological Survey, under the supervision of the Secretary of the Interior, shall make a report to Congress on the first Monday in December of each year, showing in detail how the said money has been expended, the amount used for actual survey and engineer work in the field in locating sites for reservoirs, and an itemized account of the expenditures under this and any future appropriation. (25 Stat. 960.)

These were provisions of the sundry civil appropriation act for the fiscal year 1890, cited above.

The words omitted here stated the amount appropriated for the fiscal year for the work authorized.

An appropriation for the same purposes, accompanied by provisions similar to those of this act, and further provisions for reservation of reservoir sites, etc., was made by the similar act for the preceding year, Act Oct. 2, 1888, c. 1069, § 1, 25 Stat. 526.

Subsequent provisions requiring the Secretary of the Interior to make examinations and surveys for irrigation works, and to report to Congress the results thereof, were made by the Reclamation Act of June 17, 1902, c. 1093, § 2, post, § 4701.

Cited without definite application,
U. S. v. Van Horn (D. C. 1912) 197 Fed. 611, 612.

7. (Act June 11, 1896, c. 420, § 1.) Topographic surveys; mode of marking elevations.

ited States Geological Survey. * * For topographic sur- in various portions of the United States, * * Provided, That after in such surveys west of the ninety-fifth meridian elevations e a base level located in each area under survey shall be deter- d and marked on the ground by iron or stone posts or perma- bench marks, at least two such posts or bench marks to be es- hed in each township or equivalent area, except in the forest- and mountain areas, where at least one shall be established, and shall be placed, whenever practicable, near the township cor- of the public-land surveys; and in the areas east of the ninety- meridian at least one such post or bench mark shall be simi- established in each area equivalent to the area of a township of public land surveys. (29 Stat. 435.)

These were provisions accompanying appropriations for the Geological Sur- y in the sundry civil appropriation act for the fiscal year 1897, cited above.

8. (Act March 3, 1879, c. 182, § 1.) Reports of operations, etc.; special memoirs and reports, and publication, exchange, and sale thereof.

e publications of the Geological Survey shall consist of the al report of operations, geological and economic maps illus- ng the resources and classification of the lands, and reports up- eneral and economic geology and paleontology. The annual t of operations of the Geological Survey shall accompany the al report of the Secretary of the Interior. All special memoirs reports of said survey shall be issued in uniform quarto series if ed necessary by the Director, but otherwise in ordinary octavos. e thousand copies of each shall be published for scientific ex- ges and for sale at the price of publication; and all literary and graphic materials, received in exchange shall be the property e United States and form a part of the library of the organiza- and the money resulting from the sale of such publications be covered into the Treasury of the United States, under the tion of the Secretary of the Interior. (20 Stat. 394.)

These were further provisions accompanying those establishing the office of irector, etc., set forth ante, § 771, of the sundry civil appropriation act for e fiscal year 1880, cited above.

So much of these provisions as related to the form of volumes, number of pies, publishing, and distribution of reports and other publications of the eological Survey was superseded by the provisions in regard thereto of the neral Printing and Binding Act of Jan. 12, 1895, c. 23, §§ 73, 79, post, §§ 67, 7149, and of subsequent acts, set forth post, under Title XLV, "Public rinting, Advertisements, and Public Documents," especially those of Res. ay 16, 1902, No. 22, post, § 7104.

Subsequent provisions relating to the scientific reports known as mono- aphs and bulletins, requiring specific estimates and appropriations therefor, ntained in Act Aug. 4, 1886, c. 902, § 1, 24 Stat. 255, and regulating the stribution of special memoirs and reports to public libraries, Res. March 3, 87, No. 16, 24 Stat. 647, were incorporated in and superseded by the similar ovisions of the general Printing and Binding Act of Jan. 12, 1895, c. 23, 79, post, § 7149.

The Director was authorized to furnish transfers or copies of cartographic other engraved or lithographic data in the division of engraving and print- g of the Survey, on payment therefor, by a provision of Act June 30, 1906, 3914, § 1, post, § 781.

The Director was required to furnish copies of photographs or lantern ides in the possession of the Survey, on payment therefor, by a provision Act March 4, 1909, c. 299, § 1, post, § 782.

9. (Res. Feb. 18, 1897, No. 13, § 1.) Distribution of topo- graphic and geologic maps and atlases.

hat the Director of the Geological Survey be, and is hereby, orized and directed, on the approval of the Secretary of the rior, to dispose of the topographic and geologic maps and at-

lases of the United States, made and published by the Geological Survey, at such prices and under such regulations as may from time to time be fixed by him and approved by the Secretary of the Interior; and that a number of copies of each map or atlas, not exceeding five hundred, shall be distributed gratuitously among foreign governments and Departments of our own Government, to literary and scientific associations, and to such educational institutions or libraries as may be designated by the Director of the Survey and approved by the Secretary of the Interior. (29 Stat. 701.)

This resolution, containing this section and the section next following, was entitled "Joint resolution providing for the distribution of the maps and atlases of the Geological Survey."

A previous provision, authorizing the sale of topographical maps with text at cost and ten per centum added, contained in Act June 11, 1896, c. 420, § 1, 29 Stat. 436, was superseded by this act.

§ 780. (Res. Feb. 18, 1897, No. 13, § 2.) Distribution of maps and atlases to members of Congress.

That one copy of each map and atlas shall be sent to each Senator and each Representative and Delegate in Congress, if published within his term; and that a second copy shall be placed at the disposal of each such Senator, Representative, and Delegate. (29 Stat. 701.)

§ 781. (Act June 30, 1906, c. 3914, § 1.) Sale of copies of cartographic or other engraved or lithographic data.

The Director of the Geological Survey shall, if the regular map work of the Survey is in no wise interfered with thereby, hereafter furnish to any person, concern, institution, State or foreign government, that shall pay in advance the whole cost thereof with ten per centum added, transfers or copies of any cartographic or other engraved or lithographic data in the division of engraving and printing of the Survey, and the moneys received by the Director for such transfers or copies shall be deposited in the Treasury. (34 Stat. 727.)

This was a provision of the sundry civil appropriation act for the fiscal year 1907, cited above.

§ 782. (Act March 4, 1909, c. 299, § 1.) Sale of copies of photographs or lantern slides.

The Director of the Geological Survey shall hereafter furnish to any person, concern, or institution, in the interest of education and the dissemination of knowledge, that shall pay in advance the whole cost of material and services thereof, copies of any photographs or lantern slides in the possession of the United States Geological Survey; and the moneys received by the director for the same shall be deposited in the United States Treasury. (35 Stat. 989.)

This was a provision of the sundry civil appropriation act for the fiscal year 1910, cited above.

CHAPTER NINE B

The Bureau of Mines

This chapter, inserted here as additional to the original chapters of Title XI of the Revised Statutes, includes the provisions in force relating to the Bureau of Mines, which was established in the Department of the Interior by Act May 16, 1910, c. 240, 36 Stat. 369. That act was amended by a provision of Act June 25, 1910, c. 384, § 1, 36 Stat. 743, which repealed part of it, and was again amended by Act Feb. 25, 1913, c. 72, 37 Stat. 681, to read as set forth therein. The provisions of said last-mentioned act supersede entirely those of the original act and the previous amendment, and are set forth here, together with the later provisions relating thereto, as the law in force relating to the Bureau.

Sec.
Establishment of Bureau; Director, his qualifications, appointment, and salary; experts and other employés.
. Details of employees for service in Washington, D. C.; payment of expenses or per diem; reports of details.
. Absence of Director; Assistant Director to perform duties; designation of officer to act in absence of Director and Assistant Director.
Duties of Bureau.
Reports by Director of Investigations and Recommendations by Bureau.
Restrictions upon Director and members of Bureau as to personal interest in mines, etc.; temporary employment of engineers or other experts.
787. Fees for tests or investigations other than for the United States or state governments.
787a. Additional mining experiment stations and mine safety stations; duties; limit of number to be established in any one fiscal year.
787b. Lands, buildings, etc., contributed from States cooperating in carrying out this act.
787c. Headquarters of mine rescue cars, etc.; donations of lands, etc.; lease of lands, etc.

83. (Act Feb. 25, 1913, c. 72, § 1.) Establishment of Bureau; Director, his qualifications, appointment, and salary; experts and other employés.

'here is hereby established in the Department of the Interior ıreau of mining, metallurgy, and mineral technology, to be desated the Bureau of Mines, and there shall be a director of said eau, who shall be thoroughly equipped for the duties of said ce by technical education and experience and who shall be apıted by the President, by and with the advice and consent of Senate, and who shall receive a salary of six thousand dollars annum; and there shall also be in the said bureau such experts other employees, to be appointed by the Secretary of the Inor, as may be required to carry out the purposes of this Act ıccordance with the appropriations made from time to time by ıgress for such purposes. (37 Stat. 681.)

This section and §§ 784–787, post, were sections 1–5 of an act, cited above, amending Act May 16, 1910, c. 240, 36 Stat. 369, which estabished in the Department of the Interior a Bureau of Mines, to read s set forth in these sections. These provisions, therefore, superseded those f said original act and the provision of Act June 25, 1910, c. 384, § 1, 36 Stat. 743, repealing part thereof.

The provisions of section 1 of said original act authorized the Bureau and provided for the Director and experts and other employés therein, and section 2 defined the duties of the Bureau. They were superseded by the more comprehensive provisions, relating to the same matters, of this section and the section next following.

Section 3 of said original act required the Secretary of the Interior to provide the Bureau with furnished offices in the city of Washington, books, records, stationery, etc., and such assistants, clerks, etc., and other employés as might be necessary. Provisions for the officers, clerks, and other employés and for the expenses of the Bureau are made annually in the sundry

civil appropriation acts. Appropriations for the fiscal year 1917 were by Act July 1, 1916, c. 209, § 1, 39 Stat.

Section 4 of said original act transferred from the Geological Survey to the Bureau the supervision of certain investigations, etc. It was repealed in part by the provision of Act June 25, 1910, c. 384, § 1, mentioned above. It may be regarded as executed.

Section 5 of said original act provided that "nothing in this Act shall be construed as in any way granting to any officer or employé of the Bureau of Mines any right or authority in connection with the inspection or supervision of mines or metallurgical plants in any State."

Notes of Decisions

Transfer of buildings and apparatus to bureau.—Certain equipment, among which is a 10,000,000-pound testing machine, which was purchased by the Department of the Interior for investigating structural materials, is the property of the United States, and under existing law cannot be transferred to the Bureau of Mines, but should be transferred to the Bureau of Standards of the Department of Commerce and Labor in order that it may be applied to the specific purpose for which it was authorized. (1911) 28 Op. Atty. Gen. 549.

The Superintendent of the Library Building and Grounds has no authority to transfer certain disused portions of the lighting and heating plant of the Library of Congress to the Bureau of Mines of the Department of the Interior. (1912) 29 Op. Atty. Gen. 524.

Purchase of land.—The validity of the titles to the lands proposed to be acquired for mine rescue work should be submitted to the Attorney General. (1910) 28 Op. Atty. Gen. 413.

Moneys appropriated for the maintenance of the Bureau of Mines may be expended in the erection of temporary structures on land acquired by the United States for mine rescue work. Id.

The former Acts of May 16, 1910 (36 Stat. 369), establishing a Bureau of Mines, and of June 25, 1910 (36 Stat. 742), making appropriation for its maintenance, did not authorize the purchase of land for mine rescue stations. Id.

Lands, or interest in lands, acquired by the United States without consideration, or for a mere nominal sum, do not evidence a purchase within the meaning of section 355, R. S., post, § 6902. Id.

The leasing of a mine in Pennsylvania by the United States on a cash payment of $1,500, for experimentations in mine rescue work, constitutes a purchase of land within the meaning of section 3736, R. S., post, § 6889, which provides that no land shall be purchased on account of the United States except under a law authorizing such purchase. (1910) 28 Op. Atty. Gen. 463.

The statement in the opinion of September 15, 1910 (28 Op. Atty. Gen. 413), that it would be a wise precaution to have the titles to tracts of land to be acquired submitted to the Attorney General for his opinion as to validity, regardless of whether section 355, R. S., post, § 6902, be applicable or not, contains no intimation that when section 355 does not apply the opinion of the Attorney General is not necessary. Id.

§ 783a. (Act July 1, 1916, c. 209, § 1.) Details of employees for service in Washington, D. C.; payment of expenses or per diem; reports of details.

Persons employed during the fiscal year nineteen hundred and seventeen in field work, outside of the District of Columbia, under the Bureau of Mines, may be detailed temporarily for service in Washington, District of Columbia, for purposes of preparing results of their field work; all persons so detailed shall be paid in addition to their regular compensation only their actual traveling expenses or per diem in lieu of subsistence in going to and returning therefrom: Provided, That nothing herein shall prevent the payment to employees of the Bureau of Mines their necessary expenses or per diem, in lieu of subsistence while on temporary detail in Washington, District of Columbia, for purposes only of consultation or investigations on behalf of the United States. All details made hereunder, and the purposes of each, during the preceding fiscal year, shall be reported in the annual estimates of appropriations to Congress at the beginning of each regular session thereof. (39 Stat.)

This was a provision in the sundry civil appropriation act for the fiscal year 1917, cited above. It was repeated in prior appropriation acts.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensa-

tion of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1915, c. 417, post, § 3230a.

§ 783b. (Act July 1, 1916, c. 209, § 1.) Absence of Director; Assistant Director to perform duties; designation of officer to act in absence of Director and Assistant Director.

Hereafter in the absence of the Director of the Bureau of Mines the assistant director of said bureau shall perform the duties of the director during the latter's absence, and in the absence of the Director and of the Assistant Director of the Bureau of Mines the Secretary of the Interior may designate some officer of said bureau to perform the duties of the director during his absence. (39 Stat.)

This was a provision in the sundry civil appropriation act for the fiscal year 1917, cited above.

§ 784. (Act Feb. 25, 1913, c. 72, § 2.) Duties of Bureau.

It shall be the province and duty of the Bureau of Mines, subject to the approval of the Secretary of the Interior, to conduct inquiries and scientific and technologic investigations concerning mining, and the preparation, treatment, and utilization of mineral substances with a view to improving health conditions, and increasing safety, efficiency, economic development, and conserving resources through the prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; to inquire into the economic conditions affecting these industries; to investigate explosives and peat; and on behalf of the Government to investigate the mineral fuels and unfinished mineral products belonging to, or for the use of, the United States, with a view to their most efficient mining, preparation, treatment and use; and to disseminate information concerning these subjects in such manner as will best carry out the purposes of this Act. (37 Stat. 681.)

See notes to § 783, ante.

§ 785. (Act Feb. 25, 1913, c. 72, § 3.) Reports by Director of Investigations and Recommendations by Bureau.

The director of said bureau shall prepare and publish, subject to the direction of the Secretary of the Interior, under the appropriations made from time to time by Congress, reports of inquiries and investigations, with appropriate recommendations of the bureau, concerning the nature, causes, and prevention of accidents, and the improvement of conditions, methods, and equipment, with special reference to health, safety, and prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; the use of explosives and electricity, safety methods and appliances, and rescue and first-aid work in said industries; the causes and prevention of mine fires; and other subjects included under the provisions of this Act. (37 Stat. 681.)

See notes to § 783, ante.

§ 786. (Act Feb. 25, 1913, c. 72, § 4.) Restrictions upon Director and members of Bureau as to personal interest in mines, etc.; temporary employment of engineers or other experts.

In conducting inquiries and investigations authorized by this Act neither the director nor any member of the Bureau of Mines

shall have any personal or private interest in any mine or the products of any mine under investigation, or shall accept employment from any private party for services in the examination of any mine or private mineral property, or issue any report as to the valuation or the management of any mine or other private mineral property: Provided, That nothing herein shall be construed as preventing the temporary employment by the Bureau of Mines, at a compensation not to exceed ten dollars per day, in a consulting capacity or in the investigation of special subjects, of any engineer or other expert whose principal professional practice is outside of such employment by said bureau. (37 Stat. 682.)

See notes to § 783, ante.

§ 787. (Act Feb. 25, 1913, c. 72, § 5.) Fees for tests or investigations other than for the United States or state governments.

For tests or investigations authorized by the Secretary of the Interior under the provisions of this Act, other than those performed for the Government of the United States or State governments within the United States, a reasonable fee covering the necessary expenses shall be charged, according to a schedule prepared by the Director of the Bureau of Mines and approved by the Secretary of the Interior, who shall prescribe rules and regulations under which such tests and investigations may be made. All moneys received from such sources shall be paid into the Treasury to the credit of miscellaneous receipts. (37 Stat. 682.)

See notes to § 783, ante.

§ 787a. (Act March 3, 1915, c. 95, § 1.) Additional mining experiment stations and mine safety stations; duties; limit of number to be established in any one fiscal year.

The Secretary of the Interior is hereby authorized and directed to establish and maintain in the several important mining regions of the United States and the Territory of Alaska, as Congress may appropriate for the necessary employees and other expenses, under the Bureau of Mines and in accordance with the provisions of the Act establishing said bureau, ten mining experiment stations and seven mine safety stations, movable or stationary, in addition to those already established, the province and duty of which shall be to make investigations and disseminate information with a view to improving conditions in the mining, quarrying, metallurgical, and other mineral industries, safeguarding life among employees, preventing unnecessary waste of resources, and otherwise contributing to the advancement of these industries: Provided, That not more than three mining experiment stations and mine safety stations hereinabove authorized shall be established in any one fiscal year under the appropriations made therefor. (38 Stat. 959.)

This section and the section next following was an act entitled an "Act to provide for the establishment and maintenance of mining experiment and mine safety stations for making investigations and disseminating information among employés in mining, quarrying, metallurgical, and other mineral industries, and for other purposes," cited above.

§ 787b. (Act March 3, 1915, c. 95, § 2.) Lands, buildings, etc., contributed from States cooperating in carrying out this act.

The Secretary of the Interior is hereby authorized to accept lands, buildings, or other contributions from the several States offering to cooperate in carrying out the purposes of this Act. (38 Stat. 959.)

§ 787c. (Act July 1, 1916, c. 209, § 1.) Headquarters of mine rescue cars, etc.; donations of lands, etc.; lease of lands, etc.

For purchase or lease of necessary land, where and under such conditions as the Secretary of the Interior may direct, for the headquarters of mine rescue cars and construction of necessary railway sidings and housing for the same, or as the site of an experimental mine and a plant for studying explosives, * *: Provided, That the Secretary of the Interior is authorized to accept any suitable land or lands, buildings, or improvements, that may be donated for said purpose, and to enter into leases for periods not exceeding ten years, subject to annual appropriations by Congress. (39 Stat.)

This was a provision in the sundry civil appropriation act for the fiscal year 1917, cited above.

CHAPTER NINE C

The National Park Service

This chapter, inserted here as additional to the original chapters of Title XI of the Revised Statutes, includes the provisions of Act Aug. 25, 1916, c. 408, entitled "An act to establish a National Park Service, and for other purposes."

Sec.
787d. National Park Service; creation; director; appointment; salary; assistant director; appointment and salary; chief clerk; appointment and salary; draftsman; appointment and salary; other employees; limitation on expenditure for salaries in District of Columbia; purpose of National Park Service.
787e. Supervision, management, and control by director of national parks, reservations, and monuments; cooperation of Secretary of Agriculture in supervision, etc., of national monuments contiguous to national forests.
787f. Rules and regulation for use and management of parks, monuments and reservations made and published by Secretary of Interior; violations of rules and regulations; punishment; sale and disposition of timber on parks, etc.; destruction of detrimental animal and plant life; grant of privileges, leases, and permits; grazing of live stock.
787g. Rights of way through public lands, forest and other reservations, etc.

§ 787d. (Act Aug. 25, 1916, c. 408, § 1.) National Park Service; creation; director; appointment; salary; assistant director; appointment and salary; chief clerk; appointment and salary; draftsman; appointment and salary; other employees; limitation on expenditure for salaries in District of Columbia; purpose of National Park Service.

There is hereby created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director, who shall be appointed by the Secretary and who shall receive a salary of $4,500 per annum. There shall also be appointed by the Secretary the following assistants and other employees at the salaries designated: One assistant director, at $2,500 per annum; one chief clerk, at $2,000 per annum; one draftsman, at $1,800 per annum; one messenger, at $600 per annum; and, in addition thereto, such other employees as the Secretary of the Interior shall deem necessary: Provided, That not more than $8,100 annually shall be expended for salaries of experts, assistants, and employees within the District of Columbia not herein specifically enumerated unless previously authorized by law. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and

the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. (39 Stat.)

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1915, c. 417, post, § 3230a.

See note at the beginning of this chapter.

§ 787e. (Act Aug. 25, 1916, c. 408, § 2.) Supervision, management, and control by director of national parks, reservations and monuments; cooperation of Secretary of Agriculture in supervision, etc., of national monuments contiguous to national forests.

The director shall, under the direction of the Secretary of the Interior, have the supervision, management, and control of the several national parks and national monuments which are now under the jurisdiction of the Department of the Interior, and of the Hot Springs Reservation in the State of Arkansas, and of such other national parks and reservations of like character as may be hereafter created by Congress: Provided, That in the supervision, management, and control of national monuments contiguous to national forests the Secretary of Agriculture may cooperate with said National Park Service to such extent as may be requested by the Secretary of the Interior. (39 Stat.)

See notes to § 787d, ante.

§ 787f. (Act Aug. 25, 1916, c. 408, § 3.) Rules and regulation for use and management of parks, monuments and reservations made and published by Secretary of Interior; violations of rules and regulations; punishment; sale and disposition of timber on parks, etc.; destruction of detrimental animal and plant life; grant of privileges, leases, and permits; grazing of live stock.

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violations of any of the rules and regulations authorized by this Act shall be punished as provided for in section fifty of the Act entitled "An Act to codify and amend the penal laws of the United States," approved March fourth, nineteen hundred and nine, as amended by section six of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth United States Statutes at Large, page eight hundred and fifty-seven). He may also, upon terms and conditions to be fixed by him, sell or dispose of timber in those cases where in his judgment the cutting of such timber is required in order to control the attacks of insects or diseases or otherwise conserve the scenery or the natural or historic objects in any such park, monument, or reservation. He may also provide in his discretion for the destruction of such animals and of such plant

life as may be detrimental to the use of any of said parks, monuments, or reservations. He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks, monuments, or other reservations herein provided for, but for periods not exceeding twenty years; and no natural curiosities, wonders, or objects of interest shall be leased, rented, or granted to anyone on such terms as to interfere with free access to them by the public: Provided however, That the Secretary of the Interior may, under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze live stock within any national park, monument, or reservation herein referred to when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park. (39 Stat.)

See notes to § 787d, ante.

§ 787g. (Act Aug. 25, 1916, c. 408, § 4.) Rights of way through public lands, forest and other reservations, etc.

Nothing in this Act contained shall affect or modify the provisions of the Act approved February fifteenth, nineteen hundred and one, entitled "An Act relating to rights of way through certain parks, reservations, and other public lands." (39 Stat.)

The act referred to in this section is Act Feb. 15, 1901, c. 372, post, § 4946.
See notes to § 787d, ante.

TITLE XII

THE DEPARTMENT OF AGRICULTURE

This title, as enacted in the Revised Statutes, was not divided into chapters, and contained only ten sections. Subsequent provisions relating to the department, especially those establishing or affecting separate bureaus therein, are numerous and important. For convenience the sections of the Revised Statutes, with subsequent provisions relating to the department, its officers, clerks, employés, etc., generally, are placed in chapter A; and provisions applicable only to particular bureaus are grouped in the subsequent chapters under the titles of the Bureaus.

Chap.		Sec.
A.	The Department and the Secretary of Agriculture	788
B.	The Weather Bureau	840
C.	The Bureau of Animal Industry	850

CHAPTER A

The Department and the Secretary of Agriculture

The Department, as established under the Revised Statutes, was not included among the Executive Departments, and was under charge of a Commissioner of Agriculture. It was made an Executive Department, under a Secretary of Agriculture, by Act Feb. 9, 1889, c. 122, post, §§ 789–792.

Sec.

788. Establishment of the Department of Agriculture.
789. Department to be an Executive Department under Secretary of Agriculture.
790. Assistant Secretary of Agriculture.
791. Salaries.
792. Laws applicable to Department continued in force.
793. Clerks and employés.
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796. Disbursing clerk, administrative officer of fiscal affairs of department; deputy disbursing clerk, his authority, bond, and liabilities.
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804. Details of law clerks.
805. Details of employés from and to library and bureaus and offices of the Department.
806. Details of employés from and to Division of Accounts and Disbursements and bureaus and offices of the Department.
807. Leaves of absence to employés outside of city of Washington.
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808. Assignment of pay by employés.
809. Purchase of mileage and mileage books from appropriations for traveling expenses.
810. Traveling expenses, etc., of officers and employés transferred from one official station to another.
811. Expenses of officials and employés traveling on official business; per diem in lieu of subsistence, etc.
812. Reimbursement of officials and employés for expenses for streetcar fares.

Sec.
13. Purchases for bureaus from appropriations for contingent expenses, reimbursable from lump-fund appropriations.
. Exchange of typewriters and computing, etc., machines, purchased from lump-fund appropriations.
a. Exchange of scientific apparatus and laboratory equipment purchased from any appropriation.
b. Purchase, maintenance, etc., of passenger-carrying vehicles and motor boats from lump sum appropriations; limitation of amount and reports of expenditures.
c. Exchange of books, etc., of library not needed.
d. Sale or exchange of animals or animal products not needed.
. Bonds.
. Seal.
. Custody of property, records, etc.
. Duties of Secretary.
). Secretary to perform duties of former Commissioner of Agriculture.
). Purchase and distribution of seeds, plants, etc.
)a. Contracts for supplying printed packets, etc., and packeting, etc., and mailing seeds, bulbs, etc.
1. Preservation, etc., of game birds and other wild birds.
2. Regulation of importation of eggs of game birds for propagation.
3. Execution of laws affecting lands reserved for national forests.
4. Solicitor to supervise legal work of Department.
5. Monthly crop reports.
6. Reports of number of acres of cotton in cultivation.
827. Reports of total cotton production.
828. Farmers' bulletins; allotment to Members of Congress for distribution.
829. Sale of copies of card index of publications of Department.

Sec.
830. Sale of copies of card index of agricultural literature prepared by Office of Experiment Stations.
830a. Sale of copies of card index of agricultural literature prepared by Department.
831. Sale of photographic prints, etc., and forest maps, and of condemned property, etc.
832. Sale of prints and lantern slides from photographic negatives.
832a. Sale of samples of pure sugars, naval stores, microscopical specimens, etc.
832b. Sale of potash obtained from experimentation.
833. Sale of waste paper; accumulations of Department files; obsolete or worthless documents or publications.
834. Powers and duties of watchmen of Department.
835. Annual and special reports of Secretary.
836. Annual report of expenditures.
837. Additional detailed statement of expenditure of appropriations.
837a. Statement of expenditure from appropriations of amount paid for quarters.
838. Report of persons employed, expenditures, and means adopted for suppression of contagious, etc., diseases among domestic animals.
838a. Detailed estimates for executive officers, clerks, and employés below the grade of clerk.
838b. Statement of completed investigations.
839. Report of payments for compensation or expenses to officers of any State, etc., in carrying into effect provisions of Pure Food and Drugs Act.
839a. Statements of expenditures under acts relating to agricultural experiment stations and co-operative agricultural extension work between agricultural colleges.

§ 788. (R. S. § 520.) Establishment of the Department of Agriculture.

There shall be at the seat of Government a Department of Agriculture, the general design and duties of which shall be to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture, in the most general and comprehensive sense of that word, and to procure, propagate, and distribute among the people new and valuable seeds and plants.

Act May 15, 1862, c. 72, § 2, 12 Stat. 387.

Notes of Decisions

Reports as evidence.—In action for publication charging plaintiff with selling Miracle Wheat at $1 a pound, reports of United States Department of Agriculture as to such wheat, kept as required by this section and section 818, post, receivable in evidence under Code Civ. Proc. N. Y. § 944, and section 789, post, for any proper purpose, held admissible. Russell v. Brooklyn Daily Eagle (1915) 153 N. Y. Supp. 450, 168 App. Div. 121.

(R. S. § 521. Superseded.)

This section provided that the Department should be under the charge of a Commissioner of Agriculture. It was superseded by the provisions for the appointment of a Secretary of Agriculture and an Assistant Secretary, of Act Feb. 9, 1889, c. 122, post, §§ 789–792.

Cited without definite application,
Reid v. Colorado (1902) 23 Sup. Ct. 92, 95, 187 U. S. 137, 47 L. Ed. 108.

§ 789. (Act Feb. 9, 1889, c. 122, § 1.) Department to be an Executive Department under Secretary of Agriculture.

The Department of Agriculture, shall be an Executive Department, under the supervision and control of a Secretary of Agriculture, who shall be appointed by the President, by and with the advice and consent of the Senate; and section one hundred and fifty-eight of the Revised Statutes is hereby amended to include such Department, and the provisions of title four of the Revised Statutes, including all amendments thereto, are hereby made applicable to said Department. (25 Stat. 659.)

This section and the three sections next following, were an act entitled "An act to enlarge the powers and duties of the Department of Agriculture and to create an Executive Department to be known as the Department of Agriculture."

R. S. § 158, ante, § 232, amended by this section, defined the Executive Departments, to which Title IV, relating to all the Executive Departments, should apply.

A Council of National Defense, composed of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor, was created by Act Aug. 29, 1916, c. 418, § 2, set forth post, under Title XVII A, "The Council of National Defense and the Advisory Committee on Aeronautics."

Notes of Decisions

Reports as evidence.—In action for publication charging plaintiff with selling Miracle Wheat at $1 a pound, reports of United States Department of Agriculture as to such wheat, kept as required by section 788, ante, and section 818, post, receivable in evidence under Code Civ. Proc. N. Y. § 944, and this section, for any proper purpose, held admissible. Russell v. Brooklyn Daily Eagle (1915) 153 N. Y. Supp. 450, 168 App. Div. 121.

Cited without definite application, Reid v. Colorado (1902) 23 Sup. Ct. 92, 95, 187 U. S. 137, 47 L. Ed. 108.

§ 790. (Act Feb. 9, 1889, c. 122, § 2.) Assistant Secretary of Agriculture.

There shall be in said Department an Assistant Secretary of Agriculture, to be appointed by the President, by and with the advice and consent of the Senate, who shall perform such duties as may be required by law or prescribed by the Secretary. (25 Stat. 659.)

A provision that "the Assistant Secretary is hereby authorized to perform such duties in the conduct of the business of the Department of Agriculture as may be assigned by the Secretary of Agriculture" accompanied the appropriation for the Assistant Secretary in the agricultural appropriation act for the fiscal year 1907, Act June 30, 1906, c. 3913, 34 Stat. 670, and that for the year next following, but it was not repeated in subsequent similar acts.

In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof is required, unless otherwise directed, to perform the duties of the head of such Department until a successor is appointed, or such absence or sickness shall cease, by R. S. § 177, set forth ante, § 259. In case of the death, resignation, absence, or sickness of the head of any Department, except where the Attorney General is concerned, the President may authorize and direct the head of any other Department or any officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness

or absence of the incumbent shall cease, by R. S. § 179, also set forth ante, § 261.

Notes of Decisions

Nature of office.—The Assistant Secretary is not a clerk or employé within the meaning of the statute; as to the chiefs of divisions, quære. (1894) 20 Op. Atty. Gen. 728.

§ 791. (Act Feb. 9, 1889, c. 122, § 3.) Salaries.

The Secretary of Agriculture shall receive the same salary as is paid to the Secretary of each of the Executive Departments, and the salary of the Assistant Secretary of Agriculture shall be the same as that now paid to the First Assistant Secretary of the Department of the Interior. (25 Stat. 659.)

The compensation of the heads of Executive Departments who are members of the President's Cabinet is at the rate of $12,000 per annum each, by Act Feb. 26, 1907, c. 1635, § 4, ante, § 36. Subsequent appropriations for the Secretary of Agriculture are $12,000. The provision for the fiscal year 1917 was by Act Aug. 11, 1916, c. 313, 39 Stat.

The amount appropriated for compensation of the First Assistant Secretary of the Interior, for the year in which this act was passed, by Act July 11, 1888, c. 615, § 1, 25 Stat. 284, was $4,500; and that sum was appropriated for compensation of the Assistant Secretary of Agriculture by the subsequent Agricultural appropriation acts, down to the fiscal year 1907, and was increased to $5,000 by the similar appropriation acts thereafter. For the fiscal year 1914, the appropriation for the Assistant Secretary was $5,000, by Act March 4, 1913, c. 145, 37 Stat. 828, and thereafter he is entitled to receive compensation at that rate, by a further provision of said act, post, § 802. The provision for the fiscal year 1917 was $5,000, by Act Aug. 11, 1916, c. 313, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1915, c. 417, post, § 3230a.

792. (Act Feb. 9, 1889, c. 122, § 4.) Laws applicable to Department continued in force.

All laws and parts of laws relating to the Department of Agriculture now in existence, as far as the same are applicable and not in conflict with this act, and only so far, are continued in full force and effect. (25 Stat. 659.)

§ 793. (R. S. § 522.) Clerks and employés.

There shall be in the Department of Agriculture:

One chief clerk, at a salary of two thousand dollars a year.

One chemist, at a salary of two thousand dollars a year.

One assistant chemist, at a salary of one thousand six hundred dollars a year.

One entomologist, at a salary of two thousand dollars a year.

One microscopist, at a salary of one thousand eight hundred dollars a year.

One botanist, at a salary of one thousand eight hundred dollars a year.

One statistician, at a salary of two thousand dollars a year.

One superintendent of experimental gardens and grounds, at a salary of two thousand dollars a year.

One assistant superintendent of experimental gardens and grounds, at a salary of one thousand two hundred dollars a year.

One disbursing clerk, at a salary of one thousand eight hundred dollars a year.

One superintendent of the seed-room, at a salary of one thousand eight hundred dollars a year.

One assistant superintendent of the seed-room, at a salary of one thousand two hundred dollars a year.

One librarian, at a salary of one thousand eight hundred dollars a year.

One engineer, at a salary of one thousand four hundred dollars a year.

One superintendent of the folding-room, at a salary of one thousand two hundred dollars a year.

Two attendants in the museum, at a salary of one thousand dollars a year each.

One carpenter, at a salary of nine hundred and sixty dollars a year.

Act May 15, 1862, c. 72, § 4, 12 Stat. 388. Act March 3, 1873, c. 226, 17 Stat. 506.

This section enumerated the subordinate officers, clerks, and employés in the Department at the time of the compilation of the Revised Statutes, as authorized by the then existing statutes, cited above. The employment of such other persons "as Congress may from time to time provide," was also authorized by R. S. § 523, post, § 795. The officers, clerks, and others actually appointed or employed, and their respective salaries and other compensation, depend on the specific provisions made in the annual appropriation acts, each providing for the fiscal year next following; the employment or payment of others in the executive departments being forbidden by Act Aug. 5, 1882, c. 389, § 4, ante, § 249, which may be regarded as applicable to this Department since it became an executive department by Act Feb. 9, 1889, c. 122, ante, §§ 789–792.

Subsequent appropriation acts provided for officers, clerks and employés, and for salaries different from those fixed by the above section, increasing with the extension of the scope of the functions of the Department. The appropriations for the fiscal year 1914, by Act March 4, 1913, c. 145, 37 Stat. 828–855, were accompanied by a provision that thereafter every officer or employé of the Department whose rate of compensation was specified therein should receive compensation at the rate so specified, which is set forth post, § 802, and thereby the provisions of this section as to rates of compensation of particular officers or employés were superseded. The provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat.

See notes to R. S. § 523, post, § 794, as to particular officers, clerks, etc., in the Department, and the several bureaus, divisions, and offices therein.

See, also, notes to § 791, ante.

Notes of Decisions

Assistant Secretary.—The Assistant Secretary is not a clerk or employé within the meaning of the statute; as to the chiefs of divisions, quære. (1894) 20 Op. Atty. Gen. 728.

§ 794. (R. S. § 523.) Officers and employés.

The Commissioner of Agriculture shall appoint a chief clerk, with a salary of [two thousand dollars] a year, who in all cases during the necessary absence of the Commissioner, or when the office of Commissioner shall become vacant, shall perform the duties of Commissioner, and he shall appoint such other employés as Congress may from time to time provide, with salaries corresponding to the salaries of similar officers in other Departments of the Government; and he shall, as Congress may from time to time provide, employ other persons, for such time as their services may be needed, including chemists, botanists, entomologists, and other persons skilled in the natural sciences pertaining to agriculture.

Act May 15, 1862, c. 72, § 4, 12 Stat. 388.

The Secretary of Agriculture was authorized and directed to perform all the duties of the Commissioner, by a provision of Act July 14, 1890, c. 707, post, § 819.

The words of this section inclosed in brackets, "two thousand dollars,"

stating the amount of the salary of the chief clerk, were superseded by the appropriations for the fiscal year 1914, as in previous years, for "chief clerk, $3,000, and $500 additional as custodian of buildings," by Act March 4, 1913, c. 145, 37 Stat. 828, and the further provision of said act that thereafter every officer or employé of the Department whose compensation was specified therein should receive compensation at the rate so specified, post, § 802. The agricultural appropriation act for the fiscal year 1917, Act Aug. 11, 1916, c. 313, 39 Stat., contained a similar provision as to the chief clerk.

The provision of this section that, in case of absence or vacancy in office of the Commissioner, the chief clerk shall perform the duties of the office, was superseded by the change of the Department into an executive department, under a Secretary of Agriculture, with an Assistant Secretary, to perform such duties as might be required by law or prescribed by the Secretary, by Act Feb. 9, 1889, c. 122, ante, §§ 789–792, and the provisions, applicable to all the Departments, that, in case of the death, resignation, absence, or sickness of the head of the Department, the duties of the office may be performed, temporarily, by the assistant, made by R. S. § 177, ante, § 259.

The appropriations for said fiscal year 1914, by said act, also provided, in the Office of the Secretary, for a Solicitor, $5,000, private secretary to the Secretary of Agriculture, $2,500, stenographer and executive clerk to the Secretary of Agriculture, $2,250, private secretary to the Assistant Secretary of Agriculture, $1,600, stenographer to the Assistant Secretary of Agriculture, $1,400, one appointment clerk, $2,000, one chief of supply division, $2,000, one inspector, $2,750, various numbers of law clerks, at different salaries, one special agent on exhibits, $3,000, one telegraph and telephone operator, $1,600, and other clerks and employés at specified salaries. And every officer or employé whose salary was so specified is thereafter to receive compensation at the rate specified, by a further provision of said act, post, § 802. But the agricultural appropriation act for the fiscal year 1917, Act Aug. 11, 1916, c. 313, 39 Stat., contained different provisions for the officers, employés, etc., in the office of the Secretary of Agriculture as follows: Solicitor, $5,000; private secretary to the Secretary, $2,500; executive clerk, $2,250; executive clerk, $2,100; stenographer and executive clerk to the Secretary, $2,250; private secretary to the Assistant Secretary, $2,250; appointment clerk, $2,000; assistant in charge of information, $3,000; officer in charge of supplies, $2,000; assistant, $2,000; inspector, $2,750; inspector, $2,250; various numbers of law clerks, at different salaries; expert on exhibits, $3,000; telegraph and telephone operator, $1,600; and other clerks and employés at specified salaries.

The legal work of the Department is to be performed under supervision and direction of the Solicitor, by a provision of Act May 26, 1910, c. 256, post, § 824.

The annual appropriations provide for a chemist, an entomologist, and others, including a statistician, such as were mentioned specifically in the preceding section, or were authorized by this section to be employed as "persons skilled in the natural sciences pertaining to agriculture," who are designated in the successive appropriation acts as chiefs of the several bureaus, divisions, etc., established in the Department, and as assistants, etc. The provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat., and were as follows: Bureau of Animal Industry—Chief of bureau, $5,000; chief clerk, $2,500; editor and compiler, $2,250; executive clerk, $2,000; executive clerk, $1,920. Bureau of Plant Industry—Physiologist and pathologist, who shall be chief of bureau, $5,000; chief clerk, $3,000; executive assistant in seed distribution, $2,500; officer in charge of publications, $2,250; landscape gardener, $1,800; officer in charge of records, $2,250; superintendent of seed weighing and mailing, $2,000; two executive clerks, at $1,980 each; assistant superintendent of seed warehouse, $1,400; seed inspector, $1,000; seed warehouseman, $1,400; seed warehouseman, $1,020; seed warehouseman, $1,000; seed warehouseman, $840. Bureau of Chemistry—Chemist, who shall be chief of bureau, $5,000; chief clerk, $2,500; three executive clerks, at $2,000 each. Bureau of Soils—Soil physicist, who shall be chief of bureau, $4,000; chief clerk, $2,000; executive assistant, $2,000. Bureau of Entomology—Entomologist, who shall be chief of bureau, $4,500; chief clerk and executive assistant, $2,250; administrative assistant, $2,250; financial clerk, $1,800. Bureau of Biological Survey—Biologist, who shall be chief of bureau, $3,500; chief clerk and executive assistant, $1,800; administrative assistant, $2,250; financial clerk, $1,600. Bureau of Crop Estimates—Statistician, who shall be chief of bureau, $4,000; chief clerk, $1,800.

The bureaus established in the Department include the following: The Bureau of Animal Industry, established by Act May 29, 1884, c. 60, § 1, post, § 850; the Weather Bureau, established on the transfer of the Weather Service from the War Department, by Act Oct. 1, 1890, c. 1266, §§ 1, 3, 4, post, §§ 840–842; several other bureaus, reorganized from divisions of the Department, as described in a provision relating thereto of Act June 3, 1902, c.

985, post, § 795, and others provided for by subsequent appropriations. The provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat.

A Federal Horticultural Board, of five members, appointed by the Secretary of Agriculture from existing bureaus and offices in the Department, including the Bureau of Entomology, the Bureau of Plant Industry, and the Forest Service, not more than two from any one bureau or office, the members to serve without additional compensation, was created by Act Aug. 20, 1912, c. 308, § 12, post, § 8764.

In the Division of Accounts and Disbursements, a chief of division and disbursing clerk, to be administrative officer of the fiscal affairs of the Department, and a deputy disbursing clerk, were authorized by provisions of Act March 4, 1911, c. 238, post, § 797, and appropriations for their compensation and for other fiscal officers and clerks, etc., in that Division were continued in the subsequent appropriation acts. Provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat.

In the Division of Publications, an editor, who shall be chief of division, at $3,500, an editor, who shall be assistant chief of division, at $2,500, a chief clerk, at $2,000, various assistant editors at different salaries, and other clerks and employés, are provided for by recent agricultural appropriation acts. The provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat.

Recent agricultural appropriation acts, under the heading Library, Department of Agriculture, made appropriations for a librarian, at $2,000, and for various clerks and employés. The provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat. Said appropriation acts also contain appropriations for officers and employés in other divisions of the Department of Agriculture as follows: States Relations Service—Director, $4,500; chief clerk, $2,000; financial clerk, $2,000. Office of Public Roads and Rural Engineering—Director, who shall be a scientist and have charge of all scientific and technical work, $4,500; draftsman or clerk, $1,920; chief clerk, $1,900; model maker, $1,800. Office of Markets and Rural Organization—Chief of office, $4,500; chief clerk, $2,000; administrative assistant, $1,980. Enforcement of the Insecticide Act—Executive officer, $2,750; executive assistant, $2,000—together with various clerks and employés for said services and offices. The provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat.

The Secretary of Agriculture was authorized to make appointments, promotions, and changes in salaries to be paid out of the lump funds of the several bureaus, divisions, and offices of the Department, subject to certain limitations, by provisions of Act March 4, 1907, c. 2907, post, § 799.

Details of the law clerks for service in or out of Washington, and details of employés from and to the library and other bureaus and offices of the Department, were authorized by provisions of Act March 4, 1911, c. 238, post, §§ 804, 805.

Similar details of employés from and to the Division of Accounts and Disbursements were authorized by a provision of Act Aug. 10, 1912, c. 284, post, § 806.

Leaves of absence for employés, outside of the city of Washington, were authorized by a provision of Act May 23, 1908, c. 192, post, § 807.

Assignments of pay by employés, under regulations to be prescribed, were authorized by a provision of Act March 4, 1909, c. 301, post, § 808.

Provisions for allowances for expenses, etc., of officers and employés, incurred while traveling, etc., on official business, contained in Act March 4, 1911, c. 238, and Act Aug. 10, 1912, c. 284, are set forth post, §§ 810, 811.

Provisions applicable to all the Departments, relating to the employment of clerks and others, were made by R. S. § 169, and Aug. 5, 1882, c. 389, § 4, ante, §§ 248, 249.

Provisions applicable to all the Departments, relating to the duties of chief clerks and disbursing clerks, were made by R. S. §§ 173, 174, 176, ante, §§ 255, 256, 258.

See notes to § 791, ante.

§ 795. (Act June 3, 1902, c. 985.) Bureaus of Soils, of Forestry, of Chemistry, and of Plant Industry.

All existing statutes relating to the Division of Soils, reorganized into the Bureau of Soils; the Division of Forestry, reorganized into the Bureau of Forestry; the Division of Chemistry, reorganized into the Bureau of Chemistry; and the Division of Botany, the Division of Pomology, the Division of Vegetable Physiology and Pathology, the Division of Agrostology and Experimental Gardens and Grounds, reorganized into the Bureau of Plant Industry, not otherwise repealed, shall remain in effect as applying to the respec-

tive bureaus into which the divisions named have been reorganized. (32 Stat. 303.)

This was a proviso annexed to an appropriation for silk investigations in the agricultural appropriation act for the fiscal year 1903, cited above.

See notes to R. S. § 523, ante, § 794, as to other bureaus in the Department.

§ 795a. (Act June 30, 1914, c. 131.) Bureau of Crop Estimates.

Hereafter the powers conferred and the duties imposed by law on the Bureau of Statistics of the Department of Agriculture shall be exercised and performed by the Bureau of Crop Estimates. (38 Stat. 436.)

This was a provision of the agricultural appropriation act for the fiscal year 1915, cited above.

§ 796. (Act March 4, 1911, c. 238.) Disbursing clerk, administrative officer of fiscal affairs of department; deputy disbursing clerk, his authority, bond, and liabilities.

Salaries, Division of Accounts and Disbursements: One chief of division and disbursing clerk, who shall be administrative officer of the fiscal affairs of the department, * *; * * one deputy disbursing clerk, * *.

The deputy disbursing clerk herein provided for shall hereafter have authority to sign checks in the name of the disbursing clerk; he shall give bond to the United States in such sum as the Secretary of the Treasury may require, and when so acting for the disbursing clerk shall be subject to all the liabilities and penalties prescribed by law for the official misconduct in like cases of the disbursing clerk for whom he acts, and the official bond of the disbursing clerk executed shall also be made to cover and apply to the acts of the deputy disbursing clerk. (36 Stat. 1258.)

These were provisions of the agricultural appropriation act for the fiscal year 1912, cited above. The amounts appropriated thereby for the chief of division and disbursing clerk, and for the deputy disbursing clerk, and provisions for other fiscal officers, clerks, and employés in the division are omitted here. Subsequent appropriations were for increased amounts in some instances. For the fiscal year 1914 was appropriated, for the chief of division, $4,000, for the deputy disbursing clerk, $2,000, by Act March 4, 1913, c. 145, 37 Stat. 848, and thereafter every officer or employé whose compensation was specified therein is to receive compensation at the rate specified, by a further provision of said act, post, § 802. The provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat., said act also making an appropriation for one supervising auditor, $2,250, one cashier and chief clerk, $2,250, and several clerks with varying salaries, by Act Aug. 11, 1916, c. 313, 39 Stat.

See notes to §§ 791, 794, ante.

Cited without definite application, U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 562, 126 C. C. A. 376.

§ 797. (Act March 3, 1885, c. 338, § 2.) Payment from appropriations of additional compensation to officers or employés of government, forbidden.

No part of the money herein or hereafter appropriated for the Department of Agriculture shall be paid to any person, as additional salary or compensation, receiving at the same time other compensation as an officer or employee of the Government. (23 Stat. 356.)

This was a provision of section 2 of the agricultural appropriation act for the fiscal year 1886, cited above. The remaining portion of the section is set forth post, § 837.

Notes of Decisions

Limitation on power of Secretary.—This provision is a limitation upon the power of the Secretary which does not extend to courts whose judgments will not be paid out of that appropriation. Geddes v. U. S. (1903) 38 Ct. Cl. 428.

Officers on retired list.—An officer on the retired list who is also chief clerk of the Department of Agriculture is entitled to the salary of both offices. Geddes v. U. S. (1903) 38 Ct. Cl. 428.

§ 798. (Act June 30, 1906, c. 3913.) Promotions without examination of laborers transferred to classified service.

All classified laborers whose positions were transferred from the lump funds to the statutory rolls by the Act making appropriations for the Department of Agriculture approved March third, nineteen hundred and five, and who were by the last clause of that Act placed in the classified service without further examination in the grades and at the rates of compensation provided in said Act, are hereby made eligible for promotion without further examination. (34 Stat. 695.)

The transfer of the laborers mentioned in this section from the lump funds to the statutory rolls, to be placed in the classified service without further examination, was made by provisions of Act March 3, 1905, c. 1405, 33 Stat. 861–883, omitted, as temporary merely and executed.

§ 799. (Act March 4, 1907, c. 2907.) Appointments, promotions, and changes in salaries paid out of lump funds.

Hereafter the Secretary of Agriculture is hereby authorized to make such appointments, promotions, and changes in salaries, to be paid out of the lump funds of the several bureaus, divisions, and offices of the Department as may be for the best interests of the service. (34 Stat. 1280.)

This was a provision of the agricultural appropriation act for the fiscal year 1908, cited above. A provision in the same language, except the word "hereafter," was contained in the similar act for the preceding year, Act June 30, 1906, c. 3913, 34 Stat. 695.

A further provision of this act, authorizing and directing the Secretary "to submit to Congress each year a statement covering all appointments, promotions, or other changes made in the salaries paid from lump funds," etc., was repealed, with other provisions of the act, by a provision of Act March 4, 1911, c. 238, 36 Stat. 1264.

Notes of Decisions

Promotions to different classes.—It is permissible to promote from class 1 to class 3 and from class 2 to class 4 without regard to intermediate steps. (1893) 20 Opp. Atty. Gen. 573.

Messengers and laborers.—All appointments and removals of messengers and laborers must be made by the Secretary or Acting Secretary. (1896) 21 Op. Atty. Gen. 355.

§ 800. (Act June 30, 1914, c. 131.) Maximum salary of scientific investigators, etc., paid from general appropriation.

Hereafter the maximum salary of any scientific investigator, or other employee engaged in scientific work and paid from the general appropriations of the Department of Agriculture, shall not exceed at the rate of $4,500 per annum. (38 Stat. 441.)

This was a provision of the agricultural appropriation act for the fiscal year 1915, cited above. A provision in exactly the same language, except as to the amount of the maximum salary, which was fixed at $4,000, was contained in Act May 26, 1910, c. 256, 36 Stat. 440. See notes to § 791, ante.

Every officer or employé of the Department whose rate of compensation was specified in the agricultural appropriation act for the fiscal year 1914 is thereafter to receive compensation at the rate so specified, by a provision of said act, post, § 802.

Notes of Decisions

Who are employés.—The word "employé" as used herein does not embrace persons whose services have been contracted for in connection with a particular case in court, and whose employment has no degree of permanence. (1909) 28 Op. Atty. Gen. 75.

Expert witnesses for the government in cases arising under the food and drugs act are not "employés" as the term is used in Agricultural Appropriation Act March 4, 1907 (34 Stat. 1280), or in section 2687, R. S., post, § 5394. Id.

§ 801. (Act March 4, 1907, c. 2907.) Salary of each employé to be paid from roll of bureau, etc., in which he is working.

The Secretary of Agriculture is hereby authorized and directed to pay the salary of each employee from the roll of the bureau,

ndependent division, or office in which the employee is working, nd no other. (34 Stat. 1280.)

This was a provision of the agricultural appropriation act for the fiscal year 1908, cited above.

802. (Act March 4, 1913, c. 145.) Compensation of officers and employés to be at rates specified in act.

Hereafter every officer or employee of the Department of Agriulture whose rate of compensation is specified herein shall reeive compensation at the rate so specified. (37 Stat. 854.)

This was a provision of the agricultural appropriation act for the fiscal year 1914, cited above.

803. (Act March 4, 1907, c. 2907.) Details of employés from office of Secretary.

Details may be made from the office of the Secretary when necssary and the services of the person whom it is proposed to deail are not required in that office. (34 Stat. 1280.)

This was a proviso of the agricultural appropriation act for the fiscal year 1908, cited above.

Notes of Decisions

Persons in classified service.—The Secretary may detail a person in the lassified service of his Department to luty elsewhere within the classified ervice of his Department provided his ompensation be not increased. (1893) 0 Op. Atty. Gen. 573.

Army officers.—The Secretary can leally detail any such officers or employés from his Department as may be requested by the Civil Service Commission, but he cannot assign an officer of the Army detailed for service in the Weather Bureau to any other duties than those for which he is by law authorized to be detailed in the Weather Bureau. (1894) 20 Op. Atty. Gen. 750.

804. (Act March 4, 1911, c. 238.) Details of law clerks.

Hereafter the law clerks may be detailed by the Secretary of griculture for service in or out of Washington. (36 Stat. 1236.)

This was a proviso following appropriations for officers, clerks, etc., including law clerks, in the office of the Secretary, in the agricultural appropriation act for the fiscal year 1912, cited above. A provision in the same language, except the word "hereafter," was contained in the similar act for the preceding year.

Cited without definite application, S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 562, 126 C. C. A. 376.

805. (Act March 4, 1911, c. 238.) Details of employés from and to library and bureaus and offices of the Department.

Hereafter employees of the Library may be temporarily detailed y the Secretary of Agriculture for library service in the bureaus nd offices of the department, and employees of the bureaus and ofces of the department engaged in library work may also be temorarily detailed to the Library. (36 Stat. 1261)

This was a proviso annexed to the appropriation for "general expenses, library," in the agricultural appropriation act for the fiscal year 1912, cited above.

Cited without definite application, S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 562, 126 C. C. A. 376.

806. (Act Aug. 10, 1912, c. 284.) Details of employés from and to Division of Accounts and Disbursements and bureaus and offices of the Department.

Hereafter employees of the Division of Accounts and Disbursenents may be detailed by the Secretary of Agriculture for accountng and disbursing work in any of the bureaus and offices of the lepartment for duty in or out of the city of Washington, and employees of the bureaus and offices of the department may also be letailed to the Division of Accounts and Disbursements for duty

in or out of the city of Washington, traveling expenses of employees so detailed to be paid from the appropriation of the bureau or office in connection with which such travel is performed. (37 Stat. 294.)

This was a proviso annexed to appropriations for the Division of Accounts and Disbursements in the agricultural appropriation act for the fiscal year 1913, cited above.

Notes of Decisions

Persons in classified service.—The Secretary may detail a person in the classified service of his Department to duty elsewhere within the classified service of his Department provided his compensation be not increased. (1893) 20 Op. Atty. Gen. 573.

§ 807. (Act May 23, 1908, c. 192.) Leaves of absence to employés outside of city of Washington.

Leave of absence: The employees of the Department of Agriculture, outside of the city of Washington, may hereafter, in the discretion of the Secretary of Agriculture, be granted leave of absence not to exceed fifteen days in any one year, which leave may in exceptional and meritorious cases where such an employee is ill, be extended, in the discretion of the Secretary of Agriculture, not to exceed fifteen days additional in any one year. (35 Stat. 267.)

This was a provision of the agricultural appropriation act for the fiscal year 1909, cited above. Previous similar provisions, relating to the employés of particular bureaus, etc., in the Department, were contained in the similar acts for preceding years.

Notes of Decisions

Notice of furlough.—It is not necessary for the Secretary to give a notice of furlough without pay of assistant microscopists over his official signature in each individual case when their services are not required. (1896) 21 Op. Atty. Gen. 318.

A general order, signed by him, directing inspectors in charge of assistant microscopists to furlough them without pay when their services are not required, will be sufficient. Id.

§ 807a. (Act June 30, 1914, c. 131.) Leaves of absence to employés assigned to permanent duty in Alaska, Hawaii, Porto Rico, and Guam.

Hereafter employees of the Department of Agriculture assigned to permanent duty in Alaska, Hawaii, Porto Rico, and Guam may, in the discretion of the Secretary of Agriculture, without additional expense to the Government, be granted leave of absence not to exceed thirty days in any one year, which leave may, in exceptional and meritorious cases where an employee is ill, be extended, in the discretion of the Secretary of Agriculture, not to exceed thirty days additional in any one year. (38 Stat. 441.)

This was a provision of the agricultural appropriation act for the fiscal year 1915, cited above.

§ 808. (Act March 4, 1909, c. 301.) Assignment of pay by employés.

Hereafter the Secretary of Agriculture is authorized to permit employees of the Department of Agriculture to make assignments of their pay, under such regulations as he may prescribe, during such time as they may be in the employ of the said department. (35 Stat. 1057.)

This was a provision of the agricultural appropriation act for the fiscal year 1910, cited above.

§ 809. (Act March 4, 1907, c. 2907.) Purchase of mileage and mileage books from appropriations for traveling expenses.

Hereafter the Secretary of Agriculture is authorized to purchase from appropriations made for traveling expenses for employees of the Department of Agriculture, mileage and mileage books, at commercial

, in the manner in which such mileage or mileage books are y purchased. (34 Stat. 1281.)

This was a provision of the agricultural appropriation act for the fiscal ar 1908, cited above.

. (Act March 4, 1911, c. 238.) Traveling expenses, etc., of officers and employés transferred from one official station to another.

reafter officers and employees of the Department of Agricul- transferred from one official station to another for permanent when authorized by the Secretary of Agriculture, may be ed actual traveling expenses, including charges for the transfer eir effects and personal property used in official work, under such and regulations as may be prescribed by the Secretary of Agri- re. (36 Stat. 1265.)

This was a provision of the agricultural appropriation act for the fiscal ar 1911, cited above.

d without definite application, v. Utah Power & Light Co. (1913) 209 Fed. 554, 562, 126 C. C. A. 376.

. (Act Aug. 10, 1912, c. 284.) Expenses of officials and employés traveling on official business; per diem in lieu of subsistence, etc.

reafter, when officials and employees of the Department of culture are traveling on official business in the United States, may be allowed necessary railroad and steamboat fares, sleep- erth, and stateroom on steamboats, livery hire and stage fare, other means of conveyance between points not accessible ailroad, but in lieu of subsistence and all other traveling ex- es they may receive a per diem allowance, to be fixed by the etary in each case, in addition to their regular salaries, sub- to such rules and regulations as the Secretary of Agriculture prescribe. (37 Stat. 300.)

This was a provision of the agricultural appropriation act for the fiscal ar 1913, cited above.

Notes of Decisions

veling expenses included in sal- The Secretary probably has the to compensate agents employed e Department, by stated salaries shall be in full for all traveling expenses as well as for services, but the matter is one of considerable doubt and uncertainty. (1893) 20 Op. Atty. Gen. 601.

2. (Act Aug. 10, 1912, c. 284.) Reimbursement of officials and employés for expenses for street-car fares.

reafter officials and employees of the Department of Agricul- may, when authorized by the Secretary of Agriculture, re- reimbursement for moneys expended for street-car fares at official headquarters when expended in the transaction of al business. (37 Stat. 300.)

This was a further provision of the agricultural appropriation act for the cal year 1913, cited above.

3. (Act Aug. 10, 1912, c. 284.) Purchases for bureaus from appropriations for contingent expenses, reimbursable from lump-fund appropriations.

reafter the Secretary of Agriculture may purchase stationery, lies, furniture, and miscellaneous materials from this appro- ion and transfer the same at actual cost to the various bureaus, ions, and offices of the Department of Agriculture in the city Vashington, reimbursement therefor to be made to this appro- ion by said bureaus, divisions, and offices from their lump-fund

appropriations by transfer settlements through the Treasury Department. (37 Stat. 296.)

This was a proviso annexed to an appropriation for contingent expenses of the Department in the agricultural appropriation act for the fiscal year 1913, cited above.

§ 814. (Act Aug. 10, 1912, c. 284.) Exchange of typewriters and computing, etc., machines, purchased from lump-fund appropriations.

The Secretary of Agriculture may hereafter exchange typewriters and computing, addressing, and duplicating machines purchased from any lump-fund appropriation of the Department of Agriculture. (37 Stat. 296.)

This was a further proviso following that set forth in the preceding paragraph, ante, § 813.

§ 814a. (Act June 30, 1914, c. 131.) Exchange of scientific apparatus and laboratory equipment purchased from any appropriation.

The Secretary of Agriculture may hereafter exchange general scientific apparatus and laboratory equipment purchased from any appropriation of the Department of Agriculture. (38 Stat. 441.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above.

§ 814b. (Act Aug. 11, 1916, c. 313.) Purchase, maintenance, etc., of passenger-carrying vehicles and motor boats from lump sum appropriations; limitation of amount and reports of expenditures.

Not to exceed $60,000 of the lump-sum appropriations herein made for the Department of Agriculture shall be available for the purchase, maintenance, repair, and operation of motor-propelled and horse-drawn passenger-carrying vehicles and motor boats necessary in the conduct of the field work of the Department of Agriculture outside the District of Columbia: Provided, That not to exceed $10,000 of this amount shall be expended for the purchase of such vehicles and boats, and that such vehicles and boats shall be used only for official service outside the District of Columbia, but this shall not prevent the continued use for official service of motor trucks in the District of Columbia: Provided further, That the Secretary of Agriculture shall, on the first day of each regular session of Congress, make a report to Congress showing the amount expended under the provisions of this paragraph during the preceding fiscal year: Provided, That hereafter, nothing in this paragraph or in section five of the legislative, executive, and judicial appropriation Act, approved July sixteenth, nineteen hundred and fourteen (Thirty-eighth Statutes at Large, page five hundred and eight), shall be construed to apply to the hire of motor-propelled and horse-drawn passenger-carrying vehicles and motor boats necessary in the conduct of the field work of the department, or to the maintenance, repair, or operation of vehicles so hired. (39 Stat.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above. Similar provisions were contained in Act June 30, 1914, c. 131, 38 Stat. 442 and Act March 4, 1915, c. 144, 38 Stat. 1115.

Act July 16, 1914, c. 141, § 5, mentioned in this section is set forth post, § 3238a.

§ 814c. (Act March 4, 1915, c. 144.) Exchange of books, etc., of library not needed.

Hereafter the Secretary of Agriculture may exchange books and periodicals of the library not needed for permanent use for other books and periodicals. (38 Stat. 1107.)

This was a provision of the agricultural appropriation act for the fiscal year 1916, cited above.

§ 814d. (Act March 4, 1915, c. 144.) Sale or exchange of animals or animal products not needed.

Hereafter the Secretary of Agriculture is authorized to sell in the open market or to exchange for other live stock such animals or animal products as cease to be needed in the work of the department, and all moneys received from the sale of such animals or animal products or as a bonus in the exchange of the same shall be deposited in the Treasury of the United States as miscellaneous receipts. (38 Stat. 1144.)

This was a provision of the agricultural appropriation act for the fiscal year 1916, cited above.

§ 815. (R. S. § 524.) Bonds.

The Commissioner, and the chief clerk, before entering upon their uties, shall severally give bonds to the Treasurer of the United tates, the former in the sum of ten thousand dollars, and the latter the sum of five thousand dollars, conditioned to render a true d faithful account to the Treasurer quarter-yearly of all moneys hich shall be by them received by virtue of their office, with sure-s to be approved by the Solicitor of the Treasury. Such bonds all be filed in the office of the First Comptroller of the Treasury, be by him put in suit upon any breach of the conditions thereof.

Act May 15, 1862, c. 72, § 4, 12 Stat. 388.

The requirement of this section that the commissioner should give bond, and a further provision that the bond should be in the penal sum of $25,000, made by Act March 3, 1887, c. 351, § 2, 24 Stat. 499, were superseded by the change of the Department into an executive department, under a Secretary of Agriculture, with an Assistant Secretary, by Act Feb. 9, 1889, c. 122, ante, §§ 789–792.

The designation of First Comptroller of the Treasury was changed to Comptroller of the Treasury by Act July 31, 1894, c. 174, § 4, ante, § 402.

816. (Act Aug. 8, 1894, c. 238, § 1.) Seal.

The Secretary of Agriculture is hereby authorized and directed to rocure a proper seal, with such suitable inscriptions and devices s he may approve, to be known as the official seal of the Department of Agriculture, and to be kept and used to verify official documents, under such rules and regulations as he may prescribe. (28 tat. 272.)

This was a provision of the agricultural appropriation act for the fiscal year 1895, cited above.

817. (R. S. § 525.) Custody of property, records, etc.

The Commissioner of Agriculture shall have charge, in the building and premises appropriated to the Department, of the library, rniture, fixtures, records, and other property appertaining to it, r hereafter acquired for use in its business.

Act May 15, 1862, c. 72, § 3, 12 Stat. 387. Res. Dec. 15, 1868, No. 1, 15 Stat. 343.

The duties of the Commissioner were to be performed by the Secretary of Agriculture, by a provision of Act July 14, 1890, c. 707, post, § 819.

818. (R. S. § 526.) Duties of Secretary.

The Commissioner of Agriculture shall procure and preserve all nformation concerning agriculture which he can obtain by means f books and correspondence, and by practical and scientific experments, accurate records of which experiments shall be kept in his Office, by the collection of statistics, and by any other appropriate neans within his power; he shall collect new and valuable seeds and plants; shall test, by cultivation, the value of such of them as may require such tests; shall propagate such as may be worthy of propagation; and shall distribute them among agriculturists.

Act May 15, 1862, c. 72, § 3, 12 Stat. 387.

The office of Secretary of Agriculture was established by Act Feb. 9, 1889,

c. 122, ante, §§ 789–792, and the Secretary was authorized and directed to perform all the duties named in acts of Congress in force on Feb. 8, 1889, to be performed by the Commissioner of Agriculture, by provisions of Act July 14, 1890, c. 707, post, § 819.

Further provisions as to the duties of the Secretary are set forth post, §§ 819–823.

In connection with an appropriation for completion of the work of the United States Entomological Commission under the Department of the Interior in the special investigation of the Rocky Mountain locust or grasshopper and the cotton worm, in Act June 16, 1880, c. 235, § 1, 21 Stat. 276, a proviso thereto required that after the close of the next fiscal year all work of the character provided for should be exclusively under control of the Agricultural Department.

The Secretary was directed to test for adulterations samples of seeds of grass, clover, or alfalfa, obtained in the open market, by a provision of Act April 28, 1904, c. 1486, post, § 8741.

The Secretary was authorized to establish an official standard of classification for the different grades of cotton, by a provision of Act May 23, 1908, c. 192, post, § 829.

The Secretary was authorized to establish and maintain laboratories for examining samples, etc., of seed or grain and to report upon them, such reports to serve as a basis for fixing grades and for the issuance of certificates of inspection, by a further provision of Act May 23, 1908, c. 192, post, § 830.

The Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor, were directed to make regulations for carrying out the provisions of the Pure Food and Drugs Act of June 30, 1906, c. 3915, by section 3 of that act, and also for carrying out the provisions of the Insecticide Act of April 26, 1910, c. 191, by section 3 of said act, both which are set forth post, §§ 8719, 8767.

Further provisions for the enforcement, by the Secretary of the Treasury and the Secretary of Agriculture, of the provisions of the pure food act and of the insecticide act as to imported articles were contained in section 11 of each of said acts, also set forth post, §§ 8727, 8775.

Provisions for the regulation of the exportation and transportation of live stock and the suppression of diseases among such stock, by the Secretary of Agriculture, were contained in Act Feb. 2, 1903, c. 349, set forth post, §§ 8698–8700.

The Secretary of Agriculture was authorized to cause to be made, by inspectors appointed for the purpose, the inspection of cattle, etc., carcasses, etc., thereof, and meat and meat food products, provided for by Act March 4, 1907, c. 2907, and to make regulations for the execution of that act, by various provisions of said Act March 4, 1907, c. 2907, relating to such inspections, etc., set forth post, §§ 8681, 8707.

The Secretary of Agriculture was charged with the proper administration of Act March 16, 1906, c. 951, providing for an increased annual appropriation for agricultural experiment stations, by section 4 of that act, and specific requirements in regard thereto are contained in that and other sections of said Act March 16, 1906, c. 951, set forth post, §§ 8891–8896.

The Secretary of Agriculture was made one of the members of the National Forest Reservation Commission, and various powers and duties are imposed on him in regard to the acquisition, etc., of lands necessary for regulation of flow of navigable streams, by Act March 1, 1911, c. 186, §§ 4–11, set forth post, under Title XXXII A, "The National Forests," post, §§ 5177–5184.

The Secretary of Agriculture was authorized to prescribe such regulations as may be required for determining the purity of breeding and the identity of animals imported for breeding purposes, to be admitted free of duty, under the Free List of the Underwood Tariff Act of Oct. 3, 1913, c. 16, § I, par. 397, post, § 5291.

The Secretary of the Treasury, the Secretary of Agriculture, and the Comptroller of the Currency were constituted "The Reserve Bank Organization Committee," and the duties and powers of said committee were defined, by the Federal Reserve Act of Dec. 23, 1913, c. 6, § 2, post, § 9786.

Provisions for investigation by the Secretary of the cost of food supplies, contained in the agricultural appropriation act for the fiscal year 1911, Act May 26, 1910, c. 256, 36 Stat. 440, and for the continuance of such investigations, in the similar acts for subsequent years, and further provisions for investigation by him of systems of marketing farm products and the making of recommendations to Congress thereon, etc., contained in Act Aug. 10, 1912, c. 284, 37 Stat. 295, being temporary merely, are omitted.

Notes of Decisions

Reports as evidence.—In action for publication charging plaintiff with selling Miracle Wheat at $1 a pound, reports of United States Department of Agriculture as to such wheat, kept as required by this section, and section

, ante, receivable in evidence under le Civ. Proc. N. Y. § 944, and sec- 789, ante, for any proper purpose, held admissible. Russell v. Brooklyn Daily Eagle (1915) 153 N. Y. Supp. 450, 168 App. Div. 121.

319. (Act July 14, 1890, c. 707.) Secretary to perform duties of former Commissioner of Agriculture.

The authority granted to the Commissioner of Agriculture by the of May twenty-nine, eighteen hundred and eighty-four, estab- ning the Bureau of Animal Industry, and by the provisions of the propriation act for the Agricultural Department, approved July hteenth, eighteen hundred and eighty-eight, relating to said Bu- u, is hereby vested in the Secretary of Agriculture; and the said cretary is hereby authorized and directed to perform all the duties ned in said acts and all other acts of Congress in force on Feb- ry eighth, eighteen hundred and eighty-nine, to be performed by Commissioner of Agriculture. (26 Stat. 288.)

These were provisions of the agricultural appropriation act for the fiscal year 1891, cited above.

Sections 1 and 11 of Act May 29, 1884, c. 60, establishing the Bureau of Animal Industry, referred to in this provision, are set forth, post, §§ 850, 838; sections 2–9, relating to the exportation and transportation of live stock to foreign countries and between different States, etc., and to the suppression of diseases of live stock, are set forth post, §§ 8690–8697.

The authority granted by the agricultural appropriation act of 1888, Act July 18, 1888, c. 677, 25 Stat. 333, referred to in this provision, was limited to the use of the sum therein appropriated. It was substantially repeated, but amplified, though not made permanent, by subsequent appropriation acts.

Said provisions of the act of July 18, 1888, were as follows:

"Salaries and expenses Bureau of Animal Industry: For carrying out the provisions of the act of May twenty-ninth, eighteen hundred and eighty-four, establishing the Bureau of Animal Industry, five hundred thousand dollars; and the Commissioner of Agriculture is hereby authorized to use any part of this sum he may deem necessary or expedient, and in such manner as he may think best, to prevent the spread of pleuro-pneumonia, and for this purpose to employ as many persons as he may deem necessary, and to expend any part of this sum in the purchase and destruction of diseased or exposed animals and the quarantine of the same whenever in his judgment it is essential to prevent the spread of pleuro-pneumonia from one State into another."

Cited without definite application,
U. S. v. Haas (D. C. 1906) 167 Fed. 211.

20. (R. S. § 527, as amended, Act April 25, 1896, c. 140, § 1.) Purchase and distribution of seeds, plants, etc.

Purchase and distribution of vegetable, field, and flower seeds, nts, shrubs, vines, bulbs and cuttings shall be of the freshest and t obtainable varieties and adapted to general cultivation.

Act June 25, 1864, c. 147, § 1, 13 Stat. 145, 155. Act March 2, 1865, c. 73, § 1, 13 Stat. 445, 455. Act July 23, 1866, c. 208, § 1, 14 Stat. 191, 201. Act March 2, 1867, c. 166, § 1, 14 Stat. 440, 452. Act April 25, 1896, c. 140, § 1, 29 Stat. 106.

This section, as enacted in the Revised Statutes, was as follows:

"The purchase and distribution of seeds by the Department of Agriculture shall be confined to such seeds as are rare and uncommon to the country, or such as can be made more profitable by frequent changes from one part of our own country to another; and the purchase or propagation and distribution of trees, plants, shrubs, vines, and cuttings, shall be confined to such as are adapted to general cultivation and to promote the general interests of horticulture and agriculture throughout the United States."

It was amended by Act April 25, 1896, c. 140, § 1, cited above, to read as set forth here.

Appropriations are made annually, in the agricultural appropriation acts, for the purchase, etc., and distribution by the Secretary of Agriculture of valuable seeds, bulbs, etc., and plants, with provisions for allotment of an equal proportion of five-sixths thereof to Senators, Representatives, and Delegates in Congress for distribution among their constituents, the provisions of the successive acts varying in details from year to year. Such provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat., and were as follows: "An equal proportion of five-sixths of all seeds, bulbs, shrubs, vines, cuttings, and plants, shall, upon their request, after due notification by the Secretary

of Agriculture that the allotment to their respective districts is ready for distribution, be supplied to Senators, Representatives, and Delegates in Congress for distribution among their constituents, or mailed by the department upon the receipt of their addressed franks, in packages of such weight as the Secretary of Agriculture and the Postmaster General may jointly determine: Provided, however, That upon each envelope or wrapper containing packages of seeds the contents thereof shall be plainly indicated, and the Secretary shall not distribute to any Senator, Representative, or Delegate seeds entirely unfit for the climate and locality he represents, but shall distribute the same so that each Member may have seeds of equal value, as near as may be, and the best adapted to the locality he represents: Provided, also, That the seeds allotted to Senators and Representatives for distribution in the districts embraced within the twenty-fifth and thirty-fourth parallels of latitude shall be ready for delivery not later than the tenth day of January: Provided, also, That any portion of the allotments to Senators, Representatives, and Delegates in Congress remaining uncalled for on the first day of April shall be distributed by the Secretary of Agriculture, giving preference to those persons whose names and addresses have been furnished by Senators and Representatives in Congress and who have not before during the same season been supplied by the department: And provided, also, That the Secretary shall report, as provided in this Act, the place, quantity, and price of seeds purchased, and the date of purchase; but nothing in this paragraph shall be construed to prevent the Secretary of Agriculture from sending seeds to those who apply for the same."

Provisions for transmission of seeds, etc., distributed by members of Congress, through the mails, free of charge, contained in Act March 3, 1875, c. 128, § 7, are set forth post, § 7380.

Provisions for the printing annually by the Public Printer of franks required for sending out seeds on Congressional orders were contained in Res. May 19, 1902, No. 23, post, § 6994.

Appropriations are also made annually, in the sundry civil appropriation acts, for the printing and distribution of farmers' bulletins, adapted to the interests of the people of the different sections of the country, with provisions for allotment of four-fifths thereof to members of Congress for distribution. Further provisions relating thereto, contained in Act June 30, 1906, c. 3913, are set forth post, § 828. The appropriation for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

Notes of Decisions

Authority of Secretary of Agriculture.—The Secretary is authorized to make the purchases of seeds referred to conformably to R. S. § 3709, post, § 6832, reserving the right to reject any and all bids. (1895) 21 Op. Atty. Gen. 162.

Construction of prior acts and resolutions.—The act making appropriations for the purchase of seeds for the Department of Agriculture for the fiscal year 1895 does not authorize the purchase of any others than those described in this section. (1894) 21 Op. Atty. Gen. 55.

The seeds purchasable out of the appropriation made in Act March 2, 1895 (28 Stat. 733), for the purchase, propagation, and distribution of seeds, etc., are limited to those described in this section, and must be such as are adapted to general cultivation and to promote the general interests of horticulture and agriculture throughout the United States. (1895) 21 Op. Atty. Gen. 162.

Joint resolution No. 27 of March 3, 1896 (29 Stat. 467), authorizes and directs the Secretary of Agriculture to purchase and distribute seeds for the year 1896 in accordance with the practice followed by the Department prior to the year 1895. (1896) 21 Op. Atty. Gen. 321.

If the practice has been varied from year to year, the Secretary is to exercise his discretion, but it will be a discretion of choice, and not a discretion to do or leave undone. Id.

The last part of the resolution authorizes and directs the purchase of seeds for the year 1896 in open market at the discretion of the Secretary, without resorting to advertisement for bids. Id.

The act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1897 (29 Stat. 99, 106), authorizes the Department to pay $130,000 for seed already put up in packages and labeled, ready for distribution. (1896) 21 Op. Atty. Gen. 372.

§ 820a. (Act Aug. 11, 1916, c. 313.) Contracts for supplying printed packets, etc., and packeting, etc., and mailing seeds, bulbs, etc.

The Secretary of Agriculture, after due advertisement and on competitive bids, is authorized to award the contract for the supplying of printed packets and envelopes and the packeting, assem-

ling, and mailing of the seeds, bulbs, shrubs, vines, cuttings, and lants, or any part thereof, for a period of not more than five years or less than one year, if by such action he can best protect the terests of the United States. (39 Stat.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above. It was repeated in the previous agricultural appropriation acts for the fiscal year 1915 and 1916, Act June 30, 1914, c. 131, 38 Stat. 424, Act March 4, 1915, c. 144, 38 Stat. 1094.

See notes to § 820, ante.

821. (Act May 25, 1900, c. 553, § 1.) Preservation, etc., of game birds and other wild birds.

The duties and powers of the Department of Agriculture are ereby enlarged so as to include the preservation, distribution, in-oduction, and restoration of game birds and other wild birds. The ecretary of Agriculture is hereby authorized to adopt such meas-es as may be necessary to carry out the purposes of this Act and purchase such game birds and other wild birds as may be re-red therefor, subject, however, to the laws of the various States Territories. The object and purpose of this Act is to aid in restoration of such birds in those parts of the United States ted thereto where the same have become scarce or extinct, also to regulate the introduction of American or foreign birds animals in localities where they have not heretofore existed.

The Secretary of Agriculture shall from time to time collect and blish useful information as to the propagation, uses, and pres-ation of such birds.

And the Secretary of Agriculture shall make and publish all need-rules and regulations for carrying out the purposes of this Act, l shall expend for said purposes such sums as Congress may ap-opriate therefor. (31 Stat. 187.)

This was the first section of the Lacey Act, entitled "An act to enlarge the powers of the Department of Agriculture," etc., cited above. The other sections, being sections 2–5 of the act, relating to the importation of foreign wild animals or birds, and to the transportation between different States, etc., of animals or birds the importation of which is prohibited, or the dead bodies of wild animals or birds killed in violation of the laws of a State, etc., were incorporated into the Criminal Code, in sections 241–244 thereof, post, §§ 10411–10414, and were repealed by section 341 of said Criminal Code, post, § 10515.

The Secretary of Agriculture was further empowered to authorize and regulate the importation of eggs of game birds for propagation, by Act June 3, 1902, c. 983, post, § 822.

Provisions that migratory game and insectivorous birds, which, in their northern and southern migrations do not remain permanently the entire year within the borders of any State or Territory, shall be deemed within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations to be adopted by the Department of Agriculture, were made by Act March 4, 1913, c. 145, and are set forth under Title LVII D, "Protection of Migratory Game and Insectivorous Birds."

822. (Act June 3, 1902, c. 983.) Regulation of importation of eggs of game birds for propagation.

From and after the passage of this Act the Secretary of Agri-ulture shall have the power to authorize the importation of eggs game birds for purposes of propagation, and he shall prescribe l necessary rules and regulations governing the importation of ggs of said birds for such purposes. (32 Stat. 285.)

This act was entitled "An act to regulate the introduction of eggs of game birds for propagation."

823. (Act Feb. 1, 1905, c. 288, § 1.) Execution of laws affecting lands reserved for national forests.

The Secretary of the Department of Agriculture shall, from and fter the passage of this Act, execute or cause to be executed all aws affecting public lands heretofore or hereafter reserved under he provisions of section twenty-four of the Act entitled "An Act

to repeal the timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, and Acts supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands. (33 Stat. 628.)

This was the first section of an act entitled "An act providing for the transfer of forest reserves from the Department of the Interior to the Department of Agriculture," cited above.

Act March 3, 1891, c. 561, § 24, and acts supplemental to and amendatory thereof, mentioned in this section, are set forth under Title XXXII A, "The National Forests," §§ 5121–5187.

Before this act, the Secretary of the Interior was charged with the supervision of the public lands by R. S. § 441, ante, § 680, and with the execution of the laws relating to forest reserves by various special provisions of such laws, post, §§ 5126–5134, 5136.

Notes of Decisions

Permits for use of land.—The Secretary of Agriculture is authorized by Act Feb. 15, 1901 (31 Stat. 790), to make the granting of permits for the use of lands or resources within the national forest reserves for the purposes contemplated by that act, which include irrigation, mining, and quarrying, etc., dependent upon the payment of such charges as he may deem reasonable. (1907) 26 Op. Atty. Gen. 421.

Whether charges based upon the grounds specifically enumerated by the Secretary of Agriculture, to wit, the use of the ground and rights of way without regard to their special value for the particular purposes contemplated by the permit, and for "conservation," being the special value of the land for the particular purpose contemplated in excess of its value for general purposes, would or would not be reasonable, is not a question which can properly be determined by the Attorney General. Id.

Use of water.—Intimated, that the right to use water on the forest reserves can be secured only under the provisions of Act June 4, 1897 (30 Stat. 35), and of other legislation specifically referring to the reserves, unless such rights existed before the particular reserve in question was created. (1907) 26 Op. Atty. Gen. 421.

Cited without definite application, U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 562, 126 C. C. A. 376.

§ 824. (Act May 26, 1910, c. 256.) Solicitor to supervise legal work of Department.

Hereafter the legal work of the Department of Agriculture shall be performed under the supervision and direction of the solicitor. (36 Stat. 416.)

This was a provision, accompanying an appropriation for compensation of the Solicitor, in the agricultural appropriation act for the fiscal year 1911. The amount appropriated, as in the previous year, was $4,500. It was increased to $5,000 in the appropriations for subsequent years. He is to receive compensation at that rate by a provision accompanying the appropriation of that amount for the fiscal year 1914, by Act March 4, 1913, c. 145, ante, § 802. The appropriation for the fiscal year 1917 was by Act Aug. 11, 1916, c. 313, 39 Stat.

§ 825. (Act March 4, 1909, c. 301.) Monthly crop reports.

Hereafter the monthly crop reports, which shall be gathered as far as practicable from practical farmers, and which shall be issued on or before the tenth of each month, shall embrace statements of the conditions of crops by States, in the United States, with such explanations, comparisons, and information as may be useful for illustrating the above matter, and that it shall be submitted to and officially approved by the Secretary of Agriculture before being issued or published: Provided further, That hereafter the condition reports of the cotton crop shall be issued on the same day in October each year as the first ginners' report of actual cotton ginned. (35 Stat. 1053.)

These were provisos annexed to the appropriations for expenses of the Bureau of Statistics in the Agricultural appropriation act for the fiscal year 1910, cited above. Provisos in nearly the same language, without the word

ereafter," were contained in the agricultural appropriation acts for previ-
s years.

Previous similar provisions, relating to a monthly crop report issued on the nth day of each month, had been made for many years.

The monthly crop reports are to embody information procured and transitted by consuls, etc., in foreign countries, relative to agricultural, etc., indusies of the countries in which they are stationed, by a provision added to S. § 1712, by amendment by Act June 18, 1888, c. 393, post, § 3167.

5. (Act May 27, 1912, c. 135, § 1.) Reports of number of acres of cotton in cultivation.

e Secretary of Agriculture be directed to cause the Bureau of stics of the Department of Agriculture to issue a report, on out the first Monday in July of each year, showing by States in total the number of acres of cotton then in cultivation in the ed States. (37 Stat. 118.)

This section and the section next following are provisions of an act entled "An act authorizing the Secretary of Agriculture to issue certain reorts relating to cotton," cited above.

7. (Act May 27, 1912, c. 135, § 2.) Reports of total cotton production.

e Secretary of Agriculture shall cause the Bureau of Statistics e Department of Agriculture to issue each year, immediately wing the publication of the ginning report of the Census Bu- of December first, an estimate of the total production of cotn the United States for the current crop year. (37 Stat. 118.)

8. (Act June 30, 1906, c. 3913.) Farmers' bulletins; allotment to Members of Congress for distribution.

blications, Department of Agriculture: General expenses, sion of Publications: * * for the preparation, printing, and ibution of farmers' bulletins, which shall be adapted to the ests of the people of the different sections of the country, an l proportion of four-fifths of which shall be delivered to or out under the addressed franks furnished by Senators, Repreatives, and Delegates in Congress, as such Senators, Repreatives, or Delegates shall direct: Provided, That the Secretary griculture shall notify Senators, Representatives, and Dele- s in Congress of the title and character of each such bulletin, the total number to which each Senator, Representative, and gate may be entitled for such distribution; and on the face of envelope inclosing said bulletins shall be printed the title of bulletin contained therein: Provided further, That all such tins included in the quotas of Senators, Representatives, or gates not called for on or before the thirty-first day of May in fiscal year shall revert to the Secretary of Agriculture, and vailable to him, either for miscellaneous distribution, or in ing up Congressional quotas for the next fiscal year. (34 690.)

These were provisions of the agricultural appropriation act for the fiscal ear 1907, cited above. The appropriation made was for the fiscal year only, t the accompanying provisions set forth here may be regarded as more peranent.

Previous provisions of the same nature had been made in the agricultural opropriation acts for several preceding years, with some variations from year year. For each fiscal year subsequent to 1907, an appropriation, varying in nount, but otherwise in substantially the same terms as those of this act, t forth here, without the provisos, was made in the annual sundry civil opropriation acts. The provision for the fiscal year 1917 was by Act July 1, 916, c. 209, § 1, 39 Stat.

Notes of Decisions

viso of Appropriation Act.—The so in Appropriation Act June 30, (34 Stat. 669), with regard to ers' Bulletins not called for in the quotas of Senators and Representatives is no longer in force. (1909) 27 Op. Atty. Gen. 288.

§ 829. (Act May 23, 1908, c. 192.) Sale of copies of card index of publications of Department.

Hereafter the Secretary of Agriculture may furnish to such institutions or individuals as may care to buy them, copies of the card index of the publications of the Department and of other agricultural literature prepared by the library, and charge for the same a price covering the additional expense involved in the preparation of these copies. (35 Stat. 264.)

This was a provision accompanying appropriations for the library of the Department in the agricultural appropriation act for the fiscal year 1909, cited above.

The same provision, without the word "hereafter," was contained in the similar appropriation acts for previous years.

§ 830. (Act May 23, 1908, c. 192.) Sale of copies of card index of agricultural literature prepared by Office of Experiment Stations.

The Secretary of Agriculture hereafter may furnish to such institutions or individuals as may care to buy them copies of the card index of agricultural literature prepared by the Office of Experiment Stations, and charge for the same a price covering the additional expense involved in the preparation of these copies, the money received from such sales to be deposited in the Treasury of the United States as miscellaneous receipts. (35 Stat. 265.)

This was a provision accompanying appropriations for agricultural experiment stations in the agricultural appropriation act for the fiscal year 1909, cited above.

Similar provisions, not containing the word "hereafter" were contained in the annual agricultural appropriation acts for preceding years.

§ 830a. (Act March 4, 1915, c. 144.) Sale of copies of card index of agricultural literature prepared by Department.

The Secretary of Agriculture hereafter may furnish to such institutions or individuals as may care to buy them copies of the card index of agricultural literature prepared by the Department of Agriculture in connection with its administration of the Act of March second, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, page four hundred and forty), and the Act of March sixteenth, nineteen hundred and six (Thirty-fourth Statutes at Large, page sixty-three), and the Acts amendatory of and supplementary thereto, and charge for the same a price covering the additional expenses involved in the preparation of these copies, the money received from such sales to be deposited in the Treasury of the United States as miscellaneous receipts. (38 Stat. 1109.)

This was a provision of the agricultural appropriation act for the fiscal year 1916, cited above.

Act March 2, 1887, c. 314, 24 Stat. 440, mentioned in this section, is set forth post, §§ 8878, 8879, 8881–8887, 8889. Act March 16, 1906, c. 951, 34 Stat. 63, also mentioned in this section, is set forth post, §§ 8891–8896.

§ 831. (Act March 4, 1907, c. 2907.) Sale of photographic prints, etc., and forest maps, and of condemned property, etc.

General Expenses, Forest Service: To enable the Secretary of Agriculture to experiment and to make and continue investigations on forestry, * * and hereafter he may dispose of photographic prints (including bromide enlargements), lantern slides, transparencies, blueprints, and forest maps at cost and ten per centum additional, and condemned property or materials under his charge in the same manner as provided by law for other bureaus. (34 Stat. 1269.)

This was a part of the provisions accompanying appropriations for the Forest Service in the agricultural appropriation act for the fiscal year 1908, cited above.

The same provision, without the word "hereafter," was contained in the sim-

ilar appropriation act for the preceding year, Act June 30, 1906, c. 3913, 34 Stat. 684.

Further provisions of this act, for the sale of prints and lantern slides from negatives, and for the sale of waste paper, etc., are set forth post, §§ 832, 833.

32. (Act March 4, 1907, c. 2907.) Sale of prints and lantern slides from photographic negatives.

Hereafter the Secretary of Agriculture is hereby authorized to nish, upon application, prints and lantern slides from negatives in possession of the Department and to charge for the same a price to er the cost of preparation, such price to be determined and estab- ed by the Secretary of Agriculture, and the money received from h sales to be deposited in the Treasury of the United States. Stat. 1281.)

This was a provision of the agricultural appropriation act for the fiscal year 1908, cited above.

The same provision, without the word "hereafter," was contained in the similar appropriation act for the preceding year, Act June 30, 1906, c. 3913, 34 Stat. 696.

32a. (Act March 4, 1915, c. 144.) Sale of samples of pure sugars, naval stores, microscopical specimens, etc.

Hereafter the Secretary of Agriculture may furnish, upon appli- ion, samples of pure sugars, naval stores, microscopical speci- ns, and other products to State and municipal officers, educa- nal institutions, and other parties and charge for the same a ce to cover the cost thereof, such price to be determined and ablished by the Secretary, and the money received from sales to deposited in the Treasury of the United States as miscellaneous eipts. (38 Stat. 1101.)

This was a provision of the agricultural appropriation act for the fiscal year 1916, cited above.

32b. (Act Aug. 11, 1916, c. 313.) Sale of potash obtained from experimentation.

For the investigation and demonstration within the United States determine the best method of obtaining potash on a commercial le, including the establishment and equipment of such plant or nts as may be necessary therefor, * *: Provided, That the prod- obtained from such experimentation may be sold at the market ce of such product, and the amount obtained from the sale there- shall be covered into the Treasury as miscellaneous receipts. (39 t.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above.

33. (Act March 4, 1907, c. 2907.) Sale of waste paper; accumulations of Department files; obsolete or worthless documents or publications.

Hereafter the Secretary of Agriculture is authorized to sell as ste waste paper, or otherwise to dispose of the accumulation of De- tment files which do not constitute permanent records, and all other uments and publications which have become obsolete or worthless. Stat. 1281.)

This was a further provision of the agricultural appropriation act for the fiscal year 1908, cited above.

Provisions, applicable to all the Departments, for the disposition of accumulations of useless papers, were made by Act Feb. 16, 1889, c. 171, set forth ante, § 254.

34. (Act March 4, 1909, c. 301.) Powers and duties of watchmen of Department.

Hereafter all duly and lawfully constituted and appointed watch- n of the Department of Agriculture stationed in and upon the build- s and premises of said department in the city of Washington, Dis-

trict of Columbia, shall have and perform the same powers and duties, while on duty in and about said premises, as the Metropolitan police of the District of Columbia. (35 Stat. 1057.)

This was a provision of the agricultural appropriation act for the fiscal year 1910, cited above.

§ 835. (R. S. § 528.) Annual and special reports of Secretary.

The Commissioner of Agriculture shall annually make a general report in writing of his acts to the President and to Congress, in which he may recommend the publication of papers forming parts of or accompanying his report, which shall also contain an account of all moneys received and expended by him. He shall also make special reports on particular subjects whenever required to do so by the President or either House of Congress, or when he shall think the subject in his charge requires it.

Act May 15, 1862, c. 72, § 3, 12 Stat. 387.

The Secretary of Agriculture was authorized and directed to perform all the duties of the Commissioner of Agriculture named in acts of Congress in force Feb. 8, 1889, by a provision of Act July 14, 1890, c. 707, ante, § 819.

The annual reports were to include information obtained by consular officers which pertains to agriculture, by a provision added to R. S. § 1713, by amendment by Act June 18, 1888, c. 393, post, § 3169.

Further provisions as to reports, statements, etc., by the Secretary are set forth post, §§ 836–839a.

The provisions of the annual agricultural appropriation acts for the purchase and distribution of seeds, etc., include in the act for each year a proviso, "That the Secretary shall report, as provided in this Act, the place, quantity, and price of seeds purchased, and the date of purchase." The provision for the fiscal year 1917 was by Act Aug. 11, 1916, c. 313, 39 Stat.

The appropriations in the annual agricultural appropriation acts to carry into effect the provisions of Act March 2, 1887, c. 314, to establish agricultural experiment stations, and of Act March 16, 1906, c. 951, to provide for an increased annual appropriation for such stations, are accompanied by a provision in the act for each year that "the Secretary of Agriculture shall prescribe the form of the annual financial statement required under the above acts, ascertain whether the expenditures are in accordance with their provisions, and make report thereon to Congress." The provision for the fiscal year 1914 was by Act March 4, 1913, c. 145, 37 Stat. 851.

Provisions for the printing and distribution of the reports of the Secretary of Agriculture and of the Weather Bureau and the Bureau of Animal Industry were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, pars. 2–4, post, §§ 7054–7056.

Special provisions for the printing and distribution of the report on field operations of the Division of Soils, of the Department of Agriculture, were made by Res. Feb. 23, 1901, No. 8, as amended by Res. March 14, 1904, No. 9, post, § 7096.

Provisions applicable to all the Departments, relating to the time of making annual reports, and the time of furnishing copies thereof to the printer were made by R. S. §§ 195, 196, and Act July 1, 1916, c. 209, § 3, ante, §§ 278, 279, 279a.

General provisions for the submission by the heads of Departments to Congress of estimates of expenditures and appropriations are contained in Title XLI, "Appropriations."

§ 836. (R. S. § 529.) Annual report of expenditures.

The Commissioner of Agriculture shall, on or before the fifteenth day of December in each year, make a report in detail to Congress of all moneys expended by him or under his direction.

Act March 2, 1867, c. 166, § 1, 14 Stat. 440, 452.

The Secretary of Agriculture was authorized and directed to perform all the duties of the Commissioner of Agriculture named in acts of Congress in force Feb. 8, 1889, by a provision of Act July 14, 1890, c. 707, ante, § 819.

A detailed statement to Congress at each session of the expenditure of all appropriations for the Department for the preceding fiscal year was required by a provision of Act March 3, 1885, c. 338, § 2, as amended by Act Aug. 11, 1916, c. 313, post, § 837.

Provisions requiring the Secretary to submit to Congress each year classified and detailed reports of receipts and expenditures by the Forest Service, and classified and detailed estimates and reports of every subject of expenditure by the Department, and statements showing all appointments, promotions, or

other changes made in the salaries paid from lump funds, contained in Act March 4, 1907, c. 2907, 34 Stat. 1270, 1280, 1282, were repealed by Act March 4, 1911, c. 238, 36 Stat. 1264.

The Commissioner was to direct and superintend the expenditure of all money appropriated to the Department, and render accounts thereof, by R. S. § 3677, which may be regarded as superseded by the organization of the Department as, an Executive Department, and the provisions of Act March 3, 1885, c. 338, § 2, as amended by Act Aug. 11, 1916, c. 313, post, § 837.

Rev. St. § 3709, which required advertisements for proposals for supplies, etc., in any of the Departments, was not to apply in the Department of Agriculture when the amount involved did not exceed $50, by a provision of Act March 1, 1899, c. 325, post, § 6834.

837. (Act March 3, 1885, c. 338, § 2, as amended, Act Aug. 11, 1916, c. 313.) Additional detailed statement of expenditure of appropriations.

Hereafter in addition to the proper vouchers and accounts for the ıms appropriated for the Department of Agriculture to be furshed to the accounting officers of the Treasury, the Secretary Agriculture shall, at the commencement of each regular session, esent to Congress a detailed statement of the expenditure of all propriations for said department for the last preceding fiscal year. 3 Stat. 356, 39 Stat.)

This provision was a part of section 2 of the agricultural appropriation act for the fiscal year 1886, cited above. It was amended by Act Aug. 11, 1916, c. 313, to read as set forth above. Said amendment consisted in the addition of the word "hereafter," at the beginning of the section, and the substitution, for the words "said Department" and "Commissioner of Agriculture" in the section as originally enacted, the words "Department of Agriculture" and "Secretary of Agriculture," as set forth above. The preceding portion of the section is set forth ante, § 797.

The vouchers and accounts referred to in this provision, to be furnished to the accounting officers of the Treasury, were required by Act June 16, 1880, c. 252, § 2, 21 Stat. 296, which directed the Commissioner of Agriculture to account and report to such officers of the Treasury in the same manner as the heads of the executive departments. And the requirements relating to those departments were made applicable to the Department of Agriculture by the act making it an executive department, under a Secretary of Agriculture, Act Feb. 9, 1889, c. 122, ante, §§ 789–792.

Provisions applicable to all the departments, forbidding additional compensation to clerks, were made by R. S. § 170, ante, § 253.

Subsequent provisions similar to those of this section, in requiring the Secretary to submit to Congress classified and detailed estimates and reports of every subject of expenditure by the Department, were contained in Act March 4, 1907, c. 2907, 34 Stat. 1282, but were repealed, with other provisions of that act, by Act March 4, 1911, c. 238, 36 Stat. 1264.

837a. (Act Aug. 11, 1916, c. 313.) Statement of expenditure from appropriations of amount paid for quarters.

Rent of Buildings, Department of Agriculture: For rent of ıildings and parts of buildings in the District of Columbia, for use the various bureaus, divisions, and offices of the Department of griculture, * *: Provided, That the Secretary of Agriculıre shall submit annually to Congress in his estimates of appropriıions a statement showing what proportion of this appropriation paid for the quarters occupied by the various branches of the deırtment. (39 Stat.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above.

838. (Act May 29, 1884, c. 60, § 11.) Report of persons employed, expenditures, and means adopted for suppression of contagious, etc., diseases among domestic animals.

The Commissioner of Agriculture shall report annually to Conress, at the commencement of each session, a list of the names of ll persons employed, an itemized statement of all expenditures nder this act, and full particulars of the means adopted and car-

ried into effect for the suppression of contagious, infectious, or communicable diseases among domestic animals. (23 Stat. 33.)

This section was part of the Animal Industry Act, cited above, section 1 of which is set forth under chapter C of this Title, post, § 850, and other sections post, §§ 8690–8697.

See note to preceding section, as to the performance by the Secretary of Agriculture of the former duties of the Commissioner of Agriculture.

§ 838a. (Act Aug. 11, 1916, c. 313.) Detailed estimates for executive officers, clerks, and employés below the grade of clerk.

The Secretary of Agriculture for the fiscal year nineteen hundred and eighteen, and annually thereafter, shall transmit to the Secretary of the Treasury for submission to Congress in the Book of Estimates detailed estimates for all executive officers, clerks, and employees below the grade of clerk, indicating the salary or compensation of each, necessary to be employed by the various bureaus, offices, and divisions of the Department of Agriculture, and shall include with such estimates a statement of all executive officers, clerks, and employees below the grade of clerk who may have been employed during the last completed fiscal year on any lump fund appropriation for the department and the salary or compensation of each. (39 Stat.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above.

§ 838b. (Act Aug. 11, 1916, c. 313.) Statement of completed investigations.

The Secretary of Agriculture is directed hereafter to submit to Congress annually a statement showing investigations and other services conducted by the Department of Agriculture which have been completed and which can be discontinued. (39 Stat.)

This was a further provision of the agricultural appropriation act for the fiscal year 1917, cited above.

§ 839. (Act May 23, 1908, c. 192.) Report of payments for compensation or expenses to officers of any State, etc., in carrying into effect provisions of Pure Food and Drugs Act.

For all expenses necessary to carry into effect the provisions of the Act of June thirtieth, nineteen hundred and six, entitled "An Act for preventing the manufacture, sale, or transportation of adulterated, or misbranded, or poisonous, or deleterious foods, drugs, medicines, and liquors, and for other purposes," including rent and the employment of labor in the city of Washington and elsewhere; employing such assistants, clerks, and other persons as the Secretary of Agriculture may consider necessary for the purposes named * *: Provided, That hereafter any sum used for compensation of or payment of expenses to any officer or other person employed by any State, county, or municipal government, shall be reported to Congress in detail, on the first Monday of December of each year. (35 Stat. 261.)

This was a provision accompanying appropriations for the Bureau of Chemistry in the agricultural appropriation act for the fiscal year 1909, cited above.

The portion of this section omitted here stated the amount of the appropriation for the particular fiscal year.

Act June 30, 1906, c. 3915, mentioned in this provision, was the Pure Food and Drugs Act, set forth post, §§ 8717–8728.

§ 839a. (Act Aug. 11, 1916, c. 313.) Statements of expenditures under acts relating to agricultural experiment stations and cooperative agricultural extension work between agricultural colleges.

The Secretary of Agriculture shall prescribe the form of the an-

nual financial statement required under the above Acts, ascertain whether the expenditures are in accordance with their provisions, coordinate the work of the Department of Agriculture with that of the State agricultural colleges and experiment stations in the lines authorized in said Acts, and make report thereon to Congress. (39 Stat.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above.

CHAPTER B

The Weather Bureau

The Weather Service, the duties of which, previous to July 1, 1891, were performed by the Signal Corps of the Army, was transferred to the Weather Bureau established in the Department of Agriculture by Act Oct. 1, 1890, c. 1266, 26 Stat. 653. This chapter includes the provisions of that act and subsequent acts relating to the Bureau so established.

Sec.
840. Establishment of the Bureau.
841. Duties of Chief of Bureau.
842. Appointment and compensation of Chief of Bureau; employés to be provided for annually.
843. Promotions in the service.
844. Changes or assignment to duty in force of Bureau.
845. Traveling expenses of officers and employés transferred from one station to another.
845a. Printing office for printing weather maps, bulletins, etc.
846. Making of appropriations and estimates for Bureau; development of Bureau in interests of agriculture.
847. Weather signals on mail cars, etc.
848. Sale of surplus maps or publications.
849. Destruction of old telegrams in Bureau.

§ 840. (Act Oct. 1, 1890, c. 1266, § 1.) Establishment of the Bureau.

The civilian duties now performed by the Signal Corps of the Army shall hereafter devolve upon a bureau to be known as the Weather Bureau, which, on and after July first, eighteen hundred and ninety-one, shall be established in and attached to the Department of Agriculture, and the Signal Corps of the Army shall remain a part of the Military Establishment under the direction of the Secretary of War, and all estimates for its support shall be included with other estimates for the support of the Military Establishment. (26 Stat. 653.)

This act was entitled "An act to increase the efficiency and reduce the expenses of the Signal Corps of the Army, and to transfer the Weather Service to the Department of Agriculture." This section and sections 3, 4, and 9 of the act, post, §§ 841, 842, 846, contain the provisions of the act of a permanent nature relating to the Bureau. Sections 5 and 10 of the act contained provisions for the transfer of part of the enlisted force and the civilian employés of the Signal Corps to the Weather Bureau, and for the division of property, moneys, etc., pertaining to the Signal Corps, between it and the Weather Bureau, which were temporary only, and are omitted. Other provisions of the act, relating to the Chief Signal Officer and the Signal Corps as part of the Military Establishment, are set forth or referred to post, under Title XIV, "The Army," c. 1, § 1867.

The President is authorized to appoint as a member of the Advisory Committee of Aeronautics a representative of the Weather Bureau, by a provision in Act March 31, 1915, c. 83, post, under Title XVIIa, "The Council of National Defense and the Advisory Committee on Aeronautics."

Notes of Decisions

See note under § 1717.

§ 841. (Act Oct. 1, 1890, c. 1266, § 3.) Duties of Chief of Bureau.

The Chief of the Weather Bureau, under the direction of the Secretary of Agriculture, on and after July first, eighteen hundred and ninety-one, shall have charge of the forecasting of weather, the

issue of storm warnings, the display of weather and flood signals for the benefit of agriculture, commerce, and navigation, the gauging and reporting of rivers, the maintenance and operation of seacoast telegraph lines and the collection and transmission of marine intelligence for the benefit of commerce and navigation, the reporting of temperature and rain-fall conditions for the cotton interests, the display of frost and cold-wave signals, the distribution of meteorological information in the interests of agriculture and commerce, and the taking of such meteorological observations as may be necessary to establish and record the climatic conditions of the United States, or as are essential for the proper execution of the foregoing duties. (26 Stat. 653.)

See note to section 1 of this act, ante, § 840.

The Bureau is to be specially developed and extended in the interests of agriculture, by a provision of section 9 of this act, post, § 846.

Annual appropriations for the Signal Service under the War Department contained provisos that "the work of no other department, bureau, or commission authorized by law shall be duplicated by this bureau," Act Aug. 7, 1882, c. 433, 22 Stat. 318, Act July 7, 1884, c. 332, 23 Stat. 217, Act March 3, 1885, c. 360, 23 Stat. 505, which may be regarded as superseded by this section and section 2 of this act, post, § 1867.

Provisions for the printing and distribution of the reports of the Secretary of Agriculture and of the Weather Bureau were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, pars. 2, 4, post, §§ 7054, 7056.

Notes of Decisions

Records of Bureau as evidence.—See Evanston v. Gunn (1878) 99 U. S. 660, 665, 666, 25 L. Ed. 306; Mears v. New York, N. H. & H. R. Co. (1902) 52 Atl. 610, 75 Conn. 171, 56 L. R. A. 884, 96 Am. St. Rep. 192; Ball v. Flora (1905) 26 App. D. C. 394; Chicago & N. W. Ry. Co. v. Trayes (1885) 17 Ill. App. 136; Chicago & E. I. R. Co. v. Zapp (1903) 110 Ill. App. 553 (judgment affirmed [1904] 70 N. E. 623, 209 Ill. 339); City of Garrett v. Winterich (Ind. 1909) 87 N. E. 161 (rehearing denied [Ind. App. 1909] 88 N. E. 308); Huston v. City of Council Bluffs (1897) 69 N. W. 1130, 101 Iowa, 33, 36 L. R. A. 211; Commonwealth v. Dorr (1914) 103 N. E. 902, 216 Mass. 314; J. H. Worden Lumber & Shingle Co. v. Minneapolis, St. P. & S. S. M. Ry. Co. (Mich. 1911) 133 N. W. 949; Moore v. H. Gaus & Sons Mfg. Co. (1892) 113 Mo. 98, 20 S. W. 975; Bretsch v. Plate (1903) 81 N. Y. Supp. 868, 82 App. Div. 399; Knott v. Raleigh & G. R. Co. (1887) 98 N. C. 73, 3 S. E. 735, 2 Am. St. Rep. 321; Nolt v. Crow (1903) 22 Pa. Super. Ct. 113; Anderson v. Hilker (1905) 80 Pac. 848, 38 Wash. 632.

Official circulars.—Any publication in an official circular by the Bureau of the ground upon which an employé has been suspended or discharged will not support a cause of action for libel against the chief of the Bureau for making such publication, provided it was made in good faith, without malice, in the performance of official duty, and with the design only of promoting the public interests. (1896) 21 Op. Atty. Gen. 320.

§ 842. (Act Oct. 1, 1890, c. 1266, § 4, as amended, Res. July 8, 1898, No. 57.) Appointment and compensation of Chief of Bureau; employés to be provided for annually.

The Weather Bureau shall hereafter consist of one Chief of Weather Bureau and such civilian employees as Congress may annually provide for and as may be necessary to properly perform the duties devolving on said bureau by law, and the chief of said bureau shall receive an annual compensation of [four thousand five hundred dollars], and be appointed by the President, by and with the advice and consent of the Senate. (26 Stat. 653.)

See note to section 1 of this act, ante, § 840.

The words of this section inclosed in brackets, "four thousand five hundred dollars," stating the amount of the compensation of the Chief of the Bureau, were superseded by appropriations of an increased salary in subsequent years, amounting in recent years to $6,000, and by the provision, accompanying an appropriation of that amount for his salary for the fiscal year 1914, that every officer or employé of the Department whose compensation was specified therein should thereafter receive compensation at the rate so specified, ante, § 802. Said appropriation for the year 1914, also provided for an Assistant Chief of Bureau, $3,250, and for numerous other officers, clerks, and employés, at

specified rates of compensation, to which they are entitled thereafter by said further provision of that Act, Act March 4, 1913, c. 145, 37 Stat. 829, 854. The provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1915, c. 417, post, § 3230a.

This section, as originally enacted, also contained a proviso, annexed to the provisions set forth here, "that the Chief Signal Officer may, in the discretion of the President, be detailed to take charge of said bureau, and in like manner other officers of the Army, not exceeding four, expert in the duties of the weather service, may be assigned to duty with the Weather Bureau, and while so serving shall receive the pay and allowances to which they are entitled by law." But "the laws authorizing the detail and assignment of the officers of the Army to duty in the Weather Bureau" were expressly repealed, by a proviso annexed to Res. July 8, 1898, No. 57, 30 Stat. 752.

The Secretary of Agriculture was authorized to make promotions in the service, and to make changes or assignment to duty in the force of the Bureau, by provisions of Act Aug. 8, 1894, c. 238, and Act March 2, 1895, c. 169, set forth post, §§ 843, 844.

Provisions for leaves of absence to employés of the Bureau, outside of the city of Washington, contained in the annual agricultural appropriation acts for several preceding years, were superseded by the provisions for such leaves to employés of the Department, outside said city, contained in Act May 23, 1908, c. 192, set forth ante, § 829.

Notes of Decisions

Change in rate of compensation.—The Secretary of Agriculture is authorized to reduce the compensation of any person transferred from the War Department so as to conform to the grading within the classified civil service. (1892) 20 Op. Atty. Gen. 395.

Employment outside city of Washington.—The employés of the Weather Bureau on duty away from and outside of the city of Washington are not members of the classified civil service. (1892) 20 Op. Atty. Gen. 345.

Manner of filling vacancies.—A vacancy in the office of Chief of the Weather Bureau can only be filled in the mode provided by this section. (1895) 21 Op. Atty. Gen. 189.

§ 843. (Act Aug. 8, 1894, c. 238.) Promotions in the service.

Expenses of the Weather Bureau, under the direction of the Secretary of Agriculture, * * and the Secretary is hereby authorized to make promotions in the service without prejudice to those transferred from the Signal Service of the War Department. (28 Stat. 273.)

This was a provision accompanying an appropriation under the heading "General Expenses, Weather Bureau," in the agricultural appropriation act for the fiscal year 1895, cited above.

Provisions in the same language were contained in the similar acts for the two years preceding this act.

Notes of Decisions

Increase in salary on promotion.—The Secretary of Agriculture may appoint any person transferred to one of the $1,500 places specified in the Act of 1891, and may promote to the vacancy thus created any other person of the transferred class, although the salary of the person promoted becomes increased thereby. (1892) 20 Op. Atty. Gen. 395.

Continuing compensation of persons transferred.—The provisions of section 5 of the Act of 1890 (26 Stat. 653), continuing the compensation of the persons transferred as it should be June 30, 1891, was intended as a protection, rather than as a bar to their promotion. (1892) 20 Op. Atty. Gen. 395.

§ 844. (Act March 2, 1895, c. 169.) Changes or assignment to duty in force of Bureau.

Salaries of the Weather Bureau: To enable the Secretary of Agriculture to carry out the provisions of the Act of October first, eighteen hundred and ninety, transferring the Weather Bureau to the Department of Agriculture; * * and the Secretary is hereby authorized to make such changes or assignment to duty in the personnel or detailed force of the Weather Bureau for limiting or reducing expenses as he may deem necessary. (28 Stat. 736.)

This was a provision accompanying an appropriation for salaries of the Bureau in the agricultural appropriation act for the fiscal year 1896, cited above.

Provisions to the same effect were contained in the similar acts for several years preceding this act.

The laws authorizing the detail of officers of the Army to the Bureau were repealed by Res. July 8, 1898, No. 57, 30 Stat. 752.

§ 845. (Act March 4, 1913, c. 145.) Traveling expenses of officers and employés transferred from one station to another.

Hereafter officials and employees of the Weather Bureau, when transferred from one station to another for official duty, shall be allowed all traveling expenses authorized by existing laws applicable to said bureau, notwithstanding any changes in appointments that may be required by such transfers. (37 Stat. 830.)

This was a provision accompanying appropriations for the Bureau in the agricultural appropriation act for the fiscal year 1914, cited above.

§ 845a. (Act Aug. 11, 1916, c. 313.) Printing office for printing weather maps, bulletins, etc.

General expenses, Weather Bureau: * * For the maintenance of a printing office in the city of Washington for the printing of weather maps, bulletins, circulars, forms, and other publications, including the pay of additional employees, when necessary, $12,800: Provided, That no printing shall be done by the Weather Bureau, that in the judgment of the Secretary of Agriculture, can be done at the Government Printing Office without impairing the service of said bureau. (39 Stat.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above. It was repeated in prior appropriation acts. See Act June 30, 1914, c. 131, 38 Stat. 417, and Act March 4, 1915, c. 144, 38 Stat. 1088.

§ 846. (Act Oct. 1, 1890, c. 1266, § 9.) Making of appropriations and estimates for Bureau; development of Bureau in interests of agriculture.

On and after July first, eighteen hundred and ninety-one, the appropriations for the support of the Signal Corps of the Army shall be made with those of other staff corps of the Army, and the appropriations for the support of the Weather Bureau shall be made with those of the other bureaus of the Department of Agriculture, and it shall be the duty of the Secretary of Agriculture to prepare future estimates for the Weather Bureau which shall be hereafter specially developed and extended in the interests of agriculture. (26 Stat. 653.)

See note to section 1 of this act, ante, § 840.

This section and the preceding sections of this act may be regarded as superseding previous provisions that appropriations for the Signal Service, under the War Department, should be expended under the direction of the Secretary of War, Act Aug. 7, 1882, c. 433, § 1, 22 Stat. 319; and that no money should be paid out of appropriations for the Army, for the Signal Service, other than the pay of officers, detailed for service therein, except sums specifically appropriated therefor, Act March 3, 1885, c. 339, 23 Stat. 356.

Provisions applicable to appropriations and estimates therefor generally are contained in Title XLI, "Appropriations."

Provisions for the sale of surplus maps and publications of the Signal Of-

ice, the money received therefrom to be applied to the expenses of the Signal Service, were made by R. S. § 227, ante, § 329.

The Secretary of the Navy was authorized to loan scientific instruments or the use of the signal service, by Act Oct. 19, 1888, c. 1210, § 3, ante, § 44.

47. (Act April 25, 1896, c. 140.) Weather signals on mail cars, etc.

he Secretary of Agriculture, in cooperation with the Postmas- General, may arrange a plan by which there shall be displayed all cars and other conveyances used for transporting United es mail, suitable flags or other signals to indicate weather casts, cold-wave warnings, frost warnings, and so forth, to be ished by the Chief of the Weather Bureau. (29 Stat. 108.)

This was a provision of the agricultural appropriation act for the fiscal ear 1897, cited above.

Similar provisions were contained in the agricultural appropriation acts or the two preceding years.

Provisions of the same acts, punishing the issue or publication of counter- eit weather forecasts, etc., were incorporated in the Criminal Code, § 61, post, 10229, and were repealed by section 341 thereof, post, § 10515.

48. (Act March 4, 1907, c. 2907.) Sale of surplus maps or pub- lications.

ereafter the Secretary of Agriculture is authorized to sell any lus maps or publications of the Weather Bureau, and the ey received from such sales shall be deposited in the Treasury he United States, section two hundred and twenty-seven of Revised Statutes notwithstanding. (34 Stat. 1258.)

This was a provision of the agricultural appropriation act for the fiscal ear 1908, cited above.

R. S. § 227, mentioned in this provision, authorizing the sale of surplus aps or publications of the Signal Office, under the War Department, the oney received therefor to be applied toward the expenses of the signal serv- ce, is set forth ante, § 329.

49. (Act May 25, 1900, c. 555.) Destruction of old telegrams in Bureau.

ereafter all telegrams pertaining to the business of the Weather eau may be destroyed after they are three years old, and the unts based thereon have been settled by the Treasury Depart- t; and the present accumulation of these old telegrams may lestroyed. (31 Stat. 204.)

This was a provision of the agricultural appropriation act for the fiscal ear 1901, cited above.

Provisions applicable to all the departments, relating to the disposition of ccumulations of useless papers, are set forth or referred to ante, §§ 283, 284.

CHAPTER C

The Bureau of Animal Industry

The Bureau of Animal Industry was established in the Department of Ag- iculture, by Act May 29, 1884, c. 60, 23 Stat. 31, before that Department was onstituted an Executive Department. This chapter includes the provisions f that act and subsequent acts relating to the Bureau so established.

Sec.
Establishment of Bureau; Chief of Bureau, clerk, and employés; salaries.
Sale or exchange of animals or products produced or purchased under appropriations for Bureau.
852. Sale of pathological and zoological specimens.

§ 850. (Act May 29, 1884, c. 60, § 1.) Establishment of Bureau; Chief of Bureau, clerk, and employés; salaries.

The Commissioner of Agriculture shall organize in his Department a Bureau of Animal Industry, and shall appoint a Chief thereof, who shall be a competent veterinary surgeon, and whose duty it shall be to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country; and the Commissioner of Agriculture is hereby authorized to employ a force sufficient for this purpose, not to exceed twenty persons at any one time. The salary of the Chief of said Bureau shall be [three thousand dollars] per annum; and the Commissioner shall appoint a clerk for said Bureau, with a salary of [one thousand five hundred dollars] per annum. (23 Stat. 31.)

This section was part of the Annual Industry Act, entitled "An act for the establishment of a Bureau of Animal Industry, to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals, cited above."

Sections 2–9 of the act contained provisions for investigation of methods of treating, transporting, etc., animals and means for suppression of contagious, etc., diseases, for regulations for suppression of such diseases and co-operation with States and Territories in plans and methods adopted therefor, and other provisions relating to exportation and transportation of live stock to foreign countries and among the States, and to the suppression of diseases of live stock. Said sections are set forth or referred to post, under Title 56B, "Regulations of Interstate and Foreign Commerce as to Particular Subjects," c. 1.

Section 10 of this act made an appropriation to carry into effect its provisions and is omitted, as temporary only.

Section 11 of this act required an annual report to Congress of persons employed, expenditures, etc., under the act, and is set forth ante, § 838.

The designation of the office of Commissioner of Agriculture was changed by the change of the department into an executive department under a Secretary of Agriculture, by Act Feb. 9, 1889, c. 122, ante, §§ 789–792. The authority granted to the Commissioner by this act was vested in the Secretary of Agriculture, by a provision of Act July 14, 1890, c. 707, ante, § 819.

The provision of this section limiting the number of persons to be employed "not to exceed twenty persons at any one time," and the words stating the amounts of the salaries of the Chief of the Bureau at "three thousand dollars," and of the clerk, at "one thousand five hundred dollars," were practically superseded by subsequent appropriations for an enlarged force, and for increased salaries. And the appropriations for the fiscal year 1914, providing for the Chief of Bureau, $5,000, a chief clerk, $2,500, an editor and compiler, $2,250, clerks of various classes, and numerous other employés, at specified rates of compensation, by Act March 4, 1913, c. 145, 37 Stat. 830, were accompanied by a further provision that every officer and employé whose rate of compensation was specified therein should thereafter receive compensation at the rate so specified, ante, § 802. The appropriations for the fiscal year 1917, by Act Aug. 11, 1916, c. 313, 39 Stat., provided for additional officers as follows: Assistant chief of bureau, $3,250; chief of division of stations and accounts, $2,750; chief of printing division, $2,500; and three chiefs of division, at $2,000 each—and omitted the provision for the editor and compiler.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any

act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1915, c. 417, post, § 3230a.

Provisions for leaves of absence to employés of the Bureau, outside of the City of Washington, contained in the annual agricultural appropriation acts for several preceding years, were superseded by the provisions for such leaves to employés of the Department, outside said city, contained in Act May 23, 1908, c. 192, set forth ante, § 807.

Forcibly assaulting, resisting, etc., any officer or employé of the Bureau of Animal Industry in the execution of his duties, and discharging any deadly weapon at such officer or employé; or using any dangerous or deadly weapon in resisting him in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, were made punishable, by Act March 3, 1905, c. 1496, § 5, 33 Stat. 1265, which was incorporated in the Criminal Code, § 62, post, § 10230.

Provisions for the printing and distribution of the reports of the Secretary of Agriculture and of the Bureau of Animal Industry were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, pars. 2, 3, post, §§ 7054, 7055.

Notes of Decisions

mployment of counsel.—Act July 18, 8 (25 Stat. 333), does not authorize employment of counsel for the dese of employés of the Bureau for s done by them under its direction. 89) 19 Op. Atty. Gen. 328.

alidity of regulations.—The order of Department of Agriculture of April 1904, prohibiting the importation of hay and straw from continental Europe as a means of preventing the introduction of foot and mouth disease among cattle in the United States, is a regulation of commerce with foreign nations and an exercise of legislative power, and therefore void. (1904) 25 Op. Atty. Gen. 249.

351. (Act Aug. 10, 1912, c. 284.) Sale or exchange of animals or products produced or purchased under appropriations for Bureau.

Hereafter the Secretary of Agriculture is authorized to sell in e open market or to exchange for other breeding animals or imal products to the best advantage, without the usual condemtion proceedings and public auction, such animals or animal prodts produced or purchased under the appropriations made by Coness for the use of the Bureau of Animal Industry as may not be eded in the work of that bureau: Provided, That all moneys ceived from the sale of such animals or animal products, or as a nus in the exchange of the same, shall be deposited in the Treasy as miscellaneous receipts. (37 Stat. 274.)

This was a provision of the agricultural appropriation act for the fiscal year 1913, cited above.

352. (Act March 4, 1913, c. 145.) Sale of pathological and zoological specimens.

Hereafter the Secretary of Agriculture is authorized to prepare d sell at cost such pathological and zoological specimens as he ay deem of scientific or educational value to scientists or others gaged in the work of hygiene and sanitation: Provided, That all oneys received from the sale of such specimens shall be deposited the Treasury as miscellaneous receipts. (37 Stat. 837.)

This was a provision accompanying appropriations for the Bureau in the agricultural appropriation act for the fiscal year 1914, cited above.

TITLE XII A

THE DEPARTMENT OF COMMERCE

The Department of Commerce and Labor, as an Executive Department, with a Secretary of Commerce and Labor as the head thereof, was established by Act Feb. 14, 1903, c. 552, 32 Stat. 825, and by section 4 of that act, various officers, bureaus, divisions, and branches of the public service were placed under the jurisdiction and made a part of the Department, including the Commissioner-General of Immigration, the Commissioners of Immigration, the Bureau of Immigration, and the Immigration Service at large, transferred from the Treasury Department, and the Department of Labor, previously established by Act June 13, 1888, c. 389, 25 Stat. 182. Thereafter the designation of the Bureau of Immigration in the Department was changed to "Bureau of Immigration and Naturalization," and said Bureau was given charge of all matters concerning naturalization of aliens, by Act June 29, 1906, c. 3592, § 1, 34 Stat. 596. Subsequently, the Children's Bureau was established in the Department by Act April 9, 1912, c. 73, 37 Stat. 79. But by Act March 4, 1913, c. 141, 37 Stat. 736, a new Executive Department was created, to be called "The Department of Labor," with a Secretary of Labor to be the head thereof, and the Department of Commerce and Labor was thereafter to be called the Department of Commerce, and the Secretary thereof to be called the Secretary of Commerce; and the Commissioner-General of Immigration, the Commissioners of Immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, the Bureau of Labor, the Children's Bureau, and the Commissioner of Labor, were transferred from the Department of Commerce and Labor to the Department of Labor, to thereafter remain under the jurisdiction of the last-named department.

This title, inserted here as additional to the original titles of the Revised Statutes, includes the provisions of said acts and subsequent acts remaining in force and applicable to the Department of Commerce; those relating to the Department, its officers, clerks, employés, etc., generally, being placed in Chapter A, and provisions applicable only to particular bureaus, offices, etc., being grouped in the subsequent chapters under the titles of the several bureaus, officers, etc.

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CHAPTER A

The Department and the Secretary of Commerce

Sec.
853. Establishment of the Department; Secretary of Commerce; seal.
854. Assistant Secretary; chief clerk, disbursing clerk, and other clerical assistants.
854a. Commercial attachés; appointment; duties; clerks; expenses.
855. Assignments of salaries by officers and employés while employed in the field.
856. Powers and duties of Department; appropriations made applicable.
857. Transfer of existing offices, bureaus, etc., and of records, furniture, etc., to Department.

c.
8. Control of fur-seal and other fisheries of Alaska; of immigration; of exclusion of Chinese.
9. Transfer of duties, powers, etc., of heads of executive departments over bureaus, offices, etc., transferred to Department, and of duties, powers, etc., of Secretary of Treasury as to shipping, seamen, etc.
0. Transfer of offices, bureaus, etc., engaged in statistical or scientific work, from certain Departments, authorized.
1. Custody of Department buildings, property, records, etc.; grades and salaries of officers, clerks, and employés transferred; work and duties of bureaus, offices, etc., transferred.

Sec.
862. Publication of commercial information.
863. Sale of commercial reports.
864. Discussions in commercial reports of partisan questions not to be published.
865. Terms of measure, weight, and money in commercial reports.
866. Supervision of census.
867. Annual report to Congress; special investigations and reports.
868. Report of statistics.
869. Printing report on commerce and navigation.
870. Forms of statements of state of commerce and navigation.
871. Printing statement of exports and imports.
872. Report of Coast-Survey expenditures.

853. (Act Feb. 14, 1903, c. 552, § 1.) Establishment of the Department; Secretary of Commerce; seal.

There shall be at the seat of government an executive department to be known as the Department of Commerce [and Labor], nd a Secretary of Commerce [and Labor], who shall be the head ereof, who shall be appointed by the President, by and with the dvice and consent of the Senate, who shall receive a salary of ght thousand dollars per annum, and whose term and tenure of fice shall be like that of the heads of the other Executive Departents; and section one hundred and fifty-eight of the Revised States is hereby amended to include such Department, and the provions of title four of the Revised Statutes, including all amendments ereto, are hereby made applicable to said Department. The said ecretary shall cause a seal of office to be made for the said Department of such device as the President shall approve, and judicial notice hall be taken of the said seal. (32 Stat. 825.)

This was the first section of an act entitled "An act to establish the Department of Commerce and Labor," cited above.

Provision of sections 2–4, 7–10, and 12 of the act, relating to the Department and the Secretary generally, are set forth in this chapter, post, §§ 854, 856–861, 867.

Section 5 of the act, relating to the Bureau of Manufactures, is set forth post, § 875.

Section 6 of the act created a Bureau of Corporations, provided for a Commissioner of Corporations, a deputy commissioner of corporations, and for other clerks and employés in the Bureau, and prescribed the powers and duties of the Bureau. This Bureau, together with the offices of Commissioner and Deputy Commissioner of Corporations, was abolished, by Act Sept. 26, 1914, c. 311, § 3, and all pending investigations and proceedings of the Bureau were required to be continued by the Federal Trade Commission, created by section 1 of said Act Sept. 26, 1914, c. 311, and all clerks and employés of the Bureau were transferred to the said Federal Trade Commission. Said § 5 of said act is therefore omitted from this compilation as superseded. Said Act Sept. 26, 1914, c. 311, § 3, is set forth post, under Title LVI D, "Federal Trade," together with the other sections of said Act Sept. 26, 1914, c. 311, relating to the Federal Trade Commission.

Section 11 of the act, providing for the appointment of a person in the Department of State to obtain information through consular officers for the Department of Commerce and Labor, is set forth ante, § 292.

Section 13 provided that the act should take effect from its passage, except that provisions other than those of section 12 in relation to the transfer of any existing office, bureau, etc., to the Department, should take effect July 1, 1903.

The words of this section inclosed in brackets, "and Labor," forming part of the titles of the Department and of the Secretary, were superseded by the change of designations, by amendment of this act, by Act March 4, 1913, c. 141, § 1, post, § 931.

R. S. § 158, ante, § 232, amended by this section, defined the Executive De-

partments to which Title IV, relating to all the Executive Departments, should apply.

The compensation of the heads of Executive Departments who are members of the President's Cabinet is at the rate of $12,000 per annum, by a provision of Act Feb. 26, 1907, c. 1635, § 4, set forth ante, § 36.

In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof is required, unless otherwise directed, to perform the duties of the head of such Department until a successor is appointed, or such absence or sickness shall cease, by R. S. § 177, set forth ante, § 259. In case of the death, resignation, absence, or sickness of the head of any Department, except where the Attorney General is concerned, the President may authorize and direct the head of any other Department or any officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease, by R. S. § 179, also set forth ante, § 261.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

A council of National Defense, composed of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor, was created by Act Aug. 29, 1916, c. 418, § 2, set forth post, under Title XVIIa, "The Council of National Defense and the Advisory Committee on Aeronautics."

Notes of Decisions

Purpose of act.—The primary purpose of Commerce and Labor Act was legislative, to enable Congress by information secured through the work of officers charged with the execution of that law to pass such remedial legislation as might be found necessary, and the act must be construed in view of such purpose. U. S. v. Armour & Co. (D. C. 1906) 142 Fed. 808.

Collectors of customs.—Collectors of customs continue to be officers of the Treasury Department, but the Secretary of the Treasury should not interfere in matters expressly transferred to the Department of Commerce and Labor by the act creating that Department. (1903) 25 Op. Atty. Gen. 3.

Regulation of navigation.—The general line of cleavage between the Department of Commerce and Labor and the Treasury Department, as established by the act creating the former Department, leaves "navigation" with the former, and little with the Treasury Department which does not concern the collection, keeping, minting, and disbursing of the public treasure. (1903) 25 Op. Atty. Gen. 29; (1904) 25 Op. Atty. Gen. 152.

Cited without definite application, U. S. v. Sing Tuck (1904) 24 Sup. Ct. 621, 622, 194 U. S. 161, 48 L. Ed. 917; Prentis v. Di Giacomo (1911) 192 Fed. 467, 112 C. C. A. 605; The Pawnee (D. C. 1909) 168 Fed. 371.

§ 854. (Act Feb. 14, 1903, c. 552, § 2.) Assistant Secretary; chief clerk, disbursing clerk, and other clerical assistants.

There shall be in said Department an Assistant Secretary of Commerce [and Labor], to be appointed by the President, who shall receive a salary of five thousand dollars a year. He shall perform such duties as shall be prescribed by the Secretary or required by law. There shall also be one chief clerk and a disbursing clerk and such other clerical assistants as may from time to time be authorized by Congress. (32 Stat. 826.)

The words of this section inclosed in brackets, "and Labor," forming part of the title of the Assistant Secretary, were superseded by the change of designations by Act March 4, 1913, c. 141, § 1, post, § 932.

Further provisions of this section, for the auditing by the Auditor of the

Treasury for the State and other Departments, of accounts of salaries and expenses of the office of the Secretary, and of all bureaus and offices under his direction, and of certain other accounts, are set forth ante, § 421.

Appropriations for compensation of the officers, clerks, and employés of the Department, including clerks and employés in addition to the chief clerk and disbursing clerk mentioned in this section, and for expenses of the Department, are made by the annual legislative, executive, and judicial appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Estimates in detail, for all personal services, and for all general and miscellaneous expenses for the Department, are to be submitted annually by a provision of Act March 3, 1903, c. 1006, post, § 6724.

A solicitor of the Department of Commerce, in the Department of Justice was authorized by a provision of Act March 18, 1904, c. 716, § 1, ante, § 525.

An appropriation for compensation of commercial agents to investigate trade conditions, with the object of promoting foreign commerce, was made by each of the annual legislative, executive, and judicial appropriation acts for several years preceding and including the fiscal year 1912, for which such provision was made by Act March 4, 1911, c. 237, § 1, 36 Stat. 1226. The provision was not continued in the subsequent similar acts, which made an appropriation to promote foreign and domestic commerce, under the heading, "Bureau of Foreign and Domestic Commerce," with provisions for a chief of the Bureau, $6,000; assistant chiefs, one at $3,500 and one at $3,000; chiefs of divisions, one at $2,500 and one at $2,000; assistant chiefs of divisions, one at $2,250; chief clerk, $2,250; experts, one on commerce and finance, $2,000; translators, one at $2,000 and one at $1,400; stenographer to chief of bureau, $1,600; and clerks and other employés. Such appropriation for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat. In addition to the above enumerated provisions recent legislative, executive, and judicial appropriation acts make provisions for commercial attachés. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, and are set forth post, § 854a.

See notes to § 853, ante.

§ 854a. (Act May 10, 1916, c. 117, § 1.) Commercial attachés; appointment; duties; clerks; expenses.

Commercial attachés: For commercial attachés, to be appointed by the Secretary of Commerce, after examination to be held under his direction to determine their competency, and to be accredited through the State Department, whose duties shall be to investigate and report upon such conditions in the manufacturing industries and trade of foreign countries as may be of interest to the United States; and for one clerk to each of said commercial attachés to be paid a salary not to exceed $1,500 each; and for necessary traveling and subsistence expenses, rent, purchase of reports, books of reference and periodicals, travel to and from the United States, exchange on official checks, and all other necessary expenses not included in the foregoing; such commercial attachés shall serve directly under the Secretary of Commerce and shall report directly to him, $100,000. (39 Stat.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above. Similar provisions were contained in prior acts. See Act July 16, 1914, c. 141, § 1, 38 Stat. 500, and Act March 4, 1915, c. 141, § 1, 38 Stat. 1041.

See notes to § 853, ante.

§ 855. (Act June 17, 1910, c. 297, § 1.) Assignments of salaries by officers and employés while employed in the field.

The Secretary of Commerce [and Labor] is hereby authorized, under such regulations as he may prescribe, to permit officers and employees of the several bureaus and divisions of the Department of Commerce [and Labor] to assign their salaries while absent from Washington, District of Columbia, and employed in the field. (36 Stat. 524.)

This was a proviso annexed to an appropriation for compensation of commercial agents in the legislative, executive, and judicial appropriation act for the fiscal year 1911, cited above.

The words of this section inclosed in brackets, "and Labor," forming part of the titles of the secretary and of the Department, were superseded by the change of designations by Act March 4, 1913, c. 141, § 1, post, § 932.

§ 856. (Act Feb. 14, 1903, c. 552, § 3.) Powers and duties of Department; appropriations made applicable.

It shall be the province and duty of said Department to foster, promote, and develop the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, the labor interests, and the transportation facilities of the United States; and to this end it shall be vested with jurisdiction and control of the departments, bureaus, offices, and branches of the public service hereinafter specified, and with such other powers and duties as may be prescribed by law. All unexpended appropriations, which shall be available at the time when this Act takes effect, in relation to the various offices, bureaus, divisions, and other branches of the public service, which shall, by this Act, be transferred to or included in the Department of Commerce and Labor, or which may hereafter, in accordance with the provisions of this Act, be so transferred, shall become available, from the time of such transfer, for expenditure in and by the Department of Commerce and Labor and shall be treated the same as though said branches of the public service had been directly named in the laws making said appropriations as parts of the Department of Commerce and Labor, under the direction of the Secretary of said Department. (32 Stat. 826.)

See note to section 1 of this act ante, § 853, as to change of designations of Department and of Secretary.

Besides the departments, bureaus, offices, etc., specified in section 4 and subsequent sections of this act, set forth below, as transferred to and included in the Department, which is vested with jurisdiction and control thereof by this section, other offices, bureaus, etc., engaged in statistical or scientific work, may be transferred by the President to the Department from certain other Departments, by section 12 of this act, post, § 860.

§ 857. (Act Feb. 14, 1903, c. 552, § 4.) Transfer of existing offices, bureaus, etc., and of records, furniture, etc., to Department.

The following-named offices, bureaus, divisions, and branches of the public service, now and heretofore under the jurisdiction of the Department of the Treasury, and all that pertains to the same, known as the Light-House Board, the Light-House Establishment, the Steamboat-Inspection Service, the Bureau of Navigation, the United States Shipping Commissioners, the National Bureau of Standards, the Coast and Geodetic Survey, the Commissioner-General of Immigration, the commissioners of immigration, the Bureau of Immigration, the immigration service at large, and the Bureau of Statistics, be, and the same hereby are, transferred from the Department of the Treasury to the Department of Commerce and Labor, and the same shall hereafter remain under the jurisdiction and supervision of the last-named Department; and that the Census Office, and all that pertains to the same, be, and the same hereby is, transferred from the Department of the Interior to the Department of Commerce and Labor, to remain henceforth under the jurisdiction of the latter; that the Department of Labor, the Fish Commission, and the Office of Commissioner of Fish and Fisheries, and all that pertains to the same, be, and the same hereby are, placed under the jurisdiction and made a part of the Department of Commerce and Labor; that the Bureau of Foreign Commerce, now in the Department of State, be, and the same hereby is, transferred to the Department of Commerce and Labor and consolidated with and made a part of the Bureau of Statistics, hereinbefore transferred from the Department of the Treasury to the Department of Commerce and Labor, and the two shall constitute one bureau, to be called the Bureau of Statistics, with a chief of the bureau; and that the Secretary of Commerce and Labor shall have control of the work of gathering and distributing statistical information naturally relating to the subjects confided to his Department; and the Secretary of Commerce and Labor is hereby given the power and authority

rearrange the statistical work of the bureaus and offices confided said Department, and to consolidate any of the statistical bureaus d offices transferred to said Department; and said Secretary shall so have authority to call upon other Departments of the Govern-ent for statistical data and results obtained by them; and said Sec-tary of Commerce and Labor may collate, arrange, and publish ch statistical information so obtained in such manner as to him may em wise.

That the official records and papers now on file in and pertaining clusively to the business of any bureau, office, department, or branch the public service in this Act transferred to the Department of ommerce and Labor, together with the furniture now in use in such reau, office, department, or branch of the public service, shall be, d hereby are, transferred to the Department of Commerce and bor. (32 Stat. 826.)

See note to section 1 of this act, ante, § 853, as to change of designations of Department and of Secretary.

These provisions for the transfer of existing offices, bureaus, etc., to the Department, took effect July 1, 1903, by section 13 of this act, 32 Stat. 830.

The powers, duties, etc., of the heads of executive departments in or over the bureaus, offices, officers, etc., transferred to the Department, were vested in the head of the Department, by section 10 of this act, post, § 859.

The powers, duties, etc., of the Secretary of the Treasury in regard to shipping, seamen, etc., were transferred to the Secretary of Commerce and Labor by section 10 of this act, post, § 859.

Provisions for the transfer to the Department of officers, clerks, and employés in the offices, bureaus, etc., transferred under this act, are contained in section 9 of this act, post, § 861.

The Secretary of Commerce has charge of the furniture, records, etc., pertaining to the Department by section 9 of this act, post, § 861.

The papers, records, and files of the Immigration Commission, provided for in Act Feb. 20, 1907, c. 1134, § 39, 34 Stat. 909, remaining on the expiration of the existence of said commission, were to be turned over to and become a part of the files of the Department, by a provision of Act June 25, 1910, c. 385, 36 Stat. 800.

Of the offices, bureaus, and branches of the public service which were transferred to and made part of the Department of Commerce and Labor by this section, the Commissioner-General of Immigration, the Commissioners of Immigration, the Bureau of Immigration and Naturalization and the Immigration Service at Large, and the Bureau of Labor and the Commissioner of Labor, were transferred from the Department to the new Department of Labor, by the act creating that Department, Act March 4, 1913, c. 141, § 3, post, § 934.

A Bureau of Light-Houses, with a Commissioner of Light-Houses, a deputy commissioner, and other officers, etc., was established in the Department, and the employés of or in the Light-House Board or the Light-House Establishment were transferred to said Bureau, and the powers and duties of the Light-House Board were transferred to and vested in the Commissioner of Light-Houses, by Act June 17, 1910, c. 301, §§ 4–7, post, §§ 896–899.

The Secretary of Commerce was empowered to authorize the killing of fur seals and the taking of sealskins on the Pribilof Islands, in Alaska, and various powers and duties were conferred and imposed on him in connection with the regulation of the killing, etc., of fur seals and other fur bearing animals in Alaska, by Act April 21, 1910, c. 183, post, §§ 8856–8858.

The Secretary of Commerce was empowered and required to perform various duties in carrying out and enforcing the provisions of Act June 26, 1906, c. 3547, for the protection and regulation of the fisheries of Alaska, by various sections of that act, post, §§ 2628–2638.

The Secretary of Commerce was required to enforce the provisions of Act June 20, 1906, c. 3442, regulating the landing, etc., and sale of sponges, by section 4 of that act, post, § 8869.

The Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce, were directed to make regulations for carrying out the provisions of the pure food act, Act June 30, 1906, c. 3915, by section 3 of that act, and also for carrying out the provisions of the insecticide act, Act April 26, 1910, c. 191, by section 3 of said act, both which are set forth post, §§ 8719, 8767.

The Secretary of Commerce was required to make regulations to secure the proper execution of Act June 24, 1910, c. 379, requiring apparatus for radio communication on certain ocean steamers, by section 4 of that act, post, § 8265.

The Secretary of Commerce was required to make regulations to secure the

proper execution of Act June 9, 1910, c. 268, regulating equipment, etc., of certain motor boats, by section 8 of that act, post, § 8285.

Appropriations for the offices, bureaus, etc., established by this act in the Department of Commerce and Labor, were made under that head in the subsequent legislative, executive, and judicial appropriation acts. Such appropriations for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Notes of Decisions

Correspondence with collectors of customs.—The Secretary of Commerce and Labor is not required, in the execution of the duties imposed upon him to correspond with collectors of customs through the Secretary of the Treasury. (1903) 25 Op. Atty. Gen. 3.

Assignment of rooms in public buildings.—The duty of assigning suitable offices and rooms in public buildings for the use of United States shipping commissioners, imposed upon the Secretary of the Treasury by Act March 3, 1897, section 8296, post, was not affected by this act. (1904) 25 Op. Atty. Gen. 117.

Power over Director of the Census.—The Secretary of Commerce and Labor is authorized, under this act, to require the Director of the Census to provide a seal for that office, as directed by section 31 of the Act of March 3, 1899 (30 Stat. 1021), and to give it a device in accordance with his (the Secretary's) views. (1903) 25 Op. Atty. Gen. 1.

The Census Office is an integral part of the Department of Commerce and Labor, and as such is subject to the direction of the Secretary of that Department. (1903) 25 Op. Atty. Gen. 11.

Powers over anchorage and anchorage grounds.—Matters arising under sections 9947, 9950, 9954, 9957, post, have been transferred by this section, and section 859, post, from the Treasury Department to the Department of Commerce. (1903) 25 Op. Atty. Gen. 37.

Cited without definite application, Pearson v. Williams (1906) 26 Sup. Ct. 608, 609, 202 U. S. 281, 50 L. Ed. 1029; McDonald & Johnson v. Southern Express Co. (C. C. 1904) 13 Fed. 282.

§ 858. (Act Feb. 14, 1903, c. 552, § 7.) Control of fur-seal and other fisheries of Alaska; of immigration; of exclusion of Chinese.

The jurisdiction, supervision and control now possessed and exercised by the Department of the Treasury over the fur-seal, salmon and other fisheries of Alaska and over the immigration of aliens into the United States, its waters, territories and any place subject to the jurisdiction thereof, are hereby transferred and vested in the Department of Commerce and Labor: Provided, That nothing contained in this Act shall be construed to alter the method of collecting and accounting for the head-tax prescribed by section one of the Act entitled "An Act to regulate immigration," approved August third, eighteen hundred and eighty-two. That the authority, power and jurisdiction now possessed and exercised by the Secretary of the Treasury by virtue of any law in relation to the exclusion from and the residence within the United States, its territories and the District of Columbia, of Chinese and persons of Chinese descent, are hereby transferred to and conferred upon the Secretary of Commerce and Labor, and the authority, power and jurisdiction in relation thereto now vested by law or treaty in the collectors of customs and the collectors of internal revenue, are hereby conferred upon and vested in such officers under the control of the Commissioner-General of Immigration, as the Secretary of Commerce and Labor may designate therefor. (32 Stat. 828.)

See note to section 1 of this act, ante, § 853, as to change of designations of Department and of Secretary.

The Bureau of Immigration and Naturalization in the Department, under direction and control of the Secretary, was given charge of all matters concerning the naturalization of aliens, by a provision of the Naturalization Act of June 29, 1906, c. 3592, § 1, post, § 962. But the Bureau of Immigration and the Immigration Service at large were transferred from the Department to the new Department of Labor, by the act creating that Department, Act March 4, 1913, c. 141, § 3, post, § 934.

Act Aug. 3, 1882, c. 376, § 1, 22 Stat. 214, mentioned in this section, was the Immigration Act of 1882, which was superseded by subsequent acts relating to the same subject.

The Secretary was empowered and required to carry out and enforce the provisions of Act June 26, 1906, c. 3547, for the protection and regulation of the

fisheries of Alaska, and to depute officers and employés of the Department for the performance of the work required, by various sections of that act, post, §§ 2628–2638.

The Secretary was empowered to authorize the killing of fur seals and the taking of sealskins on the Pribilof Islands, in Alaska, and various powers and duties are conferred and imposed on him in connection with the regulation of the killing, etc., of fur seals and other fur bearing animals in Alaska, by Act April 21, 1910, c. 183, post, §§ 8856–8858.

Notes of Decisions

Revenue Cutter Service employed in protection of seal fisheries.—Appropriations for the Revenue Cutter Service will continue to be expended by the Secretary of the Treasury, except such portions, if any, as may be applied to extraordinary business concerning seal protection, which latter will be under the control of the Secretary of Commerce and Labor. (1903) 25 Op. Atty. Gen. 4.

Vessels assigned by authority of the President to the protection of the seal fisheries will henceforth, while so assigned, be subject to the direction of the Secretary of Commerce and Labor in respect to those duties, but their internal government and duties concerning the revenue while thus engaged will be under the Secretary of the Treasury. Id.

This act does not transfer to the Department of Commerce and Labor the Revenue Cutter Service or any of its vessels or officers, and the Secretary of the Treasury is not authorized by the act, or otherwise, to assign revenue vessels to the duty of seal protection. Id.

Fur-bearing animals other than seals.—The Secretary of Commerce and Labor has no authority to regulate the killing of fur-bearing animals in Alaska, other than fur-bearing seals. (1905) 25 Op. Atty. Gen. 497.

Lease of islands for purpose of propagation of fur-bearing animals.—The Secretary of Commerce and Labor has the same authority over the islands of St. Paul and St. George, Alaska, that was possessed by the Secretary of the Treasury, and he may therefore lease those islands to the North American Commercial Company for the propagation of blue foxes. (1905) 25 Op. Atty. Gen. 497.

Exclusion and deportation of Chinese.—A proceeding for the exclusion of a Chinese alien in the first instance is within the jurisdiction of the Chinese inspector, from whom an appeal may be taken to the Department of Commerce and Labor, after which resort may be had to the courts if the decision is adverse to the persons seeking admission. Ex parte Lee Kow (C. C. 1908) 161 Fed. 592.

Rules of the Department of Commerce and Labor respecting the exclusion of Chinese persons have the force and effect of law when not inconsistent with it or with the Constitution or the treaty with China. Ex parte Chow Chok (C. C. 1908) 161 Fed. 627, order affirmed Chow Chok v. U. S. (1908) 163 Fed. 1021, 90 C. C. A. 230.

A return to a writ of habeas corpus by an alleged Chinese alien, showing that defendant was an officer of immigration under control of the commissioner general in charge of the port where the alien attempted to enter, by designation of the Secretary of Commerce and Labor, and that he held such Chinese person as such officer, sufficiently showed authority for the detention. In re Moy Quong Shing (D. C. 1903) 125 Fed. 641.

The executive officers of the Department of Commerce and Labor have authority to determine whether or not a Chinese person seeking admission had been born in the United States, and was therefore a citizen entitled to enter. Id.

The Department of Commerce and Labor has authority to prescribe rules of evidence relating to presumptions and burden of proof in the determination of an alien's right to admission. Id.

Laws which confer judicial discretion upon administrative officers must be construed with a degree of strictness requisite to make them consonant with the spirit of the fundamental doctrines of the Constitution, and the power conferred on the Secretary of Commerce and Labor by the Chinese exclusion act to finally determine on appeal the right to enter the United States by a person who claims to be a native-born citizen cannot be exercised by an acting secretary, in accordance with a recommendation made by himself as a solicitor of the Department adverse to the appellant. In re Tang Tun (D. C. 1908) 161 Fed. 618, judgment affirmed In re Can Pon (1909) 168 Fed. 479, 93 C. C. A. 635, and judgment reversed In re Tang Tun (1909) 168 Fed. 488, 93 C. C. A. 644, which is affirmed Tang Tun v. Edsell (1912) 32 Sup. Ct. 359, 223 U. S. 673, 56 L. Ed. 606.

Where an appeal was taken to the Secretary of Commerce and Labor from a deportation order, the fact that a "memorandum for the acting secretary," signed by the Commissioner General, was added to the record before it was acted on, and contained remarks on the evidence and a recommendation that the decision be affirmed, was immaterial, and did not indicate that the officer whose duty it was to determine the appeal did not do so himself. In re Jem Yuen (D. C. 1910) 188 Fed. 350.

Cited without definite application, Pearson v. Williams (1906) 26 Sup. Ct.

608, 609, 202 U. S. 281, 50 L. Ed. 1029; 814; Ex parte Chow Chok (C. C. 1908) In re Ong Lung (C. C. 1903) 125 Fed. 161 Fed. 627.

§ 859. (Act Feb. 14, 1903, c. 552, § 10.) Transfer of duties, powers, etc., of heads of executive departments over bureaus, offices, etc., transferred to Department, and of duties, powers, etc., of Secretary of Treasury as to shipping, seamen, etc.

All duties performed and all power and authority now possessed or exercised by the head of any executive department in and over any bureau, office, officer, board, branch, or division of the public service by this Act transferred to the Department of Commerce and Labor, or any business arising therefrom or pertaining thereto, or in relation to the duties performed by and authority conferred by law upon such bureau, officer, office, board, branch or division of the public service, whether of an appellate or revisory character or otherwise, shall hereafter be vested in and exercised by the head of the said Department of Commerce and Labor.

All duties, power, authority and jurisdiction, whether supervisory, appellate or otherwise, now imposed or conferred upon the Secretary of the Treasury by Acts of Congress relating to merchant vessels or yachts, their measurement, numbers, names, registers, enrollments, licenses, commissions, records, mortgages, bills of sale, transfers, entry, clearance, movements and transportation of their cargoes and passengers, owners, officers, seamen, passengers, fees, inspection, equipment for the better security of life, and by Acts of Congress relating to tonnage tax, boilers on steam vessels, the carrying of inflammable, explosive or dangerous cargo on vessels, the use of petroleum or other similar substances to produce motive power and relating to the remission or refund of fines, penalties, forfeitures, exactions or charges incurred for violating any provision of law relating to vessels or seamen or to informer's shares of such fines, and by Acts of Congress relating to the Commissioner and Bureau of Navigation, Shipping Commissioners, their officers and employees, Steamboat-Inspection Service and any of the officials thereof, shall be and hereby are transferred to and imposed and conferred upon the Secretary of Commerce and Labor from and after the time of the transfer of the Bureau of Navigation, the Shipping Commissioners and the Steamboat-Inspection Service to the Department of Commerce and Labor, and shall not thereafter be imposed upon or exercised by the Secretary of the Treasury. And all Acts or parts of Acts inconsistent with this Act are, so far as inconsistent, hereby repealed. (32 Stat. 829.)

See note to section 1 of this act, ante, § 853, as to change of designations of Department and of Secretary.

Similar provisions for transfer of executive powers, etc., of other departments, upon the transfer of any office, bureau, etc., therefrom, under section 12 of this act, are contained in that section, post, § 860.

Notes of Decisions

Authority of Secretary of Commerce and Labor.—The Secretary of Commerce and Labor is not authorized by law to consolidate the Bureau of Manufactures and the Bureau of Statistics into one bureau called the Bureau of Foreign and Domestic Commerce. (1909) 27 Op. Atty. Gen. 542.

He is authorized to require the Director of the Census to provide a seal for that office, as directed by section 31 of the Act of March 3, 1899 (30 Stat. 1021), and to give it a device in accordance with his (the Secretary's) views. There is nothing in the nature of this duty that is judicial or quasi judicial, or of such a character that its performance should not be subject to the direction of the head of the Department. (1903) 25 Op. Atty. Gen. 1.

He is authorized to change the names of the Department of Labor, the Fish Commission, and other offices thereto assigned, as the business and good government of his Department requires. (1903) 24 Op. Atty. Gen. 697.

He has authority to sell a windmill formerly used for pumping water at the oyster claire, Lynnhaven, Va., but which is no longer needed or used for that purpose. (1906) 25 Op. Atty. Gen. 567.

He has no authority to direct the dis-

ontinuance of a suit for the recovery f a fine or penalty imposed for a violaon of New York Harbor Act June 29, 888 (25 Stat. 209), nor did the Secrery of the Treasury have such power ior to the taking effect of the act eating the Department of Commerce d Labor. (1904) 25 Op. Atty. Gen. 0.

The power and authority to designate ies dividing the high seas from rivers, rbors, and inland waters, conferred pon the Secretary of the Treasury by ection 2 of the Act of Feb. 19, 1895 28 Stat. 672), was, by section 10 of the ct of Feb. 14, 1903 (32 Stat. 829), ransferred to the Secretary of Comnerce and Labor. (1904) 25 Op. Atty. Gen. 149.

He has no authority to remit or to reduce a fine or penalty imposed under section 15 of the act of March 3, 1903 (32 Stat. 1217), for failure to comply with sections 12–14 of that act in regard to the manifests or lists of alien passengers required to be furnished by masters of vessels arriving within the United States; such power not having been specifically conferred by Congress. (1905) 25 Op. Atty. Gen. 336.

He is not authorized by section 4462, R. S., section 8224, post, to amend, modify, or repeal existing regulations or to adopt new regulations for the enforcement of the provisions of title 52, R. S. (this title), entitled "Regulation of Steam Vessels," without prior action thereon by the Board of Supervising Inspectors. The Secretary has therefore no authority whatever in the matter, except as conferred by section 4405, R. S., section 8159, post. (1903) 25 Op. Atty. Gen. 67.

He is not required, in the execution the duties imposed upon him by is act, to correspond with collectors customs through the Secretary of e Treasury. (1903) 25 Op. Atty. en. 3.

He has supervisory authority to inquire and determine whether the Passenger Act of 1882 has been violated, and the extent of such violation. This act does not confer on the department greater power to remit fines and penalties under R. S. § 5294, post, § 10135, than was exercised by the Secretary of the Treasury. Findley v. U. S. (1915) 225 Fed. 337, 139 C. C. A. 207.

Anchorage and anchorage grounds.—Matters arising under sections 9947, 9950, 9954, 9957, post, have been transferred by section 857, ante, and this section from the Treasury Department to the Department of Commerce. (1903) 25 Op. Atty. Gen. 37.

Boarding of vessels.—The execution of Act March 31, 1900 (31 Stat. 58), entitled "An act concerning the boarding of vessels," has been transferred from the Secretary of the Treasury to the Secretary of Commerce and Labor. (1903) 25 Op. Atty. Gen. 51.

Certificates of registry of vessels.—The question as to whether the expense of preparing such blank forms and furnishing them to collectors can be paid out of the appropriation for defraying the expenses for collecting the revenue from customs is peculiarly one for the Comptroller of the Treasury to decide. (1901) 23 Op. Atty. Gen. 468; (1903) 25 Op. Atty. Gen. 49.

The duty imposed upon the Secretary of the Treasury by section 4158, R. S., section 7739, post, of transmitting to collectors of customs blank forms of certificates of registry of vessels, was by Act Feb. 14, 1903 (32 Stat. 825), transferred to the Secretary of Commerce and Labor. (1903) 25 Op. Atty. Gen. 49.

Cited without definite application, Pearson v. Williams (1906) 26 Sup. Ct. 608, 609, 202 U. S. 281, 50 L. Ed. 1029.

860. (Act Feb. 14, 1903, c. 552, § 12.) Transfer of offices, bureaus, etc., engaged in statistical or scientific work, from certain Departments, authorized.

That the President be, and he is hereby, authorized, by order n writing, to transfer at any time the whole or any part of any office, bureau, division or other branch of the public service engaged n statistical or scientific work, from the Department of State, the Department of the Treasury, the Department of War, the Department of Justice, the Post-Office Department, the Department of the Navy or the Department of the Interior, to the Department of Commerce and Labor; and in every such case the duties and authority performed by and conferred by law upon such office, bureau, division or other branch of the public service, or the part thereof so transferred, shall be hereby transferred with such office, bureau, division or other branch of the public service, or the part thereof which is so transferred. And all power and authority conferred by law, both supervisory and appellate, upon the department from which such transfer is made, or the Secretary thereof, in relation to the said office, bureau, division or other branch of the public service, or the part thereof so trans-

ferred, shall immediately, when such transfer is so ordered by the President, be fully conferred upon and vested in the Department of Commerce and Labor, or the Secretary thereof, as the case may be, as to the whole or part of such office, bureau, division or other branch of the public service so transferred. (32 Stat. 830.)

See note to section 1 of this act, ante, § 853, as to change of designations of Department and of Secretary.

§ 861. (Act Feb. 14, 1903, c. 552, § 9.) Custody of Department buildings, property, records, etc.; grades and salaries of officers, clerks, and employés transferred; work and duties of bureaus, offices, etc., transferred.

The Secretary of Commerce and Labor shall have charge, in the buildings or premises occupied by or appropriated to the Department of Commerce and Labor, of the library, furniture, fixtures, records, and other property pertaining to it or hereafter acquired for use in its business; and he shall be allowed to expend for periodicals and the purposes of the library, and for the rental of appropriate quarters for the accommodation of the Department of Commerce and Labor within the District of Columbia, and for all other incidental expenses, such sums as Congress may provide from time to time: Provided, however, That where any office, bureau, or branch of the public service transferred to the Department of Commerce and Labor by this Act is occupying rented buildings or premises, it may still continue to do so until other suitable quarters are provided for its use: And provided further, That all officers, clerks, and employees now employed in or by any of the bureaus, offices, departments, or branches of the public service in this Act transferred to the Department of Commerce and Labor are each and all hereby transferred to said Department at their present grades and salaries, except where otherwise provided in this Act: And provided further, That all laws prescribing the work and defining the duties of the several bureaus, offices, departments, or branches of the public service by this Act transferred to and made a part of the Department of Commerce and Labor shall, so far as the same are not in conflict with the provisions of this Act, remain in full force and effect until otherwise provided by law. (32 Stat. 829.)

See note to section 1 of this act, ante, § 853, as to change of designations of Department and of Secretary.

§ 862. (R. S. § 211.) Publication of commercial information.

The Secretary of State shall publish official notifications, from time to time, of such commercial information communicated to him by diplomatic and consular officers, as he may deem important to the public interests, in such newspapers, not to exceed three in number, as he may select.

Act Aug. 18, 1856, c. 127, § 22, 11 Stat. 60.

The duties and powers of the Secretary of State in regard to publication of commercial information, under this section, were vested in the Secretary of Commerce, by provisions of the act establishing the Department of Commerce, Act Feb. 14, 1903, c. 552, §§ 4, 5, 10, 12, ante, §§ 857, 859, 860, and post, § 875, which transferred to the Department the Bureau of Foreign Commerce, previously in the Department of State, and consolidated that Bureau with the Bureau of Statistics, transferred from the Treasury Department, and gave the Secretary of Commerce "control of the work of gathering and distributing statistical information naturally relating to the subjects confided to his Department," and further vested in him the duties, powers, etc., possessed or exercised by the head of any Executive Department over any branch of the public service transferred by the act to the Department of Commerce.

Consuls and commercial agents were required to procure and transmit commercial information to the Department of State, by R. S. § 1712, post, § 3167.

But by Act Feb. 14, 1903, c. 552, § 5, post, § 875, all consular officers were required to gather and compile information and statistics in respect to such subjects, and to send reports thereof, as often as required by the Secretary

of Commerce, to be transmitted through the State Department to said Secretary. And section 11 of said act, ante, § 292, provided for a Chief of Bureau and assistants, in the State Department, to formulate, for the instruction of consular officers, the requests of the Secretary of Commerce, and to prepare, from the dispatches of such officers, information pertaining to the work of the Department of Commerce.

The requirement that the Secretary of State should annually lay before Congress a synopsis of information communicated to him by diplomatic and consular officers during the preceding year, may be regarded as also applicable to the Secretary of Commerce, under said provisions of Act Feb. 14, 1903, c. 552, §§ 4, 5, 10, 11, referred to above.

Provisions subsequent to this section, but previous to said Act Feb. 14, 1903, relating to the publication of such information by the State Department, contained in Act June 16, 1880, c. 235, § 1, Act Feb. 25, 1885, c. 150, and Act Feb. 9, 1903, c. 530, are set forth post, §§ 863–865.

863. (Act June 16, 1880, c. 235, § 1.) Sale of commercial reports.

For printing and distributing more frequently the publications by e Department of State of the consular and other commercial reports, including circular letters to chambers of commerce, * * ovided, that such publications may be sold at such rates as may be ed by said department, and the proceeds of all sales to be paid to the Treasury. (21 Stat. 271.)

This was a provision of the sundry civil appropriation act for the fiscal year 1882, cited above.

See notes to R. S. § 211, ante, § 862.

864. (Act Feb. 25, 1885, c. 150.) Discussions in commercial reports of partisan questions not to be published.

For printing and distributing the publications by the Department State of the consular and other commercial reports, including circular letters to chambers of commerce, * * Provided, That no rt of such reports discussing partisan political, religious, or moral estions shall be published. (23 Stat. 324.)

This was a provision of the diplomatic and consular appropriation act for the fiscal year 1886, cited above.

The same provision was contained in the similar appropriation act for the preceding year.

See notes to R. S. § 211, ante, § 862.

865. (Act Feb. 9, 1903, c. 530.) Terms of measure, weight, and money in commercial reports.

Preparation, printing, publication, and distribution by the Department of State of the diplomatic, consular, and other commercial reports, * * Provided, That all terms of measure, weight, and money shall be reduced to and expressed in terms of measure, weight, and coin of the United States, as well as in the foreign terms. (32 Stat. 813.)

This was a provision of the diplomatic and consular appropriation act for the fiscal year 1904, cited above.

Provisions to the same effect were contained in the similar acts for several preceding years. In the later acts, a further provision was added limiting the number of copies of each issue. But this limitation and subsequent provisions of the same nature were superseded by the provisions for the printing of daily consular reports contained in Act June 25, 1910, c. 388, § 1, post, § 7122.

866. (R. S. § 443.) Supervision of census.

The Secretary of the Interior shall exercise supervisory and appellate powers in relation to all acts of marshals and others in taking and returning the census of the United States.

Act March 3, 1849, c. 108, § 7, 9 Stat. 395.

The powers of the Secretary of the Interior in regard to supervision of the census, conferred by this section, were vested in the Secretary of Commerce, by provisions of the act establishing the Department of Commerce, Act Feb. 14, 1903, c. 552, §§ 4, 5, 10, ante, §§ 857, 859, and post, § 875, which transferred to the Department from the Department of the Interior the Census Office and all that pertains to the same, and vested in the Secretary of Com-

merce the duties, powers, etc., possessed or exercised by the head of any executive department over any branch of the public service so transferred.

Notes of Decisions

See (1899) 22 Op. Atty. Gen. 413.

Cited without definite application, Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 825, 158 U. S. 240, 39 L. Ed. 966.

§ 867. (Act Feb. 14, 1903, c. 552, § 8.) Annual report to Congress; special investigations and reports.

The Secretary of Commerce and Labor shall annually, at the close of each fiscal year, make a report in writing to Congress, giving an account of all moneys received and disbursed by him and his Department, and describing the work done by the Department in fostering, promoting, and developing the foreign and domestic commerce, the mining, manufacturing, shipping, and fishery industries, and the transportation facilities, of the United States, and making such recommendations as he shall deem necessary for the effective performance of the duties and purposes of the Department. He shall also from time to time make such special investigations and reports as he may be required to do by the President, or by either House of Congress, or which he himself may deem necessary and urgent. (32 Stat. 829.)

See note to section 1 of this act, ante, § 853, as to change of designations of Department and of Secretary.

The requirement of R. S. § 208, ante, § 306, that the Secretary of State should annually lay before Congress certain commercial information, may be regarded as applicable to the Secretary of Commerce, under the provisions of sections 4, 5, 10, of this act, ante, §§ 857, 859, and post, § 875, which transfer to the Department of Commerce authority over the subjects of the statements required, and vest in the Secretary of Commerce the duties, powers, etc., over such branches of the public service previously possessed or exercised by the Secretary of State.

The statements of commercial information required by R. S. § 208, ante, § 306, were described in the first, second, and sixth subdivisions of said section, as follows:

"First. A statement, in a compendious form, of all such changes and modifications in the commercial systems of other nations, whether by treaties, duties on imports and exports, or other regulations, as shall have been communicated to the Department, including all commercial information contained in the official publications of other governments, which he shall deem sufficiently important.

"Second. A synopsis of so much of the information which may have been communicated to him by diplomatic and consular officers during the preceding year as he may deem valuable for public information; specifying the names of any consuls or commercial agents who may have been remiss in transmitting commercial information."

* * * * * * * * * * * * *

"Sixth. A statement of the lists of passengers arriving in the United States from foreign places, returned to him quarter-yearly by the collectors of customs."

See notes to R. S. § 211, ante, § 862.

Other provisions, requiring reports, etc., by the Secretary of the Treasury, which in like manner may be regarded as applicable to the Secretary of Commerce, contained in R. S. §§ 259, 263–265, are set forth post, §§ 868, 869, 871, 872.

§ 868. (R. S. § 259, as amended, Act Feb. 27, 1877, c. 69, § 1.) Report of statistics.

The Secretary of the Treasury shall make a report to Congress on the first Monday of January in each year, containing the results of the information collected during the preceding year, by the Bureau of Statistics, upon the condition of the manufactures, domestic trade, currency, and banks of the several States and Territories.

Res. June 15, 1844, No. 16, 5 Stat. 719. Act Feb. 27, 1877, c. 69, 19 Stat. 241.

The amendment of this section by Act Feb. 27, 1877, c. 69, § 1, cited above,

consisted in the omission of the word "agriculture," preceding the word "manufactures," in the section as originally enacted.

The collection of such statistics was provided for by R. S. §§ 334–342, post, §§ 877–880, 882, 884, 886–888.

The duties, powers, etc., of the Secretary of the Treasury under this section and R. S. § 263, post, § 869, as to reports on statistics collected by the Bureau of Statistics, were vested in the Secretary of Commerce by the transfer of said Bureau to the Department of Commerce, and the giving to the Secretary of Commerce control of the work of gathering and distributing statistical information relating to the subjects confided to his Department, and the vesting in him the duties, powers, etc., possessed or exercised by the head of any executive department in or over any bureau, etc., so transferred, or any business arising therefrom or pertaining thereto, etc., by provisions of Act Feb. 14, 1903, c. 552, §§ 4, 10, ante, §§ 857, 859.

869. (R. S. § 263.) Printing report on commerce and navigation.

The Secretary of the Treasury shall cause the annual report on e statistics of commerce and navigation, required from the Chief the Bureau of Statistics, to be prepared and printed according law, and to be submitted to Congress at as early a day in each gular session as practicable, and not later than the first Monday January.

Act Feb. 10, 1820, c. 11, § 1, 3 Stat. 541. Act Sept. 16, 1850, c. 55, §§ 1, 2, 9 Stat. 459. Act July 28, 1866, c. 298, § 13, 14 Stat. 331.

See note to R. S. § 259, ante, § 868.

The making of the annual report on statistics of commerce and navigation mentioned in this section was provided for by R. S. § 336, post, § 879. The printing and distribution of the report were provided for by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 37, post, § 7084.

870. (R. S. § 251.) Forms of statements of state of commerce and navigation.

The Secretary of the Treasury * * shall also prescribe the rms of the annual statements to be submitted to Congress by him owing the actual state of commerce and navigation between the nited States and foreign countries, or coastwise between the colction districts of the United States, in each year.

Res. May 14, 1856, No. 9, 11 Stat. 144.

This was a provision at the end of R. S. § 251, following the provisions authorizing the Secretary of the Treasury to make rules and regulations and to prescribe forms to be used in the execution of various revenue and other laws, set forth ante, § 384. But this provision may be regarded as applicable to the Secretary of Commerce by the vesting in him of the duties, powers, etc., of the Secretary of the Treasury in regard to the statements mentioned therein, by provisions of Act Feb. 14, 1903, c. 522, §§ 4, 10, ante, §§ 857, 859.

See note to R. S. § 259, ante, § 868.

Notes of Decisions

See, also, notes under § 384, ante.

Rules for transportation of appraised rchandise.—Under R. S. § 2989, post, 5682, the Secretary of the Treasury n make no regulations other than ose which may be deemed expedient d necessary for the due execution such parts of the revenue laws relate to warehouses. But the ovisions of this section comprend the making of rules and regations for the transportation of apraised merchandise in bond from one llection district to another, and they vest the Secretary with authority ver that subject as ample as that hich he formerly derived under Act ug. 6, 1846, § 5, ante, § 384, and Act larch 28, 1854, § 9, post, § 5682. 1876) 15 Op. Atty. Gen. 128.

Values of foreign coin.—The statutes directing the secretary of the treasury to proclaim the values of foreign coin as expressed in the money of account of the United States (R. S. § 3564; 26 Stat. 624) do not require the secretary to take the valuation of such foreign coin as established by proclamation at the date of the entry, rather than at the date of exportation, in the estimate of the values of imported merchandise. And the secretary's proclamation of July 1, 1891, and the corresponding regulations of 1892, changing the time from the former to the latter date, are valid in view of this section and section 5603, post. Wood v. U. S. (1896) 72 Fed. 254, 18 C. C. A. 553, distinguishing Heinemann v. Arthur's Ex'rs (1887) 7 Sup. Ct. 446, 120 U. S. 82, 30 L. Ed. 605.

§ 871. (R. S. § 265.) Printing statement of exports and imports.
The Secretary of the Treasury shall furnish to the Congressional Printer on or before the first day of November of each year, the manuscript, prepared for printing, of a condensed statement of the aggregate amount of the exports and imports from foreign countries during the preceding fiscal year.

Res. March 3, 1863, No. 27, § 3, 12 Stat. 826.
See note to R. S. § 259, ante, § 868.

§ 872. (R. S. § 264.) Report of Coast-Survey expenditures.
The Secretary of the Treasury shall report to Congress annually the number and names of the persons employed during the last preceding fiscal year upon the Coast Survey and business connected therewith; the amount of compensation of every kind respectively paid them, for what purpose, and the length of time employed; and shall report a full statement of all other expenditures made under the direction of the Superintendent of the Coast Survey.

Act March 3, 1853, c. 97, § 3, 10 Stat. 209. Act Aug. 15, 1876, c. 287, 19 Stat. 156.

The duties, powers, etc., of the Secretary of the Treasury under this section, as to reports of Coast Survey expenditures, were vested in the Secretary of Commerce by the transfer of the Coast and Geodetic Survey from the Treasury Department to the Department of Commerce, and the vesting in the head of that Department of the duties, powers, etc., possessed or exercised by the head of any executive department in or over any division of the public business so transferred, or any business arising therefrom or pertaining thereto, etc., by provisions of Act Feb. 14, 1903, c. 552, §§ 4, 10, ante, §§ 857, 859.

Cited without definite application,
Imperial Water Co. No. 5 v. Holabird
(1912) 197 Fed. 4, 116 C. C. A. 526.

CHAPTER B

The Bureau of Foreign and Domestic Commerce

A Bureau of Foreign Commerce in the State Department was so named under a provision of Act March 3, 1875, c. 123, § 1, 18 Stat. 349, having been called previously the Bureau of Statistics. The Bureau of Statistics in the Treasury Department was established under R. S. § 334, and its purpose was defined and provisions as to its duties, reports to be made by it, etc., were made by R. S. §§ 335–342. By the act establishing the Department of Commerce and Labor, Act Feb. 14, 1903, c. 552, § 4, ante, § 857, said Bureau of Foreign Commerce was transferred from the State Department to the Department of Commerce and Labor, and consolidated with said Bureau of Statistics, which was also transferred from the Treasury Department, the two to constitute one bureau, to be called the Bureau of Statistics, and powers were given to the Secretary of Commerce and Labor in regard to the collecting, distributing, etc., of statistical information.

Said act establishing the Department of Commerce and Labor also, by section 5 thereof, post, § 875, created a Bureau of Manufactures in the Department, and defined its province and duty, providing for gathering and distributing information and statistics concerning manufacturing industries and markets therefor.

Said Bureau of Manufactures and Bureau of Statistics were consolidated into one bureau, to be known as the Bureau of Foreign and Domestic Commerce, by a provision of Act Aug. 23, 1912, c. 350, § 1, post, § 873.

This chapter includes the provisions of said sections of the Revised Statutes and of subsequent acts, relating to the several bureaus so transferred, consolidated, etc., which remain in force and may be applicable to the consolidated bureau formed thereby, and further provisions relating to said Bureau of Foreign and Domestic Commerce.

Certain duties of the Bureau of Labor in the Department, prescribed by

Act June 13, 1888, c. 389, § 7, post, § 947, were also transferred to said Bureau of Foreign and Domestic Commerce, by further provisions of said Act Aug. 23, 1912, c. 350, § 1, post, § 874.

Sec.
873. Bureau of Foreign and Domestic Commerce; consolidation and transfer of duties of Bureau of Manufactures and Bureau of Statistics.
874. Transfer to Bureau of certain duties of Department of Labor; Bureau to make special investigations when required.
875. Former Bureau of Manufactures; duties of Bureau; consular reports.
876. Former Bureau of Manufactures; Assistant Chief of Bureau.
877. Former Bureau of Statistics in Treasury Department.
878. Purpose of the former Bureau of Statistics.
879. Annual report of commerce and navigation.
880. Regulations imposed on collectors.
881. Returns by collectors of exports by rail.
882. Coasting trade to be included.
883. Annual report of foreign and interstate commerce, construction and operation of railroads, cost of transportation of freight and passengers on railroads and on canals, rivers, etc., and tonnage transported.
884. Reports of exports and imports to be prepared and published.
885. Reports of exports and imports to be prepared and published quarterly.
886. Annual statement of vessels.
887. Annual statement of merchandise.
888. Statistics of manufactures.

§ 873. (Act Aug. 23, 1912, c. 350, § 1.) Bureau of Foreign and Domestic Commerce; consolidation and transfer of duties of Bureau of Manufactures and Bureau of Statistics.

The Bureau of Manufactures and the Bureau of Statistics, both of the Department of Commerce and Labor, are hereby consolidated into one bureau to be known as the Bureau of Foreign and Domestic Commerce, to take effect July first, nineteen hundred and twelve, and the duties required by law to be performed by the Bureau of Manufactures and the Bureau of Statistics are transferred to and shall after that date be performed by the Bureau of Foreign and Domestic Commerce. (37 Stat. 407.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1913, cited above.

The Department of Commerce and Labor was to be called the Department of Commerce, by a provision of Act March 4, 1913, c. 141, § 1, post, § 932.

Provisions relating to the former Bureau of Manufactures and Bureau of Statistics, consolidated by this act, and prescribing their respective duties, etc., are set forth post, §§ 875–888.

Further provisions of this act, transferring to the Bureau certain duties of the Department of Labor or Bureau of Labor, and prescribing additional duties as to special investigations and reports, are set forth post, § 874.

Appropriations for the Bureau, including provisions for a Chief of Bureau, $4,000, Assistant Chiefs of Bureau, one at $3,000, one at $2,750, Chief of Division of Consular Reports, $2,500, chief clerk, $2,250, stenographer to the Chief of the Bureau, $1,600, and other clerks and employés, and to enable the Bureau to collate and publish tariffs of foreign countries, and to furnish information to Congress and the Executive relative to customs laws, etc., of foreign countries, and to further promote, etc., the foreign and domestic commerce of the United States, were made by further provisions of this act, Act Aug. 21, 1912, c. 350, § 1, 37 Stat. 407, and were repeated in the similar appropriation act for the fiscal year 1914, Act March 4, 1913, c. 142, § 1, 37 Stat. 748. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat., and were as follows: Chief, $6,000; assistant chiefs—one $3,500, one $3,000; chiefs of divisions—one $2,500, one $2,000; assistant chiefs of divisions—one $2,250; chief clerk, $2,250; experts—one on commerce and finance, $2,000; translators—one $2,000, one $1,400; stenographer to chief of bureau, $1,600 with clerks, messengers, and laborers.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appro-

priated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 874. (Act Aug. 23, 1912, c. 350, § 1.) Transfer to Bureau of certain duties of Department of Labor; Bureau to make special investigations when required.

Those certain duties of the Department of Labor, or Bureau of Labor, contained in section seven of the Act approved June thirteenth, eighteen hundred and eighty-eight, that established the same, which especially charged it "to ascertain, at as early a date as possible, and whenever industrial changes shall make it essential, the cost of producing articles at the time dutiable in the United States, in leading countries where such articles are produced, by fully specified units of production, and under a classification showing the different elements of cost, or approximate cost, of such articles of production, including the wages paid in such industries per day, week, month, or year, or by the piece; and hours employed per day; and the profits of manufacturers and producers of such articles; and the comparative cost of living, and the kind of living; what articles are controlled by trusts or other combinations of capital, business operations, or labor, and what effect said trusts, or other combinations of capital, business operations, or labor have on production and prices," are hereby transferred to and shall hereafter be discharged by the Bureau of Foreign and Domestic Commerce, and it shall be also the duty of said Bureau of Foreign and Domestic Commerce to make such special investigation and report on particular subjects when required to do so by the President or either House of Congress. (37 Stat. 407.)

These were further provisions of the legislative, executive, and judicial appropriation act for the fiscal year 1913, cited above, following the provisions establishing the Bureau and prescribing its duties, etc., ante, § 873.

Act June 13, 1888, c. 389, § 7, mentioned in the first of these provisions, is set forth post, § 947.

An appropriation for the Bureau, for investigating cost of production, was made by the urgent deficiency appropriation for the fiscal year 1913, Act Oct. 22, 1913, c. 32, 38 Stat. 223, as follows:

"Investigating cost of production: For salaries and all other actual necessary expenses, including field investigations at home and abroad, compensation of special agents, clerk hire, and rental of quarters in Washington, District of Columbia, purchase of books of reference and manuscripts, to enable the Bureau of Foreign and Domestic Commerce of the Department of Commerce to ascertain at as early a date as possible, and whenever industrial changes shall make it essential, the cost of producing articles at the time dutiable in the United States, in leading countries where such articles are produced, by fully specified units of production, and under a classification showing the different elements of cost of such articles of production, including the wages paid in such industries per day, week, month, or year, or by the piece; and hours employed per day; and the profits of manufacturers and producers of such articles; and the comparative cost of living, and the kind of living; what articles are controlled by trusts or other combinations of capital, business operations, or labor, and what effect said trusts or other combinations of capital, business operations, or labor have on production and prices, fiscal year nineteen hundred and fourteen, $50,000." This appropriation was substantially repeated in the legislative, executive, and judicial appropriation act for the fiscal year 1917, Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 875. (Act Feb. 14, 1903, c. 552, § 5.) Former Bureau of Manufactures; duties of Bureau; consular reports.

There shall be in the Department of Commerce and Labor a bureau to be called the Bureau of Manufactures, and a chief of said bureau, who shall be appointed by the President, and who shall

receive a salary of four thousand dollars per annum. There shall also be in said bureau such clerical assistants as may from time to time be authorized by Congress. It shall be the province and duty of said bureau, under the direction of the Secretary, to foster, promote, and develop the various manufacturing industries of the United States, and markets for the same at home and abroad, domestic and foreign, by gathering, compiling, publishing, and supplying all available and useful information concerning such industries and such markets, and by such other methods and means as may be prescribed by the Secretary or provided by law. And all consular officers of the United States, including consuls-general, consuls, and commercial agents, are hereby required, and it is made a part of their duty, under the direction of the Secretary of State, to gather and compile, from time to time, useful and material information and statistics in respect to the subjects enumerated in section three of this Act in the countries and places to which such consular officers are accredited, and to send, under the direction of the Secretary of State, reports as often as required by the Secretary of Commerce and Labor of the information and statistics thus gathered and compiled, such reports to be transmitted through the State Department to the Secretary of the Department of Commerce and Labor. (32 Stat. 827.)

This section was part of the act to establish the Department of Commerce and Labor, cited above, other sections of which are set forth ante, §§ 853, 854, 856-861, 867, and post, § 889.

The Department of Commerce and Labor is to be called the Department of Commerce, and the Secretary of Commerce and Labor is to be called the Secretary of Commerce, by provisions of Act March 4, 1913, c. 141, § 1, post, § 932.

An Assistant Chief of Bureau was authorized by a provision of Act Feb. 27, 1906, c. 510, § 1, set forth post, § 876.

The appointment of a person to formulate, under direction of the Secretary of State, for the instruction of consular officers, the requests of the Secretary of Commerce and Labor, and to prepare from the dispatches of consular officers, for transmission to the Secretary of Commerce and Labor, information pertaining to the work of the Department, was provided for by section 11 of this act, ante, § 292.

The printing of daily consular reports, for distribution by the Department was authorized by Act June 25, 1910, c. 388, § 1, post, § 7122.

The Bureau of Manufactures was consolidated with the Bureau of Statistics to form the Bureau of Foreign and Domestic Commerce, by a provision of Act Aug. 23, 1912, c. 350, § 1, ante, § 873.

Notes of Decisions

Consolidation of bureaus.—The Secretary of Commerce and Labor is not authorized by law to consolidate the Bureau of Manufactures and the Bureau of Statistics into one bureau called the Bureau of Foreign and Domestic Commerce. (1909) 27 Op. Atty. Gen. 542.

§ 876. (Act Feb. 27, 1906, c. 510, § 1.) Former Bureau of Manufactures; Assistant Chief of Bureau.

Bureau of Manufactures: For assistant chief of bureau, to be selected and appointed by the Secretary of Commerce and Labor, at the rate of two thousand five hundred dollars per annum. (34 Stat. 42.)

This was a provision of the urgent deficiency act for the fiscal year ending 1906, cited above, which made an appropriation for salary of the office during the balance of the fiscal year. Subsequent appropriations were made by the legislative, executive, and judicial appropriation acts for each year. On the consolidation of the Bureau of Manufactures with the Bureau of Statistics, to form the Bureau of Foreign and Domestic Commerce, appropriations were made for "Assistant Chiefs of Bureau, one at $3,000, one at $2,750," by Act Aug. 23, 1912, c. 350, § 1, 37 Stat. 407, and were repeated in the similar appropriation acts for subsequent years. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat., with increases in the salaries.

See notes to § 873, ante.

§ 877. (R. S. § 334.) Former Bureau of Statistics in Treasury Department.

There shall be in the Department of the Treasury a Bureau to be called the Bureau of Statistics; and the Secretary of the Treasury may appoint one division clerk, who shall superintend the Bureau, and shall be entitled to a salary of two thousand five hundred dollars a year.

Res. June 15, 1844, No. 16, 5 Stat. 719. Act July 13, 1866, c. 184, § 64, 14 Stat. 170. Act July 28, 1866, c. 298, § 13, 14 Stat. 330. Act July 20, 1868, c. 176, § 1, 15 Stat. 99.

The Bureau of Statistics established in the Treasury Department under this section was transferred to the Department of Commerce and Labor, and the Bureau of Foreign Commerce, likewise transferred from the State Department, was consolidated with and made a part of it, the two constituting one bureau, to be called the Bureau of Statistics, in the Department of Commerce and Labor, by the act establishing that Department, Act Feb. 14, 1903, c. 522, § 4, ante, § 857.

The Bureau so transferred from the State Department was also called, formerly, the Bureau of Statistics, but its name had been changed to the Bureau of Foreign Commerce in pursuance of a provision of Act Feb. 20, 1897, c. 268, 29 Stat. 590.

The Bureau of Statistics in the Department of Commerce and Labor was consolidated with the Bureau of Manufactures, to form the Bureau of Foreign and Domestic Commerce, by a provision of Act Aug. 23, 1912, c. 522, § 4, ante, § 857.

The Department of Commerce and Labor is to be called the Department of Commerce, by a provision of Act March 4, 1913, c. 141, § 1, post, § 932.

The provision of this section for "one division clerk, who shall superintend the Bureau," etc., was practically superseded by subsequent appropriations in the annual legislative, executive, and judicial appropriation acts for an "officer in charge of the Bureau," and for a "Chief of Bureau," at increased rates of salary. Recent appropriations for the Bureau provide for a Chief of Bureau, $6,000. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 873, ante.

§ 878. (R. S. § 335, as amended, Act Feb. 27, 1877, c. 69, § 1.) Purpose of the former Bureau of Statistics.

The purpose of the Bureau of Statistics is the collection, arrangement, and classification of such statistical information as may be procured, showing, or tending to show, each year the condition of the manufactures, domestic trade, currency, and banks of the several States and Territories.

Res. June 15, 1844, No. 16, 5 Stat. 719. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 241.

The amendment of this section by Act Feb. 27, 1877, c. 69, § 1, cited above, consisted in the omission of the word "agriculture," which, in the section as originally enacted, preceded the word "manufactures."

The provisions of this section and of R. S. §§ 336–342, Act March 3, 1875, c. 129, § 1, and Act July 16, 1892, c. 196, § 1, post, §§ 879–888, relating to the purpose, duties, reports, etc., of the Bureau of Statistics in the Treasury Department may be regarded as applicable to the Bureau of Foreign and Domestic Commerce in the Department of Commerce, by the provisions for the transfer of said Bureau of Statistics and its consolidation with other bureaus into the Bureau of Foreign and Domestic Commerce, contained in Act Feb. 14, 1903, c. 552, § 4, and Act Aug. 23, 1912, c. 350, § 1, ante, §§ 857, 873.

§ 879. (R. S. § 336.) Annual report of commerce and navigation.

The Chief of the Bureau of Statistics shall, under the direction of the Secretary of the Treasury, annually prepare a report on the statistics of commerce and navigation of the United States with foreign countries, to the close of the fiscal year. Such accounts shall comprehend all goods, wares, and merchandise exported from the United States to other countries; all goods, wares, and merchandise imported into the United States from other countries, and all navigation employed in the foreign trade of the United States; which facts shall be stated according to the principles and in the manner hereby directed.

First. The kinds, quantities, and values of all articles exported, and the kinds, quantities, and values of all articles imported, shall be distinctly stated in such accounts, except in cases in which it may appear to the Secretary of the Treasury that separate statements of the species, quantities, or values of any particular articles would swell the annual statements without utility; and, in such cases, the kinds and total values of such articles shall be stated together, or in such classes as the Secretary of the Treasury may think fit.

Second. The exports shall be so stated as to show the exports to each foreign country, and their values; and the imports shall be so stated as to show the imports from each foreign country, and their values.

Third. The exports shall be so stated as to show, separately, the exports of articles of the production or manufacture of the United States, and their values; and the exports of articles of the production or manufacture of foreign countries, and their values.

Fourth. The navigation employed in the foreign trade of the United States shall be stated in such manner as to show the amount of the tonnage of all vessels departing from the United States for foreign countries; and, separately, the amount of such tonnage of vessels of the United States, and the amount of such tonnage of foreign vessels; and also the foreign nations to which such foreign tonnage belongs, and the amount of such tonnage belonging to each foreign nation; and in such manner as also to show the amount of the tonnage of all vessels departing for every particular foreign country with which the United States have any considerable commerce; and, separately, the amount of such tonnage of vessels of the United States, and the amount of such tonnage of foreign vessels; and in such manner as to show the amount of the tonnage of all vessels arriving in the United States from foreign countries; and, separately, the amount of such tonnage of vessels of the United States, and the amount of such tonnage of foreign vessels; and also the foreign nations to which such foreign tonnage belongs, and the amount of such tonnage belonging to each foreign nation; and in such manner as also to show the amount of the tonnage of all vessels arriving from every particular foreign country with which the United States have any considerable commerce; and, separately, the amount of such tonnage of vessels of the United States, and the amount of such tonnage of foreign vessels.

Fifth. Such accounts shall comprehend and include, in tabular form, the quantity by weight or measure, as well as the amount of value, of the several articles of foreign commerce, whether dutiable or otherwise; and also a similar and separate statement of the commerce of the United States with the British Provinces, under the late so-called reciprocity treaty with Great Britain.

Act Feb. 10, 1820, c. 11, §§ 1, 4, 3 Stat. 541. Act July 28, 1866, c. 298, §§ 3, 5, 6, 13, 14 Stat. 328–330. Act March 2, 1861, c. 68, § 29, 12 Stat. 197. See note to R. S. § 335, ante, § 878.

An annual report to Congress containing the results of the information collected during the preceding year by the Bureau was provided for by R. S. § 259, ante, § 868.

Provisions applicable to all the Departments, as to the time for making annual reports, and the time for furnishing copies thereof to the printer, were made by R. S. §§ 195, 196, ante, §§ 278, 279.

The printing and distribution of the statistical abstract was provided for by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 35, post, § 7082.

§ 880. (R. S. § 337.) Regulations imposed on collectors.

In order to enable the Chief of the Bureau of Statistics to prepare the annual report on the statistics of commerce and navigation required to be submitted to Congress by the Secretary of the Treas-

ury, the following regulations shall be observed by all collectors of customs:

First. The kinds and quantities of all imported articles free from duty shall be ascertained by entry, made upon oath or affirmation, by the owner, or by the consignee or agent of the importer, or by actual examination, where the collector shall think such examination necessary; and the values of all such articles shall be ascertained in the same manner in which the values of imports subject to duties ad valorem are ascertained.

Second. The values of all imported articles subject to specific duties shall be ascertained in the manner in which the values of imports subject to duties ad valorem are ascertained.

Third. The several collectors shall keep separate accounts of the kinds, quantities, and values of such parts of the imports subject to duties ad valorem as may be directed by the Secretary of the Treasury.

Fourth. All articles exported shall be valued at their actual cost, or the values which they may truly bear, at the time of exportation, in the ports of the United States from which they are exported; and all articles imported shall be valued at their actual cost, or the values which they may truly bear in the foreign ports from which they are exported for importation into the United States, at the time of such exportation.

Fifth. Before a clearance shall be granted for any vessel bound to a foreign place, the collector shall require the owners, shippers, or consignors of the cargo to deliver to the collector manifests of the cargo, or of the parts thereof shipped by them respectively, which manifests shall specify the kinds and quantities of the articles shipped by them respectively, and the value of the total quantity of each kind of articles; and state that such manifest contains a full, just, and true account of all articles laden on board of such vessel by the owners, shippers, or consignors, respectively, and that the values of such articles are truly stated, according to their actual cost, or the values which they truly bear at the port and time of exportation. And the collector shall also require the master of the vessel, and the owners, shippers, and consignors of the cargo, to state in writing, to the collector, the foreign place or country in which such cargo is truly intended to be landed. The manifests and statements hereby required shall be verified by the oath of the person by whom they are respectively made and subscribed.

Sixth. Every collector shall keep an accurate account of the national characters and tonnage of all vessels which depart from his district for foreign countries, and of the foreign places or countries for which such vessels depart; and, also, an accurate account of the national characters and tonnage of all vessels which enter his district from foreign countries, and of the foreign places or countries from which such vessels arrive.

Seventh. The several collectors shall make quarter-yearly returns to the Bureau of Statistics of all the facts and matters which they are hereby required to ascertain.

Act Feb. 10, 1820, c. 11, §§ 7, 12, 3 Stat. 542, 543.
See note to R. S. § 335, ante, § 878.

§ 881. (Act July 16, 1892, c. 196, § 1, as amended, Act March 3, 1893, c. 211, § 1.) Returns by collectors of exports by rail.

Hereafter collectors of customs shall render to the Bureau of Statistics, in such manner and form and at such periods as the Secretary of the Treasury may prescribe, returns of exports to foreign countries leaving the United States by rail. Any person who shall hereafter deliver to any railway or transportation company or other common carrier commodities for transportation and exportation by

rail from the United States to foreign countries, shall also deliver to the collector of customs at the frontier port through which the goods pass into the foreign country a manifest, in such form as the Secretary of the Treasury may prescribe, duly certified as to its accuracy by said person or his agent, exhibiting the kinds, quantities, and values of the several articles delivered by such person or his agent for exportation. And no railway car containing commodities, the product or manufacture of the United States or foreign goods, duty paid or free of duty, intended to be exported to any foreign country, shall be permitted hereafter to leave the United States until the agent of the railway or transportation company, or the person having such car in charge, shall deliver to the customs officer at the last port in the United States through which the commodities pass into foreign territory a manifest thereof, which shall specify the kinds and quantities of the commodities in the form prescribed by the Secretary of the Treasury, and until the manifest, exhibiting the kinds, quantities, and values of the several commodities, shall have been delivered to the collector of customs, as above required, by the person exporting such commodities, or by his agent, or information satisfactory to such customs officer as to the kind, quantities, and values of the domestic and foreign free or duty paid commodities laden on such car. The agent or employee of any railway or transportation company who shall transport such commodities into a foreign country before the delivery to the collector of customs of the manifest, as above required shall be liable to a penalty of fifty dollars for each offense; Provided, That the provisions of this law shall apply to commodities transported to the frontier in railway cars for exportation and transhipment across the frontier into the adjacent foreign territory in ferry boats or vehicles, so far as to require the person in charge thereof to furnish to the collector of customs information of the kinds, quantities, and values of such commodities; And provided further, That nothing contained in the foregoing shall be held as applicable to goods in transit between American ports by routes passing through foreign territory or to merchandise in transit between places in the Dominion of Canada by routes passing through the United States, or to merchandise arriving at the ports designated under the authority of section three thousand and five of the Revised Statutes, and which may be destined for places in the Republic of Mexico. (27 Stat. 197. 27 Stat. 689.)

These were provisions of the legislative, executive, and judicial appropriation act for the fiscal year 1893, cited above, amended to read as set forth here by the similar act the next following year, also cited above.

R. S. § 3005, mentioned in the last proviso, is set forth post, § 5690.

See note to R. S. § 335, ante, § 878.

§ 882. (R. S. § 338.) Coasting trade to be included.

The annual report of the statistics of commerce and navigation shall state the kinds, quantities, and value of the merchandise entered and cleared coastwise into and from the collection districts of the United States.

Res. May 14, 1856, No. 9, 11 Stat. 144.

See note to R. S. § 335, ante, § 878.

§ 883. (Act March 3, 1875, c. 129, § 1.) Annual report of foreign and interstate commerce, construction and operation of railroads, cost of transportation of freight and passengers on railroads and on canals, rivers, etc., and tonnage transported.

It shall be the duty of the officer in charge of the Bureau of Statistics to gather, collate, and annually report to the Secretary of the Treasury, for transmission to Congress, statistics and facts relating to commerce with foreign nations and among the several

States, the railroad systems of this and other countries, the construction and operation of railroads, the actual cost of such construction and operation of railroads, the actual cost of transporting freights and passengers on railroads, and on canals, rivers, and other navigable waters of the United States, the charges imposed for such transportation of freight and passengers, and the tonnage transported. (18 Stat. 352.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1876, cited above.

See note to R. S. § 335, ante, § 878.

§ 884. (R. S. § 339.) Reports of exports and imports to be prepared and published.

The Chief of the Bureau of Statistics shall, under the direction of the Secretary of the Treasury, prepare and publish monthly reports of the exports and imports of the United States, including the quantities and values of goods warehoused or withdrawn from warehouse, and such other statistics relative to the trade and industry of the country as the Secretary of the Treasury may consider expedient.

Act July 28, 1866, c. 298, § 13, 14 Stat. 330. Act March 3, 1875, c. 129, 18 Stat. 352.

These reports were required to be prepared and published quarterly, by a provision of Act March 3, 1875, c. 129, § 1, post, § 885.

See note to R. S. § 335, ante, § 878.

§ 885. (Act March 3, 1875, c. 129, § 1.) Reports of exports and imports to be prepared and published quarterly.

The reports now by law required to be prepared and published monthly in the said Bureau of Statistics shall hereafter be prepared and published quarterly under the direction of the Secretary of the Treasury. (18 Stat. 352.)

This was a further provision of the legislative, executive, and judicial appropriation act for the fiscal year 1876, cited above, following the provision relating to annual reports, ante, § 883.

The reports referred to in this provision were the reports of exports and imports provided for by R. S. § 339, ante, § 884.

See note to R. S. § 335, ante, § 878.

§ 886. (R. S. § 340.) Annual statement of vessels.

The Chief of the Bureau of Statistics shall also prepare an annual statement of vessels registered, enrolled, and licensed under the laws of the United States, together with the class, name, tonnage, and place of registry of each vessel, and such other information as the Secretary of the Treasury may deem proper to embody therein.

Act July 28, 1866, c. 298, § 13, 14 Stat. 330.

The Commissioner of Navigation was required to prepare such a list of vessels, etc., by the act establishing a Bureau of Navigation, Act July 5, 1884, c. 221, § 4, post, § 894.

See note to R. S. § 335, ante, § 878.

§ 887. (R. S. § 341.) Annual statement of merchandise.

The Chief of the Bureau of Statistics shall prepare an annual statement of all merchandise passing in transit through the United States to foreign countries, each description of merchandise, so far as practicable, warehoused, withdrawn from warehouse for consumption, for exportation, for transportation to other districts, and remaining in the warehouse at the end of each fiscal year.

Act July 28, 1866, c. 298, § 13, 14 Stat. 330.

See note to R. S. § 335, ante, § 878.

§ 888. (R. S. § 342.) Statistics of manufactures.

The Chief of the Bureau of Statistics shall collect, digest, and arrange, for the use of Congress, the statistics of the manufactures of the United States, their localities, sources of raw material, markets, exchanges with the producing regions of the country, trans-

portation of products, wages, and such other conditions as are found to affect their prosperity.

Act July 28, 1866, c. 298, § 13, 14 Stat. 330.
See note to R. S. § 335, ante, § 878.

CHAPTER C

The Bureau of Corporations

§ 889. [Superseded.]

This section, which consisted of Act Feb. 14, 1903, c. 552, § 6; 32 Stat. 827, created in the Department of Commerce and Labor a bureau, to be called the Bureau of Corporations. It provided for a Commissioner of Corporations, to be appointed by the President, with a salary of $5,000 per annum. It also provided for a Deputy Commissioner of Corporations, with a salary of $3,500 per annum. Said Deputy Commissioner of corporations was, in the absence of the commissioner, to act as and perform the duties of the commissioner, and also to perform such other duties as might be assigned to him by the Secretary of Commerce and Labor, or by the Commissioner of Corporations. Provision was also made for a chief clerk, and such special agents, clerks, and other employés in the bureau as might be authorized by law. The Commissioner of Corporations was given power and authority to make, under the direction and control of the Secretary of Commerce and Labor, investigation into the organization, conduct, etc., of the business of any corporation, joint stock company, or corporate combination engaged in foreign or interstate commerce excepting common carriers, subject to Act Feb. 4, 1887, c. 104. He was further authorized to gather such information and data as would enable the President to make recommendations to Congress for legislation for the regulation of such foreign and interstate commerce, and to report such data to the President from time to time as required, such information so obtained, or as much thereof as the President might direct, to be made public. Said Commissioner of Corporations was given the same power and authority in respect to corporations, etc., as was conferred on the Interstate Commerce Commission by said Act Feb. 4, 1887, c. 104, and amendments thereof, in so far as the same might be applicable, including the right to subpœna and compel the attendance and testimony of witnesses, and the production of documentary evidence, and the administration of oaths. It was made the province and duty of said bureau, under the direction of the Secretary of Commerce and Labor to gather, compile, publish and supply useful information concerning corporations doing business within the United States and engaged in interstate or foreign commerce, including corporations engaged in insurance, and also to attend to such other duties as might be provided for by law. This section was superseded by the provisions of Act Sept. 26, 1914, c. 311, § 3, which provided that, upon the organization of the Federal Trade Commission, created by section 1 of said act, the Bureau of Corporations, and the offices of Commissioner and Deputy Commissioner of Corporations, should cease to exist, and that all pending investigations and proceedings of the Bureau of Corporations should be continued by the Federal Trade Commission, and that all clerks and employés of the Bureau of Corporations should be transferred to and become clerks and employés of the Federal Trade Commission, at their then present grades and salaries, and that all records, papers and property of the Bureau of Corporations should become the records, papers and property of the Federal Trade Commission, and that all unexpended funds for the use and maintenance of the Bureau of Corporations, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year 1915, or from the departmental printing fund for said year, should become funds and appropriations available to be expended by the Federal Trade Commission in the exercise of the powers, authority and duties conferred on it by said act Sept. 26, 1914, c. 311. Said Act Sept. 26, 1914, c. 311, § 3, is set forth post, under Title LVI D, "Federal Trade," together with the other provisions of said Act Sept. 26, 1914, c. 311, creating and relating to the Federal Trade Commission.

Notes of Decisions

Disclosure of data and information.—The Commissioner of Corporations is not permitted by section 6 of the act creating a Department of Commerce and Labor to disclose the data and information collected by him or his predecessors under that section, unless by the special direction of the President,

and this notwithstanding the request is made by a subcommittee of the Senate. (1909) 27 Op. Atty. Gen. 150.

He should, however, immediately present such a request to the President, submit to him, if practicable, all the documents containing relevant information upon the subject referred to, and obtain his instructions as to what part, if any, of such data is suitable for publication by direction of the committee preferring the request. Id.

Privileges and immunities of witnesses.—This section contemplates that the Commissioner of Corporations shall proceed by private hearings; and a person who appears before him on his demand or by his request, and gives testimony or produces documents, although not sworn, is entitled to the same privileges and immunities as though his attendance was compelled by subpœna and his testimony given under oath. U. S. v. Armour & Co. (D. C. 1906) 142 Fed. 808.

CHAPTER D

The Bureau of Navigation

A Bureau of Navigation in the Treasury Department was constituted by Act July 5, 1884, c. 221, 23 Stat. 118, and was transferred to the Department of Commerce and Labor by the act establishing that Department, Act Feb. 14, 1903, c. 552, § 4, ante, § 857.

This chapter includes the provisions of said Act July 5, 1884, c. 221, as applicable to the Bureau in the Department of Commerce and Labor.

Sec.
890. Bureau of Navigation; Commissioner.
891. General duties of Commissioner.
892. Additional duties of Commissioner; supervision of laws relating to admeasurement and designation of vessels and collection of tonnage tax.
893. Annual list of vessels; annual reports.
894. Change of names of vessels.
895. Appointment and compensation of Commissioner; designation of clerk as Deputy Commissioner; additional clerks.

§ 890. (Act July 5, 1884, c. 221, § 1.) Bureau of Navigation; Commissioner.

There shall be in the Department of the Treasury of the United States a Bureau of Navigation, under the immediate charge of a Commissioner of Navigation. (23 Stat. 118.)

This section and the five sections next following were sections 1–6 of an act entitled "An act to constitute a Bureau of Navigation in the Treasury Department," cited above.

The Bureau was transferred to the Department of Commerce and Labor, and the duties, powers, etc., of the head of the Treasury Department in and over the Bureau were vested in the head of the Department of Commerce and Labor, by the act establishing that Department, Act Feb. 14, 1903, c. 552, §§ 4, 10, ante, §§ 857, 859.

By such transfer, provisions of this act relating to the Department of the Treasury or the Secretary of the Treasury were made applicable to the Department of Commerce and Labor and to the Secretary of Commerce and Labor, respectively.

The Department of Commerce and Labor is to be called the Department of Commerce, and the Secretary of Commerce and Labor is to be called the Secretary of Commerce, by provisions of Act March 4, 1913, c. 141, § 1, post, § 932.

§ 891. (Act July 5, 1884, c. 221, § 2.) General duties of Commissioner.

The Commissioner of Navigation, under the direction of the Secretary of the Treasury, shall have general superintendence of the commercial marine and merchant seamen of the United States, so far as vessels and seamen are not, under existing laws, subject to the supervision of any other officer of the Government. He shall be specially charged with the decision of all questions relating to the issue of registers, enrollments, and licenses of vessels, and to the filing and preserving of those documents; and wherever in

title forty-eight or fifty of the Revised Statutes any of the above-named documents are required to be surrendered or returned to the Register of the Treasury, such requirement is hereby repealed, and such documents shall be surrendered and returned to the Commissioner of Navigation. Said Commissioner shall have charge of all similar documents now in the keeping of the Register of the Treasury, and shall perform all the duties hitherto devolved upon said Register relating to navigation. (23 Stat. 118.)

Provisions requiring the surrender of certificates of registry or enrollment or licenses, referred to in this section, were made by R. S. §§ 4146, 4160, 4162, 4325, post, §§ 7723, 7741, 7743, 8073.

See notes to section 1 of this act, ante, § 890.

§ 892. (Act July 5, 1884, c. 221, § 3.) Additional duties of Commissioner; supervision of laws relating to admeasurement and designation of vessels and collection of tonnage tax.

The Commissioner of Navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final. (23 Stat. 119.)

Regulations of the measurement of vessels by the Commissioner of Navigation were provided for by Act March 2, 1895, c. 173, § 4, post, § 7733.

See notes to section 1 of this act, ante, § 890.

Notes of Decisions

Conclusiveness of decisions of Commissioner of Navigation.—The provision making final the decision of the commissioner on all questions "relating to the collection of tonnage tax, and to the refunding of such tax, when collected erroneously or illegally," is constitutional. North German Lloyd S. S. Co. v. Hedden (C. C. 1890) 43 Fed. 17.

The provision making the decision of the commissioner of navigation on the question of refunding a tonnage tax erroneously imposed "final" does not take away the right of action from the person who paid said tax, but such decision is "final" in the department only. Laidlaw v. Abraham (C. C. 1890) 43 Fed. 297.

By virtue of this section the decision of the Commissioner of Navigation on questions involving a refund of the tonnage tax is final. That section supersedes or repeals the previous law vesting the Secretary of the Treasury with appellate power in such cases. (1885) 18 Op. Atty. Gen. 197. See, also, (1890) 19 Op. Atty. Gen. 660; (1892) 20 Op. Atty. Gen. 367.

The President has no authority to reverse the decision of the Commissioner of Navigation so as to adjust the claims of Sweden and Norway for the return of tonnage dues alleged to have been erroneously exacted. Any application for relief should be addressed to the legislative branch of the Government. (1892) 20 Op. Atty. Gen. 367.

Repeal of statutes.—Section 26 of the Act of June 26, 1884, post, § 10136, in regard to remission of fines, penalties, and forfeitures, and this section, are still in force. (1909) 28 Op. Atty. Gen. 21.

Repayment of tonnage taxes imposed.—The secretary of the treasury is authorized under Shipping Act June 26, 1884, § 26, post, § 10136, to repay the tonnage tax imposed on the steamer Cuba if he finds that it was "illegally, improperly, or excessively imposed" and if the Commissioner of Navigation shall have first decided under this section that such tax was erroneously or illegally exacted. (1890) 19 Op. Atty. Gen. 660.

Should the provision of section 37 of the act of Aug. 5, 1909, post, § 7808, imposing a duty of $7 per gross ton on the vessels therein named be declared invalid, such duty would be an improper or illegal charge within the meaning of the act of June 26, 1884, post, § 10136, and this section, and, if collected, should be refunded. (1909) 28 Op. Atty. Gen. 21.

§ 893. (Act July 5, 1884, c. 221, § 4.) Annual list of vessels; annual reports.

The Commissioner of Navigation shall annually prepare and publish a list of vessels of the United States belonging to the commercial marine, specifying the official number, signal letters, names,

rig, tonnage, home port, and place and date of building of every vessel, distinguishing in such list sailing-vessels from such as may be propelled by steam or other motive power. He shall also report annually to the Secretary of the Treasury the increase of vessels of the United States, by building or otherwise, specifying their number, rig, and motive power. He shall also investigate the operations of the laws relative to navigation, and annually report to the Secretary of the Treasury such particulars as may, in his judgment, admit of improvement or may require amendment. (23 Stat. 119.)

Before the passage of this act, the Chief of the Bureau of Statistics was required to prepare an annual statement of vessels, etc., by R. S. § 340.

See notes to section 1 of this act, ante, § 890.

§ 894. (Act July 5, 1884, c. 221, § 5.) Change of names of vessels.

The Commissioner of Navigation shall, under the direction of the Secretary of the Treasury, be empowered to change the names of vessels of the United States, under such restrictions as may have been or shall be prescribed by act of Congress. (23 Stat. 119.)

Authority to change the names of vessels was conferred on the Secretary of the Treasury by Act March 2, 1881, c. 107, post, §§ 7763, 7764.

See notes to section 1 of this act, ante, § 890.

§ 895. (Act July 5, 1884, c. 221, § 6.) Appointment and compensation of Commissioner; designation of clerk as Deputy Commissioner; additional clerks.

The Commissioner of Navigation shall be appointed by the President of the United States, by and with the advice and consent of the Senate, and shall receive a salary of four thousand dollars per annum. And the Secretary of the Treasury shall have power to transfer from existing Bureaus or divisions of the Treasury one clerk, to be designated as deputy commissioner of navigation, to act with the full powers of said Commissioner during his temporary absence from his official duty for any cause, and such additional clerks as he may consider necessary to the successful operation of the Bureau of Navigation, without impairing the efficiency of the Bureaus or divisions whence such clerks may be transferred. (23 Stat. 119.)

Appropriations for the Bureau are made by the annual legislative, executive, and judicial appropriation acts. Recent appropriations provide, besides the salary of the commissioner, $4,000, for a Deputy Commissioner, $2,400, chief clerk, $2,000, clerk to commissioner, $1,600, clerks of various classes, and other employés. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

CHAPTER E

The Bureau of Light-Houses

The Light-House Board, established under Title LV of the Revised Statutes, §§ 4653–4680, of which the Secretary of the Treasury was president, by R. S. § 4654, and which was attached to the office of the Secretary of the Treasury, by R. S. § 4658, and the Light-House Establishment, were transferred to the Department of Commerce and Labor, by the act establishing that Department, Act Feb. 14, 1903, c. 552, § 4, ante, § 857. The Bureau of Light-Houses in the Department, with a Commissioner of Light-Houses as the head of the Bureau, was established by Act June 17, 1910, c. 301, §§ 4–7, 36 Stat. 537.

This chapter includes the provisions of said acts and other provisions which remain in force and may be applicable to the Bureau in the Department of Commerce.

Sec.
896. Establishment of Bureau; Commissioner of Light-Houses; Deputy Commissioner; chief clerk; inspectors, clerical assistants, etc.; Chief Constructing Engineer; Superintendent of Naval Construction; report of Commissioner; adjustment of claims for damages from collisions.
897. Transfer of employés of Light-House Board or Light-House Establishment to Bureau.

Sec.
898. Transfer of duties, powers, etc., of Light-House Board to Commissioner.
899. Commissioner to have charge and control of Light-House Service, etc.
900. Designation of Acting Commissioner in absence of Commissioner and Deputy Commissioner.

§ 896. (Act June 17, 1910, c. 301, § 4.) Establishment of Bureau; Commissioner of Light-Houses; Deputy Commissioner; chief clerk; inspectors, clerical assistants, etc.; Chief Constructing Engineer; Superintendent of Naval Construction; report of Commissioner; adjustment of claims for damages from collisions.

Hereafter there shall be in the Department of Commerce and Labor a bureau of light-houses and a commissioner of light-houses, who shall be the head of said bureau, to be appointed by the President, who shall receive a salary of five thousand dollars per annum. There shall also be in the bureau a deputy commissioner, to be appointed by the President, who shall receive a salary of four thousand dollars per annum, and a chief clerk, who shall perform the duties of chief clerk and such other duties as may be assigned to him by the Secretary of Commerce and Labor or by the commissioner. There shall also be in the bureau such inspectors, clerical assistants, and other employees as may from time to time be authorized by Congress, and there shall also be employed one chief constructing engineer at a salary of four thousand dollars per annum and one superintendent of naval construction at a salary of three thousand dollars per annum, both to be appointed by the President. The commissioner of light-houses shall make an annual report to the Secretary of Commerce and Labor, who shall transmit the same to Congress at the beginning of each regular session thereof; and such commissioner, subject to the approval of the Secretary of Commerce and Labor, is hereby authorized to consider, ascertain, adjust, and determine all claims for damages, where the amount of the claim does not exceed the sum of five hundred dollars, hereafter occasioned by collisions, for which collisions vessels of the Light-House Service shall be found to be responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. (36 Stat. 537.)

This section was part of an act entitled "An act to authorize additional aids to navigation in the Light-House Establishment, and to provide for a Bureau of Light-Houses in the Department of Commerce and Labor, and for other purposes."

Sections 5–7 of the act are set forth post, §§ 897–899.

Sections 4–13 of the act were to take effect July 1, 1910, by section 14 thereof, 36 Stat. 539.

The Department of Commerce and Labor is to be called the Department of Commerce, and the Secretary of Commerce and Labor is to be called the Secretary of Commerce, by provisions of Act March 4, 1913, c. 141, § 1, post, § 932.

Appropriations for the Bureau are made in the annual legislative, executive, and judicial appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by

any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Extension of lighthouse reservation.—The Secretary of the Navy has authority to transfer control of certain land at San Juan, Porto Rico, reserved by executive order for naval purposes to the Department of Commerce and Labor, for the extension of the lighthouse reservation at that place. (1904) 25 Op. Atty. Gen. 269.

Suit against United States as affecting right to insurance money.—A special act of Congress authorizing suit against the United States to recover damages sustained in a collision with a lighthouse tender held not to preclude recovery for loss of cargo because of insurance thereon. L. Boyers Sons Co. v. United States (1912) 195 Fed. 490, 115 C. C. A. 400.

§ 897. (Act June 17, 1910, c. 301, § 5.) Transfer of employés of Light-House Board or Light-House Establishment to Bureau.

All employees of or in the Light-House Board or the Light-House Establishment are hereby transferred to the bureau of light-houses, excepting, however, army and navy officers. (36 Stat. 537.)

See note to preceding section of this act, ante, § 896.

The Light-House Board, mentioned in this section, was constituted, and its organization and proceedings were prescribed and regulated, by R. S. §§ 4653–4657.

R. S. § 4653, provided as follows:

"The President shall appoint two officers of the Navy, of high rank, two officers of the Corps of Engineers of the Army, and two civilians of high scientific attainments, whose services may be at the disposal of the President, together with an officer of the Navy and an officer of engineers of the Army, as secretaries, who shall constitute the Light-House Board."

R. S. § 4654, provided that the Secretary of the Treasury should be ex-officio president of the board. And R. S. §§ 4655–4657, provided for the election of a chairman of the board and regulated its meetings.

Said sections were repealed by section 13 of this act, 36 Stat. 539.

§ 898. (Act June 17, 1910, c. 301, § 6.) Transfer of duties, powers, etc., of Light-House Board to Commissioner.

All duties performed and all power and authority now possessed or exercised by the Light-House Board, under any provision of law not hereby repealed, are hereby transferred to and imposed and conferred upon and vested in the commissioner of light-houses, under the direction and control of the Secretary of Commerce and Labor. (36 Stat. 538.)

See note to section 4 of this act, ante, § 896.

The Secretary of Commerce and Labor is to be called the Secretary of Commerce, by a provision of Act March 4, 1913, c. 141, § 1, post, § 932.

§ 899. (Act June 17, 1910, c. 301, § 7.) Commissioner to have charge and control of Light-House Service, etc.

The commissioner of light-houses shall, under the direction and control of the Secretary of Commerce and Labor, have charge and control of the construction, maintenance, repair, illumination, inspection, and superintendence of light-house depots, supply stations, light and signal stations, light-houses, light-vessels, light-house tenders, fog signals, submarine signals, beacons, buoys, day marks, post-lantern lights, and seamarks and their appendages, and generally of the Light-House Service; and the charge and custody of all the archives, books, documents, drawings, models, returns, apparatus, and other things appertaining to the Light-House Establishment. (36 Stat. 538.)

See note to section 4 of this act, ante, § 896.

The Secretary of Commerce and Labor is to be called the Secretary of Commerce by a provision of Act March 4, 1913, c. 141, § 1, post, § 932.

The powers and duties of the Light-House Board in regard to the Light-House Service were prescribed by R. S. § 4658, as amended by Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 252, and its jurisdiction was extended over the Mis-

sissippi, Ohio, and Missouri rivers, by a provision of Act June 23, 1874, c. 455, § 1, 18 Stat. 220. The charge and control of the Service, etc., were conferred on the Commissioner of Light-Houses, by this section, and R. S. § 4658, was repealed, by section 13 of this act.

§ 900. (Act July 27, 1912, c. 255, § 2.) Designation of Acting Commissioner in absence of Commissioner and Deputy Commissioner.

Hereafter, in case of the absence of the Commissioner and Deputy Commissioner of the Bureau of Lighthouses, the Secretary of Commerce and Labor may designate some officer of said bureau to perform the duties of the commissioner during his absence. (37 Stat. 239.)

This provision was the first part of section 2 of Act July 27, 1912, c. 255, § 2, an act to authorize additional aids to navigation in the Light-House Service, etc., cited above.

Further provisions of this section, relating to the Light-House Service, are set forth post, § 8449.

CHAPTER F

The Bureau of Fisheries

A Commissioner of Fish and Fisheries was authorized, and his duties and powers were prescribed, by Res. Feb. 9, 1871, No. 22, 16 Stat. 594, incorporated into R. S. §§ 4395–4398. The Fish Commission and the Office of Commissioner of Fish and Fisheries, and all that pertains to the same, were placed under the jurisdiction and made a part of the Department of Commerce and Labor, by the act establishing that Department, Act Feb. 14, 1903, c. 552, § 4, ante, § 857. Subsequent appropriation and other acts designated the office as the "Bureau of Fisheries."

This chapter includes said provisions of R. S. §§ 4395–4398, and subsequent provisions which remain in force and may be applicable to the Bureau under the Department of Commerce.

Sec.
901. Appointment of Commissioner of Fish and Fisheries; salary; tenure of office.
902. Designation of acting Commissioner during absence of Commissioner and Deputy Commissioner.
903. Details from Revenue Marine for duty under Commissioner.
904. Duties of the Commissioner.
904a. Investigation of damage to fisheries by predacious fish and aquatic animals; duty of Commissioner.
904b. Investigation of damage to fisheries by predacious fish and aquatic animals; purpose of.
905. Executive Departments to aid investigations.
906. Powers of Commissioner.
907. Vessels of the Commission.
907a. Commutation of rations of officers and crews of vessels.
908. Annual statement of expenditures for propagation of food-fishes.

§ 901. (R. S. § 4395, as amended, Act Jan. 20, 1888, c. 1.) Appointment of Commissioner of Fish and Fisheries; salary; tenure of office.

There shall be appointed by the President, by and with the advice and consent of the Senate, a person of scientific and practical acquaintance with the fish and fisheries to be a Commissioner of Fish and Fisheries, and he shall receive a salary at the rate of five thousand dollars a year, and he shall be removable at the pleasure of the President. Said Commissioner shall not hold any other office or employment under the authority of the United States or any State.

Res. Feb. 9, 1871, No. 22, § 1, 16 Stat. 594. Act Jan. 20, 1888, c. 1, 25 Stat. 1.

This section, as enacted in the Revised Statutes, provided for the appointment by the President, by and with the advice and consent of the Senate, from among the civil officers or employés of the Government, of a Commissioner of Fish and Fisheries, said appointee to be a person of proved scientific and practical acquaintance with the fishes of the coast, and to serve without additional

salary. It was amended by Act Jan. 20, 1888, c. 1, last cited above, to read as set forth here.

The Fish Commission and the office of Commissioner were placed under the jurisdiction of and made a part of the Department of Commerce and Labor, by the act establishing that Department, Act Feb. 14, 1903, c. 552, § 4, ante, § 857.

Subsequent appropriations provide an increased salary for the commissioner. The appropriation for the fiscal year 1917 was $6,000, by Act July 1, 1916, c. 209, § 1, 39 Stat.

Provisions authorizing the Commissioner to designate, from the employés of the Commission, an assistant to discharge his duties in case of his absence, etc., and designating said assistant as Assistant Commissioner, contained in Act March 3, 1883, c. 143, § 1, 22 Stat. 628, and Act March 3, 1885, c. 359, 23 Stat. 450, were superseded by appropriations, after the transfer of the Commission to the Department of Commerce and Labor, for a Deputy Commissioner, and by the provision for designation of an officer to perform the duties of the Commissioner during the absence of the Commissioner and Deputy Commissioner, of Act March 4, 1911, c. 285, § 1, post, § 902.

Appropriations for the Bureau, including salaries of officers, clerks, and other employés, and expenses, are made in the annual sundry civil appropriation acts. The appropriation for the fiscal year 1917 provided for the commissioner, $6,000; deputy commissioner, $3,500; assistants in charge of divisions—fish culture, $2,700; inquiry respecting food fishes, $2,700; statistics and methods of fisheries, $2,500; assistants—one, in charge of office, $2,500, one $2,500, one $2,400, one $2,000, one $1,800, one $1,600, two at $1,200 each, and two at $900 each; fish pathologist (to be appointed by the Secretary of Commerce), $2,500; architect and engineer, $2,200; assistant architect, $1,600; draftsman, $1,200; accountant, $2,100; librarian, $1,500; superintendent of car and messenger service, $1,600; and clerks of various classes and other employés—by Act July 1, 1916, c. 209, § 1, 39 Stat.

Details for duty under the Commissioner of officers and men of the Revenue Marine Service were authorized by a provision of Act March 3, 1885, c. 360, post, § 903.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Appointment of deputy commissioner.—The deputy commissioner of fisheries must be appointed by the President, by and with the advice and consent of the Senate, and where such appointment is made by the head of the department it is illegal, and the incumbent's status is that of a de facto officer. A new appointment is not made necessary, however, merely by reason of the increase of the salary of the office. (1911) 29 Op. Atty. Gen. 116.

What law governs fishery rights.—The waters of Lake Champlain, within the limits of the United States, being partly in New York and partly in Vermont, the right to take fish therefrom depends solely upon the laws of the one or of the other of those states, according as the locus is within the boundaries of the one or of the other. The general government can afford no relief. (1881) 17 Op. Atty. Gen. 74.

The regulation of fisheries in navigable waters within the territorial limits of the several states, in the absence of federal treaty, is a subject of state rather than of federal jurisdiction. (1898) 22 Op. Atty. Gen. 214.

Cited without definite application, Manchester v. Massachusetts (1891) 11 Sup. Ct. 559, 561, 139 U. S. 240, 35 L. Ed. 159; McDonald & Johnson v. Southern Express Co. (C. C. 1904) 134 Fed. 282.

§ 902. (Act March 4, 1911, c. 285, § 1.) Designation of acting Commissioner during absence of Commissioner and Deputy Commissioner.

Hereafter in the case of the absence of the Commissioner and Deputy Commissioner of Fisheries the Secretary of Commerce and Labor may designate some officer of said bureau to perform the duties of the Commissioner during their absence. (36 Stat. 1436.)

This was a provision of the sundry civil appropriation act for the fiscal year 1912, cited above.

Appropriations for the Deputy Commissioner, mentioned in this provision, were made, after the transfer of the Commission to the Department of Commerce, in the annual sundry civil appropriation acts. The appropriation for the fiscal year 1917 was $3,500, by Act July 1, 1916, c. 209, § 1, 39 Stat.

This provision supersedes previous provisions for designation of an Assistant Commissioner, to discharge the duties of the Commissioner in his absence, etc., contained in Act March 3, 1883, c. 143, § 1, 22 Stat. 628, and Act March 3, 1885, c. 359, 23 Stat. 450.

See notes to § 901, ante.

§ 903. (Act March 3, 1885, c. 360.) Details from Revenue Marine for duty under Commissioner.

The Secretary of the Treasury is authorized to detail from time to time for duty under the Commissioner of Fish and Fisheries any officers and men of the Revenue Marine Service whose services can be spared for such duty. (23 Stat. 494.)

This was a provision of the sundry civil appropriation act for the fiscal year 1886, cited above.

Provisions relating to revenue cutters and boats are contained in Title XXXIV, "Collection of Duties upon Imports," c. 3, §§ 5389–5461.

§ 904. (R. S. § 4396.) Duties of the Commissioner.

The commissioner of fish and fisheries shall prosecute investigations and inquiries on the subject, with the view of ascertaining whether any and what diminution in the number of the food-fishes of the coast and the lakes of the United States has taken place; and, if so, to what causes the same is due; and also whether any and what protective, prohibitory, or precautionary measures should be adopted in the premises; and shall report upon the same to Congress.

Res. Feb. 9, 1871, No. 22, § 2, 16 Stat. 594.

The Commissioner was required to submit to Congress an annual detailed statement of expenditures under all appropriations for "propagation of food-fishes," by Act March 3, 1887, c. 362, post, § 908.

He was also required to embrace in the annual estimates of appropriations estimates for all officers, clerks, and other employés whose services are permanent and continuous in their character, and deemed to be necessary, by Act Aug. 5, 1892, c. 380, § 1, post, § 6727.

The Commissioner was required to investigate, under the direction of the Secretary of the Treasury, and, when requested, to report annually to the Secretary, regarding the conditions of seal life upon the rookeries of the Pribilof Island, and also to continue his inquiries relative to the life, history, and migrations of the fur seals frequenting the waters of Behring Sea, by Act March 3, 1893, c. 208, § 1, post, § 8860.

The Commissioner was directed to investigate the damage to fisheries by dogfish and other predacious fishes and aquatic animals, by Act June 21, 1916, c. 160, post, §§ 904a–904c.

The printing and distribution of the reports of the Commissioner and of the bulletins of the Commission, were provided for by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, pars. 10, 11, post, §§ 7062, 7063.

§ 904a. (Act June 21, 1916, c. 160, § 1.) Investigation of damage to fisheries by predacious fish and aquatic animals; duty of Commissioner.

That the Commissioner of Fisheries be, and he is hereby, authorized and directed to conduct investigations and experiments for the purpose of ameliorating the damage wrought to the fisheries by dogfish and other predacious fishes and aquatic animals. (39 Stat.)

This section, and the section next following, were part of an act entitled "An act to conduct investigations and experiments for ameliorating the dam-

age wrought to the fisheries by predacious fishes and aquatic animals," cited above. Section 3 of said act made an appropriation to enable the Commissioner to carry out the provisions of the act.

§ 904b. (Act June 21, 1916, c. 160, § 2.) Investigation of damage to fisheries by predacious fish and aquatic animals; purpose of.

The said investigations and experiments shall be such as to develop the best and cheapest means of taking such fishes and aquatic animals, of utilizing them for economic purposes, especially for food and to encourage the establishment of fisheries and markets for them. (39 Stat.)

See note to § 904 ante.

§ 905. (R. S. § 4397.) Executive Departments to aid investigations.

The heads of the several Executive Departments shall cause to be rendered all necessary and practicable aid to the commissioner in the prosecution of his investigations and inquiries.

Res. Feb. 9, 1871, No. 22, § 3, 16 Stat. 594.

§ 906. (R. S. § 4398.) Powers of Commissioner.

The commissioner may take or cause to be taken at all times, in the waters of the sea-coast of the United States, where the tide ebbs and flows, and also in the waters of the lakes, such fish or specimens thereof as may in his judgment, from time to time, be needful or proper for the conduct of his duties, any law, custom, or usage of any State to the contrary notwithstanding.

Res. Feb. 9, 1871, No. 22, § 4, 16 Stat. 594.

Duplicate specimens may be distributed to colleges, academies, and other institutions of learning upon the payment of the cost of preparation for and the transportation of such specimens, by a provision of Act March 3, 1883, c. 143, § 1, post, § 10578.

Cited without definite application, Manchester v. Massachusetts (1891) 11 Sup. Ct. 559, 565, 139 U. S. 240, 35 L. Ed. 159; McDonald & Johnson v. Southern Express Co. (C. C. 1904) 134 Fed. 282.

§ 907. (Act May 31, 1880, c. 113, § 1.) Vessels of the Commission.

The Secretary of the Navy is hereby authorized to place the vessels of the United States Fish Commission on the same footing with the Navy Department as those of the United States Coast and Geodetic Survey. (21 Stat. 151.)

This was a provision of an appropriation act for the payment of deficiencies in the appropriation for the payment of pensions for the fiscal year 1880, cited above.

Provisions relating to the vessels of the Coast and Geodetic Survey were made by R. S. § 4686, post, § 8557.

§ 907a. (Act Sept. 8, 1916, c. 464, § 1.) Commutation of rations of officers and crews of vessels.

Commutation of rations may be paid to officers and crews of vessels of the Bureau of Fisheries at such rates as the Secretary of Commerce may fix and under regulations prescribed by him, not to exceed 50 cents per day to each person. (39 Stat.)

This was a provision in the deficiency appropriation act for the year 1916, cited above.

§ 908. (Act March 3, 1887, c. 362.) Annual statement of expenditures for propagation of food-fishes.

The Commissioner of Fish and Fisheries shall submit to Congress at its next session a detailed statement of the expenditures for the fiscal year eighteen hundred and eighty-seven under all appropriations for "propagation of food-fishes;" and annually thereafter a detailed statement of expenditures under all appropriations for "propagation of food-fishes" shall be submitted to Congress at the beginning of each session thereof. (24 Stat. 523.)

This was a provision of the sundry civil appropriation act for the fiscal year 1888, cited above.

CHAPTER G

The Census Office

Sec.
909. Census Office made permanent.
910. Time of organization of permanent Census Office.
911. Director of the Census; salary; duties.
912. Director of the Census to edit, index, and publish Official Register.
913. Officers, clerks, and employés; bond of disbursing clerk.
913a. Division of Cotton and Tobacco Statistics.
913b. Special agents for Division of Cotton and Tobacco Statistics; rate of compensation.
914. Appointment of employés; preference of honorably discharged soldiers and their widows.
915. Additional officers during decennial census period.
916. Duties of Assistant Director and of appointment clerk; additional bond of disbursing clerk during decennial period.
917. Compensation of officials during decennial census period.
918. Additional clerks and employés during decennial census period.
919. Examinations for appointment of additional clerks and employés; selections; temporary employment or appointment; transfers to and from Census Office.
920. Transfer to Census Office of schedules, records and reports of former censuses; copies to be furnished to governors of States, etc., or chief officers of municipal governments.

The Census Office, temporarily established in the Department of the Interior for the taking of the Twelfth Census, in accordance with Act March 3, 1899, c. 419, § 2, 30 Stat. 1014, was made a permanent office by the Census Act of March 6, 1902, c. 139, § 1, 32 Stat. 51, and was transferred to the Department of Commerce and Labor by the act establishing that Department, Act Feb. 14, 1903, c. 552, § 4, ante, § 857.

This chapter includes the provisions of said acts and subsequent provisions which remain in force and may be applicable to the Census Office in the Department of Commerce.

§ 909. (Act March 6, 1902, c. 139, § 1.) Census office made permanent.

The Census Office temporarily established in the Department of the Interior in accordance with an Act entitled "An Act to provide for taking the Twelfth and subsequent censuses," approved March third, eighteen hundred and ninety-nine, is hereby made a permanent office. (32 Stat. 51.)

This section and the two sections next following were part of the Census Act of 1902, entitled "An act to provide for a permanent Census Office," cited above. Other sections of the act are set forth post, §§ 913, 914, 4489–4491, 4503, 4514.

All provisions of Act March 3, 1899, c. 419, 30 Stat. 1014, mentioned in this section, which were inconsistent with this act, and several supplemental acts amendatory thereof, were repealed by section 12 of this act, 32 Stat. 53. And said Act March 3, 1899, c. 419, was repealed by Act July 2, 1909, c. 2, § 33, post, § 4519.

The Census Office was transferred from the Department of the Interior to the Department of Commerce and Labor by the act establishing the latter department, Act Feb. 14, 1903, c. 552, § 4, ante, § 857.

This act, establishing the permanent Census Office, and acts amendatory thereof and supplemental thereto, except as amended in the act to provide for the Thirteenth and subsequent decennial censuses, Act July 2, 1909, c. 2, 36 Stat. 10, remain in full force, by section 33 of said act, post, § 4519.

The transfer to the Census Office of all the schedules, records, and volumes of reports of the eleven decennial enumerations from 1790 to 1890, in possession of the Department of the Interior, was provided for by Act Jan. 12, 1903, c. 90, post, § 920.

§ 910. (Act March 6, 1902, c. 139, § 2.) Time of organization of permanent Census Office.

The work pertaining to the Twelfth Census shall be carried on by the Census Office under the existing organization until the first day of July, nineteen hundred and two, when the permanent Cen-

sus Office herein provided for shall be organized by the Director of the Census. (32 Stat. 51.)

§ 911. (Act March 6, 1902, c. 139, § 3.) Director of the Census; salary; duties.

The permanent Census Office shall be in charge of a Director of the Census, appointed by the President, by and with the advice and consent of the Senate, who shall receive an annual salary of six thousand dollars. It shall be his duty to superintend and direct the taking of the Thirteenth and subsequent censuses of the United States and to perform such other duties as may be imposed upon him by law. (32 Stat. 51.)

The Secretary of the Interior was authorized to exercise supervisory powers in relation to taking and returning of the census, by R. S. § 443, ante, § 866.

Notes of Decisions

Seal of Census Office.—The Secretary of Commerce and Labor is authorized to require the Director of the Census to provide a seal for that office, as directed by section 31 of the Act of March 3, 1899 (30 Stat. 1021), and to give it a device in accordance with his (the Secretary's) views. 1903) 25 Op. Atty. Gen. 1.

There is nothing in the nature of this duty that is judicial or quasi judicial, or of such a character that its performance should not be subject to the direction of the head of the Department. Id.

§ 912. (Act June 7, 1906, c. 3048.) Director of the Census to edit, index, and publish Official Register.

The Director of the Census shall edit, index, and publish the Official Register of the United States, and the provisions of existing law imposing that duty upon the Department of the Interior are hereby repealed, and the data to be included in the Official Register, which is now required to be transmitted to the Secretary of the Interior, shall hereafter be transmitted to the Director of the Census. (34 Stat. 219.)

This was a provision added to section 7 of Act March 6, 1902, c. 139, 32 Stat. 52, by amendment of said section by Act June 7, 1906, c. 3048, cited above.

Said section, as otherwise amended by that act, is set forth post, § 4489.

The provisions imposing on the Secretary of the Interior the duty to cause the Official Register to be edited, indexed, and published by the chief clerk of the Interior Department, mentioned in this provision, and superseded thereby, were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, pars. 63–68, post, § 7092.

Further provisions as to the contents, etc., of the Official Register, of said Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, and subsequent acts are set forth post, §§ 7092, 7127, 7128.

§ 913. (Act March 6, 1902, c. 139, § 4, as amended, Act June 30, 1902, c. 1325.) Officers, clerks, and employés; bond of disbursing clerk.

There shall be in the Census Office, to be appointed by the Director thereof, with the approval of the head of the Department to which the said Census Office is attached, four chief statisticians, who shall be persons of known and tried experience in statistical work, at an annual salary of two thousand five hundred dollars each; a chief clerk, at an annual salary of two thousand five hundred dollars, who, in the absence of the Director, shall serve as acting director; a disbursing clerk, who shall also act as appointment clerk, at an annual salary of two thousand five hundred dollars; one stenographer, at an annual salary of one thousand five hundred dollars; four expert chiefs of division, at an annual salary of one thousand eight hundred dollars each; six clerks of class three; ten clerks of class two; and such number of clerks of class one, and of clerks, copyists, computers, and skilled laborers, with salaries at the rate of not less than six hundred dollars nor more than one thousand dollars per annum, messengers, assistant messengers, watchmen, un-

skilled laborers, and charwomen as may be necessary for the proper and prompt performance of the duties required by law. The disbursing clerk herein provided for shall, before entering upon his duties, give bond to the Secretary of the Treasury in the sum of twenty-five thousand dollars, which bond shall be conditioned that the said officer shall render a true and faithful account to the proper accounting officers of the Treasury quarter yearly of all moneys and properties which shall be received by him by virtue of his office, with surety, to be approved by the Solicitor of the Treasury. Such bond shall be filed in the office of the Secretary of the Treasury, to be by him put in suit upon any breach of the conditions thereof. (32 Stat. 51. 32 Stat. 506.)

This section and the section next following were sections 4 and 5 of the act to provide for a permanent Census Office, first cited above.

See notes to section 1 of the act, ante, § 909.

The amendment of this section by Act June 30, 1902, c. 1325, cited above, consisted in the insertion after the word "watchmen," and before the words "and charwomen," of the words "unskilled laborers."

The appointment of employés of the Office was provided for by the next following section of this act, post, § 914.

Estimates in detail for the expenses of the permanent Census Office are to be submitted annually in the regular Book of Estimates, by a provision of Act June 28, 1902, c. 1301, § 1, post, § 6714.

Annual appropriations for the Census Office are made in the legislative, executive, and judicial appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

During the decennial census period, the annual compensation of the officials of the Census Office is increased, by Act July 2, 1909, c. 2, § 5, post, § 917.

During the decennial census period, in addition to the force in the Census Office provided for by this act, the appointment of an Assistant Director and other officers, and the employment of additional clerks and other employés are authorized by Act July 2, 1909, c. 2, §§ 3, 4, 6, 7, post, §§ 915, 916, 918, 919.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 913a. (Act May 10, 1916, c. 117, § 1.) Division of Cotton and Tobacco Statistics.

Hereafter there shall be in the official organization of the bureau a separate, distinct, and independent division called the Division of Cotton and Tobacco Statistics. (39 Stat.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1916, cited above. See notes to § 913b, post.

§ 913b. (Act May 10, 1916, c. 117, § 1.) Special agents for Division of Cotton and Tobacco Statistics; rate of compensation.

The compensation of not to exceed five special agents provided for in this paragraph may be fixed at a rate not to exceed $8 per day. (39 Stat.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above. "The special agents provided for in this paragraph" are those provided for by a preceding portion of the paragraph, making an appropriation for securing information for census reports provided for by law, etc., and for per diem compensation of special agents and supervising special agents, etc. See notes to § 4421a, post.

§ 914. (Act March 6, 1902, c. 139, § 5.) Appointment of employés; preference of honorably discharged soldiers and their widows.

All employees of the Census Office, at the date of the passage of this Act, except unskilled laborers, may be appointed by the Director of the Census with the approval of the head of the Department to which said Census Office is attached, and when so appointed shall be and they are hereby placed, without further examination, under the provisions of the civil service Act approved January sixteenth, eighteen hundred and eighty-three, and the amendments thereto and the rules established thereunder; and persons who have served as soldiers in any war in which the United States may have been engaged, who have been honorably discharged from the service of the United States, and the widows of such soldiers, shall have preference in the matter of employment; and all new appointments to the permanent clerical force in the Census Office hereby created shall be made in accordance with the requirements of the civil service Act above referred to.

Act March 6, 1902, c. 139, § 5, 32 Stat. 51.

See notes to section 1 of this act, ante, § 909.

The Civil Service Act of 1883, with the amendments thereto, mentioned in this section, is set forth post, §§ 3271–3282.

Notes of Decisions

Special agents and field employés.—The words "all employés of the Census Office" cannot be held to apply to special agents or other field employés who may be temporarily assigned to service in the Census Office. (1902) 24 Op. Atty. Gen. 78.

Nature and extent of requirement as to preference.—The preference given honorably discharged soldiers of the United States by this section in the matter of employment in the permanent Census Office is not absolute and regardless of qualifications. Such preference is to be given if the person is equally qualified; but the appointing power still retains and must exercise its discretion and judgment in determining the fitness for the required work of the persons to be selected and retained. To this end the Director of the Census may fix a reasonable standard of fitness, and guard it by reasonable regulations intended and calculated to secure an efficient permanent force. Such regulations may relate to age, experience, rating, proposed time of service, etc. The preference given by the statute is one with respect to the place sought or held; but, if a person of the preferred class fails to secure the place he seeks, or to retain the one he has, there is no obligation on the appointing power to create a vacancy by dismissing an efficient employé to give him another chance. (1902) 24 Op. Atty. Gen. 64.

Cited without definite application, Western Loan & Savings Co. v. Butte & B. Consol. Min. Co. (1908) 28 Sup. Ct. 720, 210 U. S. 368, 52 L. Ed. 1101.

§ 915. (Act July 2, 1909, c. 2, § 3.) Additional officers during decennial census period.

After June thirtieth, nineteen hundred and nine, and during the decennial census period only, there may be employed in the Census Office, in addition to the force provided for by the Act of March sixth, nineteen hundred and two, entitled "An Act to provide for a permanent Census Office," an Assistant Director, who shall be an experienced practical statistician; a geographer, a chief statistician, who shall be a person of known and tried experience in statistical work, an appointment clerk, a private secretary to the Director, two stenographers, and eight expert chiefs of division. These officers, with the exception of the Assistant Director, shall be appointed without examination by the Secretary of Commerce and Labor upon the recommendation of the Director of the Census. The Assistant Director shall be appointed by the President, by and with the advice and consent of the Senate. (36 Stat. 2.)

This section and the four sections next following were part of the act entitled "An act to provide for the Thirteenth and subsequent decennial censuses," cited above. Other sections of the act are set forth post, §§ 4485–4487, 4493–4502, 4505–4513, 4515–4519.

The provisions of Act March 6, 1902, c. 139, for officers, etc., in the Census

Office, mentioned in this section, were contained in sections 4 and 5 of that act, ante, §§ 913, 914.

The decennial census period, mentioned in this section, was defined as the period of three years beginning the first day of July next preceding the census, by section 2 of this act, post, § 4486.

The Secretary of Commerce and Labor is to be called the Secretary of Commerce, by a provision of Act March 4, 1913, c. 141, § 1, post, § 932.

§ 916. (Act July 2, 1909, c. 2, § 4.) Duties of Assistant Director and of appointment clerk; additional bond of disbursing clerk during decennial period.

The Assistant Director shall perform such duties as may be prescribed by the Director of the Census. In the absence of the Director the Assistant Director shall serve as Director, and in the absence of the Director and Assistant Director the chief clerk shall serve as Director.

The appointment clerk shall perform the appointment duties assigned to the disbursing clerk in section four of the Act entitled "An Act to provide for a permanent Census Office," approved March sixth, nineteen hundred and two. The disbursing clerk of the Census Office shall, at the beginning of the decennial census period, give additional bond to the Secretary of the Treasury in the sum of one hundred thousand dollars, surety to be approved by the Solicitor of the Treasury, which bond shall be conditioned that the said officer shall render, quarterly, a true and faithful account to the proper accounting officers of the Treasury of all moneys and properties which shall be received by him by virtue of his office during the said decennial census period. Such bond shall be filed in the office of the Secretary of the Treasury, and be by him put in suit upon any breach of the conditions thereof. (36 Stat. 2.)

Act March 6, 1902, c. 139, § 4, mentioned in this section, is set forth ante, § 913.

See notes to preceding section of this act, ante, § 915.

§ 917. (Act July 2, 1909, c. 2, § 5.) Compensation of officials during decennial census period.

During the decennial census period the annual compensation of the officials of the Census Office shall be as follows: The Director of the Census, seven thousand dollars; the private secretary to the Director, two thousand two hundred and fifty dollars; the Assistant Director, five thousand dollars; the chief statisticians, three thousand dollars each; the chief clerk, two thousand five hundred dollars; the disbursing clerk, two thousand eight hundred and seventy-five dollars; the appointment clerk, two thousand five hundred dollars; the geographer, two thousand five hundred dollars; the chiefs of division, two thousand dollars each; and the stenographers provided for in section three of this Act, one thousand eight hundred dollars each. (36 Stat. 2.)

The compensation of the Director of the Census and officers in the Census Office was prescribed by Act March 6, 1902, c. 139, §§ 3, 4, ante, §§ 911, 913.

See notes to section 3 of this act, ante, § 915.

§ 918. (Act July 2, 1909, c. 2, § 6.) Additional clerks and employés during decennial census period.

In addition to the force hereinbefore provided for and to that already authorized by law there may be employed in the Census Office during the decennial census period, and no longer, as many clerks of classes four, three, two, and one; as many clerks, copyists, computers, and skilled laborers, with salaries at the rate of not less than six hundred dollars nor more than one thousand dollars per annum, and as many messengers, assistant messengers, messenger boys, watchmen, unskilled laborers, and charwomen, as may be found necessary for the proper and prompt performance of the duties herein required, these additional clerks and employees to be appointed by the

Director of the Census: Provided, That the total number of such additional clerks of classes two, three, and four shall at no time exceed one hundred: And provided further, That employees engaged in the compilation or tabulation of statistics by the use of mechanical devices may be compensated on a piece-price basis to be fixed by the Director. (36 Stat. 2.)

See notes to section 3 of this act, ante, § 915.

§ 919. (Act July 2, 1909, c. 2, § 7.) Examinations for appointment of additional clerks and employés; selections; temporary employment or appointment; transfers to and from Census Office.

The additional clerks and other employees provided for in section six shall be subject to such special test examination as the Director of the Census may prescribe, the said examination to be conducted by the United States Civil Service Commission, the examination to be open to all applicants without regard to political party affiliations, and such examination shall be held at such places in each State as may be designated by the Civil Service Commission. Copies of the eligible registers so established and the examination papers of all eligibles shall be furnished the Director of the Census by the Civil Service Commission, and selections therefrom shall be made by the Director of the Census, in conformity with the law of apportionment as now provided for the classified service, in the order of rating: * * Provided, however, That when the exigencies of the service require, the Director may appoint for temporary employment not exceeding sixty days' duration from the aforesaid list of eligibles those who, by reason of residence or other conditions, are immediately available; and may also appoint for not exceeding sixty days' duration, persons having had previous experience in operating mechanical appliances in census work whose efficiency records in operating such appliances are satisfactory to him, and may accept such records in lieu of the civil service examination: And provided further, That employees in other branches of the departmental classified service who have had previous experience in census work may be transferred without examination to the Census Office to serve during the whole or a part of the decennial census period, and at the end of such service the employees so transferred, shall be eligible to appointment to positions in any Department held by them at date of transfer to the Census Office, without examination: And provided further, That during the decennial census period and no longer the Director of the Census may fill vacancies in the permanent force of the Census Office by the promotion or transfer of clerks or other employees employed on the temporary force authorized by section six of this Act: And provided further, That at the expiration of the decennial census period the term of service of all employees so transferred and of all other temporary officers and employees appointed under the provisions of this Act shall terminate, and such officers and employees shall not be eligible to appointment or transfer into the classified service of the Government by virtue of their examination or appointment under this Act. (36 Stat. 3.)

This section contained, preceding the provisos set forth here, three other provisos, applying in terms to all applicants for positions in the government service, which prescribed certain requirements for appointment, as to residence, health, and limit of one appointment from the same family. Said provisos are set forth post, § 3284.

See notes to section 3 of this act, ante, § 915.

Notes of Decisions

Temporary employés.—The fourth proviso to section 7, regarding the employment of temporary employés in the Census Office, seems to supersede paragraphs 1 and 2 of Rule VII of the Civil Service Rules, but it is un-

doubtedly governed by the preceding (third) proviso "that in no instance shall more than one person be appointed from the same family." (1909) 27 Op. Atty. Gen. 546.

The word "appointed," in the third and fourth provisos, embraces both employment after examination, in conformity with the law of apportionment and appointment for temporary employment without regard to apportionment. Id.

During the decennial census period clerks in the Census Office may be transferred from the permanent to the temporary force under Act July 2, 1909 (36 Stat. 1), without losing their status in the classified service of the government. (1910) 28 Op. Atty. Gen. 395.

Examination of honorably discharged soldiers and sailors.—Section 1754, R. S., section 3214, post, and section 7 of the Civil Service Act Jan. 16, 1883 (22 Stat. 403), do not exempt honorably discharged soldiers and sailors from examination into the civil service, nor do they interfere with the rule of apportionment established by section 2 of the latter act and re-enacted in section 7 of the Census Service Act of 1909. (1909) 27 Op. Atty. Gen. 546.

§ 920. (Act Jan. 12, 1903, c. 90.) Transfer to Census Office of schedules, records and reports of former censuses; copies to be furnished to governors of States, etc., or chief officers of municipal governments.

The Secretary of the Interior be, and he hereby is, authorized and directed to transfer to the Census Office all of the schedules, records, and volumes of reports of the eleven decennial enumerations from seventeen hundred and ninety to eighteen hundred and ninety, inclusive, that may be in the possession of the Department of the Interior, which transfer shall not change the allotment of such reports heretofore made to Senators and Representatives; and the Director of the Census is hereby authorized, upon the request of a governor of any State or Territory, or the chief officer of any municipal government, to furnish such governor or municipal officer with copies of so much of said files or records as may be requested, at the discretion of the Director of the Census, upon payment of the actual cost of making such copies; and the amounts so received shall be covered into the Treasury of the United States, to be placed to the credit of and in addition to the appropriation made for the taking of the census. (32 Stat. 767.)

This was an act entitled "An act providing for the transfer of census records and volumes to the Census Office, and for other purposes."

Previous provisions for the transfer to the Census Office of records, books, and files relating to preceding censuses necessary in conducting the work of the Census Office, were made by Act March 3, 1899, c. 419, § 29, 30 Stat. 1021.

CHAPTER H

The Bureau of Standards

Sec.
921. Bureau established.
922. Functions of Bureau.
923. Functions, for whom to be exercised; requests therefor.
924. Testing structural, etc., materials for government of District of Columbia.
925. Officers and employés; salaries.
926. Director; appointment; powers and duties; report; bulletins.
927. Appointment of officers and employés.
927a. Apprentices; promotion.
928. Designation of officer to perform duties of Director during his absence.
929. Fees for comparisons, tests, etc.
930. Regulations.
931. Visiting committee.

The National Bureau of Standards, previously known as the Office of Standard Weights and Measures, in the Treasury Department, was established by Act March 3, 1901, c. 872, 31 Stat. 1449, and was transferred to the Department of Commerce and Labor by the act establishing that Department, Act Feb. 14, 1903, c. 552, § 4, ante, § 857.

This chapter includes the provisions of said Act March 3, 1901, c. 872,

and subsequent provisions applicable to the Bureau in the Department of Commerce.

§ 921. (Act March 3, 1901, c. 872, § 1.) Bureau established.

The Office of Standard Weights and Measures shall hereafter be known as the National Bureau of Standards. (31 Stat. 1449.)

This section and the two sections next following were sections 1-3 of an act entitled "An act to establish the National Bureau of Standards," cited above. Sections 4-6, 8-10, of the act, which also contained provisions of a permanent nature, are set forth post, §§ 925-927, 929-931. Section 7 made appropriations for salaries, for erection, equipment, and site for a laboratory, and for general expenses of the Bureau, and is omitted as temporary merely.

The President is authorized to appoint as a member of the Advisory Committee for Aeronautics a representative of the Bureau of Standards, by a provision in Act March 3, 1915, c. 83, post, § 9385a.

§ 922. (Act March 3, 1901, c. 872, § 2.) Functions of Bureau.

The functions of the bureau shall consist in the custody of the standards; the comparison of the standards used in scientific investigations, engineering, manufacturing, commerce, and educational institutions with the standards adopted or recognized by the Government; the construction, when necessary, of standards, their multiples and subdivisions; the testing and calibration of standard measuring apparatus; the solution of problems which arise in connection with standards; the determination of physical constants and the properties of materials, when such data are of great importance to scientific or manufacturing interests and are not to be obtained of sufficient accuracy elsewhere. (31 Stat. 1449.)

A provision of Act May 27, 1908, c. 200, § 1, 35 Stat. 354, which transferred the testing machines at the Watertown Arsenal to the Department of Commerce and Labor, was repealed by Act March 4, 1909, c. 297, § 1, 35 Stat. 905.

Notes of Decisions

Transfer of equipment.—Certain equipment, among which is a 10,000,000-pound testing machine, which was purchased by the Department of the Interior for investigating structural materials is the property of the United States, and under existing law cannot be transferred to the Bureau of Mines, but should be transferred to the Bureau of Standards of the Department of Commerce and Labor in order that it may be applied to the specific purpose for which it was authorized. (1911) 28 Op. Atty. Gen. 549.

§ 923. (Act March 3, 1901, c. 872, § 3.) Functions, for whom to be exercised; requests therefor.

The bureau shall exercise its functions for the Government of the United States; for any State or municipal government within the United States; or for any scientific society, educational institution, firm, corporation, or individual within the United States engaged in manufacturing or other pursuits requiring the use of standards or standard measuring instruments. All requests for the services of the bureau shall be made in accordance with the rules and regulations herein established. (31 Stat. 1449.)

Structural and other materials, purchased for the government of the District of Columbia, when necessary in the judgment of the Commissioners of the District to be tested, shall be tested by the Bureau of Standards, by a provision of Act March 4, 1913, c. 150, post, § 924.

Notes of Decisions

Requests for services.—The Secretary of the Treasury is authorized to provide by regulation what officer or officers of "state governments" shall be recognized by the National Bureau of Standards in requests made upon it for the services specified in that act. (1903) 24 Op. Atty. Gen. 667.

§ 924. (Act March 4, 1913, c. 150.) Testing structural, etc., materials for government of District of Columbia.

Hereafter materials for fireproof buildings, other structural materials, and all materials, other than materials for paving and for fuel, purchased for and to be used by the government of the Dis-

trict of Columbia, when necessary in the judgment of the commissioners to be tested, shall be tested by the Bureau of Standards under the same conditions as similar testing is required to be done for the United States Government. (37 Stat. 945.)

This was a provision of the District of Columbia appropriation act for the fiscal year 1914, cited above.

§ 925. (Act March 3, 1901, c. 872, § 4.) Officers and employés; salaries.

The officers and employees of the bureau shall consist of a director, at an annual salary of five thousand dollars; one physicist, at an annual salary of three thousand five hundred dollars; one chemist, at an annual salary of three thousand five hundred dollars; two assistant physicists or chemists, each at an annual salary of two thousand two hundred dollars; one laboratory assistant, at an annual salary of one thousand four hundred dollars; one laboratory assistant, at an annual salary of one thousand two hundred dollars; one secretary, at an annual salary of two thousand dollars; one clerk, at an annual salary of one thousand two hundred dollars; one messenger, at an annual salary of seven hundred and twenty dollars; one engineer, at an annual salary of one thousand five hundred dollars; one mechanician, at an annual salary of one thousand four hundred dollars; one watchman, at an annual salary of seven hundred and twenty dollars, and one laborer, at an annual salary of six hundred dollars. (31 Stat. 1449.)

Subsequent appropriations provided for increased salaries for the Director and other officers, etc., and for additional physicists, chemists, assistants, etc., and clerks and other employés. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 8, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 926. (Act March 3, 1901, c. 872, § 5.) Director; appointment; powers and duties; report; bulletins.

The director shall be appointed by the President, by and with the advice and consent of the Senate. He shall have the general supervision of the bureau, its equipment, and the exercise of its functions. He shall make an annual report to the Secretary of the Treasury, including an abstract of the work done during the year and a financial statement. He may issue, when necessary, bulletins for public distribution, containing such information as may be of value to the public or facilitate the bureau in the exercise of its functions. (31 Stat. 1449.)

The duties and powers possessed or exercised by the Secretary of the Treasury in and over the Bureau, under the provisions of this section and sections 6 and 8-10 of this act, post, §§ 927, 929-931, were vested in the head of the Department of Commerce, by Act Feb. 14, 1903, c. 552, §§ 4, 10, ante, §§ 857, 859.

§ 927. (Act March 3, 1901, c. 872, § 6.) Appointment of officers and employés.

The officers and employees provided for by this Act, except the

director, shall be appointed by the Secretary of the Treasury, at such time as their respective services may become necessary. (31 Stat. 1450.)

See note to section 5 of this act, ante, § 926.

§ 927a. (Act July 16, 1914, c. 141, § 1.) Apprentices; promotion.

Apprentices in the Bureau of Standards may be promoted after satisfactory apprenticeship, with the approval of the Civil Service Commission, to positions corresponding to the journeyman grades for which their duties logically prepare them, without regard to apportionment: Provided, That they thus acquire no rights to transfer to other lines of work. (38 Stat. 502.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1915, cited above.

§ 928. (Act March 4, 1911, c. 237, § 1.) Designation of officer to perform duties of Director during his absence.

Hereafter in the case of the absence of the Director of the Bureau of Standards the Secretary of Commerce and Labor may designate some officer of said bureau to perform the duties of the director during his absence. (36 Stat. 1231.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1912, cited above.

The Secretary of Commerce and Labor is to be called the Secretary of Commerce by a provision of Act March 4, 1913, c. 141, § 1, post, § 932.

§ 929. (Act March 3, 1901, c. 872, § 8.) Fees for comparisons, tests, etc.

For all comparisons, calibrations, tests, or investigations, except those performed for the Government of the United States or State governments within the United States, a reasonable fee shall be charged, according to a schedule submitted by the director and approved by the Secretary of the Treasury. (31 Stat. 1450.)

See note to section 5 of this act, ante, § 926.

Notes of Decisions

Rights of states.—Each state may properly demand and receive from the National Bureau of Standards all comparisons, calibrations, tests, or investigations, free of charge, which are necessary or essential for a state government in performing its lawful functions. (1903) 24 Op. Atty. Gen. 667.

State institutions may also call upon and receive from that Bureau, free of charge, such services as state governments would be entitled to have performed. Id.

§ 930. (Act March 3, 1901, c. 872, § 9.) Regulations.

The Secretary of the Treasury shall, from time to time, make regulations regarding the payment of fees, the limits of tolerance to be attained in standards submitted for verification, the sealing of standards, the disbursement and receipt of moneys, and such other matters as he may deem necessary for carrying this Act into effect. (31 Stat. 1450.)

See note to section 5 of this act, ante, § 926.

Notes of Decisions

Requests for services.—The Secretary of the Treasury is authorized to provide by regulation what officer or officers of "state governments" shall be recognized by the Bureau in requests made upon it for the services specified in the act. (1903) 24 Op. Atty. Gen. 667.

§ 931. (Act March 3, 1901, c. 872, § 10.) Visiting committee.

There shall be a visiting committee of five members to be appointed by the Secretary of the Treasury, to consist of men prominent in the various interests involved, and not in the employ of the Government. This committee shall visit the bureau at least once a year, and report to the Secretary of the Treasury upon the efficiency of its scientific work and the condition of its equipment. The

bers of this committee shall serve without compensation, but be paid the actual expenses incurred in attending its meetings. period of service of the members of the original committee shall o arranged that one member shall retire each year, and the ap- tments thereafter to be for a period of five years. Appointments e to fill vacancies occurring other than in the regular manner to be made for the remainder of the period in which the vacancy ts. (31 Stat. 1450.)

See note to section 5 of this act, ante, § 926.

TITLE XII B

THE DEPARTMENT OF LABOR

A Department of Labor, under charge of a Commissioner of Labor, was established by Act June 13, 1888, c. 389, 25 Stat. 182, and by section 9 of that act, the Bureau of Labor, created under Act June 27, 1884, c. 127, 23 Stat. 60, was to cease on the organization of the Department. The Department of Commerce and Labor, as an Executive Department, with a Secretary of Commerce and Labor as the head thereof, was established by Act Feb. 14, 1903, c. 552, 32 Stat. 825, and by section 4 of that act, the Department of Labor was placed under the jurisdiction and made a part of the Department of Commerce and Labor with various other offices, bureaus, and branches of the public service also transferred to and placed under the jurisdiction of the Department so established. In subsequent appropriation and other acts, the Department of Labor was designated as the Bureau of Labor in that Department. But by Act March 4, 1913, c. 141, 37 Stat. 736, a new executive department was created, to be called "The Department of Labor," with a Secretary of Labor to be the head thereof, and the Department of Commerce and Labor was thereafter to be called the Department of Commerce, and the Secretary thereof to be called the Secretary of Commerce; the Commissioner General of Immigration, the Commissioners of Immigration, the Bureau of Immigration and Naturalization and the Immigration Service at Large, and the Children's Bureau which had been established in the Department of Commerce and Labor, were transferred therefrom to the Department of Labor to thereafter remain under the jurisdiction of that Department; and the Bureau of Labor and the Commissioner of Labor were likewise transferred to the Department of Labor, with further provisions that the Bureau of Labor should thereafter be known as the Bureau of Labor Statistics, and the Commissioner of Labor be known as the Commissioner of Labor Statistics.

This title, inserted here as additional to the original titles of the Revised Statutes, includes the provisions of said acts and subsequent acts remaining in force and applicable to the Department of Commerce, those relating to the Department, its officers, clerks, employés, etc., generally, being placed in chapter A, and provisions applicable only to particular bureaus, offices, etc., being grouped in the subsequent chapters under the titles of the several bureaus, offices, etc.

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CHAPTER A

The Department and the Secretary of Labor

Sec.

932. Establishment of the Department; Secretary of Labor; change of designations of Department and of Secretary of Commerce and Labor; purpose of Department of Labor; seal.

933. Assistant Secretary; chief clerk, disbursing clerk, and other clerical assistants.

934. Transfer of offices, bureaus, etc., to Department.

935. Transfer of records and papers on file, and furniture in use, in bureaus, offices, etc., transferred to Department.

936. Custody of Department buildings, property, records, etc.; grades and salaries of officers, clerks and employés transferred; work and duties of bureaus, offices, etc., transferred.

Sec.
937. Detail of special immigrant inspectors for duty at Washington.
938. Detail of officer employed in enforcement of Chinese exclusion acts for duty at Department.
939. Detail of officer and clerk employed for enforcing alien contract-labor laws for duty at Department.
940. Powers of Secretary as mediator and to appoint commissioners of conciliation in labor disputes; transfer of duties, powers, etc., of heads of executive departments over bureaus, offices, etc., transferred to Department.
941. Annual report to Congress; special investigations and reports.
942. Report on coordination of activities, duties, and powers of the office of Secretary of Labor with those of existing bureaus, commissions, and Departments, relating to labor and its conditions.
943. Report of expenditures of Division of Naturalization.

§ 932. (Act March 4, 1913, c. 141, § 1.) Establishment of the Department; Secretary of Labor; change of designations of Department and of Secretary of Commerce and Labor; purpose of Department of Labor; seal.

There is hereby created an executive department in the Government to be called the Department of Labor, with a Secretary of Labor, who shall be the head thereof, to be appointed by the President, by and with the advice and consent of the Senate; and who shall receive a salary of twelve thousand dollars per annum, and whose tenure of office shall be like that of the heads of the other executive departments; and section one hundred and fifty-eight of the Revised Statutes is hereby amended to include such department, and the provisions of title four of the Revised Statutes, including all amendments thereto, are hereby made applicable to said department; and the Department of Commerce and Labor shall hereafter be called the Department of Commerce, and the Secretary thereof shall be called the Secretary of Commerce, and the Act creating the said Department of Commerce and Labor is hereby amended accordingly. The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment. The said Secretary shall cause a seal of office to be made for the said department of such device as the President shall approve and judicial notice shall be taken of the said seal. (37 Stat. 736.)

This was the first section of an act entitled "An act to create a Department of Labor," cited above.

Provisions of sections 2–3, 5, 6, and 8–10, relating to the Department and the Secretary generally, are set forth in this chapter, post, §§ 933–936, 940–942.

Section 4 of the act, as well as provisions of other sections, relating to particular bureaus only, are set forth under subsequent chapters of this Title.

Section 7 of the act, providing for a Solicitor of the Department of Justice for the Department of Labor, is set forth ante, § 526.

R. S. § 158, ante, § 232, amended by this section, defined the Executive Departments to which Title IV, relating to all the Executive Departments, should apply.

In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof is required, unless otherwise directed, to perform the duties of the head of such Department until a successor is appointed, or such absence or sickness shall cease, by R. S. § 177, set forth ante, § 259. In case of the death, resignation, absence, or sickness of the head of any Department, except where the Attorney General is concerned, the President may authorize and direct the head of any other Department or any officer in either Department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease, by R. S. § 179, also set forth ante, § 261.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an an-

nual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

A Council of National Defense, composed of the Secretary of War, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor, was created by Act Aug. 29, 1916, c. 418, § 2, set forth post, under Title XVII A, "The Council of National Defense and the Advisory Committee on Aeronautics."

Notes of Decisions

Deportation of aliens.—Under section 4244, post, as amended by Act March 26, 1910, c. 128, § 1, and this and the following sections, and section 4269, post, where an alien was excluded after a finding by the Board of Special Inquiry, confirmed by the Secretary of Labor, that he was attempting to bring in a woman for an immoral purpose, and thereafter returned to the United States and was duly admitted without such finding having been reversed, his entry was in violation of law, and he could be deported. U. S. v. Uhl (1914) 211 Fed. 628, 128 C. C. A. 560. See, also, post, § 4241 et seq., and notes thereunder.

§ 933. (Act March 4, 1913, c. 141, § 2.) Assistant Secretary; chief clerk, disbursing clerk, and other clerical assistants.

There shall be in said department an Assistant Secretary of Labor, to be appointed by the President, who shall receive a salary of five thousand dollars a year. He shall perform such duties as shall be prescribed by the Secretary or required by law. There shall also be one chief clerk and a disbursing clerk, and such other clerical assistants, inspectors, and special agents as may from time to time be provided for by Congress. (37 Stat. 736.)

Further provisions of this section, for the auditing by the Auditor of the Treasury for the State and other Departments, of accounts of salaries and expenses of the office of the Secretary, and of all bureaus and offices under his direction, and of certain other accounts, are set forth ante, § 422.

Appropriations for the salaries of the Secretary and Assistant Secretary, and of other officers, clerks, and employés in the Department, from March 4, 1913, the date when this act took effect, until the end of the fiscal year 1914, were made by the act making appropriations for expenses incident to the first session of the Sixty-Third Congress, Act May 1, 1913, c. 1, 38 Stat. 1.

Further provisions making the appropriations and balances of appropriations for the bureaus, offices, etc., transferred to the Department of Labor available for expenditure in and by the Department, and for the transfer of officers, clerks, and other employés engaged upon work relating to the business of the bureaus and offices so transferred, were made also by said Act May 1, 1913, c. 1, 38 Stat. 2.

Subsequent appropriations for the remainder of the fiscal year 1914, for additional employés in the office of the Secretary, for additional amounts for contingent, etc., expenses for the offices and bureaus of the Department, and for rent for the office of the Secretary, etc., were made by the urgent deficiency act of Oct. 22, 1913, c. 32, 38 Stat. 225.

The appropriations for the fiscal year 1917 were by the legislative, executive and judicial appropriation act for that year, Act May 10, 1916, c. 117, § 1, 39 Stat.

See notes to § 932, ante.

§ 934. (Act March 4, 1913, c. 141, § 3.) Transfer of offices, bureaus, etc., to Department.

The following-named offices, bureaus, divisions, and branches of the public service now and heretofore under the jurisdiction of the Department of Commerce and Labor, and all that pertains to the same, known as the Commissioner General of Immigration, the Commissioners of Immigration, the Bureau of Immigration and

Naturalization, the Division of Information, the Division of Naturalization, and the Immigration Service at Large, the Bureau of Labor, the Children's Bureau, and the Commissioner of Labor, be, and the same hereby are, transferred from the Department of Commerce and Labor to the Department of Labor, and the same shall hereafter remain under the jurisdiction and supervision of the last-named department. (37 Stat. 737.)

Further provisions of this section, relating to the Bureau of Naturalization, and to the Bureau of Labor, respectively, are placed under subsequent chapters of this title, post, §§ 945, 961, 962.

The powers, duties, etc., of the heads of Executive Departments in or over the bureaus, offices, etc., transferred to the Department of Labor, were vested in the head of the Department, by section eight of this act, post, § 940.

Provisions for the transfer to the Department of officers, clerks, and employés in the offices, bureaus, etc., transferred under this act were made by section 6 of this act, post, § 936, and by Act May 1, 1913, c. 1, 38 Stat. 2.

The records and papers on file, and the furniture in use in the bureaus, offices, etc., transferred by this act, were also transferred to the Department of Labor, by section 5 of this act, post, § 935.

The Secretary of Labor has charge of the furniture, records, etc., pertaining to the Department by section 6 of this act, post, § 936.

Provisions previous to this act, for the detail, for duty in the Bureau of Immigration at Washington, of special immigrant inspectors and of officers employed in the enforcement of the Chinese Exclusion Acts and the Alien Contract Labor Laws, which may be applicable to the Bureau of Immigration in the Department of Labor, were made by Act March 2, 1895, c. 177, § 1, Act June 6, 1900, c. 791, § 1, and Act March 3, 1901, c. 853, § 1, post, §§ 937–939.

§ 935. (Act March 4, 1913, c. 141, § 5.) Transfer of records and papers on file, and furniture in use, in bureaus, offices, etc., transferred to Department.

The official records and papers now on file in and pertaining exclusively to the business of any bureau, office, department, or branch of the public service in this Act transferred to the Department of Labor, together with the furniture now in use in such bureau, office, department, or branch of the public service, shall be, and hereby are, transferred to the Department of Labor. (37 Stat. 737.)

§ 936. (Act March 4, 1913, c. 141, § 6.) Custody of Department buildings, property, records, etc.; grades and salaries of officers, clerks, and employés transferred; work and duties of bureaus, offices, etc., transferred.

The Secretary of Labor shall have charge in the buildings or premises occupied by or appropriated to the Department of Labor, of the library, furniture, fixtures, records, and other property pertaining to it or hereafter acquired for use in its business; he shall be allowed to expend for periodicals and the purposes of the library and for rental of appropriate quarters for the accommodation of the Department of Labor within the District of Columbia, and for all other incidental expenses, such sums as Congress may provide from time to time: Provided, however, That where any office, bureau, or branch of the public service transferred to the Department of Labor by this Act is occupying rented buildings or premises, it may still continue to do so until other suitable quarters are provided for its use: And provided further, That all officers, clerks, and employees now employed in any of the bureaus, offices, departments, or branches of the public service in this Act transferred to the Department of Labor are each and all hereby transferred to said department at their present grades and salaries, except where otherwise provided in this Act: And provided further, That all laws prescribing the work and defining the duties of the several bureaus, offices, departments, or branches of the public service by this Act transferred to and made a part of the Department of

Labor shall, so far as the same are not in conflict with the provisions of this Act, remain in full force and effect, to be executed under the direction of the Secretary of Labor. (37 Stat. 738.)

The Secretary of Labor is authorized to permit the use of Charleston immigration and dock for an armory, by the South Carolina Naval Militia, under certain regulations and restrictions, by Res. May 3, 1916, No. 107, 39 Stat.

§ 937. (Act March 2, 1895, c. 177, § 1.) Detail of special immigrant inspectors for duty at Washington.

Bureau of Immigration: * * Hereafter special immigrant inspectors, not to exceed three, may be detailed for duty in the Bureau at Washington. (28 Stat. 780.)

This was a proviso annexed to an appropriation for the Bureau of Immigration in the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above.

Subsequent provisions for detailing one officer employed in the enforcement of the Chinese Exclusion Act, and one employed in the enforcement of the alien contract-labor laws, for duty at Washington, were made by Act June 6, 1900, c. 791, § 1, and Act March 3, 1901, c. 853, § 1, post, §§ 938, 939.

§ 938. (Act June 6, 1900, c. 791, § 1.) Detail of officer employed in enforcement of Chinese exclusion acts for duty at Department.

Nothing in section four of the Act of August fifth, eighteen hundred and eighty-two (Twenty-second Statutes at Large, page two hundred and twenty-five) shall be construed to prevent the Secretary of the Treasury from hereafter detailing one officer employed in the enforcement of the Chinese exclusion Acts for duty at the Treasury Department at Washington. (31 Stat. 611.)

This was a provision accompanying an appropriation for enforcement of the Chinese Exclusion Act in the sundry civil appropriation act for the fiscal year 1901, cited above.

The authority possessed by the Secretary of the Treasury by virtue of any law in relation to exclusion of Chinese having been transferred to the Secretary of Commerce and Labor by Act Feb. 14, 1903, c. 522, § 7, ante, § 858, and this act having provided, by section 6 thereof, ante, § 936, that the laws prescribing the work and defining the duties of the several bureaus, etc., transferred to the Department of Labor, should be executed under the direction of the Secretary of Labor, this provision may be regarded as applicable to the detail of an officer to the Department of Labor.

A further provision of the same act, accompanying the appropriation for enforcement of alien contract-labor laws, authorized the detail of one special inspector for duty in Washington. It was superseded by the provision of the similar act for the year next following Act March 3, 1901, c. 853, § 1, 31 Stat. 1155, which was in turn superseded by a provision in Act March 4, 1915, c. 147, § 1, post, § 939.

§ 939. (Act March 4, 1915, c. 147, § 1.) Detail of officer and clerk employed for enforcing alien contract labor laws for duty at Department.

Section four of the Act of August fifth, eighteen hundred and eighty-two (Twenty-second Statutes, page two hundred and twenty-five), shall not be construed to prevent the Secretary of Labor from hereafter detailing one officer and one clerk employed for the special duty of enforcing the alien contract labor provisions of the immigration Act approved February twentieth, nineteen hundred and seven (Thirty-fourth Statutes, page eight hundred and ninety-eight), in pursuance of section twenty-four of said immigration Act, for duty at the Department of Labor at Washington. (38 Stat. 1151.)

This was a provision of the deficiency appropriation act for the fiscal year 1915, cited above. It superseded a similar provision in Act March 3, 1901, c. 853, § 1, 31 Stat. 1155.

Act Aug. 5, 1882, c. 389, § 4, mentioned in this section, is set forth ante, § 249. Act Feb. 20, 1907, c. 1134, also mentioned in this section, is set forth post

nder Title XXIX, "Immigration," Chapter A, "Regulation and Restriction f Immigration in General."

See notes to the similar provision for detail of an officer employed in enorcement of the Chinese Exclusion Act, Act June 6, 1900, c. 791, § 1, nte, § 938.

40. (Act March 4, 1913, c. 141, § 8.) Powers of Secretary as mediator and to appoint commissioners of conciliation in labor disputes; transfer of duties, powers, etc., of heads of executive departments over bureaus, offices, etc., transferred to Department.

he Secretary of Labor shall have power to act as mediator and ppoint commissioners of conciliation in labor disputes when- in his judgment the interests of industrial peace may require be done; and all duties performed and all power and authornow possessed or exercised by the head of any executive dement in and over any bureau, office, officer, board, branch, or sion of the public service by this Act transferred to the Dement of Labor, or any business arising therefrom or pertaining eto, or in relation to the duties performed by and authority ferred by law upon such bureau, officer, office, board, branch, ivision of the public service, whether of an appellate or revisory racter or otherwise, shall hereafter be vested in and exercised the head of the said Department of Labor. (37 Stat. 738.)

See notes to section 1 of this act, ante, § 932.

An appropriation to pay the expenses of commissioners of conciliation in abor disputes, appointed in pursuance of this section, was made by the rgent deficiency Act of Oct. 22, 1913, c. 32, 38 Stat. 225. The appropriation or the fiscal year 1917, was by the legislative, executive, and judicial apropriation act for that year, Act May 10, 1916, c. 117, § 1, 39 Stat.

41. (Act March 4, 1913, c. 141, § 9.) Annual report to Congress; special investigations and reports.

he Secretary of Labor shall annually, at the close of each fiscal r, make a report in writing to Congress, giving an account of moneys received and disbursed by him and his department and cribing the work done by the department. He shall also, from e to time, make such special investigations and reports as he be required to do by the President, or by Congress, or which himself may deem necessary. (37 Stat. 738.)

42. (Act March 4, 1913, c. 141, § 10.) Report on coordination of activities, duties, and powers of the office of Secretary of Labor with those of existing bureaus, commissions, and Departments, relating to labor and its conditions.

he Secretary of Labor shall investigate and report to Conss a plan of coordination of the activities, duties, and powers of office of the Secretary of Labor with the activities, duties, and vers of the present bureaus, commissions, and departments, so as they relate to labor and its conditions, in order to harmonize unify such activities, duties, and powers, with a view to further islation to further define the duties and powers of such Departt of Labor. (37 Stat. 738.)

43. (Act March 4, 1909, c. 299, § 1.) Report of expenditures of Division of Naturalization.

pecial examiners, Division of Naturalization: For compensation, e fixed by the Secretary of Commerce and Labor, of examiners, rpreters, clerks, and stenographers, for the purpose of carrying the work of the Division of Naturalization, Bureau of Immigra- and Naturalization, provided for by the Act of Congress apved June twenty-ninth, nineteen hundred and six, entitled "An Act stablish a Bureau of Immigration and Naturalization and to pro- e for a uniform rule for the naturalization of aliens throughout

the United States," and for their actual necessary traveling expenses while absent from their official stations, subject to such rules and regulations as the Secretary of Commerce and Labor may prescribe; and for the actual necessary traveling expenses of the officers and employees of the Division of Naturalization in Washington while absent on official duty outside of the District of Columbia, one hundred and twenty-five thousand dollars. A detailed report of the expenditures under the appropriations for this service shall be annually submitted to Congress at the beginning of each regular session thereof. (35 Stat. 982.)

These were provisions of the sundry civil appropriation act for the fiscal year 1910, cited above.

The appropriations made therein and the accompanying provisions relate to the particular fiscal year only, but the requirement of a report of the expenditures under the appropriation for this service, to be submitted annually, may be regarded as permanent. Appropriations for similar purposes are made in the subsequent sundry civil appropriation acts. The provisions for the fiscal year 1917 were made, under the heading "Naturalization Service," by Act July 1, 1916, c. 209, § 1, 39 Stat.

CHAPTER B

The Bureau of Labor Statistics

The Department of Labor, established by Act June 13, 1888, c. 389, 25 Stat. 182, which, on the establishment of the Department of Commerce and Labor, by Act Feb. 14, 1903, c. 552, 32 Stat. 825, was by section 4 of that act placed under the jurisdiction and made a part of said Department, and which was designated in subsequent acts as the Bureau of Labor in that department, was again transferred, on the creation of the Department of Labor as a new executive department by Act March 4, 1913, c. 141, 37 Stat. 736, to said Department, by section 3 of said act, to be known thereafter as the Bureau of Labor Statistics.

This chapter includes the provisions of said acts and subsequent acts relating to said former Department of Labor or Bureau of Labor which remain in force and may be applicable to the Bureau of Labor Statistics as a bureau of the Department of Labor.

Sec.
944. Designations of Bureau and of Commissioner of Labor Statistics; powers and duties of former Commissioner of Labor retained; administration of act granting compensation to injured employés of United States.
945. Powers of Bureau; collection and reports of statistics of labor conditions, etc.; powers of Secretary of Labor.
946. Former Department of Labor; design and duties.
947. Commissioner; appointment and term of office; salary.
948. Duties of Commissioner.
949. Bulletin as to condition of Labor, etc.
950. Bulletin to contain abstract of statistics of certain cities.
951. Reports by Commissioner.
952. Reports of statistics of Labor, etc., in Hawaii.
953. Laws relating to former Bureau of Labor continued in force so far as applicable.

§ 944. (Act March 4, 1913, c. 141, § 3.) Designations of Bureau and of Commissioner of Labor Statistics; powers and duties of former Commissioner of Labor retained; administration of act granting compensation to injured employés of United States.

The Bureau of Labor shall hereafter be known as the Bureau of Labor Statistics, and the Commissioner of the Bureau of Labor shall hereafter be known as the Commissioner of Labor Statistics; and all the powers and duties heretofore possessed by the Commissioner of Labor shall be retained and exercised by the Commissioner of Labor Statistics; and the administration of the Act of May thirtieth, nineteen hundred and eight, granting to certain employees of the United States the right to receive from it compen-

sation for injuries sustained in the course of their employment. (37 Stat. 737.)

These provisions were part of section three of the "Act to create a Department of Labor" cited above.

Previous provisions of the section, transferring the Bureau of Labor and the Commissioner of Labor from the Department of Commerce and Labor to the Department of Labor, are set forth ante, § 934.

The duties of the Bureau of Labor Statistics were prescribed, and the powers of the Secretary of Labor in the performance thereof were defined, by section 4 of this act, post, § 945.

The provisions of Act May 30, 1908, c. 236, mentioned in this section, are set forth post, §§ 8923–8929.

Provisions relating to the former Department of Labor and Commissioner of Labor, and prescribing their powers, duties, etc., are set forth post, §§ 946–953.

§ 945. (Act March 4, 1913, c. 141, § 4.) Powers of Bureau; collection and reports of statistics of labor conditions, etc.; powers of Secretary of Labor.

The Bureau of Labor Statistics, under the direction of the Secretary of Labor, shall collect, collate, and report at least once each year, or oftener if necessary, full and complete statistics of the conditions of labor and the products and distribution of the products of the same, and to this end said Secretary shall have power to employ any or either of the bureaus provided for his department and to rearrange such statistical work and to distribute or consolidate the same as may be deemed desirable in the public interests; and said Secretary shall also have authority to call upon other departments of the Government for statistical data and results obtained by them; and said Secretary of Labor may collate, arrange, and publish such statistical information so obtained in such manner as to him may seem wise. (37 Stat. 737.)

Before the transfer of the Bureau from the Department of Commerce and Labor to this Department by this act, certain duties of the Bureau, prescribed by Act June 13, 1888, c. 389, § 7, post, § 948, in regard to ascertaining the cost of production in foreign countries of articles dutiable in the United States, were transferred to the Bureau of Foreign and Domestic Commerce, in the Department of Commerce and Labor, in connection with provisions for consolidating the Bureau of Manufactures and the Bureau of Statistics in that Department into said Bureau of Foreign and Domestic Commerce, made by Act Aug. 23, 1912, c. 350, § 1, ante, § 873.

Other provisions of said Act June 13, 1888, c. 389, and of subsequent acts, relating to the former Department of Labor and Commissioner of Labor, or to the Bureau of Labor in the Department of Commerce and Labor, are set forth post, §§ 946–953.

§ 946. (Act June 13, 1888, c. 389, § 1.) Former Department of Labor; design and duties.

There shall be at the seat of Government a Department of Labor, the general design and duties of which shall be to acquire and diffuse among the people of the United States useful information on subjects connected with labor, in the most general and comprehensive sense of that word, and especially upon its relation to capital, the hours of labor, the earnings of laboring men and women, and the means of promoting their material, social, intellectual, and moral prosperity. (25 Stat. 182.)

This was the first section of the act to establish the former Department of Labor, which was afterwards transferred to and made part of the Department of Commerce and Labor, and again transferred to this Department, to be known as the Bureau of Labor Statistics therein, as stated in the note at the beginning of this chapter.

Provisions of sections 2, 7, 8, and 9 of this act, relating to the appointment, etc., of the former Commissioner of Labor and his powers and duties in said former Department of Labor, which may be applicable to the Commissioner of Labor Statistics, are set forth post, §§ 947, 948, 951, 953.

Section 3 of this act provided for a chief clerk and other clerks and employés, at specified salaries, in said Department of Labor, to be appointed by the Commissioner of Labor, and for an allowance to special agents for

traveling expenses, and for employment of temporary experts, assistants, etc. The power of appointment thereby vested in the Commissioner could not be exercised by him after the transfer of the Department to the Department of Commerce and Labor and subsequently to this Department, he being no longer the head of the Department. And the provisions of the section had been practically superseded by the different specific provisions for clerks and employés made in the annual appropriation act, each act providing for the fiscal year next following. They were also superseded by the provision of Act March 4, 1913, c. 141, creating this Department, that there should be in the Department certain officers named, "and such other clerical assistants, inspectors, and special agents as may from time to time be provided for by Congress," made by section 2 of the act, ante, § 933.

The appropriations for the Bureau of Labor in the Department of Commerce and Labor for the fiscal year 1914 were by Act March 4, 1913, c. 142, § 1, 37 Stat. 783, and were made available for expenditure in and by the Department of Labor by provisions of Act May 1, 1913, c. 1, 38 Stat. 2. The appropriations for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Said appropriations further provided for allowances to special agents and employés while traveling, and for employment of experts and temporary assistants, such as were authorized by this section.

Section 4 of this act provided that during the absence of the Commissioner, or when the office should become vacant, the chief clerk should perform the duties of Commissioner. No provision for a chief clerk has been made by recent appropriations for the Bureau, but instead thereof, provision has been made for a "Chief Statistician, who shall also perform the duties of chief clerk, $3,000."

Section 5 of this act related to the bond to be required of the disbursing clerk of the former Department. Recent appropriations have made no provision for a disbursing clerk for the Bureau, and a disbursing clerk for the Department was provided for by the act creating it, Act March 4, 1913, c. 141, § 2, ante, § 933.

Section 6 of this act provided that the former Commissioner of Labor should have charge of the building, property, records, etc., of the former Department of Labor. It was superseded, on the transfer of the Bureau to the Department of Commerce and Labor, by provisions of Act Feb. 14, 1903, c. 552, establishing that Department, giving the Secretary of Commerce and Labor charge of the buildings, property, records, etc., of the Department, made by section 9 of that act, ante, § 861, and on the subsequent transfer of the Bureau to this Department, by similar provisions relating to the Secretary of Labor, made by Act March 4, 1913, c. 141, § 6, ante, § 936.

Section 7 of this act prescribed the duties of the former Commissioner of Labor. Certain of said duties were transferred to the Bureau of Foreign and Domestic Commerce in the Department of Commerce and Labor, in connection with the provisions establishing said Bureau by the consolidation of the Bureau of Manufacturers and the Bureau of Statistics in that Department, by provisions of Act Aug. 23, 1912, c. 350, § 1, ante, § 873.

§ 947. (Act June 13, 1888, c. 389, § 2.) Commissioner; appointment and term of office; salary.

The Department of Labor shall be under the charge of a Commissioner of Labor, who shall be appointed by the President, by and with the advice and consent of the Senate; he shall hold his office for four years, unless sooner removed, and shall receive a salary of five thousand dollars per annum. (25 Stat. 182.)

See note to preceding section of this act, ante, § 946.

The Department was to be known as the Bureau of Labor Statistics, and the Commissioner as the Commissioner of Labor Statistics, by provisions of Act March 4, 1913, c. 141, § 3, ante, § 944.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one sal-

ary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 948. (Act June 13, 1888, c. 389, § 7.) Duties of Commissioner.

The Commissioner of Labor, in accordance with the general design and duties referred to in section one of this act, [is specially charged to ascertain, at as early a date as possible, and whenever industrial changes shall make it essential, the cost of producing articles at the time dutiable in the United States, in leading countries where such articles are produced, by fully-Specified units of production, and under a classification showing the different elements of cost, or approximate cost, of such articles of production, including the wages paid in such industries per day, week, month, or year, or by the piece; and hours employed per day; and the profits of the manufacturers and producers of such articles; and the comparative cost of living, and the kind of living]. It shall be the duty of the Commissioner also to ascertain and report as to the effect of the customs laws, and the effect thereon of the state of the currency, in the United States, on the agricultural industry, especially as to its effect on mortgage indebtedness of farmers; [and what articles are controlled by Trusts, or other combinations of capital, business operations, or labor and what effect said trusts, or other combinations of capital, business operations, or labor have on production and prices]. He shall also establish a system of reports by which, at intervals of not less than two years, he can report the general condition, so far as production is concerned, of the leading industries of the country. The Commissioner of Labor is also specially charged to investigate the causes of, and facts relating to, all controversies and disputes between employers and employees as they may occur, and which may tend to interfere with the welfare of the people of the different States, and report thereon to Congress. The Commissioner of Labor shall also obtain such information upon the various subjects committed to him as he may deem desirable from different foreign nations, and what, if any, convict made goods are imported into this country, and if so from whence. (25 Stat. 183.)

See notes to sections 1 and 2 of this act, ante, §§ 946, 947.

The provisions of this section inclosed in brackets, specially charging the former Commissioner of Labor to ascertain the cost in other countries of producing articles dutiable in the United States, etc., and making it his duty to ascertain and report what articles are controlled by trusts, etc., and the effect of said trusts, etc., on production and prices, were superseded by the transfer of the duties therein prescribed to the Bureau of Foreign and Domestic Commerce in the Department of Commerce and Labor, before the transfer of this Bureau from that Department, in connection with provisions consolidating the Bureau of Manufactures and the Bureau of Statistics into said Bureau of Foreign and Domestic Commerce, by Act Aug. 23, 1912, c 350, § 1, ante, § 873.

The Department was to be known as the Bureau of Labor Statistics, and the Commissioner as the Commissioner of Labor Statistics, by provisions of Act March 4, 1913, c. 141, § 3, ante, § 944.

§ 949. (Act March 2, 1895, c. 177, § 1.) Bulletin as to condition of Labor, etc.

The Commissioner of Labor is hereby authorized to prepare and publish a bulletin of the Department of Labor, as to the condition of labor in this and other countries, condensations of State and foreign labor reports, facts as to conditions of employment, and such other facts as may be deemed of value to the industrial interests of the country, and there shall be printed one edition of not exceeding ten thousand copies of each issue of said bulletin for distribution by the Department of Labor. (28 Stat. 805.)

This was a provision of the legislative, executive, and judicial appropriation

acts, accompanying appropriations for the former Department of Labor for the fiscal year 1896, cited above.

The Department was to be known as the Bureau of Labor Statistics, and the Commissioner as the Commissioner of Labor Statistics, by provisions of Act March 4, 1913, c. 141, § 3, ante, § 944.

The Commissioner was authorized to compile, as part of the bulletin of the Department, an abstract of the main features of the official statistics of cities having over 30,000 population, by a provision of Act July 1, 1898, c. 546, § 1, post, § 950.

The printing of extra copies of the Bulletin was provided for by Act June 6, 1900, c. 791, § 1, post, § 7107.

§ 950. (Act July 1, 1898, c. 546, § 1.) Bulletin to contain abstract of statistics of certain cities.

The Commissioner of Labor is authorized to compile and publish annually, as a part of the Bulletin of the Department of Labor, an abstract of the main features of the official statistics of the cities of the United States having over thirty thousand population. (30 Stat. 648.)

This was a provision of the sundry civil appropriation act for the fiscal year 1899, cited above.

See notes to provision of Act March 2, 1895, c. 177, § 1, ante, § 949.

§ 951. (Act June 13, 1888, c. 389, § 8.) Reports by Commissioner.

The Commissioner of Labor shall annually make a report in writing to the President and Congress, of the information collected and collated by him, and containing such recommendations as he may deem calculated to promote the efficiency of the Department. He is also authorized to make special reports on particular subjects whenever required to do so by the President or either House of Congress, or when he shall think the subjects in his charge requires it. He shall, on or before the fifteenth day of December in each year, make a report in detail to Congress of all moneys expended under his direction during the preceding fiscal year. (25 Stat. 183.)

See notes to sections 1 and 2 of this act, ante, §§ 946, 947.

The Department was to be known as the Bureau of Labor Statistics, and the Commissioner as the Commissioner of Labor Statistics, by provisions of Act March 4, 1913, c. 141, § 3, ante, § 944.

Provisions for the printing and distribution of the reports of the Commissioner of Labor were made by the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 16, post, § 7068.

A bound copy of the Congressional Record was to be furnished gratuitously to the Department of Labor by an amendment of the Printing and Binding Act of Jan. 12, 1895, c. 23, § 73, par. 55, by Act Jan. 30, 1903, c. 338, to read as set forth post, § 7090.

§ 952. (Act April 30, 1900, c. 339, § 76, as amended, Act April 8, 1904, c. 948.) Reports of statistics of Labor, etc., in Hawaii.

It shall be the duty of the United States Commissioner of Labor to collect, assort, arrange, and present in reports in nineteen hundred and five, and every five years thereafter, statistical details relating to all departments of labor in the Territory of Hawaii, especially in relation to the commercial, industrial, social, educational, and sanitary condition of the laboring classes, and to all such other subjects as Congress may by law direct. The said Commissioner is especially charged to ascertain the highest, lowest and average number of employees engaged in the various industries in the Territory, to be classified as to nativity, sex, hours of labor, and conditions of employment, and to report the same to Congress. (31 Stat. 155. 33 Stat. 164.)

These provisions were part of section 76 of the act entitled "An act to provide a government for the Territory of Hawaii," as amended to read as set forth here by Act April 8, 1904, c. 948, cited above.

The Commissioner of Labor was to be known as the Commissioner of Labor Statistics, by a provision of Act March 4, 1913, c. 141, § 1, ante, § 944.

3. (Act June 13, 1888, c. 389, § 9.) Laws relating to former Bureau of Labor continued in force so far as applicable.

ll laws and parts of laws relating to the Bureau of Labor cre- under the act of Congress approved June twenty-seventh, teen hundred and eighty-four, so far as the same are applicable not in conflict with this act, and only so far, are continued ıll force and effect. (25 Stat. 183.)

See notes to sections 1 and 2 of this act, ante, §§ 946, 947.

Act June 27, 1884, c. 127, 23 Stat. 60, mentioned in this section, which stablished the Bureau of Labor, was superseded by this act.

Further provisions of this section, for the transfer of the clerks and em- loyés, and the library, records, and property of the former Bureau to the epartment of Labor, and that, on the organization of the Department, the ınctions of the Bureau should cease, are omitted here, as temporary merely, nd executed.

CHAPTER C

The Bureau of Immigration

The office of Superintendent of Immigration in the Treasury Department as created by Act March 3, 1891, c. 551, § 7, 26 Stat. 1085, and the Su- erintendent was designated Commissioner-General of Immigration, under the eading "Bureau of Immigration," by Act March 2, 1895, c. 177, § 1, 28 Stat. 80. The Commissioner-General and the Bureau of Immigration were trans- erred to the Department of Commerce and Labor by the act establishing hat Department, Act Feb. 14, 1903, c. 552, § 4, ante, § 857. Thereafter the esignation of the Bureau was changed to Bureau of Immigration and Natu- alization by Act June 29, 1906, c. 3592, § 1, 34 Stat. 596. On the creation f the Department of Labor by Act March 4, 1913, c. 141, 37 Stat. 736, the Bureau of Immigration and Naturalization was transferred to the Department f Labor, and the Bureau was divided into two Bureaus, to be known there- fter as the Bureau of Immigration and the Bureau of Naturalization.

This chapter includes the provisions of said acts and those of other acts which remain in force and may be applicable to the Bureau of Immigra- ion in the Department of Labor.

Sec.
954. Former office of Superintendent of Immigration in Treasury Department; salary; status; reports; office accommodations; clerks.
955. Bureau of Immigration; Superintendent designated Commissioner-General of Immigration; duties as to administration of alien contract-labor laws.
956. Duties of Commissioner-General as to administration of Chinese exclusion law and of acts regulating immigration.
957. Amendment of Act March 3, 1903, c. 1012, and prior acts relating to alien immigration.
958. Refunding head tax erroneously collected.
959. Duties and powers of Commissioner-General as to administration of immigration laws; regulations; contracts; detail of immigration officers.
960. Division of Information in Bureau; distribution of aliens admitted among the several States; agents of States at immigrant stations.
960a. Motor vehicles for enforcement of immigration and Chinese exclusion laws; purchase, etc., payment for.

54. (Act March 3, 1891, c. 551, § 7.) Former office of Superintendent of Immigration in Treasury Department; salary; status; reports; office accommodations; clerks.

he office of superintendent of immigration is hereby created and blished, and the President, by and with the advice and con- of the Senate, is authorized and directed to appoint such officer, se salary shall be four thousand dollars per annum, payable thly. The superintendent of immigration shall be an officer in Treasury Department, under the control and supervision of Secretary of the Treasury, to whom he shall make annual re- s in writing of the transactions of his office, together with such ial reports, in writing, as the Secretary of the Treasury shall

require. The Secretary shall provide the superintendent with a suitable furnished office in the city of Washington, and with such books of record and facilities for the discharge of the duties of his office as may be necessary. He shall have a chief clerk, at a salary of two thousand dollars per annum, and two first-class clerks. (26 Stat. 1085.)

This section was part of the Immigration Act of 1891, cited above.

The Superintendent of Immigration was designated Commissioner-General of Immigration by a provision, under the heading "Bureau of Immigration," of Act March 2, 1895, c. 177, § 1, post, § 955.

The Commissioner-General, the commissioners of immigration, the Bureau of Immigration, and the Immigration Service at large, were transferred from the Treasury Department to the Department of Commerce and Labor, by provisions of Act Feb. 14, 1903, §§ 4, 10, ante, §§ 857, 859.

Subsequent to such transfer, by Res. April 28, 1904, No. 34, post, § 957, the words "Secretary of the Treasury," wherever used in the Immigration Act of March 3, 1903, or in amendments thereto, or in prior acts in relation to alien immigration, were stricken out, and the words "Secretary of Commerce and Labor" inserted in lieu thereof.

On the creation of the Department of Labor by Act March 4, 1913, c. 141, the Bureau was transferred to the Department of Labor by section 3 of said act, ante, § 934, and all laws prescribing the work and defining the duties of the several Bureaus, etc., transferred to the Department were to remain in force, to be executed under the direction of the Secretary of Labor, by provisions of section 6 of said act, ante, § 936.

Other provisions relating to the duties of the Commissioner-General, of Act March 2, 1895, c. 177, § 1, Act June 6, 1900, c. 791, § 1, and Act Feb. 20, 1907, c. 1134, § 22, are set forth post, §§ 955, 956, 959.

Instead of the provisions of this section relating to the salaries of the Superintendent of Immigration and chief clerk, and for other clerks, recent appropriations provide for the Commissioner-General, $5,000, for an assistant commissioner-general, who shall also act as chief clerk and actuary, $3,500, and for other officers, clerks, and employés. The provisions for the fiscal year 1914, for the Bureau in the Department of Commerce and Labor, were by Act March 4, 1913, c. 142, § 1, 37 Stat. 786, and were made available for expenditures in and by the Department of Labor by provisions of Act May 1, 1913, c. 1, 38 Stat. 2. The provisions for the fiscal year 1917, for the Bureau in the Department of Labor, were by Act May 10, 1916, c. 117, § 1, 39 Stat.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Who may appoint inspectors.—Inspectors of immigration, under this section are to be appointed by the secretary of the treasury, and not by the superintendent of immigration. Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 339, 142 U. S. 651, 35 L. Ed. 1146.

Payment of salaries.—The salaries of the Superintendent of Immigration and of his clerical assistants authorized by this section may be paid by the Secretary of the Treasury out of the immigration fund created under section 1 of Act Aug. 3, 1882, 22 Stat. 214. (1891) 20 Op. Atty. Gen. 69.

Jurisdiction of offense.—Under this section, as amended by Act March 2, 1895, post, § 955, District Court for District of Washington held without jurisdiction of prosecution for failing to file statement required by Act June 25, 1910, § 6, post, § 8817. U. S. v. Lombardo (D. C. 1915) 228 Fed. 980.

Cited without definite application, U. S. ex rel. Turner v. Williams

04) 24 Sup. Ct. 719, 722, 194 U. S. 9, 48 L. Ed. 979; Lapina v. Williams (1914) 34 Sup. Ct. 196, 197, 199, 232 U. S. 78, 58 L. Ed. 515; Warren v. U. S. (1893) 58 Fed. 559, 560, 7 C. C. A. 368.

955. (Act March 2, 1895, c. 177, § 1.) Bureau of Immigration; Superintendent designated Commissioner-General of Immigration; duties as to administration of alien contract-labor laws.

Bureau of Immigration: For Superintendent of Immigration, who all hereafter be designated as Commissioner-General of Immigration, and, in addition to his other duties, shall have charge, under e [Secretary of the Treasury], of the administration of the alien ntract-labor laws, four thousand dollars. (28 Stat. 780.)

This was a provision, accompanying appropriations for the Bureau of Immigration in the legislative, executive, and judicial appropriation act for the fiscal year 1896, cited above.

The words of this provision inclosed in brackets, "Secretary of the Treasury," were stricken out, and the words "Secretary of Commerce and Labor," were inserted in lieu thereof, by Res. April 28, 1904, No. 34, post, § 957. But on the transfer of the Bureau to the Department of Labor, by Act March 4, 1913, c. 141, the laws prescribing the work and defining the duties of the Bureau were to be executed by the Secretary of Labor, by a provision of section 6 of said act, ante, § 936.

See notes to Act March 3, 1891, c. 551, § 7, ante, § 954.

Notes of Decisions

urisdiction of offense.—Under Act rch 3, 1891, § 7, ante, § 954, as ended by this section, District Court District of Washington held with- jurisdiction of prosecution for failing to file statement required by Act June 25, 1910, § 6, post, § 8817. U. S. v. Lombardo (D. C. 1915) 228 Fed. 980.

956. (Act June 6, 1900, c. 791, § 1.) Duties of Commissioner-General, as to administration of Chinese exclusion law and of acts regulating immigration.

Hereafter the Commissioner-General of Immigration, in addition his other duties, shall have charge of the administration of the inese exclusion law and of the various Acts regulating immigrn into the United States, its Territories, and the District of lumbia, under the supervision and direction of the [Secretary of e Treasury]. (31 Stat. 611.)

This was part of a proviso following appropriations for enforcement of the Chinese Exclusion Act and alien contract-labor laws, in the sundry civil appropriation act for the fiscal year 1901, cited above.

The words of this provision inclosed in brackets, "Secretary of the Treasury," were stricken out, and the words "Secretary of Commerce and Labor," were inserted in lieu thereof, by Res. April 28, 1904, No. 34, post, § 957. But on the transfer of the Bureau to the Department of Labor, by Act March 4, 1913, c. 141, the laws prescribing the work and defining the duties of the Bureau were to be executed by the Secretary of Labor, by a provision of section 6 of said act, ante, § 936.

Further provisions as to the duties of the Commissioner-General in the administration of the immigration laws were contained in Act Feb. 20, 1907, c. 1134, § 22, post, § 959.

See notes to Act March 3, 1891, c. 551, § 7, ante, § 954.

957. (Res. April 28, 1904, No. 34.) Amendment of Act March 3, 1903, c. 1012, and prior acts relating to alien immigration.

That the words "Secretary of the Treasury," wherever used in e Act entitled "An Act to regulate the immigration of aliens into e United States," approved March third, nineteen hundred and ree, or in amendments thereto, or in prior Acts in relation to alien imgration, be stricken out, and the words "Secretary of Commerce and abor" inserted in lieu thereof. (33 Stat. 591.)

Said Act March 3, 1903, c. 1012, except section 34 thereof, was repealed by Act Feb. 20, 1907, c. 1134, § 43, post, § 4289, other sections of which act contained provisions covering the subjects of those so repealed.

By Act March 3, 1903, c. 1012, 32 Stat. 1213, mentioned in this resolution, the provisions of that act were to be executed by the Secretary of the

Treasury or by the Commissioner-General of Immigration under the direction or with the approval of the Secretary of the Treasury. But before the passage of that act, the Commissioner-General, the Commissioners of Immigration, the Bureau of Immigration, and the Immigration Service at large, had been transferred from the Treasury Department to the Department of Commerce and Labor, and the duties and powers possessed or exercised by the Secretary of the Treasury in and over that Bureau and branch of the public service, etc., had been vested in the head of the Department of Commerce and Labor, by the act establishing that Department, Act Feb. 14, 1903, c. 552, §§ 4, 10, ante, §§ 857, 859. The amendment of said Act March 3, 1903, c. 1012, and of prior acts, by this resolution, made those acts conform to the changes by such transfer of the Bureau and the Immigration Service, by substituting for the Secretary of the Treasury in their provisions, the Secretary of Commerce and Labor. But on the transfer of the Bureau to the Department of Labor, by Act March 4, 1913, c. 141, the laws prescribing the work and defining the duties of the bureaus, etc., or branches of the public service so transferred, were to be executed by the Secretary of Labor, by a provision of section 6 of said act, ante, § 936.

§ 958. (Act Feb. 3, 1905, c. 297, § 1.) Refunding head tax erroneously collected.

The Commissioner-General of Immigration, with the approval of the Secretary of Commerce and Labor, shall have power to refund head tax heretofore and hereafter collected under section one of the immigration Act approved March third, nineteen hundred and three, upon presentation of evidence showing conclusively that such collection was erroneously made. (33 Stat. 684.)

This was a proviso annexed to an appropriation for the Bureau of Immigration in the legislative, executive, and judicial appropriation act for the fiscal year 1906, cited above.

Act March 3, 1903, c. 1012, § 1, mentioned in this section, authorizing the collection of head tax on alien passengers from foreign ports, was repealed, and similar provisions re-enacted by Act Feb. 20, 1907, c. 1134, §§ 1, 43, post, §§ 4242, 4289.

§ 959. (Act Feb. 20, 1907, c. 1134, § 22.) Duties and powers of Commissioner-General as to administration of immigration laws; regulations; contracts; detail of immigration officers.

The Commissioner-General of Immigration, in addition to such other duties as may by law be assigned to him, shall, under the direction of the Secretary of Commerce and Labor, have charge of the administration of all laws relating to the immigration of aliens into the United States, and shall have the control, direction, and supervision of all officers, clerks, and employees appointed thereunder. He shall establish such rules and regulations, prescribe such forms of bond, reports, entries, and other papers, and shall issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto from fraud and loss, and shall have authority to enter into contract for the support and relief of such aliens as may fall into distress or need public aid; all under the direction or with the approval of the Secretary of Commerce and Labor. And it shall be the duty of the Commissioner-General of Immigration to detail officers of the immigration service from time to time as may be necessary, in his judgment, to secure information as to the number of aliens detained in the penal, reformatory, and charitable institutions (public and private) of the several States and Territories, the District of Columbia, and other territory of the United States and to inform the officers of such institutions of the provisions of law in relation to the deportation of aliens who have become public charges: Provided, That the Commissioner-General of Immigration may, with the approval of the Secretary of Commerce and Labor, whenever in his judgment such action may be necessary to accomplish the purposes of this Act, detail immigration officers, and also surgeons, in accordance with the provi-

sions of section seventeen, for service in foreign countries. (34 Stat. 905.)

This section and the section next following were sections 22 and 40 of the Immigration Act of 1907, entitled "An act to regulate the immigration of aliens into the United States," cited above. Other sections of the act are set forth under Title XXIX, "Immigration," c. A, §§ 4242–4289.

Provisions similar to those of this section were made by Act March 3, 1903, c. 1012, § 22, 32 Stat. 1219, repealed by section 43 of this act, post, § 4289.

A Division of Information in the Bureau was authorized and its duties prescribed by section 40 of this act, post, § 960.

Provisions for the punishment of the transportation in interstate or foreign commerce of women or girls for the purpose of prostitution or debauchery or other immoral purpose, and designating the Commissioner-General of Immigration as the authority of the United States to receive and centralize information concerning the procuration of alien women and girls with a view to their debauchery, and prescribing his duties in that regard, in pursuance of the international agreement for the suppression of the white-slave traffic, are contained in the White-Slave Traffic Act of June 25, 1910, c. 395, § 6, post, § 8817.

Provisions for detailing immigrant inspectors and other officers for service at Washington, made by Act March 2, 1895, c. 177, § 1, Act June 6, 1900, c. 791, § 1, and Act March 3, 1901, c. 853, § 1, are set forth ante, §§ 937–939.

Notes of Decisions

Effect of rules.—Rules and regulations in pursuance of this section have been established for the enforcement of the law, and such rules and regulations have the force and effect of the act itself. U. S. v. Sibray (C. C. 1910) 178 Fed. 144, reversed (1911) 185 Fed. 401, 107 C. C. A. 483.

Cited without definite application, U. S. v. Holland-America Line (1914) 212 Fed. 116, 128 C. C. A. 632; Ex parte Li Dick (D. C. 1909) 174 Fed. 674; In re Bhagat Singh (D. C. 1913) 209 Fed. 700, 703.

§ 960. (Act Feb. 20, 1907, c. 1134, § 40.) Division of Information in Bureau; distribution of aliens admitted among the several States; agents of States at immigrant stations.

Authority is hereby given the Commissioner-General of Immigration to establish, under the direction and control of the Secretary of Commerce and Labor, a division of information in the Bureau of Immigration and Naturalization; and the Secretary of Commerce and Labor shall provide such clerical assistance as may be necessary. It shall be the duty of said division to promote a beneficial distribution of aliens admitted into the United States among the several States and Territories desiring immigration. Correspondence shall be had with the proper officials of the States and Territories, and said division shall gather from all available sources useful information regarding the resources, products, and physical characteristics of each State and Territory, and shall publish such information in different languages and distribute the publications among all admitted aliens who may ask for such information at the immigrant stations of the United States and to such other persons as may desire the same. When any State or Territory appoints and maintains an agent or agents to represent it at any of the immigrant stations of the United States, such agents shall, under regulations prescribed by the Commissioner-General of Immigration, subject to the approval of the Secretary of Commerce and Labor, have access to aliens who have been admitted to the United States for the purpose of presenting, either orally or in writing, the special inducements offered by such State or Territory to aliens to settle therein. While on duty at any immigrant station such agents shall be subject to all the regulations prescribed by the Commissioner-General of Immigration, who, with the approval of the Secretary of Commerce and Labor, may, for violation of any such regulations, deny to the agent guilty of such violation any of the privileges herein granted. (34 Stat. 909.)

See notes to section 22 of this act, ante, § 959.

Detailed estimates for appropriations for additional assistants, clerical and

otherwise, for the Division of Information, were required by a provision of Act March 4, 1907, c. 2918, § 1, post, § 6730.

Provisions for printing the annual reports of the Bureau were made by Res. March 3, 1905, No. 33, post, § 7137.

Annual appropriations for the Division of Information established by this act are made by the legislative, executive, and judicial appropriation acts. The provisions for the fiscal year 1917, for a chief of division, $3,500, assistant chief of division, $2,500, and clerks of various classes, etc., were by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 960a. (Act July 1, 1916, c. 209, § 1.) Motor vehicles for enforcement of immigration and Chinese exclusion laws; purchase, etc., payment for.

The purchase, use, maintenance, and operation of horses and motor vehicles required in the enforcement of the immigration and Chinese exclusion laws outside of the District of Columbia may be contracted for and the cost thereof paid from the appropriation for the execution of those laws, under such terms and conditions as the Secretary of Labor may prescribe. (39 Stat.)

This was a provision of the sundry civil appropriation act for the fiscal year 1917, cited above.

CHAPTER D

The Bureau of Naturalization

The designation of the Bureau of Immigration in the Department of Commerce and Labor was changed to Bureau of Immigration and Naturalization, and said Bureau, in addition to the duties previously prescribed, was given charge of all matters concerning the naturalization of aliens, by Act June 29, 1906, c. 3592, § 1, 34 Stat. 596. On the transfer of that Bureau, with the Division of Naturalization therein, to the Department of Labor, it was divided into two bureaus, to be known as the Bureau of Immigration and the Bureau of Naturalization, and the titles Chief of Division of Naturalization and Assistant Chief were changed to Commissioner of Naturalization and Deputy Commissioner of Naturalization, by provisions of Act March 4, 1913, c. 141, § 3, 37 Stat. 737.

This chapter includes the provisions of said acts and those of other acts which remain in force and may be applicable to the Bureau of Naturalization in the Department of Labor.

Sec.
961. Establishment of Bureau of Naturalization, on division of Bureau of Immigration and Naturalization; Commissioner and Deputy Commissioner of Naturalization.
962. Powers of Commissioner and Deputy Commissioner; mode of appointment.
963. Former Bureau of Immigration designated Bureau of Immigration and Naturalization; duties as to naturalization of aliens; registry of aliens; certificates of registry.

§ 961. (Act March 4, 1913, c. 141, § 3.) Establishment of Bureau of Naturalization, on division of Bureau of Immigration and Naturalization; Commissioner and Deputy Commissioner of Naturalization.

The Bureau of Immigration and Naturalization is hereby divided into two bureaus, to be known hereafter as the Bureau of Immigration and the Bureau of Naturalization, and the titles Chief Division of Naturalization and Assistant Chief shall be Commissioner of Naturalization and Deputy Commissioner of Naturalization. (37 Stat. 737.)

This was a provision of section 3 of the act to create a Department of Labor, cited above.

Preceding provisions of the section, which transferred the Bureau of Immigration and Naturalization, with the Division of Naturalization, from the Department of Commerce and Labor to the Department of Labor, are set forth ante, § 944.

§ 962. (Act March 4, 1913, c. 141, § 3.) Powers of Commissioner and Deputy Commissioner; mode of appointment.

The Commissioner of Naturalization or, in his absence, the Deputy Commissioner of Naturalization, shall be the administrative officer in charge of the Bureau of Naturalization and of the administration of the naturalization laws under the immediate direction of the Secretary of Labor, to whom he shall report directly upon all naturalization matters annually and as otherwise required, and the appointments of these two officers shall be made in the same manner as appointments to competitive classified civil-service positions. (37 Stat. 737.)

This was a further provision of section 3 of the act to create a Department of Labor, cited above.

See notes to preceding provision of this section, ante, § 961.

§ 963. (Act June 29, 1906, c. 3592, § 1.) Former Bureau of Immigration designated Bureau of Immigration and Naturalization; duties as to naturalization of aliens; registry of aliens; certificates of registry.

The designation of the Bureau of Immigration in the Department of Commerce and Labor is hereby changed to the "Bureau of Immigration and Naturalization," which said Bureau, under the direction and control of the Secretary of Commerce and Labor, in addition to the duties now provided by law, shall have charge of all matters concerning the naturalization of aliens. That it shall be the duty of the said Bureau to provide, for use at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this Act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof. (34 Stat. 596.)

This was the first section of the Naturalization Act of 1906, entitled "An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States," cited above.

Section 2 of this act directed the Secretary of Commerce and Labor to provide the Bureau with such additional offices, such books of records and facilities, and such additional assistants, clerks, etc., and other employés as might be necessary for the proper discharge of the duties imposed by this act upon the Bureau.

Appropriations for the purpose of carrying into effect the provisions of this act were made for the Bureau for the fiscal year 1908, including a chief of division of Naturalization, $3,500, an assistant chief of Division, $2,500, clerks of various classes, and other employés, by the sundry civil appropriation act for that year, Act March 4, 1907, c. 2918, § 1, 34 Stat. 1329. Similar appropriations were made by the legislative, executive, and judicial appropriation act for subsequent years. The provisions for such purposes for the fiscal year 1914 were by Act March 4, 1913, c. 142, § 1, 37 Stat. 786, and, with the appropriations for miscellaneous expenses of the Division of Naturalization thereafter made by the sundry civil appropriation act for the same year, Act June 23, 1913, c. 3, § 1, 38 Stat. 65, were made available for expenditure in and by the Department of Labor, by provisions of Act May 1, 1913, c. 1, 38 Stat. 2. The appropriations for salaries for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat., and were as follows: Commissioner, $4,000; deputy commissioner, $3,250; and clerks and other employés.

The appropriations for miscellaneous expenses of the naturalization service for the fiscal year 1917 were by Act July 1, 1916, c. 209, § 1, 39 Stat.

Other sections of this act are set forth under Title XXX, "Naturalization," §§ 4351–4383.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts

are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

Notes of Decisions

Registration of aliens.—Under Act June 29, 1906, §§ 1, 4, where an alien deserted a ship at New York harbor and entered the country without inspection, certificate of arrival, not based on his registry at that time, but on information acquired at a subsequent hearing, held not a sufficient compliance with section 4 to entitle him to admission to citizenship. In re Hollo (D. C. 1913) 206 Fed. 852.

Filing certificate in naturalization proceedings.—The certificate which an applicant is required to file with his petition by Naturalization Act, § 4, post, § 4352, is not necessarily the same certificate which it is provided by this section shall be issued to an immigrant on his registry by the Commissioner of Immigration. In re Schmidt (D. C. 1913) 207 Fed. 678; In re McPhee (D. C. 1913) 209 Fed. 143.

CHAPTER E

The Children's Bureau

The Children's Bureau was established in the Department of Commerce and Labor by Act April 9, 1912, c. 73, 37 Stat. 79, and was transferred to the Department of Labor, on the creation of that Department as a new executive department, by Act March 4, 1913, c. 141, 37 Stat. 736.

This chapter includes the provisions of said Act April 9, 1912, c. 73, as applicable to the Bureau in the Department of Labor.

Sec.
964. Establishment of Bureau.
965. Chief of Bureau; investigations and reports by Bureau; publications.
966. Assistant Chief of Bureau; subordinate officers, clerks, and employés.
967. Quarters for work of Bureau.

§ 964. (Act April 9, 1912, c. 73, § 1.) Establishment of Bureau.

There shall be established in the Department of Commerce and Labor a bureau to be known as the Children's Bureau. (37 Stat. 79.)

This was the first section of an act entitled "An act to establish in the Department of Commerce and Labor a bureau to be known as the Children's Bureau," cited above.

The Bureau was transferred to the Department of Labor by the act creating that Department, Act March 4, 1913, c. 141, § 3, ante, § 934.

All laws prescribing the work and defining the duties of the several bureaus, etc., transferred to the Department of Labor, remained in full force and effect, to be executed under the direction of the Secretary of Labor, by a provision of the act establishing the Department, Act March 4, 1913, c. 141, § 6, ante, § 936.

§ 965. (Act April 9, 1912, c. 73, § 2.) Chief of Bureau; investigations and reports by Bureau; publications.

The said bureau shall be under the direction of a chief, to be appointed by the President, by and with the advice and consent of the Senate, and who shall receive an annual compensation of five thousand dollars. The said bureau shall investigate and report to said department upon all matters pertaining to the welfare of chil-

dren and child life among all classes of our people, and shall especially investigate the questions of infant mortality, the birth rate, orphanage, juvenile courts, desertion, dangerous occupations, accidents and diseases of children, employment, legislation affecting children in the several States and Territories. But no official, or agent, or representative of said bureau shall, over the objection of the head of the family, enter any house used exclusively as a family residence. The chief of said bureau may from time to time publish the results of these investigations in such manner and to such extent as may be prescribed by the Secretary of Commerce and Labor. (37 Stat. 79.)

See notes to preceding section of this act, ante, § 964.

§ 966. (Act April 9, 1912, c. 73, § 3.) Assistant Chief of Bureau; subordinate officers, clerks, and employés.

There shall be in said bureau, until otherwise provided for by law, an assistant chief, to be appointed by the Secretary of Commerce and Labor, who shall receive an annual compensation of two thousand four hundred dollars; one private secretary to the chief of the bureau, who shall receive an annual compensation of one thousand five hundred dollars; one statistical expert, at two thousand dollars; two clerks of class four; two clerks of class three; one clerk of class two; one clerk of class one; one clerk, at one thousand dollars; one copyist, at nine hundred dollars; one special agent, at one thousand four hundred dollars; one special agent, at one thousand two hundred dollars, and one messenger at eight hundred and forty dollars. (37 Stat. 80.)

See notes to section 1 of this act, ante, § 964.

Appropriations for the Bureau are made in the annual legislative, executive, and judicial appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat. In addition to the appropriation for salaries said Act May 10, 1916, c. 117, § 1, 39 Stat., provided an appropriation for traveling expenses, per diem, etc., for the Children's Bureau.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, post, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, post, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, post, § 3230a.

§ 967. (Act April 9, 1912, c. 73, § 4.) Quarters for work of Bureau.

The Secretary of Commerce and Labor is hereby directed to furnish sufficient quarters for the work of this bureau at an annual rental not to exceed two thousand dollars. (37 Stat. 80.)

See notes to section 1 of this act, ante, § 964.

TITLE XII C

THE JUDICIAL CODE

The Judicial Code was enacted by Act March 3, 1911, c. 231, 36 Stat. 1087, entitled, "An act to codify, revise, and amend the laws relating to the judiciary," the enacting clause of which was as follows:

"Be it enacted," etc., "That the laws relating to the judiciary be, and they hereby are, codified, revised, and amended, with title, chapters, headnotes, and sections, entitled, numbered, and to read as follows:"

Said act took effect Jan. 1, 1912, by section 301 thereof, post, § 1278.

This Title of this compilation includes, besides said Judicial Code and the specific amendments thereof incorporated in the several sections, etc., amended, all subsequent provisions relating to subjects embraced in the Code, each such provision inserted in connection with the provisions of the Code of the same nature.

Many sections of Title XIII of the Revised Statutes, "The Judiciary," and subsequent acts and parts of acts relating to the subjects thereof, were incorporated in the Judicial Code and repealed or superseded thereby. Such repeals, etc., are indicated specifically, post, under the several chapters of said Title XIII affected thereby.

Acts and parts of acts subsequent to the Revised Statutes relating to subjects included in Title XIII thereof but not within the scope of the Judicial Code, which remain in force, are set forth, post, under the several chapters of said Title XIII.

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CHAPTER ONE

District Courts—Organization

Sec.

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990. Districts having more than one judge; division of business.

§ 968. (Jud. Code, § 1, as amended, Act July 30, 1914, c. 216.) District courts established; appointment and residence of judges.

In each of the districts described in chapter five there shall be a court called a district court, for which there shall be appointed one judge, to be called a district judge, except that in the northern district of California, the southern district of California, the northern district of Illinois, the district of Minnesota, the district of Nebraska, the district of New Jersey, the eastern district of New York, the northern and southern districts of Ohio, the district of Oregon, the eastern and western districts of Pennsylvania, and the western district of Washington, there shall be an additional district judge in each, and in the southern district of New York three additional district judges: Provided, That there shall be one judge for the eastern and western districts of South Carolina, one judge for the eastern and middle districts of Tennessee, and one judge for the northern and southern districts of Mississippi: Provided further, That the district judge for the middle district of Alabama shall continue as heretofore to be a district judge for the northern district thereof. Every district judge shall reside in the district or one of the districts for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor.

R. S. §§ 551, 552. Act Aug. 2, 1886, c. 842, 24 Stat. 213. Act Dec. 19, 1900, c. 3, 31 Stat. 726. Act Feb. 4, 1903, c. 402, 32 Stat. 795. Act Feb. 9, 1903, c. 527, 32 Stat. 805. Act April 1, 1904, c. 857, 33 Stat. 155. Act March 3, 1905, c. 1418, 33 Stat. 987. Act March 3, 1905, c. 1427, § 2, 33 Stat. 993. Act May 26, 1906, c. 2557, 34 Stat. 202. Act Feb. 25, 1907, c. 1189, 34 Stat. 928. Act Feb. 25, 1907, c. 1198, 34 Stat. 931. Act Feb. 27, 1907. c. 2073, 34 Stat. 997. Act March 2, 1907, c. 2575, 34 Stat. 1253. Act Feb. 26, 1909, c. 215, 35 Stat. 656. Act March 2, 1909, c. 242, 35 Stat 685. Act March 2, 1909, c. 243, 35 Stat. 686. Act Feb. 24, 1910, c. 56, 36 Stat. 201. Act Feb. 24, 1910, c. 57, 36 Stat. 202. Act June 25, 1910, c. 410, 36 Stat. 838. Act March 3, 1911, c. 231, § 1, 36 Stat. 1087. Act July 30, 1914, c. 216, 38 Stat. 580.

This section, as enacted in the Judicial Code, was amended by Act July 30, 1914, c. 216, to read as set forth above. Said amendment was in the addition, after the words "northern district of California," of the words "the southern district of California," and in the omission, after the words "northern district of Illinois," of the words "the district of Maryland," and in the omission, after the words "three additional district judges," of the words, "provided, that whenever a vacancy shall occur in the office of the district judge for the district of Maryland, senior in commission, such vacancy shall not be filled, and thereafter there shall be but one district judge in said district."

Additional district judges were authorized as follows: One for the eastern

district of Pennsylvania, by Act Feb. 16, 1914, c. 20, § 1, post, § 968a; one for the southern district of Georgia, by Act March 3, 1915, c. 96, § 1, post, § 968c; one for the eastern district of South Carolina and one for the western district of South Carolina, by Act March 3, 1915, c. 100, § 1, post, § 968d; and one for the district of New Jersey, by Act April 11, 1916, c. 64, § 1, post, § 968g.

Notes of Decisions

Two judges for same district.—Where there are two district judges of the same federal district, they have, unless the statutes relating to them otherwise provide, equal rights and authority, and in some matters joint rights and authority, and the absence of one of them from the district or the fact that one alone holds the court cannot justify that judge in overriding the rights or authority of a colleague or give legality to his appointment or the removal of court officials without the consent of the absent judge. Ex parte Steele (D. C. 1908) 162 Fed. 694.

Cited without definite application. Ex parte U. S. (1913) 33 Sup. Ct. 170, 226 U. S. 420, 57 L. Ed. 281.

§ 968a. (Act Feb. 16, 1914, c. 20, § 1.) Additional district judge for eastern district of Pennsylvania.

The President of the United States shall appoint an additional district judge for the eastern district of Pennsylvania, by and with the advice and consent of the Senate, who shall reside in said district and shall possess the same qualifications and have the same power and jurisdiction and receive the same salary now prescribed by law in respect of the present district judges therein. (38 Stat. 283.)

This section, and the section next following, were an act entitled "An act to provide for the appointment of an additional district judge in and for the eastern district of Pennsylvania," cited above.

Notes of Decisions

Construction of previous superseded acts—Alabama district.—Act Feb. 25, 1907, c. 1198, 34 Stat. 931, providing for the appointment of a district judge for the Northern district of Alabama, merely created an additional judge for said district, and did not by implication repeal Act Aug. 2, 1886, c. 842, § 2, 24 Stat. 213, by which the then existing judge was vested with jurisdiction within the Middle and Northern districts. Birch v. Steele (1908) 165 Fed. 577, 91 C. C. A. 415.

§ 968b. (Act Feb. 16, 1914, c. 20, § 2.) Vacancy in office of district judge for eastern district of Pennsylvania not to be filled.

That whenever a vacancy shall occur in the office of the district judge for the eastern district of Pennsylvania, senior in commission, such vacancy shall not be filled, and thereafter there shall be but two district judges in said district. (38 Stat. 283.)

See note to § 968a, ante.

§ 968c. (Act March 3, 1915, c. 96, § 1.) Additional district judge for southern district of Georgia.

The President of the United States shall appoint an additional district judge for the southern district of the State of Georgia, by and with the consent of the Senate, who shall reside in the said district and shall possess the same qualifications and have the same power and jurisdiction and receive the same salary now prescribed by law in respect of the present district judge therein: Provided, however, That the President shall make public all indorsements made in behalf of the person appointed as such district judge. (38 Stat. 959.)

This section, and the section next following, were an act entitled "An act providing for the appointment of an additional district judge for the southern district of the state of Georgia," cited above.

§ 968d. (Act March 3, 1915, c. 96, § 2.) Vacancy in office of district judge for southern district of Georgia not to be filled.

Whenever a vacancy shall occur in the office of the district judge for the southern district of the State of Georgia senior in

commission such vacancy shall not be filled, and thereafter there shall be but one district judge in said district. (38 Stat. 960.)

See note to § 968c.

§ 968e. (Act March 3, 1915, c. 100, § 1.) District judges for eastern district and for western district of South Carolina; appointment; assignment of present district judge to eastern district.

There shall be a district judge for the eastern district of South Carolina and a district judge for the western district of South Carolina, who shall be appointed as district judges are appointed in other judicial districts of the United States: Provided, That the President, previous to appointing said judge, shall make public all indorsements of the applicants for said position. The present district judge, who is a resident of the eastern district of South Carolina, is hereby assigned to said eastern district as the district judge thereof. (38 Stat. 961.)

This section, and the section next following, were sections 1 and 2 of an act entitled "An act to provide for the appointment of a district judge, district attorney, and marshal for the western district of South Carolina, and for other purposes," cited above.

§ 968f. (Act March 3, 1915, c. 100, § 2.) Jurisdiction of present district judge in certain pending civil causes in western district.

All causes of a civil nature and motions therein submitted and all causes and proceedings of a civil nature, including proceedings in bankruptcy, now pending in the western district of South Carolina in which the evidence has been taken in whole or in part before the present district judge for the eastern and western districts of South Carolina, or taken in whole or in part and submitted to and passed upon by the said district judge, shall be retained by said judge and proceeded with and disposed of by said judge, who may for that purpose continue to exercise jurisdiction in the said western district. (38 Stat. 961.)

See note to § 968e.

§ 968g. (Act April 11, 1916, c. 64, § 1.) Additional district judge for district of New Jersey.

The President of the United States be, and he hereby is, authorized and directed, by and with the advice and consent of the Senate, to appoint an additional judge of the district court of the United States for the district of New Jersey, who shall reside in said district, and whose term of office, compensation, duties, and powers shall be the same as now provided by law for the judge of said district. (39 Stat.)

This section was an act entitled "An act to create an additional judge in the district of New Jersey," cited above.

§ 969. (Jud. Code, § 2.) Salaries of district judges.

Each of the district judges shall receive a salary of six thousand dollars a year, to be paid in monthly installments.

Act Feb. 12, 1903, c. 547, 32 Stat. 825. Act March 3, 1911, c. 231, § 2, 36 Stat. 1087.

Traveling expenses, etc., of circuit justices and circuit and district judges were provided for by Jud. Code, § 259, post, § 1236.

Notes of Decisions

Commencement of salary.—The salaries of all judges of courts of the United States are due from the date of appointment; but the party does not become entitled to draw pay until he has entered on the duties of his office, or at least taken his official oath; for, until then, though under commission, he is not actually in office; and in some cases, as that of the territorial judges of

Oregon, Washington, Kansas, and Nebraska, salary, though due from date of appointment, cannot be drawn until the judge enters on duty in the territory. (1855) 7 Op. Atty. Gen. 304.

Construction and operation of superseded acts.—See Benedict v. U. S. (1899) 34 Ct. Cl. 388, judgment affirmed (1900) 20 Sup. Ct. 458, 176 U. S. 357, 44 L. Ed. 503.

§ 970. (Jud. Code, § 3.) Clerks.

A clerk shall be appointed for each district court by the judge thereof, except in cases otherwise provided for by law.

R. S. § 555. Act March 3, 1911, c. 231, § 3, 36 Stat. 1087.

Notes of Decisions

Judicial notice of clerks.—The courts of this state are not bound to know the clerks of federal courts in other states. U. S. v. Bank of U. S. (La. 1845) 11 Rob. 418.

Effect of appointment of clerk's successor.—The power of appointment is a continuing one, and the mere appointment of a clerk's successor will per se be a removal of the incumbent. In re Hennen (1839) 13 Pet. 230, 258, 10 L. Ed. 138.

The tenure of ancient common-law offices and the rules and principles by which they are governed have no application to the office of a clerk. Id.

§ 971. (Jud. Code, § 4.) Deputy clerks.

Except as otherwise specially provided by law, the clerk of the district court for each district may, with the approval of the district judge thereof, appoint such number of deputy clerks as may be deemed necessary by such judge, who may be designated to reside and maintain offices at such places of holding court as the judge may determine. Such deputies may be removed at the pleasure of the clerk appointing them, with the concurrence of the district judge. In case of the death of the clerk, his deputy or deputies shall, unless removed, continue in office and perform the duties of the clerk, in his name, until a clerk is appointed and qualified; and for the default or misfeasances in office of any such deputy, whether in the lifetime of the clerk or after his death, the clerk and his estate and the sureties on his official bond shall be liable; and his executor or administrator shall have such remedy for any such default or misfeasances committed after his death as the clerk would be entitled to if the same had occurred in his lifetime.

R. S. § 558. Act March 3, 1911, c. 231, § 4, 36 Stat. 1087.

Notes of Decisions

Judicial notice of appointment of deputy clerks.—The courts of Illinois will take judicial cognizance of the fact that the statutes of the United States authorize the appointment of a deputy clerk for the Circuit Court of the United States. Sullivan v. Algrem (1910) 157 Ill. App. 123.

Powers of deputy clerks.—A deputy clerk may authenticate the transcript of the record for the purposes of an appeal or a writ of error to the supreme court in the name of the clerk. Garneau v. Dozier (1879) 100 U. S. 7, 25 L. Ed. 536.

Under this section the deputy district court clerk has power to perform all ministerial acts of the clerk, including the power to make an order of reference on the filing of a voluntary bankruptcy petition. Gilbertson v. U. S. (1909) 168 Fed. 672, 94 C. C. A. 158.

A recital in an order of reference in a voluntary bankruptcy proceeding that the district judge was absent when the petition was filed did not affect the jurisdiction of the court, which attached on the filing of the petition, but related only to the procedure within such jurisdiction, and was not open to collateral attack. Id.

Deputy clerk of district court held authorized to sign process in his own name. Act March 3, 1821. Bragg v. Lorio (C. C. 1871) Fed. Cas. No. 1,800.

A deputy clerk may, during vacation, and in the absence of the clerk, issue a writ of certiorari or habeas corpus cum causa as auxiliary to the removal of a criminal prosecution from a state to a federal court. North Carolina v. Sullivan (C. C. 1892) 50 Fed. 593, 599.

A deputy clerk holding his office at the pleasure of the court may sign as clerk all process issuing from the court. Ex parte Burdell (D. C. 1887) 32 Fed. 681.

A deputy clerk has no authority to refer a petition in bankruptcy to the referee. Bray v. Cobb (D. C. 1898) 91 Fed. 102, 105.

An order of reference made by the judge and attested by the deputy clerk is valid. Id.

Indictment held not invalid because

names were placed in jury box from which grand jurors were drawn by deputy clerk, instead of clerk, of District Court. U. S. v. Rockefeller (D. C. 1915) 221 Fed. 462.

Liability of clerk for acts of deputy.—Clerk of circuit court of District of Columbia held not liable for the act of his deputy in making an erroneous indorsement on an execution. Patons v. Lee (C. C. 1826) Fed. Cas. No. 10,800.

The clerk is not bound by the acts of his deputy where not in the ordinary course of business. Welddes v. Edsell (C. C. 1841) Fed. Cas. No. 17,375.

Cited without definite application, Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 475, 2 L. R. A. 229; U. S. v. Murphy (D. C. 1897) 82 Fed. 893, 900.

§ 972. (Jud. Code, § 5.) Criers and bailiffs.

The district court for each district may appoint a crier for the court; and the marshal may appoint such number of persons, not exceeding five, as the judge may determine, to wait upon the grand and other juries, and for other necessary purposes.

R. S. § 715. Act March 3, 1911, c. 231, § 5, 36 Stat. 1088.

Appropriations for pay of bailiffs and criers are made in the annual sundry civil appropriation acts. The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

Notes of Decisions

Same person may be both crier and messenger.—See Preston v. U. S. (D. C. 1888) 37 Fed. 417, and cases cited.

Relation to Attorney General or marshal.—Criers receive their appointments directly from the court, and they are entirely independent of the Attorney General or of the marshal. Allen v. U. S. (1906) 41 Ct. Cl. 235.

Status as officers.—Bailiffs and criers of the federal courts, appointed to attend the same, though not constitutional officers, are officers of the court. U. S. v. McCabe (1904) 129 Fed. 708, 709, 64 C. C. A. 236.

Court bailiffs are not officers of the United States. U. S. v. Swift (1905) 139 Fed. 225, 71 C. C. A. 351.

Number of bailiffs.—Appointment of six bailiffs held authorized. U. S. v. Swift (1905) 139 Fed. 225, 228, 71 C. C. A. 351.

Compensation under former act.—See Puleston v. U. S. (D. C. 1898) 88 Fed. 970; U. S. v. McCabe (C. C. 1903) 122 Fed. 653.

§ 973. (Jud. Code, § 6.) Records; where kept.

The records of a district court shall be kept at the place where the court is held. When it is held at more than one place in any district and the place of keeping the records is not specially provided by law, they shall be kept at either of the places of holding the court which may be designated by the district judge.

R. S. § 562. Act March 3, 1911, c. 231, § 6, 36 Stat. 1088.

Notes of Decisions

Judicial notice of records.—A District Court will take judicial notice of its records relative to the duties of its officers when it is claimed that they have failed to perform them. U. S. v. Lewis (D. C. 1911) 192 Fed. 633.

Entry of records.—The clerk of a Circuit Court has until the end of term in which to complete the minute entries for the term. Ex parte Harlan (C. C. 1909) 180 Fed. 119, decree affirmed Harlan v. McGourin (1910) 31 S. Ct. 44, 218 U. S. 442, 54 L. Ed. 1101, 21 Ann. Cas. 849.

Minute entries by the Circuit Court clerk in a record recognized by the court as its minutes are valid, though made with a rubber stamp. Id.

§ 974. (Jud. Code, § 7.) Effect of altering terms.

No action, suit, proceeding, or process in any district court shall abate or be rendered invalid by reason of any act changing the time of holding such court, but the same shall be deemed to be returnable to, pending, and triable in the terms established next after the return day thereof.

R. S. § 573. Act March 3, 1911, c. 231, § 7, 36 Stat. 1088.

Notes of Decisions

Effect of dividing district.—Under statutes in force September 14, 1889, one term of the district court was appointed to be held on the first Monday of September. On that day defendant became surety on a recognizance for the appearance of G. at the next term of court, on the first Monday of September, 1890. By Act June 9, 1890 (26 Stat. c. 403), the district was divided and

the terms of the courts were appointed to be held on the first Monday of March and the second Monday of September. The district court convened on the first Monday of September, 1890, and, before the second Monday, G. having failed to appear his recognizance was forfeited. Held that the later act repealed the former regarding the terms of court, and that the session held on the first Monday of September was without authority, and the forfeiture of G.'s recognizance was void. McGlashan v. U. S. (1896) 71 Fed. 434, 18 C. C. A. 172, reversing judgment U. S. v. McGlashen (C. C. 1895) 66 Fed. 537, writ of error dismissed (1898) 18 Sup. Ct. 948, 170 U. S. 703, 42 L. Ed. 1218.

§ 975. (Jud. Code, § 8.) Trials not discontinued by new term.

When the trial or hearing of any cause, civil or criminal, in a district court has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened.

R. S. § 746. Act March 3, 1911, c. 231. § 8, 36 Stat. 1088.

Notes of Decisions

Construction and application.—A term of the United States circuit court does not necessarily end on the court's convening in another place in the same district. East Tennessee Iron & Coal Co. v. Wiggin (1895) 68 Fed. 446, 15 C. C. A. 510.

A term of a United States circuit court may be adjourned, in the discretion of the presiding judge, to a distant day, and its regular and continuous session may be resumed on such day, as a part of the same term, though another term of the court has been held, during the adjournment, at another place. State of Florida v. Charlotte Harbor Phosphate Co. (1895) 70 Fed. 883, 17 C. C. A. 472, granting motion to docket (1895) 70 Fed. 336, 16 C. C. A. 682.

When no judgment is entered on a verdict during the term at which the verdict is rendered, the cause passes over to the next term for entry of judgment, disposition of a motion for a new trial, and any other action that might be taken in the case. Walker v. Moser (1902) 117 Fed. 230, 54 C. C. A. 262.

A trial is in progress so as to authorize proceeding therein after the day fixed for the end of the term, when several jurors have been called, and three accepted and sworn, on the last day of the term. U. S. v. Loughery (C. C. 1876) Fed. Cas. No. 15,631.

From the commencement to the end of a term there is, in contemplation of law, but one sitting, although there may be adjournments or recesses. The Canary No. 2 (C. C. 1884) 22 Fed. 536.

Although a circuit justice who has tried a case while on the circuit may hear argument on a motion for a new trial in Washington, he cannot there, without consent of the parties, render a judgment setting aside the one entered in the circuit court, but the motion may be continued from time to time until he can attend the court and make the necessary order. Hynes v. Chicago, M. & St. P. Ry. Co. (C. C. 1885) 23 Fed. 18.

It seems that a decision appearing of record as filed in vacation is not coram non judice, although the court was not in actual session, where it had not formally adjourned sine die, particularly where the decision is a denial of a motion for new trial. Harrison v. German-American Fire Ins. Co. (C. C. 1898) 90 Fed. 758.

Since adjournment orders must be the last entered on the day's proceedings, a custom of the clerk for convenience not to actually enter such orders until near the end of the term was not objectionable. U. S. v. Louisville & N. R. Co. (D. C. 1910) 177 Fed. 780.

Under this section and section 1261, post, a grand jury impaneled at the September term could by order of court be authorized to sit during the October term. U. S. v. Rockefeller (D. C. 1915) 221 Fed. 462.

Construction of similar territorial act.—Comp. Laws N. M. § 543, provides that district courts shall be held in the several counties at times fixed by law, and continued until adjourned by order of court. Section 552 authorizes holding special terms, but provides that no special term shall conflict with the regular term in another county of the district. Held, that proceedings at a special term were not invalidated by continuance of the term beyond the time fixed for a regular term. Borrego v. Cunningham (1896) 17 Sup. Ct. 182, 164 U. S. 612, 41 L. Ed. 572, affirming (N. M. 1896) 46 Pac. 349.

§ 976. (Jud. Code, § 9.) Courts always open as courts of admiralty and equity.

The district courts, as courts of admiralty and as courts of equity, shall be deemed always open for the purpose of filing any

ing, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, upon reasonable notice to the parties, make, direct, and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court.

R. S. § 574. Act March 3, 1911, c. 231, § 9, 36 Stat. 1088.

Notes of Decisions

1. Construction in general.
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6. Control over judgments or decrees in general.
7. Power of court over judgment or decree during term.
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9. Appointment and discharge of receivers.
10. Mode of proceeding.
11. Attendance and compensation of clerk.
12. End of term.
13. Term of court may exist without transaction of business.

1. **Construction in general.**—This section is substantially the same as Equity Rule No. 1 U. S. Cir. Ct. and under its authority district courts as courts of equity are always open. Central Trust Co. v. Sheffield & Birmingham Coal, I. & Ry. Co. (C. C. 1894) 60 Fed. 9, 15.

A circuit judge of the United States may do chambers business at any place within his circuit without regard to the particular district in which the cause is pending. Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626. See Pooley v. Luco (D. C. 1896) 76 Fed. 146, 147.

2. Proceedings in vacation or at chambers in general.—A motion for an order overruling an answer as frivolous may properly be heard and disposed of by a District Court on a rule day or in vacation, and a judgment entered on such order at the next ensuing term of court is valid. Knotts v. Virginia-Carolina Chemical Co. (1913) 204 Fed. 926, 123 C. C. A. 248.

An order by a district judge for the release of a vessel libeled for breach of the embargo laws is as valid when made at chambers as if made in open court. U. S. v. The Little Charles (C. C. 1819) Fed. Cas. No. 15,613.

The federal court, as a court of equity, may award attachments for contempt in vacation. Vose v. Reed (C. C. 1871) Fed. Cas. No. 17,011.

A sale made under a decree in chancery may be confirmed in vacation, especially when each of the parties has brought the other before the chancellor on the subject by a rule nisi. Central Trust Co. of New York v. Sheffield & Birmingham Coal, Iron & Ry. Co. (C. C. 1894) 60 Fed. 9.

Anything that a judge may properly do in a cause on the application of a party is an exercise of jurisdiction, whether done in open court or in chambers, and hence an order extending the time to plead, made by the judge as he was leaving the courthouse, was valid under the rule that that which a judge may lawfully do in chambers he may do at any other place in the district. Murphy v. Herring-Hall-Marvin Safe Co. (C. C. 1911) 184 Fed. 495.

3. Courts of record.—A United States district court sitting in admiralty is a court of record. Brown v. Bridge (1871) 106 Mass. 563.

4. Order to show cause.—An "order to show cause" is but a means prescribed by law in the nature of a process to bring a defendant into court to answer plaintiff's demands. Morehouse v. Pacific Hardware & Steel Co. (1910) 177 Fed. 337, 100 C. C. A. 647.

5. Res judicata.—Interlocutory order denying motion to discharge defendant in civil action from custody made before trial held not res judicata on motion to strike from judgment provision directing defendant's arrest. Mitchell v. Porter (1912) 194 Fed. 49, 114 C. C. A. 69.

Where an application for vacation of a decree finding defendant guilty of contempt had been made and denied, a second application to the same effect, without leave of court first obtained, will not be considered. A. B. Dick Co. v. Wichelman (C. C. 1901) 109 Fed. 81.

6. Control over judgments or decrees in general.—A court of admiralty has power, on seasonable application, to reopen a decree entered under a misapprehension of the facts or on improper evidence. The Eva D. Rose (1908) 166 Fed. 101, 92 C. C. A. 85.

It is competent for the court, at any time before the final decree has been signed, to reconsider, modify, or set aside any of the interlocutory rulings or orders made in the course of the proceedings. Clark v. Blair (C. C. 1883) 14 Fed. 812.

A court of admiralty has no general power—at least, after expiration of the term—to set aside a final decree on the ground of oversight, inadvertence or mistake. The Illinois (D. C. 1857) Fed. Cas. No. 7,003.

7. Power of court over judgment or decree during term.—The federal courts

have no power to set aside, reverse, or modify a judgment at law or decree in chancery after the term at which it was entered. Bronson v. Schulten (1881) 104 U. S. 410, 415, 26 L. Ed. 797; Elder v. Richmond Gold & Silver Min. Co. (1893) 58 Fed. 536, 7 C. C. A. 354; Klever v. Seawall (1894) 65 Fed. 373, 12 C. C. A. 653 (judgment reversed [1895] 65 Fed. 393, 12 C. C. A. 661); U. S. v. Williams (1895) 67 Fed. 384, 14 C. C. A. 440; Fisher v. Simon (1895) 67 Fed. 387, 14 C. C. A. 443; O'Connor v. O'Connor (1905) 142 Fed. 449, 73 C. C. A. 565; Newman v. Newton (C. C. 1882) 14 Fed. 634; Heckling v. Allen (C. C. 1882) 15 Fed. 196; Grames v. Hawley (C. C. 1883) 50 Fed. 319; Allen v. Wilson (C. C. 1884) 21 Fed. 881; Baptist v. Farwell Transp. Co. (C. C. 1886) 29 Fed. 180; Morgan's Louisiana & T. R. & S. S. Co. v. Texas Cent. Ry. Co. (C. C. 1887) 32 Fed. 525; Austin v. Riley (C. C. 1893) 55 Fed. 833; Doe v. Waterloo Min. Co. (C. C. 1894) 60 Fed. 643; Craven v. Canadian Pac. R. Co. (C. C. 1894) 62 Fed. 170; Pollitz v. Wabash R. Co. (C. C. 1910) 180 Fed. 950; Linder v. Lewis (D. C. 1880) 1 Fed. 378; U. S. v. Mani (D. C. 1912) 196 Fed. 160.

A court has power during the term at which a decree is entered to set the same aside on motion, provided the facts are such as to justify the action in the exercise of a judicial discretion. Ætna Life Ins. Co. v. Board of Com'rs of Hamilton County (1897) 79 Fed. 575, 25 C. C. A. 94; Miocene Ditch Co. v. Moore (1907) 150 Fed. 483, 80 C. C. A. 301; Wyler v. Union Pac. Ry. Co. (C. C. 1898) 89 Fed. 41; Interstate Commerce Commission v. Louisville & N. R. Co. (C. C. 1899) 101 Fed. 146.

Vacation of a judgment at the same term at which it was rendered, because inadvertently entered, leaves the case as if there had been no entry of judgment. Ætna Life Ins. Co. v. Board of County Com'rs of Hamilton County (1897) 79 Fed. 575, 25 C. C. A. 94.

A petition for rehearing in an equity suit filed and taken under advisement during the term at which the decree is entered prevents the decree from becoming final until it is disposed of, and the decree may be modified at that time, though at a subsequent term. City of New Orleans v. Fisher (1899) 91 Fed. 574, 34 C. C. A. 15.

Where a formal written judgment is not made and signed until the term succeeding the one at which the matter was orally determined, the judgment comes into existence only at the later term, and remains subject to the control of the court until the close of such term. Judson v. Gage (1899) 98 Fed. 540, 39 C. C. A. 156.

A decree, although final, remains under the control of the court during the term at which it was rendered. Mahler v. Animarium Co. (1904) 129 Fed. 897, 64 C. C. A. 329.

In a creditors' suit an order fixing the amount of an intervener's claim is interlocutory, and may be set aside for cause at any time before the close of the term at which final decree is entered. Standard Savings & Loan Ass'n v. Aldrich (1908) 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393.

8. Power of court over judgment or decree after term.—A judgment, rendered by a court of law, which is a nullity, may be set aside by the court on motion, even at a subsequent term. Thomas v. American Freehold Land & Mortgage Co. (C. C. 1891) 47 Fed. 550, 12 L. R. A. 681 (decree reversed American Freehold Land-Mortgage Co. v. Thomas [1896] 71 Fed. 782, 18 C. C. A. 327); U. S. v. Wallace (D. C. 1891) 46 Fed. 569.

The courts have no power to set aside their decrees in equity on motion after the term at which they are rendered. Cameron v. M'Roberts (1818) 3 Wheat. 591, 593, 4 L. Ed. 467.

The circuit courts of the United States have no power to set aside decrees in equity, on motion, after the term at which they were rendered. McMicken v. Perin, 59 U. S. (18 How. 1855) 507, 15 L. Ed. 504.

After hearing a case without a jury, the court took it under advisement, and, during vacation, entered judgment. Afterwards, at the next term, the court vacated such judgment, as void because entered in vacation, and entered a new judgment to the same effect. Held, that the last judgment was regular and valid. Abraham v. Levy (1896) 72 Fed. 124, 18 C. C. A. 469.

After the term at which a judgment is entered, the court pronouncing it cannot vacate it because entered "erroneously, and without authority of law," unless at such term steps are taken towards its vacation. U. S. v. 1,621 Pounds of Fur Clippings (1900) 106 Fed. 161, 45 C. C. A. 263.

A court has no jurisdiction to grant a motion to set aside a judgment, after the termination of the term at which it was rendered, on the stipulation of the attorneys, that the same should abide the event of a writ of error in another cause. Brown v. Arnold (C. C. 1904) 127 Fed. 387, decree reversed (1904) 131 Fed. 723, 67 C. C. A. 125.

Where a new term of court intervened between the making of an order and the making of a motion to vacate the same, the court lost jurisdiction to consider the motion. Born v. Schneider (C. C. 1904) 128 Fed. 179.

A federal law court has no power to vacate its judgment of a former term, founded on a false, but apparently valid, return of service of process. King v. Davis (C. C. 1905) 137 Fed. 222, judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348.

The fact that the judge expressed a willingness to make an order, where none was actually made, does not warrant the entry at a succeeding term nunc pro tunc. Klein v. Southern Pac. Co. (C. C. 1905) 140 Fed. 213.

Where a federal court had no jurisdiction to render a judgment as subsequently determined by the Circuit Court of Appeals, the Circuit Court from which the appeal was taken had inherent power thereafter to vacate the judgment after the term and after the time to appeal had expired. Pollitz v. Wabash R. Co. (C. C. 1910) 180 Fed. 950.

After the lapse of the term in which a decree is rendered in a prize case, the authority of the court to revoke or alter it is extinct. The Major Barbour (D. C. 1863) Fed. Cas. No. 8,984.

9. Appointment and discharge of receivers.—A circuit judge has authority to hear at chambers a motion to discharge a receiver. Walters v. Anglo-American Mortgage & Trust Co. (C. C. 1892) 50 Fed. 316.

A judge held to have authority at chambers to appoint a receiver. Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626.

10. Mode of proceeding.—Motions are always addressed to the discretion of the court, and it is entirely within its province to determine in what manner it will satisfy itself of the facts which appeal to its discretion. Importers' & Traders' Nat. Bank v. Lyons (C. C. 1905) 134 Fed. 510.

11. Attendance and compensation of clerk.—A clerk is entitled to his per diem compensation for days on which he refers to the referee in bankruptcy voluntary petitions filed during the absence of the judge from the district, though without written orders to open court for that or any other purpose. U. S. v. Marvin (1909) 29 Sup. Ct. 297, 298, 212 U. S. 275, 53 L. Ed. 510.

It is necessary for the clerk to be in attendance when the court is sitting for the transaction of business. Butler v. U. S. (D. C. 1898) 87 Fed. 655; Marvin v. U. S. (1910) 45 Ct. Cl. 528.

A per diem may be allowed a clerk in equity and admiralty cases when a judge is not present. Owen v. U. S. (1906) 41 Ct. Cl. 69.

It is not necessary for the clerk to make an entry showing the opening and closing of the court on days when he enters proceedings in bankruptcy cases. Keatley v. U. S. (1909) 45 Ct. Cl. 36.

12. End of term.—When a term of court begins, a prior term ends. Loewe v. Union Savings Bank (D. C. 1915) 222 Fed. 342.

13. Term of court may exist without transaction of business.—See McDowell v. U. S. (1895) 159 U. S. 596, 600, 16 Sup. Ct. 111, 40 L. Ed. 271.

Cited without definite application, Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; U. S. v. Finnell (1902) 22 Sup. Ct. 633, 635, 185 U. S. 236, 46 L. Ed. 890; Ackiss v. U. S. (1896) 31 Ct. Cl. 283.

§ 977. (Jud. Code, § 10.) Monthly adjournments for trial of criminal causes.

District courts shall hold monthly adjournments of their regular terms, for the trial of criminal causes, when their business requires it to be done, in order to prevent undue expenses and delays in such cases.

R. S. § 578. Act March 3, 1911, c. 231, § 10, 36 Stat. 1088.

Cited without definite application, Pitman v. U. S. (D. C. 1891) 45 Fed. 159, affirmed (1892) 13 Sup. Ct. 425, 147 U. S. 669, 37 L. Ed. 324.

§ 978. (Jud. Code, § 11.) Special terms.

A special term of any district court may be held at the same place where any regular term is held, or at such other place in the district as the nature of the business may require, and at such time and upon such notice as may be ordered by the district judge. Any business may be transacted at such special term which might be transacted at a regular term.

R. S. § 581. Act March 3, 1911, c. 231, § 11, 36 Stat. 1088.

Notes of Decisions

Construction and application.—The presumption of law is that a special term of court held was duly convened, and that legal notice of the time and place had been given, and the burden of overcoming such presumption rests upon one attacking the validity of the proceedings on the grounds of any irregularity in convening or giving notice of such term. Stockslager v. U. S. (1902) 116 Fed. 590, 54 C. C. A. 46.

A district court has jurisdiction at a special term to try a defendant on an indictment returned at a previous regular term, and it is not necessary that the order for the special term be in-

corporated in the record of the case to show such jurisdiction. Goll v. U. S. (1907) 151 Fed. 412, 80 C. C. A. 642.

A special term of court may lawfully be held while a regular term is in session at another place in the same district, where there are two judges, each having authority to hold court in such district. In re Stevenson (C. C. 1903) 125 Fed. 843.

The word "term" means "session." Pitman v. U. S. (D. C. 1891) 45 Fed. 159, 160, affirmed (1892) 13 Sup. Ct. 425, 147 U. S. 669, 37 L. Ed. 324.

Power of judge.—Where a judge who had power to fix terms of court, and to hold special sessions at such times as he might deem expedient, having fixed regular terms and the limit of their duration, at the close of one of such terms, instead of adjourning court sine die adjourned to the next secular day, his action was equivalent to the convening of a special session to commence on that day, and the court had the same power to transact business thereat as though a formal order had been entered calling such session in the absence of any statutory provision requiring such order. In re Stevenson (C. C. 1903) 125 Fed. 843.

The additional judge for the Indian Territory appointed under Act June 7, 1897, c. 3 (30 Stat. 62), when holding a term of court under assignment from the appellate court has the same power to call and hold a special session after the close of the regular term, to dispose of unfinished business, as the judge of the district would have. Id.

Judge as court.—The form of declaring himself to be a court is not indispensable to the validity of judicial acts of the judge. U. S. v. The Little Charles (C. C. 1819) Fed. Cas. No. 15,613.

Release of libeled vessel by order made at chambers.—See U. S. v. The Little Charles (C. C. 1819) Fed. Cas. No. 15,613.

Construction and application of superseded R. S. §§ 662–670, relating to special sessions.—The contention that, because the District Court of the United States for the district of Porto Rico is required, by Act April 12, 1900, c. 191, § 34, 31 Stat. 77, to proceed in the same manner as a federal circuit court a term of that court held at Mayaguez, under the authority of the further provision of that section that regular terms of such court shall be held at stated times in San Juan and Ponce, and special terms at Mayaguez at such other times as the judge may deem expedient, is a "special," as contradistinguished from a "regular," term, within the meaning of R. S. § 670, forbidding jury trials at special terms of the Circuit Courts, except in certain specified districts, is too clearly lacking in merit to sustain a writ of error from the federal Supreme Court, in view of the substantially uniform requirement of sections 664–669, that special terms of the Circuit Courts are to be held where the regular sessions are held. American R. Co. v. Castro (1907) 27 Sup. Ct. 466, 467, 204 U. S. 453, 51 L. Ed. 564; Same v. De Castro (1907) 27 Sup. Ct. 468, 210 U. S. 440, 51 L. Ed. 1187.

Act March 2, 1793, in relation to special sessions of the circuit court at places nearer to where the offense was committed, vests in the court a legal discretion, to be exercised on considerations of convenience and practicability. U. S. v. Insurgents (C. C. 1799) Fed. Cas. No. 15,442, 1 L. Ed. 700.

The judges have power to hold a special court in capital cases in the county in which the offense was committed; but they have a legal discretion on the subject. Id.

The court has no power to adjourn a stated general session from the place at which it is directed by statute to be held to another place, for the purpose of trying there a person indicted for a capital crime, in compliance with section 29, Judiciary Act 1789. U. S. v. Cornell (C. C. 1820) Fed. Cas. No. 14,868.

Criminal cases pending at a regular session cannot be continued to a special session held for the trial of crimes, nor can any order be made therein at such session. U. S. v. Milburn (C. C. 1834) Fed. Cas. No. 15,765.

The probability that difficult and important questions of law will arise will not ordinarily justify the postponement of the trial, so as to await the holding of the court by two judges, with a view to a certificate of division of opinion. U. S. v. Fullerton (C. C. 1868) Fed. Cas. No. 15,175.

R. S. § 662 is construed to merely provide for the holding of special sessions near the place of the commission of the offenses, and still affords a remedy. U. S. v. Berry (C. C. 1885) 24 Fed. 780, 784.

Where an act changing the time of holding a term of court is passed, but too late to permit the holding of a term at the substituted time, and a special term in lieu thereof is called, proceedings for the removal of a cause, the petition and bond in which were filed before the time of holding the regular term as fixed either by the act or the former law are before the special term for the purposes of a motion to remand; the act providing that process from the clerk's office shall be returnable at the substituted term, and R. S. §§ 669, 670, enabling a special term to transact all business that may be transacted at a regular term. Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C. 1888) 37 Fed. 3.

The District Court of the northern district of Iowa may name the time and place of trial of criminal cases, whether at regular or special term, subject only

to defendant's right to a speedy trial within the district where the offense was committed. U. S. v. Kessel (D. C. 1894) 63 Fed. 433, 434.

Cited without definite application, Rosecrans v. U. S. (1897) 17 Sup. Ct. 302, 304, 165 U. S. 257, 41 L. Ed. 708; Butler v. U. S. (D. C. 1898) 87 Fed. 655, 664.

§ 979. (Jud. Code, § 12.) Adjournment in case of nonattendance of judge.

If the judge of any district court is unable to attend at the commencement of any regular, adjourned, or special term, or any time during such term, the court may be adjourned by the marshal, or clerk, by virtue of a written order directed to him by the judge, to the next regular term, or to any earlier day, as the order may direct.

R. S. § 583. Act March 3, 1911, c. 231, § 12, 36 Stat. 1088.

Notes of Decisions

Construction.—A term does not lapse because of the absence of the judge on an adjourned day, though no written order of adjournment is made. Schofield v. Horse Springs Cattle Co. (C. C. 1895) 65 Fed. 433.

While a telegram from the judge to the court officers directing an adjournment may be considered an order in "writing" within this section, an order given over the telephone by the judge is not a written order within the statute. Schofield v. Horse Springs Cattle Co. (C. C. 1895) 65 Fed. 433, 435.

This section applies to sessions of court held after an adjournment for several days by order of the judge. Pitman v. U. S. (D. C. 1891) 45 Fed. 159, judgment affirmed U. S. v. Pitman (1893) 13 Sup. Ct. 425, 147 U. S. 669, 37 L. Ed. 324.

The word "court" means something more than a court that is open by the judge for business at the beginning of a regular term and continued by adjournment until the close thereof. Butler v. U. S. (D. C. 1898) 87 Fed. 655, 664.

Compensation of attendants.—A clerk is entitled to his per diem where the court is adjourned and opened by the marshal pursuant to the express order of the judge. Pitman v. U. S. (D. C. 1891) 45 Fed. 159, 160 (affirmed [1892] 13 Sup. Ct. 425, 147 U. S. 669, 37 L. Ed. 324); Dart v. U. S. (1897) 32 Ct. Cl. 267.

The clerk is entitled to his fees on business transactions when the court is adjourned in the absence of the judge. U. S. v. Finnell (1902) 22 Sup. Ct. 633, 635, 185 U. S. 236, 46 L. Ed. 890.

R. S. § 824, post, § 1378, allowing a compensation to a district attorney, is limited by Act March 3, 1887, c. 362, 24 Stat. 509, 541, to each day when the court is open by the judge for business, and does not extend to days on which the court is opened or adjourned by the marshal or clerk. Sill v. U. S. (1898) 87 Fed. 699, 700, 31 C. C. A. 200.

The marshal is entitled to his regular per diem where the court was opened and adjourned on Sunday. Puleston v. U. S. (C. C. 1898) 85 Fed. 570.

Criers and bailiffs held entitled to per diem for attendance on days when the court was adjourned by written order of the judge. U. S. v. McCabe (C. C. 1903) 122 Fed. 653, affirmed (1904) 129 Fed. 708, 64 C. C. A. 236; Swift v. U. S. (C. C. 1904) 128 Fed. 763, 766, affirmed (1905) 139 Fed. 225, 71 C. C. A. 351.

Where the clerk attends the judge in one division and his deputy attends in another division opened and adjourned pursuant to this section, he is entitled to pay for attendance by deputy as well as for his attendance in person. Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 477, 2 L. R. A. 229.

Cited without definite application, U. S. v. Perry (1892) 50 Fed. 743, 747, 1 C. C. A. 648; U. S. v. Aldrich (1893) 58 Fed. 688, 690, 7 C. C. A. 431; Ackiss v. U. S. (1896) 31 Ct. Cl. 283; Kelly v. U. S. (1906) 41 Ct. Cl. 246.

§ 980. (Jud. Code, § 13.) Designation of another judge in case of disability of judge.

When any district judge is prevented, by any disability, from holding any stated or appointed term of his district court, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, any such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said court, and to discharge all the judicial duties of the judge so disabled, during such disability. Whenever it shall be certified by any such circuit judge or, in his absence, by the circuit justice

of the circuit in which the district lies, that for any sufficient reason it is impracticable to designate and appoint a judge of another district within the circuit to perform the duties of such disabled judge, the chief justice may, if in his judgment the public interests so require, designate and appoint the judge of any district in another circuit to hold said court and to discharge all the judicial duties of the judge so disabled, during such disability. Such appointment shall be filed in the clerk's office, and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed.

R. S. § 591. Act March 4, 1907, c. 2940, 34 Stat. 1417. Act March 3, 1911, c. 231, § 13, 36 Stat. 1089.

Notes of Decisions

Construction.—Judge B., the district judge of a district of Louisiana, was appointed by the circuit judge of the fifth judicial circuit to act as judge for the Eastern district of Texas, during the year 1889, and during the sickness of the judge of that district to hold the terms of said court in 1889 at Tyler, Jefferson, and Galveston, and the appointment was recorded at Galveston. The appointment was made before Act March 1, 1889, establishing two separate terms of that court to be held at Paris, and was never recorded there. Judge B. held the 1889 terms of the court at Paris, and also, after the death of the regular judge and before the appointment of his successor, held the April term, 1890. Held, that he was judge de jure of the court held at Paris in 1889, and was judge de facto, if not de jure, at the April term, 1890. Ball v. U. S. (1891) 11 Sup. Ct. 761, 140 U. S. 118, 35 L. Ed. 377.

Each successive statute relative to district judges passed since the Judiciary Act of 1789, § 6 (1 Stat. 76), which statutes have been incorporated respectively in this section and R. S. § 592, post, § 981, and R. S. § 596, have seemingly been intended to make larger provision for the regular and continued transaction of the business of the district court. McDowell v. U. S. (1895) 16 Sup. Ct. 111, 112, 159 U. S. 596, 40 L. Ed. 271.

A judge holding court for a resident judge held authorized to make an order extending the time for filing the return to a writ of error, the citation for which had been previously signed by the resident judge. Hall v. McKinnon (1911) 193 Fed. 572, 113 C. C. A. 440.

If the disability of the district judge terminates in his death, the circuit court must remand the certified causes to the district court under Act March 2, 1809, c. 94. Ex parte United States (C. C. 1812) Fed. Cas. No. 14,411.

An appointment should be filed in the office of the clerk of the district court, but the failure to file as directed did not invalidate the appointment. National Home for Disabled Volunteer Soldiers v. Butler (C. C. 1888) 33 Fed. 874.

When there is a vacancy in the office of district judge the circuit judge cannot designate a district judge to hold court in that district; Act July 29, 1850, c. 30, only authorizing such designation in cases of sickness or other disability. (1858) 9 Op. Atty. Gen. 131.

Acts of designated judge.—A district judge acting in another district in which the office of judge is vacant, by virtue of an appointment regular on its face, made by its circuit judge, is an officer de facto, if not de jure, and his acts cannot be collaterally attacked. McDowell v. U. S. (1895) 16 Sup. Ct. 111, 112, 159 U. S. 596, 40 L. Ed. 271.

An order for the drawing of a grand jury by a designated judge held a sufficient order of the court within this section and R. S. § 810, post, § 1261. May v. U. S. (1912) 199 Fed. 53, 117 C. C. A. 431.

Where a judge who rendered a decree in a district other than his own could under the statute have been designated to hold court in such district, it was conclusively presumed that he was actually holding such court when the decree was rendered and that the decree was valid. The Alaska (C. C. 1888) 35 Fed. 555, 557.

A United States district judge who has, under order of the circuit judge, tried a case in another district, has jurisdiction to pass upon a motion for a new trial in the case, even after he has returned to his own district where the parties waive his returning to the other district for the purpose of deciding the motion. Cheesman v. Hart (C. C. 1890) 42 Fed. 98.

Under this section and R. S. § 614, providing that a district judge, when holding circuit court alone, may, by consent of parties, hear an appeal or writ of error from his own decision in the district court, a district judge, when holding circuit court in another district by appointment of the circuit judge, could, by consent of the parties, hear and determine a writ of error in a criminal case from the district court. Harmon v. U. S. (C. C. 1890) 43 Fed. 817.

A federal district judge, assigned by order of a circuit judge to hold Circuit and District Courts in a district other

than his own, because of the contemplated absence of the district judge of the district to which such assignment is made, is not thereby empowered to make and sign orders in a case pending in such other district when absent therefrom and in his own district, and especially when the resident judge of such other district, who presided at the hearing of the cause, is within his district. Gay v. Hudson River Electric Power Co. (C. C. 1911) 190 Fed. 812.

Cited without definite application, In re McCall (1906) 145 Fed. 898, 76 C. C. A. 430.

§ 981. (Jud. Code, § 14.) Designation of another judge in case of an accumulation of business.

When, from the accumulation or urgency of business in any district court, the public interests require the designation and appointment hereinafter provided, and the fact is made to appear, by the certificate of the clerk, under the seal of the court, to any circuit judge of the circuit in which the district lies, or, in the absence of all the circuit judges, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may designate and appoint the judge of any other district in the same circuit to have and exercise within the district first named the same powers that are vested in the judge thereof. Each of the said district judges may, in case of such appointment, hold separately at the same time a district court in such district, and discharge all the judicial duties of the district judge therein.

R. S. § 592. Act March 3, 1911, c. 231, § 14, 36 Stat. 1089.

Notes of Decisions

Construction.—Each successive statute relative to district judges passed since the Judiciary Act of 1789, § 6 (1 Stat. 76), which statutes have been incorporated respectively in this section and R. S. § 591, ante, § 980, and R. S. § 596, have seemingly been intended to make larger provision for the regular and continued transaction of the business of the district court. McDowell v. U. S. (1895) 16 Sup. Ct. 111, 112, 159 U. S. 596, 40 L. Ed. 271.

Mandamus to review designation.—Mandamus will not lie to review the ruling of a federal Circuit Judge designating another judge in place of a District Judge, who certified his withdrawal from bankruptcy proceedings on filing of an affidavit charging him with personal bias and prejudice. Ex parte American Steel Barrel Co. (1913) 33 S. Ct. 1007, 230 U. S. 35, 57 L. Ed. 1379.

Cited without definite application, Tullock v. Mulvane (1902) 22 Sup. Ct. 372, 377, 184 U. S. 497, 46 L. Ed. 657; Ex parte U. S. (1913) 33 Sup. Ct. 170, 226 U. S. 420, 57 L. Ed. 281; In re McCall (1906) 145 Fed. 898, 76 C. C. A. 430; In re Benson (C. C. 1893) 58 Fed. 962, 964 (reversed U. S. v. Benson [1895] 70 Fed. 591, 17 C. C. A. 293); Robinson v. American Car & Foundry Co. (C. C. 1906) 142 Fed. 170, 171, reversed (1907) 150 Fed. 331, 80 C. C. A. 127.

§ 982. (Jud. Code, § 15.) When designation to be made by Chief Justice.

If all the circuit judges and the circuit justice are absent from the circuit, or are unable to execute the provisions of either of the two preceding sections, or if the district judge so designated is disabled or neglects to hold the court and transact the business for which he is designated, the clerk of the district court shall certify the fact to the Chief Justice of the United States, who may thereupon designate and appoint in the manner aforesaid the judge of any district within such circuit or within any other circuit; and said appointment shall be transmitted to the clerk and be acted upon by him as directed in the preceding section.

R. S. § 593. Act March 3, 1911, c. 231, § 15, 36 Stat. 1089.

Cited without definite application, In re McCall (1906) 145 Fed. 898, 76 C. C. A. 430.

§ 983. (Jud. Code, § 16.) New appointment and revocation.

Any such circuit judge, or circuit justice, or the Chief Justice, as the case may be, may, from time to time, if in his judgment the

public interests so require, make a new designation and appointment of any other district judge, in the manner, for the duties, and with the powers mentioned in the three preceding sections, and revoke any previous designation and appointment.

R. S. § 594. Act March 4, 1911, c. 231, § 16, 36 Stat. 1089.

§ 984. (Jud. Code, § 17.) Designation of district judge in aid of another judge.

It shall be the duty of the senior circuit judge then present in the circuit, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section fourteen, the district judge of any judicial district within his circuit to hold a district court in the place or in aid of any other district judge within the same circuit.

R. S. § 596. Act March 3, 1881, c. 133, 21 Stat. 454. Act March 3, 1911, c. 231, § 17, 36 Stat. 1089.

Notes of Decisions

Construction.—This section contemplates that the appointment shall state what court the appointee is to hold, and that it is in place of the judge of the district court or in aid of him, and that it be filed and entered on the minutes as provided in section 591. Ball v. U. S. (1891) 11 Sup. Ct. 761, 764, 140 U. S. 118, 35 L. Ed. 377.

Each successive statute relative to district judges passed since the Judiciary Act of 1789, § 6 (1 Stat. 76), which statutes have been incorporated respectively in this section and R. S. §§ 591, 592, ante, §§ 980, 981, have seemingly been intended to make larger provision for the regular and continued transaction of the business of the district court. McDowell v. U. S. (1895) 16 Sup. Ct. 111, 112, 159 U. S. 596, 40 L. Ed. 271.

While the words "in aid of" naturally imply some existing judge to be aided, the words "in the place of" do not necessarily carry the same implication, but may be construed to mean that the designated judge is to take temporarily the place which is or has been filled by a regular judge. Id.

This section gives full power to the circuit judge to act, without reference to any certificate from the clerk, whenever in his judgment the public interests require. Id.

An appointment under this section should be filed as provided under section 591, but failure to so file will not invalidate the appointment. National Home for Disabled Volunteer Soldiers v. Butler (C. C. 1888) 33 Fed. 374, 375.

A district judge holding circuit court in another district by appointment of the circuit judge could by consent of the parties hear and determine a writ of error in a criminal case from the district court. Harmon v. U. S. (C. C. 1890) 43 Fed. 817, 818.

Presumption as to judge's appointment.—See The Alaska (C. C. 1888) 35 Fed. 555, 557. See note under § 591.

§ 985. (Jud. Code, § 18, as amended, Act Oct. 3, 1913, c. 18.) When circuit judge may be designated to hold district court.

Whenever, in the judgment of the senior circuit judge of the circuit in which the district lies, or of the circuit justice assigned to such circuit, or of the Chief Justice, the public interests shall require, the said judge, or associate justice, or Chief Justice, shall designate and appoint any circuit judge of the circuit to hold said district court.

Whenever it shall be certified by the senior circuit judge of the second circuit, or, in his absence, by the circuit justice of said circuit, that on account of the accumulation or urgency of business in any district court in said circuit it is impracticable to designate and appoint a sufficient number of district judges of other districts within said circuit to relieve such accumulation or urgency of business, the Chief Justice may, if in his judgment the public interests so require, designate and appoint the judge of any district court in another circuit to hold a district court within the said second circuit, and to have and exercise within the district to which he is so assigned the same powers that are vested in the judge thereof: Provided, That such judge so designated and appointed shall have consented, in writing, to such designation and appoint-

ment: And provided further, That the senior circuit judge of the circuit within which such judge so designated and appointed resides shall certify, in writing, that the business of the district of such judge will not suffer thereby. Such appointment shall be filed in the clerk's office and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed. Each of the said district judges may, in the case of such appointment, hold separately, at the same time, a district court in such district, and discharge all of the judicial duties of the district judge therein.

Act March 3, 1911, c. 231, § 18, 36 Stat. 1089. Act Oct. 3, 1913, c. 18, 38 Stat. 203.

This section, as enacted in the Judicial Code, contained only the general provision in the first sentence for designating a circuit judge to hold a district court. The further provisions for such designations in the second circuit were added by amendment of the section by Act Oct. 3, 1913, c. 18, last cited above.

Notes of Decisions

Entry and review of orders by designated judge.—It is well settled in the Eighth circuit that the rulings of the district judge, while holding the circuit court, are not subject to review in the same court, by the circuit judge or justice, and the circuit judge will only sit to hear motions for new trials in cases tried in his absence, when the district judge so desires and requests it. U. S. v. Biebusch (C. C. 1880) 1 Fed. 213.

A case was heard by a justice of the supreme court while holding a circuit court for the district of California in the city of San Francisco, and a decree was entered dismissing the bill. Held that, as the circuit court in San Francisco would be held by the circuit judge in the absence of the justice who tried the cause, the latter would direct the circuit court to forward the petition for rehearing and the answer to him at Washington, and the application would be there disposed of, and the judgment sent to the circuit court and entered. Giant Powder Co. v. California Vigorit Powder Co. (C. C. 1880) 5 Fed. 197.

Where the Supreme Court reversed a decree dismissing a suit to enforce the Anti-Trust Act, and remanded the case with specific directions, the decree on the mandate may be entered by any district judge presiding or circuit judge assigned under this section. U. S. v. Terminal Ass'n of St. Louis (D. C. 1912) 197 Fed. 446.

Judge may designate himself.—Under this section a senior Circuit Judge may properly designate himself to continue to conduct an equity cause in a District Court of which he had previously had entire charge in the Circuit Court in the absence of objection by the parties. Pennsylvania Steel Co. v. New York City Ry. Co. (D. C. 1915) 221 Fed. 440.

Cited without definite application, U. S. ex rel. Attorney General v. Judges of Circuit Court (1865) 3 Wall. 673, 675, 18 L. Ed. 111; Ex parte U. S. (1913) 33 Sup. Ct. 170, 226 U. S. 420, 57 L. Ed. 281; U. S. v. Murphy (D. C. 1897) 82 Fed. 893, 900. See note under § 602.

§ 986. (Jud. Code, § 19.) Duty of district and circuit judge in such cases.

It shall be the duty of the district or circuit judge who is designated and appointed under either of the six preceding sections, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district.

R. S. § 595. Act March 3, 1911, c. 231, § 19, 36 Stat. 1090.

Notes of Decisions

Superseded R. S. § 609, relating to Circuit Courts, cited and construed.—See Virginia v. Paul (1893) 13 Sup. Ct. 536, 539, 148 U. S. 107, 37 L. Ed. 386; Ex parte U. S. (1913) 33 Sup. Ct. 170, 226 U. S. 420, 57 L. Ed. 281; Industrial & Mining Guaranty Co. v. Electrical Supply Co. (1893) 58 Fed. 732, 737, 7 C. C. A. 471; Ex parte Brown (D. C. 1905) 140 Fed. 461, 462.

The authority of a district judge, when holding a circuit court under R. S. § 609, is coextensive with that of any judge sitting in the same court. McDowell v. Kurtz (1896) 77 Fed. 206, 23 C. C. A. 119; Goodyear Dental Vulcanite Co. v. Folsom (C. C. 1880) 3 Fed. 509.

A district judge can hold a circuit court, in the absence of a circuit judge,

and exercise all the powers of a circuit court. In re Kaine (C. C. 1852) Fed. Cas. No. 7,598.

The district judge of the Eastern district of New York has authority to hold the circuit court for the Southern district of New York. In re Nicolas (C. C. 1870) Fed. Cas. No. 10,256.

A judge of the federal district court, while sitting alone as circuit judge in the circuit court, has the same power and jurisdiction as any other judge sitting in the same court. Robinson v. Satterlee (C. C. 1874) Fed. Cas. No. 11,967.

The circuit court, when there is a full bench, consists of the chief justice, circuit judge, and district judge. In the absence of one, the other exercises the powers of all three. Cuyler v. Atlantic & N. C. R. Co. (C. C. 1904) 132 Fed. 568, 569.

§ 987. (Jud. Code, § 20.) When district judge is interested or related to parties.

Whenever it appears that the judge of any district court is in any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior circuit judge for said circuit then present in the circuit; and thereupon such proceedings shall be had as are provided in section fourteen.

R. S. § 601. Act March 3, 1911, c. 231, § 20, 36 Stat. 1090.

Jud. Code, § 14, mentioned in this section, is set forth ante, § 981.

Notes of Decisions

Construction in general.—The disqualification of a judge in the circuit court is a matter for his own determination; and his decision that, under the circumstances, it is not improper for him to enter formal or preliminary orders in a case, or that the party objecting has by his own conduct waived the right to object, is not reviewable. Coltrane v. Templeton (1901) 106 Fed. 370, 45 C. C. A. 328.

The statute does not authorize the transfer of a cause from the district court of Alaska to a circuit court in the district of Washington; as, though the district court of Alaska be considered as within the terms of the statute, Washington cannot be held to be an "adjoining state." Lewis v. Johnson (C. C. 1898) 90 Fed. 673.

When, on the final hearing of a bill for specific performance, a defective affidavit is filed to disqualify the judge, and when, after hearing the same and relating evidence, it is held that the judge is not disqualified, and the attorneys representing the complainant refuse to proceed further, declaring that the judge is merely an automaton, and that his decision will be treated by them as a nullity, it is the duty of the court to dismiss the bill for want of prosecution. Henry v. Harris (D. C. 1912) 191 Fed. 868, order reversed 201 F. 872, 120 C. C. A. 210.

Relation to parties.—A federal judge should not sit in a cause in which he is related to one of the parties within the fourth degree of consanguinity. In re Eatonton Electric Co. (D. C. 1903) 120 Fed. 1010, 1011.

Interest in controversy.—The judge of the United States District Court in Texas had power to order the record of a suit in which he was interested to be transferred to the United States Circuit Court in Louisiana. Spencer v. Lapsley (1857) 20 How. 264, 266, 15 L. Ed. 902.

A judge, who, in a bankruptcy proceeding to discover assets of the estate, declared that the estate had been looted by some one, and directed an officer of the court to expend what was left of the estate in investigating the matter, and to institute proceedings against persons found guilty, was not "concerned in interest." Epstein v. U. S. (1912) 196 Fed. 354, 116 C. C. A. 174.

A circuit judge who was a creditor of a bankrupt, and proved his claim, and thereafter sold and assigned it, so as to have no further interest, held not disqualified from subsequently hearing a petition of review by a creditor, under section 2, Act 1867. In re Sime (C. C. 1872) Fed. Cas. No. 12,860.

A District Judge who is a resident citizen and taxpayer of a county is not disqualified by pecuniary interest from sitting in a case which involves the validity of bonds issued by the county. Wade v. Travis (C. C. 1896) 72 Fed. 985, 987, affirmed 81 Fed. 742, 26 C. C. A. 589.

The fact that a judge declines to pass upon the questions of law raised by a demurrer, because of his personal interest in a possible controversy which may involve the same questions in a different suit, does not affect his right or duty to hear other questions in the case, or to dispose of the question of costs, or other matters arising in interlocutory proceedings. Middletown Nat.

Bank v. Toledo, A. A. & N. M. R. Co. (C. C. 1900) 105 Fed. 547.

Acting as counsel or giving advice in cause.—It is not a good cause of challenge that a judge has formerly been of counsel for one of the parties in a different cause. The Richmond (C. C. 1881) 9 Fed. 863; Duncan v. Atlantic Coast Line R. Co. (D. C. 1915) 223 F. 446.

The law favors the compromise of disputed claims; and the fact that the judge advises a compromise of litigation pending before him does not disqualify him from deciding the questions it presents. In re Nevitt (1902) 117 Fed. 448, 54 C. C. A. 622.

"Of counsel" means "of counsel for a party in that cause and in that controversy," and if either the cause or controversy is not identical the disqualification does not exist. In the former case the controversy in which the judge was of counsel was as to the liability for a collision. The present controversy was with reference to the liability of sureties under a mandate remitted from the supreme court. The Richmond (C. C. 1881) 9 Fed. 863, 864.

Where the district judge is presiding in the United States circuit court, and is the only judge in attendance, the trial will not be deferred because, after the case was commenced, but before his appointment, the district judge was retained by one of the parties in matters not connected with the case in suit. Carr v. Fife (C. C. 1891) 44 Fed. 713.

A federal judge may be disqualified because he had been of counsel in the case. Ex parte N. K. Fairbank Co. (D. C. 1912) 194 Fed. 978.

Review by judge of his own orders.—A judge may always review in his own court interlocutory orders previously made by him. Pennsylvania Steel Co. v. New York City Ry. Co. (D. C. 1915) 221 F. 440.

Waiver of disqualification.—Where a plaintiff has obtained the appointment of a receiver by a judge, and has argued before him and submitted questions relating to administrative matters in the suit, he must be regarded as having waived the right to object to the decision of such questions on the ground that the judge is disqualified by reason of interest from acting in the suit, when the facts were at all times known to him. Coltrane v. Templeton (1901) 106 Fed. 370, 45 C. C. A. 328.

This section does not declare a judge's judicial action in the case void merely because of the existence of disqualifying grounds, and he may properly and legally proceed when requested by both parties. Utz & Dunn Co. v. Regulator Co. (1914) 213 F. 315, 130 C. C. A. 17.

Construction of superseded provisions.—See Lee County v. U. S. ex rel. Rogers (1868) 7 Wall. 175, 179, 19 L. Ed. 162; Richardson v. Boston (C. C. 1852) Fed. Cas. No. 11,780; May v. Le Claire (C. C. 1883) 18 Fed. 49; Lewis v. Johnson (C. C. 1898) 90 Fed. 673.

Cited without definite application, U. S. ex rel. Attorney General v. Judges of Circuit Court (1865) 3 Wall. 673, 675, 18 L. Ed. 111; Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Hunt v. U. S. (1897) 17 Sup. Ct. 609, 610, 166 U. S. 424, 41 L. Ed. 1063; Glasgow v. Moyer (1912) 32 Sup. Ct. 753, 755, 225 U. S. 420, 56 L. Ed. 1147; In re Seibold (1901) 105 Fed. 910, 45 C. C. A. 117; Henry v. Speer (1913) 201 Fed. 869, 120 C. C. A. 207; Treadwell v. Seymour (C. C. 1890) 41 Fed. 579, 580; Hudson v. Limestone Natural Gas Co. (C. C. 1904) 132 Fed. 410; U. S. v. Garcelon (D. C. 1897) 82 Fed. 611, 613.

§ 988. (Jud. Code, § 21.) When affidavit of personal bias or prejudice of judge is filed.

Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a

certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action.

Act March 3, 1911, c. 231, § 21, 36 Stat. 1090.

Notes of Decisions

Constitutionality.—This section, if construed to mean that the mere filing of such affidavit disqualifies, would be unconstitutional as vesting judicial power to that extent in the litigants. Ex parte N. K. Fairbank Co. (D. C. 1912) 194 Fed. 978.

Construction and application.—Mandamus will not lie to review the ruling of a federal circuit judge designating, in the exercise of his jurisdiction under Jud. Code, § 14, ante, § 981, another judge in the room and place of a district judge who had certified his withdrawal from bankruptcy proceedings upon the filing of an affidavit under this section charging him with personal bias and prejudice, especially where there has been long delay in asking such extraordinary remedy. Ex parte American Steel Barrel Co. (1913) 33 Sup. Ct. 1007, 230 U. S. 35, 57 L. Ed. 1379.

This section is available to a party, although the suit was commenced before such Code took effect. Henry v. Speer (1913) 201 Fed. 869, 120 C. C. A. 207.

This section has no relation to causes pending or causes of action originating before January 1, 1912, when the Code became effective. Henry v. Harris (D. C. 1912) 191 Fed. 868, order reversed (1913) 201 Fed. 872, 120 C. C. A. 210.

The affidavit must be strictly construed, and must strictly conform to the statute. Henry v. Harris (D. C. 1912) 191 Fed. 868, order reversed (1913) 201 Fed. 872, 120 C. C. A. 210.

This section does not authorize an affidavit to disqualify a judge from ruling subsequent to January 1, 1912, on motions in arrest and for new trial and sentencing accused on overruling them on a verdict rendered before that date. Ex parte Glasgow (D. C. 1912) 195 Fed. 780.

Where respondent's answer to a rule to show cause why he should not be disbarred raised no issue of fact, but "rule absolute" should be granted on the face of the record, the proceeding was not one in which the respondent could disqualify the judge by an affidavit of prejudice. In re Ulmer (D. C. 1913) 208 Fed. 461.

Application to appellate tribunals.—This section does not apply to appellate tribunals. Kinney v. Plymouth Rock Squab Co. (1914) 213 Fed. 449, 130 C. C. A. 586.

Time of filing.—Habeas corpus will not issue as a substitute for writ of error to review a holding of the federal Circuit Court that the affidavit of creditors could not be filed after the trial or to test correctness of rulings on defenses of law or fact, though the law is asserted to be unconstitutional. Glasgow v. Moyer (1912) 32 Sup. Ct. 753, 225 U. S. 420, 56 L. Ed. 1147.

The Judicial Code having taken effect January 1, 1912, affidavits to disqualify a judge, not filed until February 12, 1912, without any excuse for failure to file within the time prescribed, were insufficient. Ex parte N. K. Fairbank Co. (D. C. 1912) 194 Fed. 978.

Sufficiency of affidavit.—It is insufficient to allege that the judge has formed an opinion of the law of the case and the rights of the parties, when it was formed judicially and published for legitimate purposes, and the affidavit must specifically allege personal prejudice and bias on the part of the judge toward the party seeking his disqualification. Henry v. Harris (D. C. 1912) 191 Fed. 868, order reversed (1913) 201 Fed. 872, 120 C. C. A. 210.

Affidavits for change of judge, failing to charge as a matter of fact that the judge had a personal bias or prejudice against the defendant or in favor of the plaintiff, held insufficient. Ex parte N. K. Fairbank Co. (D. C. 1912) 194 Fed. 978.

Facts submitted in an application to disqualify a judge for prejudice held to show as a matter of law absence of prejudice against defendant or bias in favor of plaintiff. Id.

An affidavit of disqualification of a federal judge for personal bias or prejudice must charge that the bias or prejudice is "personal." Henry v. Speer (1913) 201 Fed. 869, 120 C. C. A. 207.

On the filing of an affidavit of disqualification of a federal judge it is the duty of the judge to pass on its legal sufficiency. Id.

Cited without definite application, In re Iron Clad Mfg. Co. (D. C. 1912) 194 Fed. 906.

§ 989. (Jud. Code, § 22.) Continuance in case of vacancy in office.

When the office of judge of any district court becomes vacant, all process, pleadings, and proceedings pending before such court shall, if necessary, be continued by the clerk thereof until such times as a judge shall be appointed, or designated to hold such court; and the judge so designated, while holding such court, shall possess

the powers conferred by, and be subject to the provisions contained in, section nineteen.

R. S. §§ 602, 603. Act March 3, 1911, c. 231, § 22, 36 Stat. 1090.
Jud. Code § 19, mentioned in this section, is set forth ante, § 986.

Notes of Decisions

Construction and application.—This section in substance re-enacts the latter part of the Judiciary Act of 1789, § 6, to the effect that in case of a vacancy in the office of district judge all matters pending shall be continued, of course, until the next stated term after the appointment and qualification of his successor. McDowell v. U. S. (1895) 16 Sup. Ct. 111, 112, 159 U. S. 596, 40 L. Ed. 271.

It is only when the office of district judge of one district is vacant that the judge of another district has authority to discharge judicial duties in the former district, and a leave granted by the judge of another district to sue a receiver, the judge of the district being out of the state, is void. American Loan & Trust Co. v. East & West R. Co. (C. C. 1889) 40 Fed. 182.

An order denying a new trial made by a judge after his successor has been appointed, qualified, and assumed the duties of the office cannot be sustained as the act of a de facto officer, though the judge may not have known that his successor had actually entered on the performance of his duties when the order was signed. U. S. v. Alexander (D. C. 1891) 46 Fed. 728.

During a vacancy in the office of district judge for a district coextensive with a state, no other judge is authorized to sit therein, and all judicial action remains in abeyance until the vacancy is filled, or another judge is designated, pursuant to law, to exercise the judicial functions temporarily. U. S. v. Murphy (D. C. 1897) 82 Fed. 893.

Where a vacancy occurs by death in the office of district judge, a bail bond for the appearance of one charged with crime is continued in force both against principal and sureties until the next term after the appointment and qualification of the judge's successor. Id.

This statute, being remedial, should be liberally construed so as to carry out its general purpose, which is to so provide that the administration of justice shall not through a vacancy be defeated or unduly impeded. The doctrine of strict construction in favor of sureties has no proper application to the provisions of this section for the purpose of ascertaining whether it applies to a recognizance with surety. U. S. v. Murphy (D. C. 1897) 82 Fed. 893, 896.

The recognizance taken by United States commissioner for appearance and answer in a criminal cause is "process" within this section. Id.

The words "proceedings pending before such court" include a recognizance taken by a United States commissioner for appearance and answer in a criminal cause after the recognizance has been respited in open court until a certain day. Id.

Cited without definite application, Ball v. U. S. (1891) 11 Sup. Ct. 761, 765, 140 U. S. 118, 35 L. Ed. 377.

§ 990. (Jud. Code, § 23.) Districts having more than one judge; division of business.

In districts having more than one district judge, the judges may agree upon the division of business and assignment of cases for trial in said district; but in case they do not so agree, the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial in said district.

Act March 3, 1911, c. 231, § 23, 36 Stat. 1090.

Notes of Decisions

Interference with another judge's order.—Where there are two district judges of a federal court having equal and concurrent authority, and one judge, who is not within the district at the time an order appointing a referee in bankruptcy is made by the other judge sitting in bankruptcy within the district, goes into the district in which the order was made for the sole purpose of setting aside said order, and makes an order setting same aside, said order so made is without authority, and will be set aside as improvidently made and absolutely void. In re Steele (D. C. 1907) 156 Fed. 853.

CHAPTER TWO

District Courts—Jurisdiction

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1006. Complainants may appear and be made parties to case.
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§ 991. (Jud. Code, § 24, as amended, Act Dec. 21, 1911, c. 5.) Original jurisdiction.

The district courts shall have original jurisdiction as follows:

(1) Where the United States are plaintiffs; and of civil suits at common law or in equity.

First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made: Provided, however, That the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section.

R. S. §§ 563, 629. Act March 3, 1875, c. 137, § 1, 18 Stat. 470. Act March 3, 1887, c. 373, § 1, 24 Stat. 552. Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433. Act March 3, 1911, c. 231, § 24, 36 Stat. 1091.

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I. CIVIL SUITS AT COMMON LAW OR EQUITY

See, also, Const. art. 3, § 2, cl. 1, and notes thereunder.

1. Nature and extent of jurisdiction.—The courts of the United States have jurisdiction at common law and in chancery; and wherever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the state, but from the laws of the United States. Fitch v. Creighton (1860) 65 U. S. (24 How.) 159, 16 L. Ed. 596; Hecker v. Fowler (1864) 2 Wall. 123, 128, 17 L. Ed. 759; Omaha Hotel Co. v. Wade (1877) 97 U. S. 13, 19, 24 L. Ed. 917.

The federal courts have no common-law jurisdiction or powers, as they derive all their powers from the Constitution and acts of Congress; but in the construction of all laws they must be guided by the rules of common law in the exercise of their special jurisdiction. Rice v. Minnesota & N. W. R. Co. (1861) 66 U. S. (1 Black) 358, 17 L. Ed. 147.

This provision confers on the district courts jurisdiction of suits in a civil nature at common law, or in equity between citizens of a state and citizens or subjects of a foreign state and treats of parties. Smith v. Farbenfabriken of Elberfeld Co. (1913) 203 Fed. 476, 121 C. C. A. 598.

The provision of section 1 of the federal judiciary act (Act March 3, 1875, c. 137, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433) that the Circuit Courts should have original cognizance "of all suits of a civil nature" involving the requisite amount "in which there shall be a controversy between citizens of different states" conferred on those courts essential jurisdiction of all such suits, whether transitory or local in their nature, leaving only the question of venue to be determined. Kentucky Coal Lands Co. v. Mineral Development Co. (C. C. 1911) 191 Fed. 899.

2. "Suits of civil nature in law or equity," in general.—The clause "suits of civil nature at common law or in equity" does not restrict the jurisdiction to old and settled forms, but includes all suits in which legal rights are to be ascertained and determined. U. S. v. Block 121 (C. C. 1872) Fed. Cas. No. 14,610.

The phrase "common law" in the judiciary act of 1887–88 was used in con-

tradistinction to equity, admiralty, and maritime jurisdiction and included all cases involving "legal" rights, though such rights were given by statute. Brisenden v. Chamberlain (C. C. 1892) 53 Fed. 307.

A proceeding in a court of common law or equity which culminates in a judgment that conclusively determines a right or obligation of the parties, so that the same matter cannot be further litigated except by writ of error or appeal, is a "suit," within the meaning of the federal judiciary acts. In re Stutsman County (C. C. 1898) 88 Fed. 337, criticizing In re City of Chicago (C. C. 1894) 64 Fed. 897.

The phrase "suits at common law" is used as distinguished from a criminal action, or from an action to enforce a regulation arising under the police power of a state, or an action to recover a penalty, and in contradistinction to equity, and admiralty and maritime jurisdiction. Kirby v. Chicago & N. W. R. Co. (C. C. 1900) 106 Fed. 551.

3. Actions under state penal statutes.—A state statute punishing railroad corporations by fine of from $500 to $5,000 for negligence causing death, to be recovered by indictment for the benefit of the widow and children and next of kin of decedent, while in form penal, was not strictly so, and the civil remedy in the alternative must be regarded as remedial in an international sense, authorizing action to be brought thereunder in the federal courts or the courts of another state. Boston & M. R. R. v. Hurd (1901) 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, writ of certiorari denied Hurd v. Boston & M. R. Co. (1902) 22 S. Ct. 939, 184 U. S. 700, 46 L. Ed. 765.

A state statute requiring railroads to construct crossings on easy grades and keep such crossing in good order, and providing a forfeiture for violation thereof, held not so far penal that a civil liability enforceable in another state could not rest on a violation thereof. Strait v. Yazoo & M. V. R. Co. (1913) 209 Fed. 157, 126 C. C. A. 105, 49 L. R. A. (N. S.) 1068.

A state statute providing that, whenever any person shall die from any injury resulting from or occasioned by negligence, unskillfulness, or criminal intent, the defendant shall forfeit and pay the sum of $5,000, which may be sued for and recovered, irrespective of the actual damages caused by such death, is a penal statute, and, under the rule that such statutes can be enforced only within the sovereignty of their creation, a federal court in another state will not entertain an action thereunder. Marshall v. Wabash R. Co. (C. C. 1891) 46 Fed. 269.

An action based on a state statute to recover from a railroad company for a death caused by negligence is a penal action under a state statute, of which a federal court is without jurisdiction. Lyman v. Boston & A. R. Co. (C. C. 1895) 70 Fed. 409; Perkins v. Same (C. C. 1898) 90 Fed. 321.

A state employers' liability act which authorizes an action to recover damages for the death of an employé, to be "assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable," is not a penal statute in such sense that an action based thereon may not be maintained in a federal court. Malloy v. American Hide & Leather Co. (C. C. 1906) 148 Fed. 482.

Federal courts have jurisdiction to entertain actions for the recovery of penalties given by state statutes to individuals to compensate them for injuries sustained, but not of actions to recover penalties for the use of the state even if the nominal plaintiff is an individual, nor though a part of the penalty goes to the informer, where when collected it goes into the state treasury. Younts v. Southwestern Telegraph & Telephone Co. (C. C. 1911) 192 Fed. 200.

4, 5. Actions for damages.—An action between citizens of different states for damages for injury to land is of a civil nature and is a common-law action. Peyton v. Desmond (1904) 129 Fed. 1, 63 C. C. A. 651.

6. Appropriation of water.—The statutes of Idaho provide that one desiring to appropriate water from a stream must apply to the state engineer and obtain a permit; that, in case a stated part of the works has not been completed within a certain time, an after appropriator from the same stream may petition the state engineer for a revocation of the permit, and that officer, after investigation, shall either cancel the permit and notify the holder or refuse to do so and notify the petitioner; that in either case the party feeling himself aggrieved may appeal to the district court of the county in which the point of diversion is situated, making the other party defendant, and filing a petition and a copy of the petition to and decision of the state engineer. There is no further provision as to pleading or procedure. Held that, after such an appeal has been taken, the proceeding in the district court is a "suit of a civil nature at common law or in equity." Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irr. Co. (C. C. 1907) 158 Fed. 137.

7. Condemnation proceedings.—A proceeding for the condemnation of real estate is a civil suit. U. S. v. Inlots (C. C. 1873) Fed. Cas. No. 15,441; Same v. Block 121 (C. C. 1872) Id. 14,610; Kohl v. Hannaford (1875) 5 Ohio Dec. 306, 4 Am. Law Rec. 372.

A proceeding by the United States to take land for public use by condemnation is a suit at common law. Kohl v.

U. S. (1875) 91 U. S. 367, 23 L. Ed. 449.

A proceeding under Code Civ. Proc. Colo. to ascertain the compensation for land taken for public use is a suit at law, notwithstanding the provision of the Code for the appointment, by the court, of a commission of three freeholders to assess damages, unless defendant demand a jury. Searl v. School Dist. No. 2 (1888) 8 Sup. Ct. 460, 124 U. S. 197, 31 L. Ed. 415.

The federal courts held to have jurisdiction of an action by the Secretary of War to procure condemnation of land for the purpose of constructing a canal around the cascades of the Columbia river. U. S. v. Oregon Ry. & Nav. Co. (C. C. 1883) 16 Fed. 524.

A proceeding under a state statute to determine the compensation of a landowner for property taken for a public use under the power of eminent domain is a suit of a civil nature within the meaning of the judiciary acts. In re Delafield (C. C. 1901) 109 Fed. 577.

A proceeding instituted by a railroad company under the statute of Missouri to condemn right of way, which is a judicial proceeding under the state Constitution, is a "suit of a civil nature at law." Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co. (C. C. 1902) 119 Fed. 209.

8. Forcible entry and detainer.—An action of forcible entry and detainer was a "suit of a civil nature," within the meaning of the act of 1789 (1 Stat. 73). Wheeler v. Bates (C. C. 1874) Fed. Cas. No. 17,492.

9. Mandamus.—Mandamus is not an action at law, or a suit in equity, under this section. American Union Telegraph Co. v. Bell Telephone Co. (C. C. 1880) 1 Fed. 698, 699; Rosenbaum v. Board of Sup'rs (C. C. 1886) 28 Fed. 223, 225 (affirmed [1887] 7 Sup. Ct. 633, 120 U. S. 450, 30 L. Ed. 743); Mystic Milling Co. v. Chicago, M. & St. P. Ry. Co. (C. C. 1904) 132 Fed. 289. But see Washington Imp. Co. v. Kansas Pac. Ry. Co. (C. C. 1879) Fed. Cas. No. 17,242, where it was held that a proceeding by mandamus to compel defendant corporation to register transfers of certificates of stock held by plaintiff is a "suit of a civil nature at law."

Federal courts will issue the writ of mandamus only in aid of their jurisdiction. Wheeling v. Baltimore (C. C. 1862) Fed. Cas. No. 17,502.

The jurisdiction of the circuit courts in mandamus proceedings is not enlarged by the act of 1875. American Union Tel. Co. v. Bell Tel. Co. (C. C. 1880) 1 Fed. 698.

Though the federal courts have no jurisdiction of an original proceeding for a writ of mandamus to compel municipal officers to levy taxes to pay bonds, those courts can take jurisdiction of an action at law by a citizen of another state to recover judgment on such bonds, though the judgment recovered can be enforced only by mandamus. Waite v. Santa Cruz (C. C. 1898) 89 Fed. 619, 623.

10, 11. Partition.—A sessions proceeding for partition under a state statute held not a civil suit at common law. Austin v. Rutland R. Co. (C. C. 1883) 17 Fed. 466.

12. Suits for royalties.—A suit for royalty on a license is a suit at common law, or, if in equity, a suit on general equity not dependent on the patent law. Consolidated Middlings Purifier Co. v. Wolf (C. C. 1886) 28 Fed. 814, 815.

13. Suits in equity, in general.—The equity powers of the federal courts are such only as are conferred by act of Congress. Noonan v. Lee (1862) 2 Black, 499, 509, 17 L. Ed. 278; Waterman v. Canal-Louisiana Bank & Trust Co. (1909) 30 Sup. Ct. 10, 12, 215 U. S. 33, 54 L. Ed. 80; Lorman v. Clarke (C. C. 1841) Fed. Cas. No. 8,516; Loring v. Marsh (C. C. 1865) Fed. Cas. No. 8,515.

In the exercise of its equity jurisdiction, the federal court, as to persons and matters within its jurisdiction, can afford relief where it can be afforded by the principles of the high court of chancery in England existing at the time of the formation of our constitution. Waterman v. Canal-Louisiana Bank & Trust Co. (1909) 30 Sup. Ct. 10, 12, 215 U. S. 33, 54 L. Ed. 80; Lorman v. Clarke (C. C. 1841) Fed. Cas. No. 8,516; U. S. v. Parrott (C. C. 1858) Fed. Cas. No. 15,998; Loring v. Marsh (C. C. 1865) Fed. Cas. No. 8,515.

The district court of the United States in Louisiana has equity powers, under the acts of congress organizing such court. Livingston v. Story (1835) 34 U. S. (9 Pet.) 632, 9 L. Ed. 255.

A controversy being between citizens of different states, and the value of the property being of the jurisdictional amount, the case was held to be within the equity jurisdiction of the federal court, though it involved rights arising under the judicial proceedings in another jurisdiction. Arrowsmith v. Gleason (1889) 9 Sup. Ct. 237, 240, 129 U. S. 86, 32 L. Ed. 630.

The equity powers of the federal courts are the same in those states where no courts having chancery powers exist as in other states. Lorman v. Clarke (C. C. 1841) Fed. Cas. No. 8,516.

14. Accounting.—The District Court had, in view of the Alaska Code, jurisdiction to determine a claim by a surviving partner against the estate of his deceased partner, which involved an accounting of partnership affairs.

Esterly v. Rua (1903) 122 Fed. 609, 58 C. C. A. 548.

15. Administration and probate.— Federal courts have no probate powers nor authority to appoint an administrator. Fouvergne v. Municipality No. 2 of City of New Orleans (1855) 59 U. S. (18 How.) 470, 15 L. Ed. 399; Underground Electric Rys. Co. of London v. Owsley (1909) 176 Fed. 26, 99 C. C. A. 500; Divine v. Unaka Nat. Bank (Tenn. 1911) 140 S. W. 747, 39 L. R. A. (N. S.) 586.

A federal court of chancery has jurisdiction where the proper diversity of citizenship exists to determine the interest of an heir in an alleged lapsed legacy and the consequent increase in the residuary estate, although the bill also asks other relief which cannot be granted because it would interfere with the ordinary settlement of the estate in the state probate court. Waterman v. Canal-Louisiana Bank & Trust Co. (1909) 30 Sup. Ct. 10, 215 U. S. 33, 54 L. Ed. 80.

The chancery jurisdiction of the federal courts embraces a suit, where the requisite diversity of citizenship exists, to have the complainants adjudicated to be the heirs at law and next of kin of a decedent. McClellan v. Carland (1909) 30 Sup. Ct. 501, 504, 217 U. S. 268, 54 L. Ed. 762.

The federal court has jurisdiction, as between citizens of different states, of the administration of the assets of deceased persons, such assets being within their territorial jurisdiction; and, in a suit against a trustee under a will for an accounting and distribution, the court erred in remitting the case to the state probate court for the taking of accounts. Comstock v. Herron (1893) 55 Fed. 803, 5 C. C. A. 266, reversing decree (C. C. 1891) 45 Fed. 660.

A proceeding under a state law to contest the validity of a will which has been admitted to probate is one of which the federal court has jurisdiction, where the amount in controversy is sufficient, and the parties are citizens of different states. Richardson v. Green (1894) 61 Fed. 423, 9 C. C. A. 565, certiorari denied (1894) 15 Sup. Ct. 1042, 159 U. S. 264, 40 L. Ed. 142.

A proceeding for the probate of a will is not a "suit of a civil nature at law or in equity." Wahl v. Franz (1900) 100 Fed. 680, 40 C. C. A. 638; Pulver v. Leonard (C. C. 1909) 176 Fed. 586.

A court of the United States as a court of equity has no jurisdiction of a purely probate proceeding, which is not a matter of equity cognizance, nor has it power to undertake the general administration of the estate of a deceased person, but it may, as a court of equity, having the full jurisdiction of the English Courts of Chancery as they existed at the time of the adoption of the Constitution, in a suit where it has jurisdiction of the parties, appoint a receiver of an estate pending the probate of a will, in the absence of the appointment of a custodian by the probate court, and this although proceedings for the probate of the will and the appointment of an executor are pending in such court which have been delayed by reason of litigation between parties in interest. Underground Electric Rys. Co. of London v. Owsley (1909) 176 Fed. 26, 99 C. C. A. 500, affirming order (C. C. 1909) 169 Fed. 671.

The jurisdiction of the federal courts of equity to enforce the trusts of a will, at the suit of a legatee, is plenary; and a state statute enacting that settlements in a state court shall be prima facie evidence in favor of the accounting party cannot operate to restrict it. Pulliam v. Pulliam (C. C. 1879) 10 Fed. 23.

Jurisdiction as to wills, and their probate as such, is neither included in, nor excepted out of, the grant of judicial powers to the courts of the United States. So far as it is ex parte, and merely administrative, it is not conferred, and it cannot be exercised by them at all, until in a case at law or in equity its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties. Everhart v. Everhart (C. C. 1888) 34 Fed. 82.

A suit to annul a will as a muniment of title, and restrain the enforcement of a decree admitting it to probate, is in essential particulars a suit in equity, and, if such a suit can be maintained in one of the state courts, it may be maintained by original process in the circuit court of the United States, if the parties are citizens of different states, and the amount in controversy is sufficient to give jurisdiction. Id.

The federal courts will take equity jurisdiction of a bill by nonresident heirs against resident heirs to compel an accounting of the property of their intestate in the hands of defendants, and for distribution, notwithstanding the remedy under the probate law of the state, when the bill alleges facts evoking the exercise of the powers of a court of chancery, such as that there has been no administration after the lapse of five years; that defendants have wrongfully appropriated the whole estate, traded and speculated upon it, changing the original form of some of the property, made profits thereon, and been guilty of concealment, rendering a discovery and accounting necessary. Rich v. Bray (C. C. 1889) 37 Fed. 273, 2 L. R. A. 225.

By virtue of their chancery jurisdiction, the federal courts have jurisdiction over the administration of estates when the requisite citizenship and other conditions exist. This jurisdiction does not extend to the appointment of administrators, confirmation of executors, or the probate of wills; nor will it be exercised when the state courts of concurrent jurisdiction have taken possession of the subject-matter of the controver-

sy. Ball v. Tompkins (C. C. 1890) 41 Fed. 486.

Where the necessary diversity of citizenship exists, the federal court has jurisdiction of a suit for the construction of a will, the execution, validity, and probate of which are recognized, there having been no construction of the will, and no adjudication of complainant's rights thereunder, either by the probate court in which the settlement of the estate is pending, or by any other tribunal having jurisdiction of the subject and the parties. Toms v. Owen (C. C. 1891) 52 Fed. 417, following Colton v. Colton (1888) 8 Sup. Ct. 1164, 127 U. S. 301, 308, 32 L. Ed. 138, and distinguishing Broderick's Will (1874) 21 Wall. 503, 22 L. Ed. 599.

A federal court has no jurisdiction to disestablish a will admitted to probate in the state court and establish one not admitted, where the state courts of equity have no such powers. Cilley v. Patten (C. C. 1894) 62 Fed. 498; Oakley v. Taylor (C. C. 1894) 64 Fed. 245.

The courts of the United States have jurisdiction to entertain suits on claims against estates of decedents, brought against the executor or administrator, where the amount in controversy is sufficient, and the requisite diversity of citizenship appears; and such jurisdiction cannot be affected by a state statute requiring claims to be filed in a particular court. Crider v. Shelby (C. C. 1899) 95 Fed. 212.

16. Cancellation of instruments.—A suit, the purpose of which is to have canceled a guaranty upon a large number of negotiable bonds which might otherwise pass into the hands of bona fide purchasers, and to restrain suits upon the guaranty because of facts not appearing upon its face, is of equitable cognizance. Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co. (1899) 19 Sup. Ct. 817, 822, 174 U. S. 522, 43 L. Ed. 1081.

A federal court has jurisdiction of a bill to set aside as fraudulent a deed of assignment at suit of a resident of a state other than that of the assignor and assignee, when the amount involved exceeds $500. Fleisher v. Greenwald (C. C. 1884) 20 Fed. 547.

17. Cross demands.—Code Civ. Proc. Cal. § 440, providing for the compensation of cross demands existing between two persons, though found in the provisions relating to procedure, give substantive rights, which are enforceable in a federal court of equity. Iowa & C. Land Co. v. Temescal Water Co. (C. C. 1899) 95 Fed. 320.

18. Divorce and alimony.—The federal courts have no jurisdiction of divorce, or the allowance of alimony, either as an original proceeding in chancery, or as incident to divorce, but alimony decreed in a state court may be recovered in a federal court. Barber v. Barber (1858) 21 How. 582, 584, 16 L. Ed. 226.

A claim for future alimony under a judgment of a state court is an action of a civil nature within the jurisdiction of the federal courts; other jurisdictional requisites being present. Israel v. Israel (C. C. 1904) 130 Fed. 237.

19. Foreclosure of liens.—A federal District Court has no equity power to appoint an officer to apportion and collect a tax to satisfy its judgment on county bonds, though mandamus has proved ineffectual. Yost v. Dallas County (1915) 35 Sup. Ct. 235, 236 U. S. 50, 59 L. Ed. 460.

A suit to enforce a mechanic's lien is in the federal courts a suit in equity, and not an action at law. Armstrong Cork Co. v. Merchants' Refrigerating Co. (1910) 184 Fed. 199, 107 C. C. A. 93, modifying decree (C. C. 1909) 171 Fed. 778.

The federal court has jurisdiction of a suit in equity to enforce the right of redemption from the lien of a trust deed of lands lying in another state. Kanawha Coal Co. v. Kanawha & O. Coal Co. (C. C. 1870) Fed. Cas. No. 7,606.

The federal district courts have jurisdiction in equity of a suit to foreclose a mortgage on land situated in their districts. Pooley v. Luco (D. C. 1896) 76 Fed. 146.

20. Injunction.—The equitable jurisdiction of the federal court on removal from a state court extends to a suit on behalf of the state to restrain a corporation from continuing to operate mines belonging to the state, and from interfering with the proper state agents in their control thereof. Coosaw Min. Co. v. South Carolina (1892) 12 Sup. Ct. 689, 693, 144 U. S. 550, 36 L. Ed. 537.

The existing relation of debtor and creditor between South Carolina and the vendors of liquor under the state dispensary acts was not so altered by the winding-up act of February 16, 1907, providing a commission to close out the state dispensary business and turn over to the state treasury the surplus funds remaining after liquidating and paying claims out of the state assets, as to enable a federal court to take jurisdiction of a bill filed by such vendors, which seeks to enjoin the commission from disposing of the fund until their claims are paid, and asks for the appointment of a receiver, on the theory that by such statute the assets of the dispensary were placed in the hands of the commission as a trust fund for the benefit of all creditors having valid claims against such fund, which they are entitled to enforce by judicial action against the commission, without the presence of the state as a necessary party. Murray v. Wilson Distilling Co. (1909) 29 Sup. Ct. 458, 213 U. S. 151, 53 L. Ed. 742, (reversing decree [1908] 164 Fed. 1, 92 C. C. A. 1); Same v. State of South

Carolina (1909) 29 Sup. Ct. 465, 213 U. S. 174, 53 L. Ed. 752.

The power to issue an injunction is inherent in the original jurisdiction in equity conferred on the circuit courts by this section, and its various amendments, and is not curtailed by R. S. § 5242, post, § 9834. Hower v. Weiss Malting & Elevator Co. (1893) 55 Fed. 356, 359, 5 C. C. A. 129.

A suit in equity dependent upon a former suit of which the federal court had jurisdiction may be maintained in that court without regard to diversity of citizenship or a federal question to aid or enjoin the original suit, to restrain, avoid, or enforce the judgment or decree therein, or to enforce liens or claims to property in the custody of the court in the original suit. Campbell v. Golden Cycle Min. Co. (1905) 141 Fed. 610, 73 C. C. A. 260.

A suit will not lie in the federal court to enjoin state election officers from registering voters or holding an election in pursuance of a state law on the ground that the same is unconstitutional. Holmes v. Oldham (C. C. 1877) Fed. Cas. No. 6,643.

A suit by an alien against citizens of the United States to enjoin a conspiracy to prevent the loading or unloading of complainant's ship is within the equity jurisdiction of the federal courts, independently of any question as to interference with interstate or foreign commerce. Elder v. Whitesides (C. C. 1895) 72 Fed. 724, following Hagan v. Blindell (1893) 56 Fed. 696, 6 C. C. A. 86, and Arthur v. Oakes (1894) 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414.

No special statute is required to give a federal court of equity jurisdiction of a suit by private parties who allege special injury to enjoin the maintenance of a bridge over navigable waters, on the ground that it is maintained in violation of the laws of the United States, and is therefore a public nuisance, but such suit is within the general equity jurisdiction of the court, where the requisite amount is involved. E. A. Chatfield Co. v. City of New Haven (C. C. 1901) 110 Fed. 788.

21. Insolvency and winding-up proceedings.—The court has jurisdiction in a general creditors' suit properly pending therein for the collection and distribution of the assets of an insolvent corporation to hear and determine an ancillary suit instituted in the same cause by its receiver, in accordance with its order, against debtors of such corporation. White v. Ewing (1895) 15 Sup. Ct. 1018, 1019, 159 U. S. 36, 40 L. Ed. 67.

The federal courts have jurisdiction to wind up corporations, or marshal their assets where the state statutes provide for their dissolution and for equitable proceedings for that purpose, or in instances of ordinary creditors' bills after judgment and execution returned nulla bona, or in instances when called on to collect and dispose of assets of dissolved corporations, domestic or foreign. Dickinson v. Saunders (1904) 129 Fed. 16, 63 C. C. A. 666.

A state statute which authorizes a suit by any creditor or stockholder to wind up the affairs of a corporation which has become insolvent or suspended its ordinary business for want of funds to carry on the same creates a right which may be enforced in a federal court of equity having jurisdiction of the parties. McGraw v. Mott (1910) 179 Fed. 646, 103 C. C. A. 204.

Jurisdiction of a suit by a receiver of a national bank to reach assets of the estate of a deceased stockholder in satisfaction of an assessment by the comptroller of the currency is not based on this clause. Brown v. Ellis (C. C. 1899) 95 Fed. 1, 2.

22. Nuisances.—A court of equity may take jurisdiction in cases of public nuisances. Georgetown v. Alexandria Canal Co. (1838) 12 Pet. 91, 98, 9 L. Ed. 1012.

23. Obstruction of navigation.—Where a river within a state was navigable for some distance from its mouth, and was actually navigated by small steamboats and river craft for the purpose of carrying up groceries, supplies, clothing, loggers' tools, etc., to the head of navigation, and returning with farmers' products, a bill was maintainable in the federal courts to restrain a boom company from maintaining a boom in the river in such a manner as to be an obstruction to navigation, though the river was chiefly valuable for floating logs, and there was no proof of actual carriage of goods on the river in interstate commerce. U. S. v. Wishkah Boom Co. (1905) 136 Fed. 42, 68 C. C. A. 592, appeal dismissed Wishkah Boom Co. v. U. S. (1906) 26 Sup. Ct. 765, 202 U. S. 613, 50 L. Ed. 1171.

24. Quieting title.—A court of the United States may entertain a suit in equity to quiet title to lands, where the complainant is in possession. American Stave & Cooperage Co. v. Butler County (C. C. 1899) 93 Fed. 301.

See, also, notes under § 1244, post.

25. Specific performance.—The federal courts have, by virtue of their general chancery jurisdiction, authority to specifically enforce, as between citizens of different states, agreements concerning property, though such property may belong to the estate of a decedent. Davis v. Davis (C. C. 1898) 89 Fed. 532, 537.

26. Stay of proceedings.—A federal court has jurisdiction in a suit in equity to stay proceedings upon a judgment at law between the same parties, although the subpœna be served upon the defendant out of the district in which the court sits. Logan v. Pat-

rick (1809) 5 Cranch, 288, 3 L. Ed. 103.

The court has power to prohibit a nonresident plaintiff from prosecuting an action against a resident defendant. City Bank of New York v. Skelton (C. C. 1846) Fed. Cas. No. 2,740.

27. Trusts.—The jurisdiction of the federal courts as courts of equity is ample to enforce the performance of trusts. Irvine v. Marshall (1857) 20 How. 558, 565, 15 L. Ed. 994; McClellan v. Carland (1911) 187 Fed. 915, 110 C. C. A. 49; Bockfinger v. Foster (1900) 62 P. 799, 10 Okl. 488, affirmed (1903) 23 S. Ct. 836, 190 U. S. 116, 47 L. Ed. 975.

Where an attorney enters an unauthorized and fraudulent appearance for trustees in an action against them and their grantor to subject the interest of the grantor to claims of creditors, consents to a decree that the land be sold divested of their interest, and afterwards converts the proceeds of sale, a court of equity is the proper tribunal to afford the trustees effectual relief. Robb v. Vos (1894) 15 Sup. Ct. 4, 12, 155 U. S. 13, 39 L. Ed. 52.

Jurisdiction of courts of equity over trusts, and of the appointment of agent. Baring v. Willing (C. C. 1820) Fed. Cas. No. 985.

II. SUITS BY THE UNITED STATES OR ITS OFFICERS

As to suits against officers, see post, this note, "Cases arising under Constitution, laws, or treaties."

28. United States as party.—In all cases where the United States is the real plaintiff the proceedings should be in its name, unless it is otherwise ordered by act of Congress. Benton v. Woolsey (1838) 12 Pet. 27, 31, 9 L. Ed. 987.

The United States is the real, and not merely the nominal, plaintiff, in a suit brought in its name, for the use and benefit of a materialman, upon the bond of a contractor for a public work, which the statute requires shall contain the specific, special obligation directly to the United States that the contractor shall promptly make payments to all persons supplying him labor and materials in the prosecution of the work. United States Fidelity & Guaranty Co. v. U. S. (1907) 27 S. Ct. 381, 204 U. S. 349, 51 L. Ed. 516, affirming judgment U. S. v. Churchyard (C. C. 1904) 132 Fed. 82.

Where, in a suit in the federal court, the United States as plaintiff was placed in possession of the property under a decree containing certain stipulations as to the rights of the parties in the improvements and rents to be collected, the jurisdiction of the court over the property is ousted by the surrender of possession to the United States, and the court can neither appoint a receiver nor enforce any claim against the United States arising from the stipulations of the decree. U. S. v. Wickersham (C. C. 1882) 10 Fed. 505.

In a suit by one claiming ownership of land by conveyance from one who has made an entry thereon under the land laws of the United States, but who has not received a patent therefor, against one claiming the ownership by virtue of a subsequent entry, a petition of intervention filed by the United States alleging that plaintiff's entry was fraudulent does not make the United States a party, to give the federal courts jurisdiction, since courts have no jurisdiction to pass upon title to land to which the United States has not parted with its legal title, where there is a controversy between a person claiming title under the land laws of the United States as against the government itself. McDougall v. Hayes (C. C. 1891) 46 Fed. 817.

A federal court has not jurisdiction of an action brought in the name of the United States to recover upon a contractor's bond for labor or material furnished in the construction of a public building. U. S. v. Henderlong (C. C. 1900) 102 Fed. 2; U. S. v. Sheridan (C. C. 1902) 119 Fed. 236; U. S. v. Barrett (C. C. 1905) 135 Fed. 189. CONTRA, U. S. v. Churchyard (C. C. 1904) 132 Fed. 82, affirmed U. S. Fidelity & Guaranty Co. v. U. S. (1907) 27 S. Ct. 381, 204 U. S. 349, 51 L. Ed. 516.

A federal court has jurisdiction of any suit in which the United States properly appears as plaintiff. U. S. v. Allen (C. C. 1909) 171 Fed. 907, decrees reversed (1910) 179 Fed. 13, 103 C. C. A. 1, judgment affirmed upon conditions Deming Inv. Co. v. U. S. (1912) 32 S. Ct. 549, 224 U. S. 471, 56 L. Ed. 847, and Goat v. Same (1912) 32 S. Ct. 544, 224 U. S. 458, 56 L. Ed. 841, and Mullen v. Same (1912) 32 S. Ct. 494, 224 U. S. 448, 56 L. Ed. 834, and Heckman v. Same (1912) 32 S. Ct. 424, 224 U. S. 413, 56 L. Ed. 820.

29. Persons liable to suit.—Executors and administrators may be sued in their representative capacity in the federal courts, and judgments against them may be enforced by execution against the property of the estate unadministered. U. S. v. Drennen (D. C. 1845) Fed. Cas. No. 14,902.

30. Suits maintainable.—A federal court has jurisdiction of any civil action which the United States is authorized to maintain. U. S. v. Northern Pac. R. Co. (1905) 134 Fed. 715, 67 C. C. A. 269 (reversing decree [C. C. 1903] 120 Fed. 546); U. S. v. Bougher (C. C. 1854) Fed. Cas. No. 14,627; U. S. v. Comet Oil & Gas Co. (C. C. 1911) 187 Fed. 674.

The court has jurisdiction of a set-off interposed by the United States to an action by a district attorney for fees. U. S. v. Tuthill (1890) 10 Sup.

Ct. 1075, 136 U. S. 652, 34 L. Ed. 557; Tuthill v. U. S. (D. C. 1889) 38 Fed. 538.

When the United States has a right, under a state statute, to sue in the name of the state on the official bond of a sheriff for allowing the escape of a federal prisoner, such action is within the jurisdiction of the federal district court. State of Tennessee v. Hill (1894) 60 Fed. 1005, 9 C. C. A. 326, 24 L. R. A. 170.

The district court has jurisdiction of an action by the United States to recover money fraudulently obtained by defendant in a payment of a false claim for a pension. Pooler v. U. S. (1904) 127 Fed. 519, 520, 62 C. C. A. 307.

The court has jurisdiction of a creditor's bill brought by the United States, where the matter in dispute exceeds, exclusive of costs, the requisite sum or value. U. S. v. Stiner (C. C. 1871) Fed. Cas. No. 16,404.

The United States courts have jurisdiction of suits by the government on the official bonds of officers chargeable with public moneys. U. S. v. Belknap (C. C. 1896) 73 Fed. 19.

A suit by the United States for the use of the Creek Nation of Indians to cancel patents or deeds to town lots belonging to said nation in its tribal capacity and sold by the United States for its benefit under Act March 1, 1901, c. 676, § 10, 31 Stat. 864, on the ground that such deeds were obtained by fraud, is one in which "the United States are plaintiffs or petitioners." U. S. v. Rea-Read Mill & Elevator Co. (C. C. 1909) 171 Fed. 501.

31. Suits by receivers of national banks.—See, also, notes under § 9668, post.

An action by a receiver of a national bank to recover assets is one by an officer of the United States suing under authority of an act of Congress, of which a court of the United States has jurisdiction without regard to the amount involved or the citizenship of the parties. Short v. Hepburn (1896) 75 Fed. 113, 21 C. C. A. 252; Myers v. Hettinger (1899) 94 Fed. 370, 37 C. C. A. 369 (affirming judgment Hettinger v. Meyers [C. C. 1897] 81 Fed. 805); Price v. Abbott (C. C. 1883) 17 Fed. 506; Hendee v. Connecticut & P. R. R. Co. (C. C. 1886) 26 Fed. 677; Armstrong v. Ettlesohn (C. C. 1888) 36 Fed. 209; Armstrong v. Trautman (C. C. 1888) 36 Fed. 275, 276; Stephens v. Bernays (C. C. 1890) 44 Fed. 642, 643; Yardley v. Dickson (C. C. 1891) 47 Fed. 835; Fisher v. Yoder (C. C. 1892) 53 Fed. 565; Linn County Nat. Bank v. Crawford (C. C. 1895) 69 Fed. 532; Thompson v. Pool (C. C. 1895) 70 Fed. 725; Thompson v. German Ins. Co. (C. C. 1896) 76 Fed. 892; Brown v. Smith (C. C. 1898) 88 Fed. 565; Rankin v. Herod (C. C. 1905) 140 Fed. 661; Murray v. Chambers (C. C. 1907) 151 Fed. 142; Platt v. Beach (D. C. 1868) Fed. Cas. No. 11,215; Frelinghuysen v. Baldwin (D. C. 1882) 12 Fed. 395; Stephens v. Bernays (D. C. 1890) 41 Fed. 401; Id. (1893) 119 Mo. 143, 24 S. W. 46 (following [D. C. 1890] 41 Fed. 401); Thompson v. Schaetzel (1891) 2 S. D. 395, 50 N. W. 631.

Plaintiff was appointed receiver of an insolvent national bank in Vermont, and obtained an order from the federal court for the district of Vermont for the sale of certain bonds pledged to the bank as security for a debt due the bank by defendant railroad company in Canada, which brought suit in the Canadian court to recover the bonds, whereupon plaintiff filed a bill in the federal court for the district of Vermont for an injunction against the further prosecution of the suit in Canada. Held, that the court had jurisdiction, and that the injunction should be granted. Hendee v. Connecticut & P. R. R. Co. (C. C. 1886) 26 Fed. 677.

The federal courts have the same jurisdiction of suits by and against the "agents" of national banks appointed under the national banking acts of congress, when the "receivers" of an insolvent bank have been displaced by such "agents," as they have of suits by and against the "receivers," each being in the same sense officers of the United States, and each representing in precisely the same relation the bank in its corporate capacity, and this without regard to citizenship of the parties or amount involved. McConville v. Gilmour (C. C. 1888) 36 Fed. 277, 1 L. R. A. 498.

The F. National Bank pledged to the U. Bank, as collateral, a draft held by it. The F. Bank failed, and the comptroller appointed a receiver, to whom the U. Bank indorsed the draft for collection. Held, that the receiver could show that the draft was really an asset of the F. Bank, on which he could sue in a federal court, by virtue of his appointment, irrespective of the citizenship of parties. Thompson v. Pool (C. C. 1895) 70 Fed. 725.

32. Suits by United States marshals, district attorneys, and Indian agents.—The district attorney of the United States filed a bill of information in the district court of the United States to foreclose a mortgage in favor of the United States. Held, that the United States might be considered the real complainant, and that the court had jurisdiction. Benton v. Woolsey (1838) 12 Pet. 27, 9 L. Ed. 987.

An undertaking given to the United States marshal for the return of goods taken from his possession in replevin, by process from a state court, is a forthcoming bond, and the marshal may maintain an action in his own name in the federal court; and this irrespective of the question of the citizenship of himself and the obligors in the bond;

and so may any one beneficially interested in the bond. Patterson v. Mater (C. C. 1885) 26 Fed. 31.

A receiver of a national bank, appointed by the comptroller of the currency, is an officer of the United States, and entitled to sue in the federal courts, by virtue of R. S. § 629. Thompson v. Pool (C. C. 1895) 70 Fed. 725.

The district court has jurisdiction of an action by a United States marshal to protect money in his hands as such and when wrongfully interfered with in its possession or when his right to it as marshal is invaded. Henry v. Sowles (D. C. 1886) 28 Fed. 481.

There is no statute authorizing an Indian agent to sue for the benefit or protection of the Indians under his charge, so as to bring such a suit within the provision of R. S. § 563, substantially re-enacted in this subdivision. On the contrary, it is the right and duty of the government itself to maintain such suits as are necessary to protect the rights of tribal Indians. In re Celestine (D. C. 1902) 114 Fed. 551.

33. Suits by postmaster general.—A suit by the Postmaster General on a postmaster's bond is within the judicial power of the federal courts. Postmaster General v. Early (1827) 12 Wheat. 136, 149, 6 L. Ed. 577.

The district courts have jurisdiction of suits brought by the postmaster general and other officers of the United States under authority of acts of congress. Southwick v. Postmaster General (1829) 2 Pet. 442, 7 L. Ed. 479.

III. LAND GRANTS FROM DIFFERENT STATES

34. Grounds of jurisdiction.—The federal courts have jurisdiction over a case between citizens of Kentucky, claiming lands under different grants, one issued by Kentucky and the other by Virginia, on warrants issued by Virginia and locations founded before the separation of Kentucky from Virginia. Massie v. Watts (1810) 10 U. S. (6 Cranch) 148, 3 L. Ed. 181; Colson v. Lewis (1817) 15 U. S. (2 Wheat.) 377, 4 L. Ed. 266.

The federal courts have jurisdiction of controversies between citizens of the same state claiming lands under grants from different states. Bank of the U. S. v. Deveaux (1809) 29 U. S. (5 Cranch) 61, 85, 3 L. Ed. 38.

The jurisdiction of a circuit court over a controversy between citizens of different states, claiming under grants from different states, depended entirely upon diversity of citizenship, within the rule that makes decrees of a circuit court of appeals final in cases in which diversity of citizenship is the sole ground of original jurisdiction, since the various judiciary acts only conferred original jurisdiction on the circuit courts over such controversies when the parties are citizens of the same state. Stevenson v. Fain (1904) 25 Sup. Ct. 6, 8, 195 U. S. 165, 49 L. Ed. 142.

35. Effect of agreement between states.—An agreement between the state of Virginia and the state of Kentucky that all litigation arising over land grants made by those states before their separation shall be determined by the laws in existence at that time does not oust the federal court of its jurisdiction to try such cases. Wilson v. Mason (1801) 5 U. S. (1 Cranch) 45, 2 L. Ed. 29.

IV. AMOUNT IN CONTROVERSY

(A) *Construction and scope of provision*

36. Purpose and effect of provision.—A judgment of a circuit court, rendered upon personal service on the defendant of a summons not delivered to the marshal until after Act March 3, 1887, limiting the jurisdiction of the court to matters exceeding $2,000, went into force, although the complaint was filed before the act, will not be declared void on bill in equity on the ground that the matter in dispute was less than $2,000. If erroneous, the remedy is by writ of error. Donham v. Springfield Hardware Co. (1894) 62 Fed. 110, 10 C. C. A. 294.

Defendant in a suit involving less than $2,000 was served with summons February 2, 1887, by an unauthorized person. He appeared generally on February 23, 1887, and subsequently answered. Held, that the appearance cured the defect in service, and gave the court jurisdiction, and therefore the case was not affected by Act March 3, 1887, increasing the jurisdictional amount to $2,000. Platt v. Manning (C. C. 1888) 34 Fed. 817.

The provision as to amount merely prevents the dockets of the federal courts from being overcrowded with small cases. Davis v. Mills (C. C. 1900) 99 Fed. 39, 40.

So much of Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, as related to the amount in controversy was jurisdictional and could not be waived. Pepper v. Rogers (C. C. 1904) 128 Fed. 987.

Though the jurisdiction conferred does not depend on the amount involved, congress has by Judiciary Acts 1879, c. 20, incorporated into R. S. § 629—1, this section, excluded from the jurisdiction of the federal circuit courts all cases of a civil nature involving sums or values not in excess of $500, and by Act 1887, c. 373, as amended by Act 1888, c. 866, limited jurisdiction where the amount involved exceeded the sum or value of $2,000 and by Judicial Code, § 24, limited the matter in controversy to a sum or value in excess of $3,000, and these restrictions on the jurisdiction are valid.

Symonds v. St. Louis & S. E. Ry. Co. (C. C. 1911) 192 Fed. 353.

The restriction on the jurisdiction of the federal court is valid, though Const. art. 3, § 2, does not make jurisdiction depend on the amount involved in the controversy. Id.

This provision construed, and held not to enlarge the jurisdiction of District Courts beyond that previously possessed by the Circuit Courts in respect to the amount or value in dispute. Salander v. City of Tacoma (D. C. 1913) 208 Fed. 427.

(B) Cases subject to pecuniary limitation

37. Actions between citizens of the same state claiming land under the grants of different states.—Under Judiciary Act of 1887, § 1, as corrected by Act of 1888, a court might not take cognizance of a controversy between citizens of the same state claiming land under grants of different states unless the statutory amount was involved. U. S. v. Sayward (1895) 16 Sup. Ct. 371, 372, 160 U. S. 493, 40 L. Ed. 508.

38. Actions between citizens of different states or aliens.—The matter in dispute must exceed the jurisdictional amount, although jurisdiction is based on diverse citizenship. Richardson v. Green (1894) 61 Fed. 423, 9 C. C. A. 565; Eaton v. Hoge (1905) 141 Fed. 64, 72 C. C. A. 74, 5 Ann. Cas. 487; Turner v. Jackson Lumber Co. (1908) 159 Fed. 923, 87 C. C. A. 103; Moore v. Town of Edgefield (C. C. 1887) 32 Fed. 498; Werner v. Murphy (C. C. 1894) 60 Fed. 769; Pliable Shoe Co. v. Bryant (C. C. 1897) 81 Fed. 521; Felch v. Travis (C. C. 1899) 92 Fed. 210; Brown v. Ellis (C. C. 1899) 95 Fed. 1; Lefkowitz v. Foster Hose Supporter Co. (C. C. 1908) 161 Fed. 367; Risley v. City of Utica (C. C. 1909) 168 Fed. 737; Peters v. Queen Ins. Co. of America (C. C. 1910) 182 Fed. 113; Reich v. Tennessee Copper Co. (D. C. 1913) 209 Fed. 880.

A bill in equity against a town in one state by a citizen of another for relief against the accidental omission of seals from bonds of defendant town, payable to bearer and held by plaintiff part on his own account, and part by assignments from residents of other states, for the purpose of bringing the action, should be dismissed as far as the suit concerns bonds held by a citizen of another state to a less amount than the jurisdictional amount. Bernards Tp. v. Stebbins (1883) 3 Sup. Ct. 252, 262, 109 U. S. 341, 27 L. Ed. 956.

Jurisdiction on ground of diverse citizenship will not be taken of a suit by a nonresident taxpayer to enjoin the issue of county bonds unless complainant's liability is shown to exceed the statutory amount. Adams v. Douglas County (C. C. 1868) Fed. Cas. No. 52.

A suit for $10,000 brought by citizens and residents of France against an Illinois corporation was within the jurisdiction of the federal Circuit Court under Judiciary Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, conferring on federal courts jurisdiction of a controversy between citizens of a state and foreign states, citizens, or subjects wherein the amount in controversy exceeds $2,000. Fribourg v. Pullman Co. (C. C. 1910) 176 Fed. 981.

39. Actions under or for violation of interstate commerce acts.—An action for damages for violation of the interstate commerce act and acts amendatory thereof and supplementary thereto held not within the jurisdiction of the federal court, unless the amount in controversy exceeds the statutory limitation. Delaware, L. & W. R. Co. v. Lyne (1912) 193 Fed. 984, 113 C. C. A. 604.

A federal court had jurisdiction to compel an interstate carrier to specifically perform a contract to issue free passes to complainants during their natural lives, which the carrier had refused to do because of the provisions of Act June 29, 1906, post, § 8563 (5), prohibiting a carrier from issuing free interstate transportation; complainants having alleged that the value to each of them of the right sought to be enforced exceeded the jurisdictional amount, exclusive of interest and costs. Mottley v. Louisville & N. R. Co. (C. C. 1907) 150 Fed. 406, judgment reversed Louisville & N. R. Co. v. Mottley (1908) 29 Sup. Ct. 42, 211 U. S. 149, 53 L. Ed. 126.

An action against a carrier for loss or damage on a shipment by connecting carriers, under section 20 of the Interstate Commerce Act of Feb. 4, 1887, as amended by the Hepburn Act (Act June 29, 1906, § 7) § 8592, post, is subject to the general limitation as to amount. Smeltzer v. St. Louis & T. F. R. Co. (C. C. 1909) 168 Fed. 420.

That an initial carrier's liability for loss of goods shipped in interstate commerce was created by Carmack Amend. § 7, § 8592, post, was insufficient to confer federal jurisdiction as between plaintiff and such initial carrier, where the value of the goods did not exceed $3,000. Adams v. Chicago Great Western R. Co. (D. C. 1914) 210 Fed. 362.

40. Cases arising under constitution or federal laws.—A receiver may bring an action in the federal court where the amount in controversy exceeds the statutory amount. White v. Ewing (1895) 66 Fed. 2, 13 C. C. A. 276, certified questions answered (1895) 15 Sup. Ct. 1018, 159 U. S. 36, 40 L. Ed. 67. The matter in dispute must exceed the jurisdictional amount, although the controversy arises under the Constitution or laws of the United States. Eaton v. Hoge (1905) 141 Fed. 64, 72 C. C. A. 74, 5 Ann. Cas. 487; Turner

v. Jackson Lumber Co. (1908) 159 Fed. 923, 87 C. C. A. 103; Shewalter v. City of Lexington (C. C. 1906) 143 Fed. 161; Lefkowitz v. Foster Hose Supporter Co. (C. C. 1908) 161 Fed. 367; Risley v. City of Utica (C. C. 1909) 168 Fed. 737.

A suit to restrain the collection of taxes not exceeding the statutory limit, though arising under the constitution or laws of the United States, is not within the jurisdiction of a court of the United States, and future taxes which may be affected by the decision cannot be included in determining the value of the matter in dispute. Holt v. Indiana Mfg. Co. (1900) 20 Sup. Ct. 272, 176 U. S. 68, 44 L. Ed. 374, affirming decree (1897) 80 Fed. 1, 25 C. C. A. 301.

An action against election officers to recover damages for the wrongful rejection of plaintiff's vote for a member of Congress is one arising under the Constitution of the United States, and is within the jurisdiction of a federal court, where the damages are laid at more than the requisite amount. Brickhouse v. Brooks (C. C. 1908) 165 Fed. 534.

An action to recover money paid under an alleged unconstitutional city ordinance imposing a license tax on users of trading stamps, not involving $3,000, held not within the jurisdiction of a District Court. Salander v. City of Tacoma (D. C. 1913) 208 Fed. 427.

41. **Cases involving national banks.**—Under R. S. § 5136, post, § 9661, allowing national banks to sue and to be sued in any court of law and equity as fully as natural persons, such a bank attempting to sue in a federal court for a district other than the one in which the bank is established is subject to the jurisdictional limits as to the amount in controversy in actions by natural persons. St. Louis Nat. Bank v. Brinkham (C. C. 1880) 1 Fed. 45.

42. **Interveners.**—Where a judgment creditor whose judgment exceeds the jurisdictional amount has filed a creditors' bill in a federal court in behalf of himself and all other creditors who desire to come in, to reach and subject a special fund alleged to have been acquired by a third party in fraud of the rights of the creditors of the judgment defendant, and the court has acquired jurisdiction over such fund, it has jurisdiction to entertain a petition of intervention by another creditor desiring to become a party to the bill, and claiming an interest in the fund, though the amount of his judgment is less than the statutory amount. National Bank of Commerce v. Allen (1898) 90 Fed. 545, 33 C. C. A. 169.

43. **Receivership proceedings.**—To give the court jurisdiction to appoint a receiver for a corporation at the suit of a stockholder, it must appear that the amount in controversy, or the par value of the complainant's stock, equals the jurisdictional amount. Robinson v. West Virginia Loan Co. (C. C. 1898) 90 Fed. 770.

To confer jurisdiction on a federal court of a suit brought by a receiver of another court, though by reason of the fact that he is the receiver of a federal court the suit be regarded as one arising under the laws of the United States, it is essential that it should involve the jurisdictional amount. Sullivan v. Swain (C. C. 1899) 96 Fed. 259.

44. **Suits on marshals' bonds.**—The court has not jurisdiction in suits on United States marshals' bonds where the amount in controversy does not exceed the jurisdictional amount. Pierson v. Philips (C. C. 1888) 36 Fed. 837.

45. **Writs of right.**—Under Judiciary Act 1789, §§ 11, 20, the circuit courts have jurisdiction of a writ of right where the value of the property demanded exceeds the sum of $500. Green v. Liter (1814) 12 U. S. (8 Cranch) 229, 3 L. Ed. 545.

(C) Cases not subject to pecuniary limitation

46. **United States as plaintiff or petitioner.**—The federal courts have jurisdiction of suits by the United States without regard to the amount in controversy. U. S. v. Flournoy Live Stock & Real Estate Co. (C. C. 1896) 71 Fed. 576.

Under the judiciary acts of 1887–88, the federal courts had jurisdiction of a civil action at law in which the United States is plaintiff, without regard to the amount in dispute. U. S. v. Sayward (1895) 16 Sup. Ct. 371, 160 U. S. 493, 40 L. Ed. 508; U. S. v. Shaw (C. C. 1889) 39 Fed. 433, 3 L. R. A. 232; U. S. v. Kentucky River Mills (C. C. 1891) 45 Fed. 273; U. S. v. Reid (C. C. 1898) 90 Fed. 522. But see Maxwell v. Atchison, T. & S. F. R. Co. (C. C. 1888) 34 Fed. 286; U. S. v. Huffmaster (C. C. 1888) 35 Fed. 81; Id. 83.

47. **Suits by assignees.**—See 366 et seq., post, this subdivision.

48. **Suits by assignees in bankruptcy.**—Suits may be brought in the circuit courts of the United States, by assignees in bankruptcy, without reference to the amount or value in controversy. Payson v. Coffin (C. C. 1877) Fed. Cas. No. 10,858.

49. **Suits by national banks.**—A suit in equity in a court of the United States to restrain the defendant, as receiver of an insolvent national bank, from prosecuting an action at law in the same court against the complainant, is ancillary to the action at law, and the court has jurisdiction without regard to the amount involved. Aldrich v. Campbell (1899) 97 Fed. 663, 38 C. C. A. 347.

Under R. S. §§ 110, 111, substantially re-enacted in this section, giving the federal courts jurisdiction of all suits

by or against any national bank established in the district for which the court is held, such jurisdiction is not dependent upon the amount in controversy. St. Louis Nat. Bank v. Brinkham (C. C. 1880) 1 Fed. 45.

A receiver of a national bank may sue in the federal court to recover an indebtedness owing to the bank, without regard to the amount involved. Yardley v. Dickson (C. C. 1891) 47 Fed. 835.

To confer on the court of the United States of a district other than that in which a national bank is located jurisdiction of a suit in equity brought by the receiver of such bank, it is necessary that such suit should involve the jurisdictional amount exclusive of interest and cost. Brown v. Ellis (C. C. 1899) 95 Fed. 1.

An action by a receiver of a national bank to collect a debt due the bank is one brought under authority of R. S. § 5234, post, § 9821, and is within the jurisdiction of a federal court, regardless of the amount in controversy. Schofield v. Palmer (C. C. 1904) 134 Fed. 753. And see Rankin v. Herod (C. C. 1904) 130 Fed. 390.

50. Suits to recover penalties.—A suit under Act Feb. 26, 1885, section 4240, post, to recover penalties for importing foreigners under contract to perform labor might be maintained regardless of the amount in dispute. U. S. v. Whitcomb Metallic Bedstead Co. (D. C. 1891) 45 Fed. 89.

51. Suits to redress deprivation of civil rights.—District Court held to have jurisdiction of alien's suit to enjoin enforcement of state law requiring employment of citizens in preference to aliens, without regard to amount in controversy. Raich v. Truax (D. C. 1915) 219 Fed. 273.

(D) Matter in dispute and amount or value claimed or involved

52. "Matter in dispute" or "controversy" defined.—The term "matter in dispute" means the subject of litigation, the matter on which the action is brought and issue joined, and in relation to which, if the issue is one of fact, testimony is taken. Turner v. Southern Home Building & Loan Ass'n (1900) 101 Fed. 308, 41 C. C. A. 379; Cowell v. City Water Supply Co. (1903) 121 Fed. 53, 57 C. C. A. 393; Battle v. Atkinson (C. C. 1902) 115 Fed. 384, 387, affirmed (1903) 24 Sup. Ct. 845, 191 U. S. 559, 48 L. Ed. 302.

The matter in dispute is the claim presented on the record and the claim made by plaintiff until some further judicial proceeding has taken place showing on the record that the sum demanded is not the matter in dispute. Kanouse v. Martin (1853) 15 How. 198, 208, 14 L. Ed. 662.

Where, in an action on a money demand where the general issue is pleaded, the matter in dispute is the debt claimed; and its amount, as stated in the body of the declaration, and not merely the damages alleged or the prayer for judgment, must be considered. Turner v. Southern Home Building & Loan Ass'n (1900) 101 Fed. 308, 313, 41 C. C. A. 379.

The value of the matter in dispute, on which the jurisdiction of the federal Circuit Court is based, is the value of that which complainant seeks to recover, or the value of that which defendant will lose if complainant obtains the recovery he seeks. Cowell v. City Water Supply Co. (1903) 121 Fed. 53, 57 C. C. A. 393, reversing decree (C. C. 1899) 96 Fed. 769.

The limitation as to amount in controversy has reference to the sum in dispute; and the right of creditors is a mere incident over which the circuit court will necessarily exercise jurisdiction. New York Silk Mfg. Co. v. Second Nat. Bank (C. C. 1882) 10 Fed. 204.

"Matter in controversy" is not the result of litigation, but is that which will be affected by the result, and the value of the matter in controversy is the value which does or does not confer jurisdiction. Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co. (C. C. 1890) 43 Fed. 545, 547.

The statute contemplates that in some instances "the sum" will be the matter in dispute, and in others "the value"; and in the one case the amount in controversy controls, while in the other the value of the property involved. Colston v. Southern Home Building & Loan Ass'n (C. C. 1899) 99 Fed. 305, 306.

53. Amount claimed or value in general.—Where jurisdiction depends on the amount in controversy, the federal court cannot acquire jurisdiction unless the matter in dispute exceeds the sum specified in the statute, exclusive of interest and costs. Ladd v. Tudor (C. C. 1847) Fed. Cas. No. 7,975; Maine v. Gilman (C. C. 1882) 11 Fed. 214; Carrick v. Landman (C. C. 1884) 20 Fed. 209; Miller v. Wattier (C. C. 1885) 24 Fed. 49, 53; Western Union Tel. Co. v. White (C. C. 1900) 102 Fed. 705; Swofford v. Cornucopia Mines of Oregon (C. C. 1905) 140 Fed. 957; Kaufman v. I. Rheinstrom Sons Co. (C. C. 1911) 188 Fed. 544; Springer v. Bricker (1905) 76 N. E. 114, 165 Ind. 532; Bacon v. Iowa Cent. Ry. Co. (Iowa, 1912) 137 N. W. 1011; Adams Exp. Co. v. Milton (1875) 74 Ky. (11 Bush.) 49; Postal Telegraph Co. v. Cofer (1893) 14 Ky. Law Rep. (abstract) 574; Louisville Southern Ry. Co. v. Tucker's Adm'r (1899) 49 S. W. 314, 20 Ky. Law Rep. 1303, 105 Ky. 492; Thompson v. Kendrick's Lessee (1818) 6 Tenn. (5 Hayw.) 113; Hunt v. Hardin (1896) 36 S. W. 1028, 14 Tex. Civ. App. 285; Building & Loan Ass'n of Dakota v. Price (1898) 46 S. W. 92, 18 Tex. Civ.

App. 370; Texas & P. Ry. Co. v. Good (Tex. Civ. App. 1912) 151 S. W. 617; Missouri, K. & T. Ry. Co. of Texas v. Smith (Tex. Civ. App. 1914) 164 S. W. 885.

A writ of habeas corpus, sued out in a state court by one arrested for crime, is a civil suit, but the matter in dispute is not capable of being estimated in money. Kurtz v. Moffitt (1885) 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458.

A short stipulation by the parties that the amount in controversy exceeded $5,000 is insufficient to confer jurisdiction. Hegler v. Faulkner (1888) 127 U. S. 482, 8 Sup. Ct. 1203, 32 L. Ed. 210.

An action against election officers to recover damages for the rejection of a vote for a member of the house of representatives for the United States, in which the damages are laid at a sum exceeding the statutory amount, is within the jurisdiction of the court of the United States, concurrent with the courts of the state. Wiley v. Sinkler (1900) 21 S. Ct. 17, 179 U. S. 58, 45 L. Ed. 84.

A controversy between a state corporation commission and a railway company, which involves not only the right to enforce against the railway company the payment of statutory penalties in excess of $2,000, but also the right of that company to carry on interstate commerce in the state without being subject to orders and directions of the corporation commission, which so directly burdened such commerce as to amount to a regulation thereof, which right is alleged in the bill to be of the necessary jurisdictional value, such allegation being supported by testimony, and found to be the fact, is within the jurisdiction of a federal Circuit Court, although a dispute of some $146 demurrage may have been the origin of the litigation. McNeill v. Southern Ry. Co. (1908) 26 S. Ct. 722, 202 U. S. 543, 50 L. Ed. 1142, modifying and affirming decree Southern Ry. Co. v. Greensboro Ice & Coal Co. (C. C. 1904) 134 Fed. 82.

A federal circuit court held to have had jurisdiction of a bill, though one feature thereof involved less than the jurisdictional amount. Hayward & Clark v. McDonald (1911) 192 Fed. 890, 113 C. C. A. 368.

The circuit court could not take jurisdiction of a proceeding of habeas corpus for the custody of an infant under section 11 of the Act of 1789, although the father was a citizen of another state, as the matter in dispute has no pecuniary value, and cannot be estimated in money. Ex parte Everts (C. C. 1858) Fed. Cas. No. 4,581.

That animals may stray through a threatened opening in a fence inclosing a railway right of way, and cause wrecks occasioning great damage, does not give jurisdiction, since suits involving rights not capable of calculation in money are not within a jurisdiction dependent upon a particular sum. Oregon R. & Nav. Co. v. Shell (C. C. 1903) 125 Fed. 979, decree affirmed on rehearing (C. C. 1904) 143 Fed. 1004.

54. —— **Accounting.**—In a suit for an accounting by a surviving partner, the amount in controversy is the value of the entire partnership property, and, where that exceeds the requisite amount, it is sufficient to sustain the jurisdiction of a federal court. Rogers v. Lawton (C. C. 1908) 162 Fed. 203.

In suit for partnership accounting, held, that the amount in controversy could not exceed the aggregate of the amounts claimed by each partner to be due him from the other. Mull v. Parrott Bros. Co. (D. C. 1914) 218 Fed. 713.

55. —— **Administration and probate proceedings.**—Although the value in money of a right to appeal from the probate of a decedent's will cannot be appraised with exactness, yet, as the right of the plaintiff in the estate, if it is intestate, is far more than the requisite amount, and as the value of that right depends directly upon the power to bring the question of the validity of the will before a court, the pecuniary value of the matter in dispute is sufficient to bring this case within the jurisdiction of the court. Erwin v. Walsh (C. C. 1886) 27 Fed. 579, 581.

In a suit by a part of the distributees and heirs at law of an intestate against his administrator, whether the amount involved was sufficient to give jurisdiction to the United States circuit court should be determined by the amount of the fund in the hands of the administrator for distribution, and not by the separate sums decreed to the several distributees. Thornton v. Tyson (1891) 95 Ala. 589, 10 South. 639.

56. —— **Attachment.**—The limitation as to amount in controversy has reference, in a suit begun by attachment, to the sum in dispute between the plaintiff in attachment and the defendant, and the right of creditors for less than the jurisdictional amount to come in and have their claims adjusted and allowed is a mere incident over which the court will necessarily exercise jurisdiction. New York Silk Mfg. Co. v. Second Nat. Bank (C. C. 1882) 10 Fed. 204; Second Nat. Bank v. New York Silk Mfg. Co. (C. C. 1882) Fed. Cas. No. 12,601a.

Where an action on a claim of less than the jurisdictional amount, commenced in a state court by attachment of property exceeding that amount in value, is removed to the circuit court by a receiver of defendant's property, the amount in controversy, so far as it relates to the receiver's right to remove the cause, is the value of the property attached. Hoover & Allen Co.

v. Columbia Straw Paper Co. (C. C. 1895) 68 Fed. 945.

57. —— **Bonds.**—The court has jurisdiction in debt on a bond for the penalty of $1,000, though it appears that less than the jurisdictional amount is claimed. Postmaster General v. Cross (C. C. 1822) Fed. Cas. No. 11,306.

For purposes of jurisdiction in an action on a penal bond, the criterion of jurisdiction so far as the amount in controversy is concerned, is the sum actually due by reason of the breach of the bond, and not the penalty named in the bond. Cabot v. McMaster (C. C. 1894) 61 Fed. 129, 131.

A suit by a surety for cancellation of a bond for $40,000, on which, if valid, complainant is subject to a liability exceeding the requisite jurisdictional amount, involves a sufficient amount to confer jurisdiction on a federal court. Fidelity & Deposit Co. of Maryland v. Moshier (C. C. 1907) 151 Fed. 806.

58. —— **Claims not due.**—A federal circuit court has jurisdiction of a suit on certain notes aggregating over the jurisdictional amount, brought in good faith by a plaintiff, relying on a state statute which allows a creditor to bring an action on claims not due when the debtor intends fraud, although the amount of the notes already due is less than the required amount. Schunk v. Moline, Milburn & Stoddart Co. (1893) 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255, following Gaines v. Fuentes (1875) 92 U. S. 10, 23 L. Ed. 524, and Upton v. McLaughlin (1881) 105 U. S. 640, 26 L. Ed. 1197, and distinguishing Bowman v. Chicago & N. W. Ry. Co. (1884) 115 U. S. 611, 6 Sup. Ct. 192, 29 L. Ed. 502.

A bill against an insolvent firm for an injunction and receiver will not be dismissed after final hearing and decree on technical grounds that the claims of plaintiff, though in excess of the jurisdictional amount, were not due to that amount when the bill was filed. Johnston v. Straus (C. C. 1882) 26 Fed. 57.

59. —— **Dissolution and creditors' suits.**—In a suit by a shareholder for the appointment of a receiver of a corporation, the amount in controversy is the value of the entire corporate assets. Towle v. American Bldg., Loan & Inv. Soc. (C. C. 1894) 60 Fed. 131.

In a suit in behalf of all creditors to administer a trust fund, the amount of the fund is the amount in controversy for purposes of jurisdiction. Putnam v. Timothy Dry Goods & Carpet Co. (C. C. 1897) 79 Fed. 454.

In a creditors' suit, the amount claimed by the creditor against the judgment debtor determines the jurisdiction, and not the value of the property held by the debtor's alleged fraudulent assignee. Alkire Grocery Co. v. Richesin (C. C. 1899) 91 Fed. 79.

In a suit for the dissolution of a corporation and the distribution of its assets, the amount involved for jurisdictional purposes is the value of the property to be administered. Taylor v. Decatur Mineral & Land Co. (C. C. 1901) 112 Fed. 449.

60. —— **Divorce.**—In a suit for divorce, defendant alleged in his petition for removal that the amount in controversy exceeded the jurisdictional amount, upon the ground that the complainant charged in her bill that he was the owner of valuable real estate, and received an income of not less than $10,000 per annum, and prayed an award of alimony according to the equities of the case. Held, in view of the fact that the allowance of alimony was discretionary and the amount uncertain, that it could not be said to be a suit wherein the matter in controversy exceeded the statutory sum. Bowman v. Bowman (C. C. 1887) 30 Fed. 849.

In a suit to set aside and annul a decree of divorce fraudulently obtained, the matter in controversy cannot be measured by the pecuniary amount. Caswell v. Caswell (1887) 120 Ill. 377, 11 N. E. 342.

61. —— **Enforcement of liens.**—When a deed is given for the purpose of securing a debt, under the Georgia statutes, the mortgagee, independently of any express stipulation in the accompanying bond for reconveyance, has a right to pay the premium for proper insurance of the property conveyed, and to collect the same, as a part of the amount secured by the deed; and accordingly, in a suit for the foreclosure of such a security, the amount of insurance premiums paid by the mortgagee is properly included with the principal, in estimating the amount involved, for the purposes of the jurisdiction of the United States circuit court. Coolidge v. Ray (C. C. 1896) 75 Fed. 39.

In a suit to foreclose a chattel mortgage, the amount in controversy, as affecting the jurisdiction, is not determinable by the value of the property mortgaged. Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fertilizer Co. (C. C. 1897) 80 Fed. 68.

In a suit to foreclose a lien, the amount in dispute, for the purpose of determining the jurisdiction of a federal court, is the amount sought to be recovered under the lien. Wakeman v. Throckmorton (C. C. 1903) 124 F. 1010.

The jurisdictional amount in a suit relating to a mortgage given to secure a note held to be determined by the amount of the note. Daugherty v. Sharp (C. C. 1908) 171 Fed. 466.

In a suit to enforce liens against a steam shovel, the amount involved was the amount claimed, and not the value of the shovel. Bucyrus Co. v. McArthur (D. C. 1914) 219 Fed. 266.

62. —— **Husband and wife.**—A written contract of marriage, if genuine,

followed by the requisite consummation, imposes upon the husband from its date the obligation to support the wife, and confers upon the wife certain rights in his property; and such obligation and rights measure the value of the matter in dispute in a suit to cancel such written contract, within the meaning of the acts of congress conferring jurisdiction in the circuit courts of the United States. Sharon v. Terry (C. C. 1888) 36 Fed. 337, 1 L. R. A. 572.

63. —— **Insurance.**—Where it appears from a bill brought by a number of insurance companies to set aside an award as to the amount of a loss that the amount of insurance given by each of the plaintiffs exceeded the jurisdictional amount, and there is nothing to show that the loss was to be apportioned pro rata to the amount of each policy, this court cannot presume that such was the case, and has jurisdiction as to each plaintiff, even though the total insurance exceeds the loss fixed by the award, since the insured might select certain of the policies, and sue upon them for their full value. Hartford Fire Ins. Co. v. Bonner Mercantile Co. (C. C. 1890) 44 Fed. 151, 11 L. R. A. 623, decree modified (1893) 56 Fed. 378, 5 C. C. A. 524.

Where a suit against a mutual benefit association to invalidate an assessment involved a certificate for the jurisdictional amount and benefits, and defendant's allegation as to the amount involved was not traversed, the amount was sufficient to confer federal jurisdiction, notwithstanding a tender of premium. Enders v. Supreme Lodge Knights and Ladies of Honor (C. C. 1910) 176 Fed. 832.

64. —— **Liquidated damages.**—Where a suit is upon a demand on which the law liquidates the damages, the amount so liquidated, and not the amount claimed in the complaint, constitutes the matter in dispute; hence in a suit for conversion of property on which plaintiff claimed liens, where the several liens are specifically set out, and they aggregate less than the jurisdictional amount, without interest, a federal court is without jurisdiction, although the amount claimed is the amount of a judgment recovered on such claims against the debtor, which includes interest and other expenses, and exceeds the requisite sum, but to which judgment the present defendants were not parties. Bergman v. Inman Poulsen & Co. (C. C. 1898) 91 Fed. 293.

Where a broker's contract to develop and sell land authorized the owner to "call off the sale" on paying the broker $350 liquidated damages, the owner was only liable for such sum, whether he refused consummation after a sale was made or before, which amount was insufficient to confer federal jurisdiction in the broker's action for breach of contract. Phillips v. Troutman (D. C. 1912) 197 Fed. 325, judgment affirmed Phillips v. Troutman (1912) 199 Fed. 990, 117 C. C. A. 666.

65. —— **Payment and tender.**—Where the assignee of certain contracts, each executed for a separate parcel of school lands in Iowa by the proper county officer to a different assignor, tendered the amount due on them and brought suit for a deed of conveyance of the lands, held that, on the question of jurisdiction, the matter in dispute was the amount so tendered. Corbin v. Black Hawk County (1881) 105 U. S. 659, 26 L. Ed. 1136.

A Virginia taxpayer offered state coupons and money in payment of taxes. The tax collector refused the coupons, and garnished other funds of the taxpayer for the balance due, a sum less than the jurisdictional amount. Held, that the United States circuit court has jurisdiction; the amount in controversy being not said balance, but the value of the coupons tendered. Green v. Brooks (C. C. 1885) 28 Fed. 215.

66. —— **Penalties.**—A controversy between a state corporation commission and a railroad involving not only the enforcement of statutory penalties in excess of the requisite amount, but the railroad's right to carry on interstate commerce in the state without being subject to the commission's orders so directly burdening such commerce as to amount to a regulation thereof, was within the jurisdiction of a federal circuit court, even though a disputed demurrage of $146 may have been the origin of the suit. McNeill v. Southern R. Co. (1906) 26 Sup. Ct. 722, 724, 202 U. S. 543, 50 L. Ed. 1142.

67. —— **Quieting title and avoidance of conveyances.**—In a suit to quiet title, it is not the value of defendant's claim that constitutes the amount in controversy; it is the value of the whole of the real estate to which the claim extends. Woodside v. Ciceroni (1899) 93 Fed. 1, 35 C. C. A. 177; Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co. (C. C. 1890) 43 Fed. 545.

In a suit by an alleged owner of $^1/_{325}$ of certain real property, consisting of waterworks and their appurtenances, to cancel and avoid mortgages thereon for $475,000, and to declare his interest in the property free from the liens of such mortgages, the sum or value in dispute is the value of the $^1/_{325}$ of the property, which complainant claims to own and seeks to relieve from the lien of the incumbrances. Cowell v. City Water Supply Co. (1903) 121 Fed. 53, 57 C. C. A. 393.

In a proceeding to set aside certain conveyances as fraudulent and a cloud upon the plaintiffs' title, the "matter in dispute" is the value of the land.

Simon v. House (C. C. 1891) 46 Fed. 317.

A creditor who has a claim of less than the jurisdictional amount against an insolvent corporation cannot maintain suit in a federal circuit court on the ground of diverse citizenship, though he seeks to set aside fraudulent conveyances of corporate assets greatly exceeding that amount. Werner v. Murphy (C. C. 1894) 60 Fed. 769.

In a suit to set aside a conveyance of property, and mortgages given thereon, the value of the property and rights which will be affected if the relief prayed for is granted, and not the value of complainant's interest in the property, constitutes the amount in dispute, for the purpose of determining the jurisdiction of a federal court. Cowell v. City Water Supply Co. (C. C. 1899) 96 Fed. 769.

Where plaintiff sued to quiet title and to set aside a deed of trust on certain land, and also to vacate a deed executed to the purchaser under foreclosure of such deed of trust, but asked in the alternative that, if the deeds be not set aside, she be permitted to redeem on payment of the mortgage debt, interest, and costs, the amount involved, for the purpose of determining the jurisdiction of the federal Circuit Court, was the value of the land, and not the amount required to redeem. Greenfield v. U. S. Mortg. Co. (C. C. 1904) 133 Fed. 784.

Where suit was brought in a federal court to quiet title to certain property as against certain street improvement certificates amounting to less than the jurisdictional amount, the amount of the certificates, and not the value of the land, constituted the subject-matter of the action, and was therefore insufficient to confer jurisdiction. Shewalter v. City of Lexington (C. C. 1906) 143 Fed. 161.

In a suit by a railroad company to quiet title to a portion of its right of way which lies more than 100 feet from its tracks, and has never been used in the operation of its road, the amount in dispute is the value of the land in controversy, and not the value of the company's right to operate its road. Union Pac. R. Co. v. Cunningham (C. C. 1909) 173 Fed. 90.

In judgment creditors' suit to set aside alleged fraudulent conveyance, in which fraudulent grantor's trustee in bankruptcy intervened, amount involved held the amount of plaintiff's judgment. Casey v. Baker (D. C. 1914) 212 Fed. 247.

Where, in an action involving the title to realty, the plaintiff claimed the same without making a payment to one of the defendants of the sum of more than the jurisdictional amount, which payment the latter claimed, the action was within the jurisdiction of a federal court. Withers v. John Hopkins Place Sav. Bank (1898) 30 S. E. 766, 104 Ga. 89.

A petition alleged that defendant claimed $3,200 on a bond executed by plaintiff for that amount, which was secured by a trust deed upon her land; that the bond was really given for a loan of $1,375.80; that by the payment of usurious interest, which should be applied on the principal, it had been reduced to $723; that plaintiff was entitled to $652 as penalty for usury; that defendant had sold the land under the trust deed. The prayer was for cancellation of the sale and lien, and for judgment for the penalty. Defendant filed a general denial. The sale and lien were set aside, and judgment entered for plaintiff for $336. Held, that the amount in controversy was $3,200. Building & Loan Ass'n of Dakota v. Cunningham (1898) 47 S. W. 714, 92 Tex. 155.

68. —— Recovery of property.—The court would not take jurisdiction of a case where, although the whole property claimed by the lessor of the plaintiff in error and which was recovered in ejectment exceeded the amount necessary to give jurisdiction, the title to a lot of ground, part of the whole tract, which was of less value than such amount, was only involved in the case. Grant ex dem. Meredith v. McKee (1828) 1 Pet. 248, 7 L. Ed. 131.

The courts of Arkansas having settled that the action for unlawful detainer is merely for the purpose of restoring possession unlawfully detained, when the relation of landlord and tenant exists, without regard to ownership, the federal court in that state does not obtain jurisdiction of such an action by virtue of the allegation in the complaint that the value of the premises unlawfully detained is $5,000, with a rental value of $25 per month; the amount in controversy not depending on the value of the premises in fee, but on the rental value for the limited time. Battle v. Atkinson (1903) 24 S. Ct. 845, 191 U. S. 559, 48 L. Ed. 302, affirming decree (C. C. 1902) 115 Fed. 384.

In ejectment against a city, which has projected a street through plaintiff's land, and against an electric railway company using such street, the value of the land in controversy, for the purpose of determining the jurisdiction of the court, is, as to the railway company, not the value of the land necessary for its tracks and for the posts supporting the electric wires, but the value of the whole street, where such company has not disclaimed as to any part of the demanded premises. Greene v. City of Tacoma (C. C. 1892) 53 Fed. 562.

Where a bill alleges that complainant's land in question is valuable for pasturage, and for no other purpose, and that by force of an unconstitutional state act complainant is entirely de-

prived of his rights and property therein, the amount in controversy, for the purpose of jurisdiction, is the value of the land. Smith v. Bivens (C. C. 1893) 56 Fed. 352.

In an action to recover a piece of land on which a railroad had located its depot, the value of the land to the railroad company, according to its present situation and use, is the value to be considered in determining whether the amount involved in the litigation is sufficient to confer jurisdiction on the federal courts. King v. Southern Ry. Co. (C. C. 1902) 119 Fed. 1016.

In ejectment to recover possession of land, including a mill site with the mill thereon, the amount in controversy to sustain federal jurisdiction was not the value of defendant's claim, but was the value of the whole property which plaintiff claimed as described in his complaint. Butters v. Carney (C. C. 1904) 127 Fed. 622.

A suit based on a contract for the sale of land by complainant to defendant to be paid for in installments, in which complainant alleges payment of certain installments and nonpayment of others due, and prays that the court ascertain the amount due and to become due thereon and fix a time for its payment, in default of which defendant "be foreclosed of all right or title to, interest in, or lien upon said land," is not one of foreclosure in the ordinary sense to enforce payment of a debt secured by a lien, by taking and selling the property, but one to determine the legal and equitable rights of the parties in the land, and the amount or value involved, for the purpose of determining the jurisdiction of a federal court, is not the amount due on the contract, but the value of the land which is the subject of the suit. Squire v. Robertson (C. C. 1911) 191 Fed. 733.

The amount in controversy, which determines the jurisdiction of the District Court on a bill for discovery, is the amount involved in the main action, but in a suit to recover specific property is the value of the property. Mutual Life Ins. Co. of New York v. Painter (D. C. 1915) 220 Fed. 998.

69. —— **Regulation of rates.**—In a suit by a receiver of a water company to establish an alleged right to fix rates to consumers, the jurisdictional amount is to be determined by the value of the right, and not merely by the difference between the rates contended for by defendants and complainant respectively. Lanning v. Osborne (C. C. 1897) 79 Fed. 657.

70. —— **Reformation of deeds.**—The federal court has no jurisdiction of a suit to correct an ambiguity in the deed of a railroad right of way, and to restrain the removal of gates at a crossing in the inclosure thereof, where the value of the realty and the damage accruing to adjacent property from the road's construction are not shown to exceed the jurisdictional amount. Oregon R. & Nav. Co. v. Shell (C. C. 1903) 125 Fed. 979, decree affirmed on rehearing (C. C. 1904) 143 Fed. 1004.

71. —— **Replevin.**—An action of replevin for liquors valued at less than the required sum, brought in a state where consequential damages are not recoverable in such actions, does not involve the requisite amount to give a federal court jurisdiction, though special damages for injury to plaintiff's trade and business are claimed in a large sum. Vance v. W. A. Vandercook Co. (1898) 18 S. Ct. 645, 170 U. S. 468, 42 L. Ed. 1111, affirming judgment in part and reversing judgment in part W. A. Vandercook Co. v. Vance (C. C. 1897) 80 Fed. 786.

72. —— **Taxation.**—A Virginia taxpayer offered state coupons and money in payment of taxes. The tax collector refused the coupons, and garnished other funds of the taxpayer for the balance due, a sum less than the statutory amount. Held, that the court has jurisdiction; the amount in controversy being not said balance, but the value of the coupons tendered. Green v. Brooks (C. C. 1885) 28 Fed. 215.

An action was brought by a city in a state court to recover a tax of $2 for each of 509 telegraph poles maintained in the streets, but the declaration concluded: "And plaintiff claims $10,000." Held, that the actual amount in dispute was but the amount of the tax, $1,018, and a federal court could not take jurisdiction by removal. City of Baltimore v. Postal Tel. Cable Co. (C. C. 1894) 62 Fed. 500.

See 65, ante, and 85, post, this subdivision.

73. —— **Torts.**—In actions of tort, the amount of damages claimed by plaintiff is the matter in dispute, and the test of jurisdiction. Hulsecamp v. Teel (C. C. 1796) Fed. Cas. No. 6,862, 2 Dall. 358, 359, 1 L. Ed. 414; Louisville & N. R. Co. v. Roehling (1882) 11 Ill. App. (11 Bradw.) 264.

On complaint for false imprisonment, with damages laid at $10,000, it cannot be said that the amount in controversy is less than the jurisdictional amount, and not within the jurisdiction of the court, though plaintiff was deprived of his liberty for only 15 minutes, for refusal to pay a license demanded of him as a stove range agent. Hynes v. Briggs (C. C. 1890) 41 Fed. 468.

Where a plaintiff in a state court alleges title to real estate and a trespass thereon by defendant, and prays for damages and for general relief, as may be done under the state practice, and his title is put in issue by the answer, it is a part of the matter in dispute, the value of which is to be taken

into account in determining the question of amount. Porter v. Northern Pac. Ry. Co. (C. C. 1908) 161 Fed. 773.

In an action of trespass for the wrongful taking of property under an attachment against a third person, where malice is alleged, and acts of oppression which may properly be the basis for exemplary damages, the damages claimed in apparent good faith, and not the value of the property attached, are to be taken as the amount involved for the purpose of determining the jurisdiction of a federal court. Breard v. Lee (C. C. 1911) 192 Fed. 72.

Where, in an action for the death of plaintiffs' minor son, the damages were laid at $10,000, the fact that it appeared that, if decedent had lived and continued to earn the same amount he was earning when he died, he could only have earned $1,571.22 before attaining his majority, did not show as a matter of law that the case did not involve an amount within the jurisdiction of the federal court. Evans v. Lehigh Coal & Navigation Co. (D. C. 1913) 205 Fed. 637.

74. **Injunctions.**—The amount involved in a suit for an injunction, for the purpose of determining the jurisdiction of a federal court, is the value of the right to be protected, or the extent of the injury to be prevented, by the injunction. Board of Trade of City of Chicago v. Cella Commission Co. (1906) 145 Fed. 28, 76 C. C. A. 28 (reversing decree [C. C. 1903] 121 Fed. 1012); Same v. Donovan Commission Co. (1906) 145 Fed. 31, 76 C. C. A. 16 (reversing decree [C. C. 1903] 121 Fed. 1012); Evenson v. Spaulding (1907) 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. (N. S.) 904 (affirming order Spaulding v. Evenson [C. C. 1906] 149 Fed. 913); Nashville, C. & St. L. Ry. Co. v. McConnell (C. C. 1897) 82 Fed. 65; Humes v. City of Ft. Smith, Ark. (C. C. 1899) 93 Fed. 857; State of Arkansas v. Kansas & T. Coal Co. (C. C. 1899) 96 Fed. 353; Northern Pac. Ry. Co. v. Cunningham (C. C. 1900) 103 Fed. 708; Delaware, L. & W. R. Co. v. Frank (C. C. 1901) 110 Fed. 689; Anderson v. Bassman (C. C. 1905) 140 Fed. 10; Southern Pac. Co. v. Bartine (C. C. 1909) 170 Fed. 725; Bureau of National Literature v. Sells (D. C. 1914) 211 Fed. 379; Harbison v. Allen (1910) 68 S. E. 207, 152 N. C. 720. And see Whitman v. Hubbell (C. C. 1887) 30 Fed. 81.

75. —— **To restrain executions.**—The amount in controversy in a suit to enjoin execution is the amount of the execution, and not the value of the property on which it is levied. Ross v. Prentiss (1845) 3 How. 771, 772, 11 L. Ed. 824.

76. —— **Infringement of trade-marks and trade-names.**—In a suit to restrain the infringement of a trade-mark, the amount in dispute, as determining the jurisdiction, does not depend on the profits sought to be recovered. Symonds v. Greene (C. C. 1886) 28 Fed. 834.

In a suit to enjoin the further infringement of a trade-mark, and for an accounting, the amount in controversy is the value of the trade-mark to be protected, and not the amount of damages which may have been sustained. Hennessy v. Herrmann (C. C. 1898) 89 Fed. 669.

In a suit to restrain infringement of a trade-name not registered as a trade-mark, the injury to complainant's business from the infringement, past and prospective, measures the amount in controversy, for the purposes of federal jurisdiction. Draper v. Skerrett (C. C. 1902) 116 Fed. 206.

A federal court has jurisdiction of a suit between citizens of different states to enjoin infringement of a trade-mark, though the actual value of the trade-mark is not alleged, and it is not averred that it will be destroyed by defendant's unlawful use. Griggs, Cooper & Co. v. Erie Preserving Co. (C. C. 1904) 131 Fed. 359.

A complaint for injunction alleging that complainant's trade-name is worth in excess of $5,000; that defendant's acts are calculated to deceive and mislead intending purchasers of complainant's product, to its "great loss, injury, and damage"; and that unless defendant's acts are checked the reputation of complainant and its rifles will still further suffer great and irreparable damage—does not show jurisdiction in the federal court, as it cannot be assumed that the trade-name will be destroyed, or that complainant's damages are in excess of the statutory amount. Winchester Repeating Arms Co. v. Butler Bros. (D. C. 1904) 128 Fed. 976.

77. —— **Injury to land.**—In a suit to enjoin a permanent injury to land, the value of the land determines the amount in controversy for the purposes of the jurisdiction of a federal court. In re Turner (C. C. 1902) 119 Fed. 231.

78. —— **Mortgages.**—In a suit to enjoin sale under a power in a mortgage for $3,500 on the ground of usury, the matter in dispute exceeded the jurisdictional amount; the principal controversy being over the exercise of the power, the value of which was measured by the sum to secure which it was given. Dickinson v. Union Mortg. Banking & Trust Co. (C. C. 1894) 64 Fed. 895.

79. —— **Nuisances.**—The jurisdiction is tested by the value of the object to be gained by the bill, and that object is the removal of the nuisance. Mississippi & M. R. Co. v. Ward (1862) 2 Black, 485, 17 L. Ed. 311; American Smelting & Refining Co. v. Godfrey (1907) 158 Fed. 225, 89 C. C. A. 139, 14 Ann. Cas. 8 (writ of certiorari denied Utah Consol. Min. Co. v. Godfrey [1907] 28 Sup. Ct. 262, 207 U. S. 597, 52 L. Ed. 357); Amelia Milling Co. v.

ennessee Coal, Iron & R. Co. (C. C. 03) 123 Fed. 811.

Where a bill to abate a nuisance is ought in a federal court, it need not ow that plaintiff's damage amounts the sum which is required to give the deral courts jurisdiction. Mississippi M. R. Co. v. Ward (1862) 2 Black, 5, 492, 17 L. Ed. 311.

In a suit in a federal court to enjoin nuisance in the erection of coke ovens, the amount of damage which will acue to the plaintiff be not sufficient to ve the court jurisdiction, the court ill nevertheless have jurisdiction if the lue of the prohibited erection equal e jurisdictional amount. Rainey v. erbert (1893) 55 Fed. 443, 5 C. C. A. 3, following Mississippi & M. R. Co. Ward (1862) 2 Black, 485, 17 L. Ed. 1, and affirming decree Herbert v. ainey (C. C. 1892) 54 Fed. 248.

In a suit to restrain the maintenance defendant of an awning over a part a street adjoining the plaintiff's emises, the matter in dispute is the lue of the right to maintain the awng, and not the amount of damage ne by it to plaintiff. Whitman v. Hubll (C. C. 1887) 30 Fed. 81.

Plaintiffs' allegation, in a bill to rerain a nuisance, as to the amount of e threatened damage to their property, the criterion of jurisdiction, where e claim made is not colorable nor so travagant as to be beyond a reasonle expectation of its allowance. Herrt v. Rainy (C. C. 1892) 54 Fed. 248, cree affirmed Rainey v. Herbert 893) 55 Fed. 443, 5 C. C. A. 183.

80. —— Obstruction or diversion of ater courses.—In a suit by the several wners of water rights in a stream joing as complainants for convenience only enjoin the obstruction of the stream the diversion of water therefrom by efendants, the matter in dispute must ceed the jurisdictional amount, exusive of interest and costs, as to each mplainant, to give a federal court jusdiction. Eaton v. Hoge (1905) 141 ed. 64, 72 C. C. A. 74, 5 Ann. Cas. 487, versing decree Hoge v. Eaton (C. C. 05) 135 Fed. 411.

A suit to enjoin the defendant from estroying a flume where it crossed his nd involves the value of the flume as n entirety, and, where such value is dmitted to be equal to the requisite mount, and it is further admitted that efendant had, prior to the suit, parally destroyed the flume on his land, endering its repair necessary, damges for which injury the plaintiff might ecover in the suit, the jurisdictional mount satisfactorily appears. Maffet Quine (C. C. 1899) 95 Fed. 199, denyng rehearing (C. C. 1899) 93 Fed. 347.

81. —— Publication of biography.—n a bill to enjoin publication of comlainant's biography in a set of books, n allegation that the right infringed is orth the jurisdictional amount is prima acie sufficient to confer jurisdiction of the subject-matter on the federal circuit court, in the absence of proof that the facts which he gave for publication in another set of books were merely formal, or such as any one might learn. Colgate v. James T. White & Co. (C. C. 1910) 180 Fed. 882.

On enjoining publication of complainant's biography in a set of books other than that for which he gave facts of his life, relief cannot be had against a contract to subscribe for a set at $10 a volume; the subject-matter concerning the biography, and the subscription being distinct. Id.

82. —— Suits to restrain acts of municipalities.—Where the primary purpose of a bill was to enjoin the execution of a contract for the construction of a city water system and to restrain the issuance and delivery of bonds on the ground that the issue of the bonds was void, and the bill alleged that, if the bonds were issued, complainant would be required to pay in taxes a sum exceeding $10,000, such amount represented the amount in controversy for the purpose of determining federal jurisdiction, and not the amount of the first annual assessment on complainant's property to pay interest and provide a sinking fund for the payment of the bonds. City of Helena v. Helena Waterworks Co. (1909) 173 Fed. 18, 97 C. C. A. 320.

In a suit by a property owner and taxpayer in a city against the city and a bidder for public work to enjoin them from entering into a contract for such work, the value of the contract, and not the amount of the tax complainant may be required to pay if the contract is performed, is the sum or amount in controversy, for the purpose of determining the jurisdiction of a federal court. Johnston v. City of Pittsburg (C. C. 1901) 106 Fed. 753.

In a suit to enjoin a city on constitutional grounds from shutting off a supply of electric power furnished under a contract, the amount or value in dispute for jurisdictional purposes is the value of complainant's rights under the contract, and not the amount of the payments to be made thereunder. Riverside & A. Ry. Co. v. City of Riverside (C. C. 1902) 118 Fed. 736.

Where, in a suit in a federal court to enjoin the enforcement of a municipal smoke ordinance, complainant alleged that it was a foreign corporation, and that the amount involved was largely in excess of the jurisdictional amount, exclusive of interest and costs, the bill sufficiently showed jurisdiction of the federal courts. Glucose Refining Co. v. City of Chicago (C. C. 1905) 138 Fed. 209.

83. —— Suits relating to the rates and operation of common carriers.—In a suit by a railroad company to restrain a shipper from prosecuting a multiplicity of suits for overcharge in freight, the

maintenance of the rate under which the charges were made being the real subject of dispute, if the value of such maintenance is not fixed by law, the value alleged in the bill is conclusive on demurrer. Texas & P. Ry. Co. v. Kuteman (1893) 54 Fed. 547, 4 C. C. A. 503.

In a suit by a railroad company in a federal court against a number of landowners to enjoin threatened interference with its use of its right of way through their lands the value of the right sought to be protected, and not the value of the land constituting the right of way across the lands of defendants, constitutes the value in controversy for jurisdictional purposes. Louisville & N. R. Co. v. Smith (1904) 128 Fed. 1, 63 C. C. A. 1.

Where a state railroad commission imposed a fine of not exceeding the jurisdictional amount on each of two connecting railroads for through charges made on shipments, in alleged violation of an order of the commission, a bill for an injunction, filed by the companies as joint complainants, alleging such fact, and that the commission threatened and intended also to enforce its said order with respect to future shipments, shows a sufficient value in controversy to give a federal court jurisdiction. Railroad Commission of Louisiana v. Texas & P. Ry. Co. (1906) 144 Fed. 68, 75 C. C. A. 226.

In a suit to enjoin railroad companies from establishing a new schedule of rates, the matter in dispute is the right of the defendants to enforce such proposed rates, and, where the value of such right exceeds the jurisdictional amount, a federal court has jurisdiction. Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n (1908) 165 Fed. 1, 91 C. C. A. 39; Union Pac. R. Co. v. Oregon & Washington Lumber Mfrs.' Ass'n (1908) 165 Fed. 13, 91 C. C. A. 51.

A federal court held without jurisdiction of a suit by a property owner to enjoin the exercise by an electric railroad company of a privilege of crossing certain streets, where it was not shown that the injury would equal the jurisdictional amount. Orleans-Kenner Electric Ry. Co. v. Dunbar (1915) 218 Fed. 344, 134 C. C. A. 152.

In a suit to restrain taking of right of way, damages to the remainder of the tract, as well as the value of the land taken, is to be considered in determining the amount in controversy. Denver & R. G. R. Co. v. Mills (1915) 222 Fed. 481, 138 C. C. A. 77.

In a suit to restrain the operation of a railroad by one not the owner of it, the matter in dispute is not the railroad itself, but merely the right to operate it, and it must appear from the bill itself that the value of this right is such as to bring the suit within the jurisdiction of the United States circuit court, in which the suit is brought. Oleson v. Northern Pac. R. Co. (C. C. 1890) 44 Fed. 1.

84. —— **Suits to control corporate action.**—The court has jurisdiction of a bill brought by a stockholder for the benefit of the corporation and any other stockholders who may choose to come in to restrain the directors from paying out assets of the corporation to the amount of $100,000, though the complainant holds less than $1,000 worth of stock; the matter in dispute in such case being the wrong done the corporation. Hill v. Glasgow R. Co. (C. C. 1888) 41 Fed. 610.

In a suit by a member of a nonstock corporation to restrain alleged illegal and ultra vires action by its governing body, the amount involved for jurisdictional purposes, is the value of the rights sought to be protected; and a federal court has jurisdiction where it is shown by the bill that the mismanagement complained of, if not restrained, will result in the creation of debts, and may result in the loss of the corporation's property, which largely exceeds in value the jurisdictional amount. McKee v. Chautauqua Assembly (C. C. 1903) 124 Fed. 808, decree affirmed (1904) 130 Fed. 536, 65 C. C. A. 8.

A bill in a federal court to compel a corporation to transfer corporate stock of the market value of $33,600 and to pay the difference between the market value of the stock on the day transfer was demanded and its highest market value between that day and judgment, which alleges that the corporation refused to make the transfer of the stock which was property within the state of Wisconsin, and subject to an inheritance tax under the laws of Wisconsin of less than the jurisdictional amount until a waiver or consent to the transfer from the state was produced, was demurrable on the ground that the amount in controversy was insufficient; the corporation not claiming the stock nor any right to control it. Jessup v. Chicago & N. W. Ry. Co. (C. C. 1911) 188 Fed. 931.

A suit in a state court by a stockholder for a mandatory injunction to compel the corporation to permit an inspection of its books held not capable of a money valuation such as to give the federal court jurisdiction. Whitney v. American Shipbuilding Co. (D. C. 1911) 197 Fed. 777.

85. —— **Taxes and assessments.**—In a suit to enjoin the collection of a tax, the amount in controversy is the amount of the tax. Linehan Railway Transfer Co. v. Pendergrass (1895) 70 Fed. 1, 16 C. C. A. 585; Turner v. Jackson Lumber Co. (1908) 159 Fed. 923, 87 C. C. A. 103; Turner v. Jackson Lumber Co. (1908) 159 Fed. 926, 87 C. C. A. 106; Eachus v. Hartwell (C. C. 1901) 112 Fed. 564; Purnell v. Page (C. C. 1904) 128 Fed. 496.

Where, in an action by a foreign ex-

ess company engaged in interstate mmerce against a city to restrain the forcement of an ordinance exacting a ense fee, the bill states that the val- of the company's right to do business such city exceeds the jurisdictional ount, the federal court has jurisdic- n, though the amount of the license e is less than such amount. City of utchinson v. Beckham (1902) 118 d. 399, 55 C. C. A. 333; Southern p. Co. v. City of Ensley (C. C. 1902) 6 Fed. 756.

Where a bill by many taxpayers of a unty, in behalf of all taxpayers, at- cks the validity of certain county nds issued to aid in constructing a ilway, and prays an injunction re- aining the sheriff from collecting a x levied for the payment of interest d the county judge from making any rther levies, and also a decree that e bonds are invalid, and that all the lders be brought in by publication and rpetually enjoined from collecting incipal or interest, the main contro- rsy is as to the validity of the bonds, d therefore is not separable, as de- rmining the jurisdictional amount, in- controversies affecting the amount e from the separate taxpayers. own v. Trousdale (1891) 138 U. S. 9, 11 Sup. Ct. 308, 34 L. Ed. 987.

Where a suit is brought by an indi- dual taxpayer to enjoin a municipal rporation from issuing bonds, the ju- sdictional amount is not the amount the whole issue of bonds which is ught to be enjoined, but the amount taxes which complainant would be mpelled to pay for interest on the nds, and to provide a sinking fund r the principal thereof. Colvin v. cksonville (1895) 15 Sup. Ct. 866, 7, 158 U. S. 456, 39 L. Ed. 1053.

In a suit by a bank to enjoin the col- ction of taxes for certain years on operty claimed to be exempt, the nount of the tax being insufficient to ve jurisdiction, the fact that the value the exemption during the continu- ce of the charter of the bank will ex- ed the jurisdictional amount will not ve jurisdiction. Citizens' Bank of uisiana v. Cannon (1896) 17 S. Ct. 9, 164 U. S. 319, 41 L. Ed. 451.

A bill for injunction against taxes ought by a railroad company against revenue agent who represents all the rties interested sufficiently states the risdictional amount when it alleges at the taxes assessed amount to a ecified sum much larger than the ju- sdictional limit; and a question not ising on the face of the bill as to how e taxes, when collected, would be dis- sed of, and in what proportions and nounts they would be parceled out to terested municipalities, is immaterial. linois Cent. R. Co. v. Adams (1901) 1 Sup. Ct. 251, 180 U. S. 28, 45 L. d. 410.

A suit to enjoin the enforcement of tax levied on lands under authority of a state by the sale of timber from such lands, where it is not alleged that the tax is illegal, but merely that it was erroneously levied, is not a suit to remove a cloud on title, and the amount involved for the purpose of determining the jurisdiction of a federal court is the amount of the tax, and not the value of the land. Douglas Co. v. Stone (1903) 24 S. Ct. 843, 191 U. S. 557, 48 L. Ed. 301, affirming decree (C. C. 1901) 110 Fed. 812.

A suit to enjoin the collection of taxes on the property of an educational institution on the ground of a perpetual contract of exemption from taxation, protected from impairment by the contract clause of the Constitution, involves the amount essential to sustain the original jurisdiction of a circuit court, where the contract right exceeds in value that amount, although the particular tax assessed and levied is less than that sum. Berryman v. Board of Trustees of Whitman College (1912) 32 Sup. Ct. 147, 149, 222 U. S. 334, 56 L. Ed. 225.

In a suit by a taxpayer to enjoin a city from issuing bonds claimed to be in excess of the constitutional limit of its indebtedness, the power of the city to issue such bonds is the matter in dispute for the purpose of determining whether the amount or value in controversy is sufficient to give a federal court jurisdiction, and not the tax to which complainant would be subjected. City of Ottumwa, Iowa, v. City Water Supply Co. (1902) 119 Fed. 315, 56 C. C. A. 219, 59 L. R. A. 604.

If nonresident taxpayers, citizens of different states, join in a bill to enjoin the enforcement of an illegal tax, it seems that there must be in dispute as to each complainant the requisite jurisdictional amount. King v. Wilson (C. C. 1871) Fed. Cas. No. 7,810.

The criterion of jurisdiction is the amount of the tax in dispute. Woodman v. Ely (C. C. 1880) 2 Fed. 839.

In a suit to enjoin the enforcement of a state tax, claimed to be unconstitutional, the subject of controversy is not limited to $500, the tax imposed for a single year; nor can it be determined, on a motion to dissolve the temporary injunction, that the damages will be less than the sum required to give the court jurisdiction, where plaintiff asks to be relieved from threatened penalties and interference with its business, the damage to result from which it places at $10,000. American Fertilizing Co. v. Board of Agriculture (C. C. 1890) 43 Fed. 609, 11 L. R. A. 179.

The jurisdiction of the federal court to restrain the state board of appraisers from assessing an illegal tax against a telegraph company in several counties is not defeated by the fact that the assessment does not reach the jurisdictional amount in any single county, because, the action being against the

board of appraisers, the whole amount to be certified is the amount in controversy. Western Union Tel. Co. v. Poe (C. C. 1894) 61 Fed. 449.

In a suit in the federal court to enjoin an assessment under a law alleged to be unconstitutional, a preliminary injunction will be denied where it appears, by uncontradicted affidavits, that the increased tax thus imposed is less than the jurisdictional amount, though the averments of the bill are sufficient to give the court jurisdiction. U. S. Exp. Co. v. Poe (C. C. 1894) 61 Fed. 475.

The circuit court has jurisdiction, where the citizenship is diverse, of a bill by a telegraph company to enjoin a state auditor from collecting alleged illegal state taxes, and from certifying to the county clerks the proportion of local taxes to be collected in each county, where the amount claimed to be due the state and the aggregate amount of such local taxes each exceeds the jurisdictional amount. Western Union Tel. Co. v. Norman (C. C. 1896) 77 Fed. 13, appeal dismissed (1896) 17 Sup. Ct. 1002, 41 L. Ed. 1182.

The federal courts have equity jurisdiction, on the ground of preventing multiplicity of suits and irreparable injury, of a bill by a telegraph company to enjoin a state auditor from certifying to the county clerks the proportions of an illegal tax to be collected in their several counties, though such local taxes, taken separately, are less than the jurisdictional amount. Id.

In a suit to enjoin the enforcement of an ordinance imposing a license tax on complainant's business, alleged to be prohibitory, the amount in controversy, for the purpose of determining the jurisdiction of a federal court, is the value of such business. Humes v. City of Little Rock (C. C. 1898) 138 Fed. 929.

In a suit to enjoin the enforcement of a city ordinance alleged to impose a tax on interstate commerce, federal jurisdiction was determined by the value of the right to be protected, and not the amount of the tax to be enjoined. Jewel Tea Co. v. Lee's Summit, Mo. (D. C. 1912) 198 Fed. 532.

86. —— **Trespass.**—A bill by the owner of a number of tugs and barges employed in navigation which required them to pass through defendant's canal to enjoin defendant from enforcing certain alleged illegal regulations and charges states a cause of action in the nature of a continuing trespass, and, where it shows that complainant is subjected to charges owing to such exactions amounting to some $1,600 per year, it discloses a sufficient amount in dispute to give a federal court jurisdiction. Chesapeake & Delaware Canal Co. v. Gring (1908) 159 Fed. 662, 86 C. C. A. 530, writ of certiorari denied Gring v. Chesapeake & Delaware Canal Co. (1908) 29 Sup. Ct. 682, 212 U. S. 571, 53 L. Ed. 655.

87. —— **Unlawful interference with business.**—Value of complainant's right to maintain its electric plant free from interference by a rival company, rather than the cost of removal of defendant's poles and wires, interfering with complainant's, and their replacement, is the test in determining whether amount in controversy supports jurisdiction of federal District Court of a suit for injunction. Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co. (1915) 36 Sup. Ct. 30, 239 U. S. 121, 60 L. Ed. —.

Where bondholders of a corporation sued to restrain strikers from interfering with the operations of the corporation, the amount in controversy was the value of the bonds held by the complainants, which were being jeopardized by defendants' acts. Fortney v. Carter (1913) 203 Fed. 454, 121 C. C. A. 514.

In a suit to enjoin defendants from continuing a business in which they have engaged in violation of a contract with complainant, the amount or value in dispute for jurisdictional purposes is the value of the object to be gained by the suit, and not the amount of complainant's damages, and a federal court has jurisdiction where the value of the plant owned and operated by defendants and the amount of the business done by them annually largely exceeds the jurisdictional amount. American Fisheries Co. v. Lennen (C. C. 1902) 118 Fed. 869.

In a suit to restrain certain voluntary labor organizations and officers and members of the same from interfering with the business of complainant, the amount in dispute for the purpose of determining the jurisdiction of a federal court is the value of complainant's right to conduct its business, and an allegation in the bill that complainant will be damaged by the acts of defendants in a sum exceeding the jurisdictional amount is sufficient to confer jurisdiction. Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor (C. C. 1907) 156 Fed. 809.

88. **Effect of counterclaim and cross-bill.**—Where the issue raised by a counterclaim and reply exceeds the jurisdictional amount, the matter in dispute exceeds that sum, although the original action was brought for a less sum. Clarkson v. Manson (C. C. 1880) 4 Fed. 257; Same v. Monson (N. Y. 1880) 60 How. Prac. 45, reversing (N. Y. 1880) 59 How. Prac. 480.

A matter in dispute exceeding the value of $2,000, the requisite amount at that time, was presented by a cross-bill which sought to recover a balance of $1,700 due on a contract for the exchange of soda fountain apparatus, where the original bill, which was dismissed on complainant's own motion,

ked for the cancellation of his agree-
ent to pay $2.025 in consideration of
e exchange. Kirby v. American Soda
ountain Co. (1904) 24 S. Ct. 619, 194
S. 141, 48 L. Ed. 911.

A cross bill filed in a suit in the Unit-
States circuit court should be dis-
ssed where the amount claimed in the
iginal bill is less than the jurisdiction-
amount. Industrial & Mining Guar-
ty Co. v. Electrical Supply Co.
893) 58 Fed. 732, 7 C. C. A. 471.

When the plaintiff's declaration, in an
tion in the circuit court, shows a bal-
ce due of more than the jurisdiction-
amount, there is no lack or loss of
isdiction by reason of the reduction
the recovery below such amount by
counterclaim for recoupment, of
ich, beyond a sum which would not
duce his claim to that amount, it does
t appear that the plaintiff had knowl-
ge before bringing suit. Pickham v.
heeler-Bliss Mfg. Co. (1897) 77 F.
3, 23 C. C. A. 391, affirming judg-
ent Wheeler Bliss Mfg. Co. v. Pick-
m (C. C. 1895) 69 Fed. 419, certio-
ri denied Pickham v. Wheeler-Bliss
g. Co. (1897) 18 S. Ct. 945, 168 U.
708, 42 L. Ed. 1211.

A defendant who pleads a counter-
im in a federal court is estopped to
ny jurisdiction on the ground that the
ount in dispute is insufficient. O. J.
wis Mercantile Co. v. Klepner (1910)
6 Fed. 343, 100 C. C. A. 285, writ
certiorari denied (1910) 30 Sup. Ct.
5, 216 U. S. 620, 54 L. Ed. 641.

State statutes regulating the right of
t-off may be effective to determine
e sum or value of "the matter in dis-
te" in the suit sought to be removed,
d yet not operate as restrictions im-
sed by state legislation upon the ju-
diction of the federal court. New
rk I. & P. Co. v. Milburn Gin & Ma-
ine Co. (C. C. 1888) 35 Fed. 225.

Where the suit is one appealed from
justice to the state circuit court, and
fendant files there a plea of set-off,
iming $3,000 against plaintiff, but un-
r the statute of Tennessee he can re-
ver no more than $500 in that court,
is that sum which is "the matter in
spute," and the federal court can
ve no jurisdiction. Id.

In a suit to foreclose a mortgage for
,000, where a lien claimant files a
oss-bill which it asks to have fore-
osed, the amount in controversy is not
nited to the $1,000 demanded in the
mplaint, but is the amount of the lien
t up in the cross-bill. Wolcott v.
rague (C. C. 1893) 55 Fed. 545.

Where one sued in good faith for a
ntract price in excess of the jurisdic-
nal amount, and defendant proved a
t-off, the exact amount of which
aintiff did not know until the trial,
e court was not deprived of jurisdic-
n, by the reduction of plaintiff's claim
the set-off to less than the requisite
m, though plaintiff's counsel admitted
ter the evidence was in, that the re-
covery should be for less than that sum. Wheeler Bliss Mfg. Co. v. Pickham (C. C. 1895) 69 Fed. 419, judgment affirmed Pickham v. Wheeler-Bliss Mfg. Co. (1897) 77 Fed. 663, 23 C. C. A. 391.

A counterclaim, of a class which defendant is required by local statute to present in the original action, on pain of being forever barred from litigating it, is a part of the matter in dispute, and is to be added to the sum sued for by plaintiff, in determining the jurisdictional amount. Lee v. Continental Ins. Co. (C. C. 1896) 74 Fed. 424.

When the amount claimed exceeds the jurisdictional amount, but defendant sets up a payment reducing the sum below that amount, the court has jurisdiction if, in order to ascertain the amount actually in controversy, it must consider conflicting testimony, or decide disputed questions of law. Stillwell-Bierce & Smith-Vaile Co. v. Williamston Oil & Fertilizer Co. (C. C. 1897) 80 Fed. 68.

A plaintiff cannot confer jurisdiction on a federal court of an action on account for the price of goods sold by ignoring in his petition a credit to which the defendant is entitled on the account by agreement of the parties, the right to which is in fact undisputed, and which, if allowed, reduces the amount in controversy below the requisite sum. Bedford Quarries Co. v. Welch (C. C. 1900) 100 Fed. 513.

The court is not deprived of jurisdiction of an action, the amount claimed in which does not exceed the jurisdictional amount, by the filing of a counterclaim for a sum exceeding the aggregate amount of plaintiff's claim and the jurisdictional amount. Bennett v. Forrest (D. C. 1895) 69 Fed. 421.

Where in the District Court a cross-complaint is tendered, its amount may be added to that of the complaint to make up the jurisdictional amount, whatever the state of the complaint. American Sheet & Tin Plate Co. v. Winzeler (D. C. 1915) 227 Fed. 321.

A counterclaim, not barred unless pleaded in the action, could not be added to claim to increase amount. Fearon Lumber & Veneer Co. v. Lawson (1915) 178 S. W. 1121, 166 Ky. 123.

89. Effect of limitations.—After a successful plea of the statute of limitations to a part of plaintiff's claim, judgment may be rendered for the balance, though it is less than the amount necessary to give the court jurisdiction, and though the petition on its face shows that the part of the claim against which the statute was pleaded was barred at the commencement of the action. Hardin v. Cass County (C. C. 1890) 42 Fed. 652.

90. Reduction by payment.—The bond given by a borrowing stockholder in a building and loan association was conditional for the payment by such bor-

rower of monthly installments of dues on his stock, and premium and interest on the loan of $2,000; and the mortgage securing the loan provided for the sale of the mortgaged property in case of default, and the application of the proceeds, after paying costs and attorney's fees, to the payment of the principal of the loan, with all interest and arrears thereon, together with the monthly dues upon the stock, and the unpaid premiums on the same. Held, that in a suit brought by the association to foreclose the mortgage, at a time when the stock dues in arrears amounted to over $200, the amount in dispute exceeded the jurisdictional sum and was sufficient to give a federal court jurisdiction. There being no requirement in the contract that on such foreclosure the borrower should surrender his stock, the fact that in his answer he asked that this be done, as permitted by the by-laws, and the value of the stock credited on his loan, by which the amount remaining due was reduced below the required amount, could not affect the jurisdiction of the court. Turner v. Southern Home Building & Loan Ass'n (1900) 101 Fed. 308, 41 C. C. A. 379.

Where the complaint or declaration alleges a claim within the jurisdiction of the court, and the trial develops a substantial controversy or dispute over such claim, the jurisdiction will not be defeated by proof of partial payment of the demand, especially if there is an issue upon such payment; but, where the plaintiff by written statement of the facts presented at the trial admits that before suit brought the claim was paid, except a balance less than $500, the case will be dismissed for want of jurisdiction, on motion of defendant, or by the court sua sponte. Lozano v. Wehmer (C. C. 1885) 22 Fed. 755.

91. Fictitious or colorable claims.—The jurisdictional amount averred in a bill filed in a federal court to enjoin ticket brokers from dealing in nontransferable reduced rate excursion tickets cannot be deemed colorable and fictitious when considered with the averments as to the large number of such tickets issued, the recurring occasions for their issuance, the magnitude of the wrong dealings by the defendants, the cost and risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the revenue of the complaining railroad company, and the operation of the illegal dealing in such tickets upon the company's right to issue them in the future, coupled with the admissions in the answer that defendants had not only in the past dealt in such tickets, but intended to carry on the business as to all future issues. Bitterman v. Louisville & N. R. Co. (1907) 28 S. Ct. 91, 207 U. S. 205, 52 L. Ed. 171, 12 Ann. Cas. 693, affirming decree Louisville & N. R. Co. v. Bitterman (1906) 144 Fed. 34, 75 C. C. A. 192.

Where the actual matter in controversy is inadequate in value to confer jurisdiction, and the additional amount required for that purpose is attempted to be supplied by setting up a claim for something easily susceptible of proof, if made in good faith, but in support of which no proof is offered and no satisfactory explanation given, or by adding a claim for which the law gives no right of action, such a claim must be held to be fictitious, and to have been made for the purpose of perpetrating a fraud upon the jurisdiction of the court. Bank of Arapahoe v. David Bradley & Co. (1896) 72 Fed. 867, 19 C. C. A. 206.

Since a plaintiff cannot remove a suit to the federal court the demand in his declaration in the state court for a sum exceeding $2,000 cannot constitute a colorable enlargement for the purpose of establishing federal jurisdiction. Hayward v. Nordberg Mfg. Co. (1898) 85 Fed. 4, 29 C. C. A. 438.

What would be a colorable enlargement of a demand, where the law gives no fixed rule, depends on the facts of the particular case. Id.

Whether plaintiff's demand for damages was colorable and exaggerated, to confer jurisdiction on the court, presents a question for the court to decide, which, if proper to submit to the jury, should be submitted as to the facts, and separate from the merits. Mexican Cent. Ry. Co. v. Glover (1901) 107 Fed. 356, 46 C. C. A. 334.

Even in actions of tort, if it appears clearly from plaintiff's own statement or the testimony of his witnesses that a verdict for the jurisdictional amount would be so excessive as to require the court to set it aside, and grant a new trial, it is its duty to dismiss the case for the want of jurisdiction. Maxwell v. Atchison, T. & S. F. R. Co. (C. C. 1888) 34 Fed. 286.

It is the matter in dispute which controls the question of jurisdiction, and parties may not make up simulated matters of controversy to give jurisdiction, nor confer jurisdiction by merely claiming a sum above the jurisdictional amount, when in fact the true amount is less. Edwards v. Bates County (C. C. 1893) 55 Fed. 436, 439, reversed (1896) 16 Sup. Ct. 967, 163 U. S. 269, 41 L. Ed. 155.

When it appears from the plaintiff's own testimony that one of the causes of action pleaded never had any existence, and the remaining matters are not of sufficient value to support the jurisdiction, the case must be dismissed. Horst v. Merkley (C. C. 1894) 59 Fed. 502.

It seems that since Act March 3, 1875, the court is not concluded on the question of jurisdiction by the amount laid in the complaint, and, if at the trial that amount should appear,

from the testimony of plaintiff and his witnesses, to have been laid beyond his reasonable expectation of recovery the action should be dismissed. Holden v. Utah & M. Machinery Co. (C. C. 1897) 82 Fed. 209, writ of error dismissed (1899) 97 Fed. 983, 38 C. C. A. 692.

The relief sought by a bill was the tearing down and rebuilding of a wall on defendant's lot, alleged to encroach upon complainant's building on the adjoining lot by reason of being out of plumb, and the recovery of damages for injury caused thereby to complainant's building. The evidence taken on an issue joined on a plea to the jurisdiction of the court showed that the removal and rebuilding of defendant's wall would cost not less than $900, and complainant laid the damages for injury to his building at more than the jurisdictional amount. Held that, in the absence of evidence showing such claim to be colorable or fictitious, the matter in dispute exceeded the required sum. Von Schrœder v. Brittan (C. C. 1899) 93 Fed. 9.

In suits for damages, federal courts are required to take note of the fact, when it is a fact, that the plaintiff cannot, under the allegations of his petition, possibly recover as much as the jurisdictional amount, and the allegations as to the quantum of damages must in such case be regarded as merely colorable, and made solely for the purpose of stating a case apparently within the jurisdiction of the federal court as to amount. Clement v. Louisville & N. R. Co. (C. C. 1907) 153 Fed. 979.

See, also, notes under § 1019, post.

(E) Aggregation or joinder of claims

92. Common interest of several plaintiffs.—Where the heirs of a deceased intestate bring suit against an administrator under one title and for a common undivided interest, the circuit court will have jurisdiction, though the amount which on division would come to each heir may be less than the jurisdictional minimum. Shields v. Thomas (1854) 58 U. S. (17 How.) 3, 15 L. Ed. 93; Prince v. Towns (C. C. 1887) 33 Fed. 161.

Damages may be aggregated to make up the amount requisite to jurisdiction of a federal court, where persons joining in the suit have a common and undivided interest in the amount involved. Sioux Falls Nat. Bank v. Swenson (C. C. 1892) 48 Fed. 621, 625, affirmed Dakota Nat. Bank v. Same (C. C. 1891) 48 Fed. 626; Nolen v. Riechman (D. C. 1915) 225 Fed. 812.

A suit by a transferee of bonds and coupons "does not really and substantially involve a dispute or controversy within the jurisdiction" if the amount necessary to give jurisdiction to the court is made up by uniting in his hands the bonds or coupons of owners who separately had less than the jurisdictional amount. Waite v. City of Santa Cruz (1902) 22 S. Ct. 327, 184 U. S. 302, 46 L. Ed. 552, reversing judgment City of Santa Cruz v. Waite (1899) 98 Fed. 387, 39 C. C. A. 106.

The value of the matter in dispute in a suit to set aside judgments of a probate court establishing claims against a decedent's estate, which are a lien on his real property, on the ground that they were fraudulently obtained by defendants acting in concert, is the aggregate amount of the claims allowed in furtherance of the unlawful combination. McDaniel v. Traylor (1905) 25 Sup. Ct. 369, 373, 196 U. S. 415, 49 L. Ed. 533; Id. (1909) 29 Sup. Ct. 343, 344, 212 U. S. 428, 53 L. Ed. 584.

The undivided interests of joint owners and holders of the bonds and coupons on which suit is brought may be united for the purpose of making up the amount necessary to give jurisdiction to a federal court. Green County, Ky., v. Thomas' Ex'r (1909) 29 S. Ct. 168, 211 U. S. 598, 53 L. Ed. 343, affirming judgment Thomas v. Green County (1908) 159 Fed. 339, 89 C. C. A. 405.

All the insurers of property damaged by fire joined in the submission to arbitration, and afterwards joined in the bill to set aside the award. As the proportional liability of some of them, under the award, was less than the jurisdictional amount, the court dismissed the bill as to them. Held, that this was error, for the controversy was single; the amount in controversy being the amount of the award. Hartford Fire Ins. Co. v. Bonner Mercantile Co. (1893) 56 Fed. 378, 5 C. C. A. 524, modifying decree (C. C. 1890) 44 Fed. 151.

In a suit to enforce a lien claimed to have been given by a contract, to secure advances made thereunder, and also damages for its breach, the aggregate amount of such advances and damages claimed in good faith constitutes the amount in controversy for the purpose of the jurisdiction of a federal court, and it is immaterial to such question that the contract as construed by the court gave a lien only for the advances, which were less than the jurisdictional amount. Lilienthal v. McCormick (1902) 117 Fed. 89, 54 C. C. A. 475.

In a suit by the owners of separate lots, who derive title from a common grantor, to quiet their title as against a defendant who claims to own all the lots, the amount in controversy is the value of all the lots owned by the complainants, and not the value of separate lots of each. Lovett v. Prentice (C. C. 1890) 44 Fed. 459.

Where life tenants and remaindermen join as plaintiffs in a bill seeking an injunction against threatened injury to the corpus of the estate, the amount of their joint interest is the test of

jurisdiction. Herbert v. Rainey (C. C. 1892) 54 Fed. 248, decree affirmed Rainey v. Herbert (1893) 55 Fed. 443, 5 C. C. A. 183.

In a suit by a school building contractor to settle liens and recover the balance due under the contract as provided by Act La. No. 167 of 1912, the total amount of claims filed against the contractor's bond being in excess of $3,000, such claims might be considered as the matter in controversy for the purpose of establishing federal jurisdiction. John W. Hood & Co. v. Board of School Directors of Tangipahoa Parish (D. C. 1914) 210 Fed. 384.

In a suit by a part of the distributees and heirs at law of an intestate against his administrator, whether the amount involved was sufficient to give jurisdiction to the United States circuit court should be determined by the amount of the fund in the hands of the administrator for distribution, and not by the separate sums decreed to the several distributees. Thornton v. Tyson (1891) 95 Ala. 589, 10 South. 639.

93. Distinct demands by several plaintiffs.—In a suit by a railroad company against officers of several counties to avoid assessments and taxes levied on its lands, the amount involved cannot be brought within the jurisdiction of the circuit court by taking the aggregate of the sums involved as to each defendant; but the jurisdiction as to each must be determined by the amount in controversy between him and the railroad company. Walter v. Northeastern R. Co. (1893) 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; Keels v. Central R. Co. (1893) 147 U. S. 374, 13 Sup. Ct. 350, 37 L. Ed. 206; Northern Pac. R. Co. v. Walker (1893) 148 U. S. 391, 13 Sup. Ct. 650, 37 L. Ed. 494.

Where a number of separate property owners join in a suit to restrain the collection by a city of special taxes assessed upon their separate lots, and to recover back certain parts of the assessments already paid by them respectively, the jurisdictional amount, on an appeal to the supreme court, is to be determined, not by the aggregate of all the assessments, but by the amount assessed against the property of each individual owner; and, if some of such amounts are less than the jurisdictional sum, the appeal must be dismissed as to them. City of Ogden City v. Armstrong (1897) 18 S. Ct. 98, 168 U. S. 224, 42 L. Ed. 444, affirming judgment Armstrong v. Ogden City (1895) 43 Pac. 119, 12 Utah, 476.

Distinct and separate interests of complainants in a suit for relief against assessments, whether they have been made or merely threatened, cannot be united for the purpose of making up the amount necessary to give jurisdiction to a circuit court of the United States. Wheless v. St. Louis (1901) 21 Sup. Ct. 402, 403, 180 U. S. 379, 45 L. Ed. 583.

The amount of all the judgments against a municipality concerning which relief was sought, and which were directly adjudicated to be barred by the statute of limitations, and not simply the judgment fund in the hands of the treasurer, is the amount in controversy, for the purpose of a writ of error from the federal Supreme Court to a territorial Supreme Court, to review a judgment denying relief by mandamus, where the prayer was for a continuous levy of taxes by the municipal officers for the amount permitted by law annually to be applied in payment of the judgments. Beadles v. Smyser (1908) 28 S. Ct. 522, 209 U. S. 393, 52 L. Ed. 849, reversing judgment (1906) 87 Pac. 292, 17 Okl. 162.

Members of a chamber of commerce cannot unite their individual assessments to confer jurisdiction on the federal District Court to prevent the collection of such taxes as illegal. Rogers v. Hennepin County (1916) 36 Sup. Ct. 217, 239 U. S. 621, 60 L. Ed. —.

A statute of Colorado provides that "shareholders in banks * * * shall be held individually responsible for debts * * * of said associations in double the amount of the par value of the stock owned by them respectively." Held, that the remedy of creditors of such corporations under this statute, unless in exceptional cases requiring an accounting, is at law only, and that the claims of creditors against shareholders are several, and cannot be joined in one action to make up the amount required to give jurisdiction to the United States circuit court. Auer v. Lombard (1896) 72 Fed. 209, 19 C. C. A. 72.

Where, in suit to restrain the enforcement of a franchise tax against a corporation amounting to about $3,000, it was averred that $1,117.04 of such amount was claimed by the state and the balance by the counties, cities, and towns for local purposes, and the bill was not sustainable in so far as it affected the amount claimed by the state on the ground that the suit was really against the state, which could not be sued without its consent, and since the claims could not be aggregated, the amount of the tax in controversy which remained was insufficient to confer jurisdiction on the federal courts. Coulter v. Fargo (1904) 127 Fed. 912, 62 C. C. A. 444.

Where a number of complainants, each claiming a separate tract of land, although under the same act, unite in a suit to establish their claims, their causes of action are separate, and the value of the lands cannot be aggregated to give jurisdiction. Bateman v. Southern Oregon Co. (1914) 217 Fed. 933, 133 C. C. A. 605.

When claims are not of sufficient amount to give a court jurisdiction if suits are severally brought, a court will not gain jurisdiction by joining

them with other claims sufficient in amount. Schulenberg-Boeckeler Lumber Co. v. Town of Hayward (C. C. 1884) 20 Fed. 422.

Separate claims cannot be joined in order, by their aggregate amount, to confer jurisdiction, though a joinder be authorized by state statute. Holt v. Bergevin (C. C. 1894) 60 Fed. 1.

A creditors' bill cannot be maintained, by several complainants holding independent demands against the debtor for less than the requisite amount, though the aggregate of all the demands exceeds such amount. Putney v. Whitmire (C. C. 1895) 66 Fed. 385.

Under the settled rule that distinct demands or liabilities cannot be aggregated for the purpose of making up the amount necessary to give jurisdiction, although such rights or liabilities arise out of the same transaction, the owners in severalty of lots abutting on a city street cannot by joining as complainants maintain a suit in a federal court to enjoin the city from making an assessment against such lots, where the assessment against the property of no one complainant will equal the jurisdictional amount; and the rule is the same whether the assessment has been levied, or is merely threatened. Wheless v. City of St. Louis (C. C. 1899) 96 Fed. 865.

Landowners whose property is injured by the overflow of a stream, caused by its unlawful or negligent obstruction by defendant, may unite in a suit for injunctive relief in a federal court of equity, provided the injury to each of the several complainants reaches the jurisdictional amount. Hagge v. Kansas City S. Ry. Co. (C. C. 1900) 104 Fed. 391.

Several taxpayers cannot unite in one suit, each having a separate demand to recover back the taxes paid by them so as to confer jurisdiction on the court by aggregating their demands to make the amount in controversy within the cognizance of such court; each person having a separate and distinct demand in which the others are in no way interested. Risley v. City of Utica (C. C. 1910) 179 Fed. 875.

Where the interests of the plaintiffs or complainants in a suit are separate and distinct, as shown by their pleading, although of the same general character, their claims cannot be aggregated to make the requisite amount to give a federal court jurisdiction. Simpson v. Geary (D. C. 1913) 204 Fed. 507.

Federal court held without jurisdiction of suit by purchasers from common vendor to recover purchase money and impress land with a lien, where the claim of each purchaser was for less than $3,000. Howard v. Linnhaven Orchard Co. (D. C. 1913) 228 Fed. 523.

A petition for removal to the federal court of an action by the state as trustee for depositors on the bank examiner's bond, held properly denied, though the sum sued for exceeded $3,000, and diversity of citizenship existed, where the claim of no individual depositor amounted to $3,000. State v. Title Guaranty & Surety Co., of Scranton, Pa. (Idaho, 1915) 152 P. 189.

94. Separate claims by single plaintiff.—The amount in dispute is the sum of the claims in all the counts upon causes of action which are properly joined. Heffner v. Gwynne-Treadwell Cotton Co. (1908) 160 Fed. 635, 87 C. C. A. 606; Yates v. Whyel Coke Co. (1915) 221 Fed. 603, 137 C. C. A. 327; Judson v. Macon County (C. C. 1872) Fed. Cas. No. 7,568; Stanley v. Board of Sup'rs of Albany County (C. C. 1883) 15 Fed. 483; Hartford Fire Ins. Co. v. Erie R. Co. (C. C. 1909) 172 Fed. 899; Spokane Valley Land & Water Co. v. Kootenai County, Idaho (D. C. 1912) 199 Fed. 481.

Where several actions in the state court between the same parties aggregate over $3,000, though each is for less than $500, and all depend on the same facts, and by stipulation judgment is entered in all in accordance with the result of one, a single suit in equity to enjoin enforcement of all of them for fraud involves the jurisdictional amount required to warrant removal to the federal court. Marshall v. Holmes (1891) 12 Sup. Ct. 62, 64, 141 U. S. 589, 35 L. Ed. 870.

In a suit against auditors of several counties to avoid assessments and taxes levied on complainant's land, the amount involved cannot be brought within the jurisdiction of a federal court by taking the aggregate of the sums involved as to each defendant, but the jurisdiction as to each must be determined by the amount in controversy between him and complainant. Northern Pac. R. Co. v. Walker (1893) 13 Sup. Ct. 650, 148 U. S. 391, 37 L. Ed. 494.

A federal court has no jurisdiction of a suit by a telegraph company against the clerks of different counties to enjoin the collection of taxes on its line in each of such counties, when the bill does not show that the amount of any one of the district county assessments equals the jurisdictional amount. Fishback v. Western Union Tel. Co. (1896) 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630.

Jurisdiction cannot be conferred on a court to enjoin the collection of taxes assessed in several parishes by joining in one bill, against the different collectors, the whole amount of such taxes; the separate assessments not being sufficient to give jurisdiction. Citizens' Bank of Louisiana v. Cannon (1896) 17 Sup. Ct. 89, 164 U. S. 319, 41 L. Ed. 451.

The aggregate sum of the possible penalties sued for in several actions brought by the United States against a carrier under Act June 29, 1906, post,

§ 8651, requiring the unloading of live stock during transit, and consolidated, is the amount in dispute for the purpose of sustaining the appellate jurisdiction of the federal Supreme Court. Baltimore & O. S. W. R. Co. v. U. S. (1911) 31 Sup. Ct. 368, 220 U. S. 94, 55 L. Ed. 384, modifying judgment U. S. v. Baltimore & O. S. W. R. Co. (1908) 159 Fed. 33, 86 C. C. A. 223.

The United States courts in the Indian Territory had jurisdiction in civil cases of an action for killing stock when the total amount claimed exceeded the required amount, though the value of each animal was less than that sum. Gulf, C. & S. F. R. Co. v. Washington (1892) 49 Fed. 347, 1 C. C. A. 286.

A suit was brought in the circuit court to enforce collection of four promissory notes, and to foreclose four mortgages securing such notes separately, on separate pieces of real estate; all the notes and mortgages being made by the same person. The sum claimed on each note was less than the jurisdictional amount, but the aggregate of the notes exceeded that sum. No objection on the ground of multifariousness was made until the filing of the master's report, when an exception was taken on the ground that the court had no jurisdiction, because the sum claimed on each cause of action was less than the requisite amount. Held, that the objection was waived by failure to make it in the pleadings, and the jurisdiction should be sustained. Fitchett v. Blows (1896) 74 Fed. 47, 20 C. C. A. 286.

A federal court has jurisdiction of an action to recover on coupons from municipal bonds aggregating in amount over the jurisdictional amount, exclusive of interest, where the claim is made in good faith, although a plea of limitations is sustained as to some of the coupons sued on, which reduces the amount of recovery below that sum. Board of Com'rs of Kearny County, Kan., v. Vandriss (1902) 115 Fed. 866, 53 C. C. A. 192, writ of certiorari denied (1902) 23 Sup. Ct. 843, 187 U. S. 642, 47 L. Ed. 346.

Three suits were brought in a state court by the same plaintiffs, citizens of one state, against the same defendant, a citizen of another state, on three notes of the latter given for parts of the same consideration, and each for less than the jurisdictional amount, and the same defense existed to and was pleaded against all the notes. Held, that a judgment in one suit would constitute an estoppel, and be decisive of the others, and that therefore the matter in dispute in each suit exceeded the requisite sum, so that any one or all of the suits might be removed to the federal courts under 18 Stat. 470. Anderson v. Gerding (C. C. 1879) Fed. Cas. No. 356.

An action may be maintained in the federal courts where the sum or value of the matter in dispute, or money sought to be recovered, exceeds the statutory amount, although the complaint contain distinct demands or causes of action of less than that value; and it is immaterial whether the plaintiff is the original owner of such demands, or acquired them by assignment from such owner. Hammond v. Cleaveland (C. C. 1885) 23 Fed. 1.

A declaration containing three counts —one on a note, one for money had and received, and one for work and labor —is sufficient on demurrer to give the court jurisdiction, if the aggregate of the sums alleged to be in controversy exceeds the statutory amount. Armstrong v. Ettlesohn (C. C. 1888) 36 Fed. 209.

Where an action is brought upon a single agreement based upon the use of three distinct patents, it is unimportant for the purpose of giving jurisdiction of the suit that the sum claimed to be due on any one of the patents does not exceed the requisite amount, provided that the total sum claimed upon all three patents does. Weaver v. Norway Tack Co. (C. C. 1896) 80 Fed. 700.

Where a complaint in each of three counts claimed for personal injuries "the sum of $1,990 damages," and in two other counts "the further sum of $1,990 damages," the court, though morally certain that it was intended to claim damages for but one cause of action, cannot remand the case for want of jurisdiction apparent on the face of the complaint, as it is legally possible to recover on more than one count, under Code Ala. § 3293, providing that a plaintiff can sue in the same action for separate and independent torts, and recover damages for each in one suit. Thompson v. Southern Ry. Co. (C. C. 1902) 116 Fed. 890.

Causes of action for enforcement of lien, for goods sold, and on account stated, held not such as could be joined under Equity Rules 23, 26 (198 Fed. xxiv, xxv, 115 C. C. A. xxiv, xxv), for purpose of bringing amount involved within jurisdiction of the United States District Court. Bucyrus Co. v. McArthur (D. C. 1914) 219 Fed. 266.

Where each of two paragraphs of a complaint seeks a recovery for the death of the same person, wrongfully caused by defendant's servants, and each relates to the same occurrence, and each seeks a recovery in the sum of $2,000, the matter in dispute does not amount to $4,000, so as to authorize a removal to the federal court. Baltimore & O. R. Co. v. Ryan (1903) 68 N. E. 923, 31 Ind. App. 597.

Where several suits by the same plaintiff against a railroad company involved a federal question, and in each case the amount involved did not exceed the amount specified in the statute, the federal court could not acquire jurisdiction. Texas & P. Ry. Co. v. Cushny (Tex. Civ. App. 1901) 64 S. W. 795.

95. Suit by one for himself and others similarly situated.—Where, in a credi-

tors' bill to subject the stockholders of a corporation to liability for unpaid subscriptions, the amount of the sum claimed by the original plaintiffs exceeds the jurisdictional sum, the court has full jurisdiction as to all creditors, including those who afterwards come in, although some of them claim for sums less than the requisite amount. Handley v. Stutz (1890) 137 U. S. 366, 11 Sup. Ct. 117, 34 L. Ed. 706; Alsop v. Conway (1911) 188 Fed. 568, 110 C. C. A. 366 (writ of certiorari denied [1911] 32 Sup. Ct. 523, 223 U. S. 720, 56 L. Ed. 629); Conway v. Owensboro Sav. Bank & Trust Co. (C. C. 1908) 165 Fed. 822; Conway v. Owensboro Savings Bank & Trust Co. (C. C. 1911) 185 Fed. 950.

Where one sues on behalf of himself and all others of a class similarly situated, the aggregate interest of those who join in the suit, and not those of the whole class, is the matter in dispute. Risley v. City of Utica (C. C. 1909) 168 Fed. 737; Cowell v. City Water Supply Co. (1903) 121 Fed. 53, 57 C. C. A. 393; Massa v. Cutting (C. C. 1887) 30 Fed. 1. But see Carpenter v. Knollwood Cemetery (D. C. 1912) 198 Fed. 297.

A creditors' suit brought by two complainants, one of whom has a judgment on which more than the jurisdictional amount is due, exclusive of interest and costs, to subject property of greater value, involves an amount sufficient to confer jurisdiction on a federal court, although the claim of the other complainant is less than that amount. Huff v. Bidwell (1907) 151 Fed. 563, 81 C. C. A. 43; Bidwell v. Huff (C. C. 1900) 103 Fed. 362.

In a suit by a creditor of an insolvent national bank, in behalf of himself and all other creditors, to enjoin the receiver and the comptroller from paying dividends on an alleged fraudulent claim which has been allowed by them, the jurisdictional amount is to be determined solely by the amount of complainant's own claim, and not by the aggregate of all the claims of those whom he assumes to represent, or by the amount of the dividends, payment of which is sought to be enjoined. Smithson v. Hubbell (C. C. 1897) 81 Fed. 593.

Where the assets of an insolvent corporation, proceeded against by a receiver, exclusive of interest and costs, exceed the statutory amount, and the claims of the creditors joined in the bill exceed such amount, though no creditor has a claim equal to that amount, the jurisdictional amount is sufficient to give a Circuit Court of the United States jurisdiction. Jones v. Mutual Fidelity Co. (C. C. 1903) 123 Fed. 506.

In a suit brought in a federal court by creditors of an insolvent corporation on behalf of themselves and all other creditors similarly situated to recover property alleged to belong to the corporation, but to have been fraudulently acquired by certain of the defendants, where the claims of some of the complainants exceed the statutory amount, others may join, although their claims are less than that amount. Stanwood v. Wishard (C. C. 1905) 134 Fed. 959.

In a suit by a stockholder on behalf of himself and others for distribution of a fund belonging to a dissolved corporation, the entire fund is the amount in controversy for the purpose of determining the jurisdiction of a federal court. Kent v. Honsinger (C. C. 1909) 167 Fed. 619.

A taxpayer attacked a contract between the city and a water company, the bill alleging that the amount the city was to pay the company on November 15, 1907, was $38,903.52, which was included in the city's tax levy; that the tax rate in the city was $9.80 per thousand, and that complainant's farm was assessed at $2,000; that additional expenses were being incurred for water mains, etc., amounting to $120,000, the interest on which would be added to the tax levy thereafter and become an additional burden on all the taxable property in the city, including that of complainant; that the warrant for 1907 had been signed and delivered, and included a tax of over $20 against complainant's property; that complainant derived no benefit whatever from such contract; that he was afforded no opportunity to be heard in resistance of the tax, which was illegal; and that an actual levy on his property had been made to pay the same. Held, that the amount of the tax levied against complainant was the matter in dispute in such action, which being less than the jurisdictional amount, the case was not within the jurisdiction of the federal court. Risley v. City of Utica (C. C. 1909) 168 Fed. 737.

96. Joint and several liability.—When several actions at law pending in a state court between the same parties, each for less than $500, but aggregating over $3,000, all depend upon the same state of facts, and by stipulation judgment is entered in all in accordance with the result of the trial of one, a single suit in equity may be maintained to restrain the enforcement of all the judgments on the ground of fraud in obtaining them. Marshall v. Holmes (1891) 12 Sup. Ct. 62, 141 U. S. 589, 35 L. Ed. 870, reversing Calhoun v. McKnight (1887) 1 South. 612, 39 La. Ann. 325.

Comp. Laws S. D. § 1570, makes it the duty of a bank and its officers to retain so much of the dividends belonging to its stockholders as shall be necessary to pay the taxes levied upon their shares until the tax has been paid, but does not require the bank to pay the tax out of the fund thus retained. Held that, when a national bank sues in its own behalf and for its individual stockholders to enjoin the collection of a

tax assessed against the capital stock, and also against the shares as the property of the stockholders, and does not aver that it has in its hands or under its control any dividend belonging to stockholders which could be applied to pay the taxes, the proceeding is in separate and distinct rights, and the jurisdictional amount must be determined by the amount of the tax against each complainant, and not by the aggregate tax against all. Sioux Falls Nat. Bank v. Swenson (C. C. 1892) 48 Fed. 621; Dakota Nat. Bank v. Same (C. C. 1892) 48 Fed. 626.

Under a state law which provides that "the heirs, devisees and distributees of a decedent shall be liable, to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid," held that the liability of two or more heirs, devisees, or distributees of a decedent is several, and not joint, and, though another statute provides that they may be jointly sued, the federal court has no jurisdiction of a suit against them unless the liability of each exceeds the jurisdictional sum. Busey v. Smith (C. C. 1895) 67 Fed. 13.

Where a number of persons are separately charged with diverting the water of a river, it need not appear, to give a federal court jurisdiction, that the amount involved as to each defendant exceeds the jurisdictional amount, the matter in controversy being the injury to complainant's property, to which, it is alleged, all of the defendants contribute, and for which they are chargeable jointly. Pacific Live Stock Co. v. Hanley (C. C. 1899) 98 Fed. 327.

To give a federal court jurisdiction of a suit to quiet title to a tract of land, in which a number of persons are joined as defendants, between whom no privity of title exists, and each of whom claims title to a separate part of the tract, the value of the property in controversy between each defendant and the complainant must exceed the jurisdictional amount. Stemmler v. McNeill (C. C. 1900) 102 Fed. 660.

Under a state law which authorizes the joinder of several causes of action against several insurance companies liable for a single loss under several policies, held, that since, notwithstanding such joinder, the liability of each was separate, and not joint, the federal court had no jurisdiction of such an action where the alleged liability of each insurance company did not exceed $2,000. Wisconsin Cent. Ry. Co. v. Phœnix Ins. Co. (C. C. 1903) 123 Fed. 989.

Where a surety on the bond of two saloonkeepers may be sued alone in a single action for civil damages for which both principals are jointly liable, the amount in controversy in such action, for the purpose of the jurisdiction of a federal court, is the total amount for which defendant is liable on both bonds, or $6,000. Kaus v. American Surety Co. of New York (D. C. 1912) 199 Fed. 972.

Where, in a suit against two defendants, no joint liability was alleged, and the amount claimed against each was less than the jurisdictional amount, the federal court could not acquire jurisdiction. Texas & P. Ry. Co. v. Dishman & Tribble (1905) 85 S. W. 319, 38 Tex. Civ. App. 277.

97. Actions by assignees and indorsees.—The provision of this section that suit cannot be brought by an assignee unless it could have been prosecuted by the original owner does not apply to the amount of the claim, but merely to the other facts giving the federal courts jurisdiction. Bowden v. Burnham (1894) 59 Fed. 752, 8 C. C. A. 248; Hammond v. Cleveland (C. C. 1885) 23 Fed. 1; Bernheim v. Birnbaum (C. C. 1887) 30 Fed. 885; Chase v. Sheldon Roller-Mills Co. (C. C. 1893) 56 Fed. 625.

Claims or demands assigned for collection only, the assignors remaining the absolute owners, and paying pro rata the expenses of collection, including costs and attorney's fees, cannot be added to the amount of the assignee's own claim to create an amount in dispute in excess of the jurisdictional amount, for the express purpose of enabling suit to be brought in a Federal circuit court. Woodside v. Beckham (1909) 30 Sup. Ct. 367, 368, 216 U. S. 117, 54 L. Ed. 408.

A suit by the assignees, respectively, of two promissory notes given for the unpaid portion of the purchase price of real property, to enforce the vendor's lien, which, under the local law, passed to the assignees as a common security for the payment of both notes, without any priority of right in either assignee, involves the amount essential to sustain the jurisdiction of a federal court, if the interests of such assignees collectively equal the jurisdictional amount. Troy Bank v. G. A. Whitehead & Co. (1911) 32 Sup. Ct. 9, 222 U. S. 39, 56 L. Ed. 81, reversing decree Same v. Whitehead (C. C. 1910) 184 Fed. 932.

Where a note for more than the jurisdictional amount made by a resident of one state payable to another resident of that state was indorsed by the payee to a resident of a foreign state to secure a debt for less than such amount, and the indorsee agreed to account for and pay over to the indorser the entire amount collected over and above the amount due him, the federal court had jurisdiction of a suit by the indorsee. Lipsmeir v. Vehslage (C. C. 1886) 29 Fed. 175, 176.

Where plaintiff sets up two claims, for $400 and $7,000, respectively, both based on an assignment by a former holder of the claims, if the assignment is insufficient to cover the larger claim, the court will not allow the trial to pro-

on the smaller claim, which is be-
the court's jurisdiction. Chicago
Co. v. Fogg (C. C. 1892) 53
72.

ite the rule that the court shall
ve cognizance of any suit to re-
the contents of any promissory
r other chose in action in favor of
ssignee unless such suit might
een prosecuted in such court, if
signment or transfer had been
several claims assigned by dif-
owners, all of whom were citi-
of other states than that of de-
t, may be united to give the ju-
ional amount. Bergman v. In-
Poulsen & Co. (C. C. 1898) 91
93; Davis v. Mills (C. C. 1900)
d. 39, 40; Brigham-Hopkins Co.
ss (C. C. 1901) 107 Fed. 769.

on may be maintained by an as-
e of several claims, each less, but
regating more, than the jurisdiction-
al amount; the assignors having been citizens of states other than that of defendant. Davis v. Mills (C. C. 1900) 99 Fed. 39.

(F) Interest and costs

98. **Interest.**—Where an evicted grantee sues the grantor in Nebraska for $6,000 damages, the amount in controversy, exclusive of interest and costs, exceeds the jurisdictional sum, though the price paid by plaintiff for the land was only $1,200; and the law of such state, in case of eviction, imposes a responsibility only for the return of the price, with interest thereon. Brown v. Webster (1895) 156 U. S. 328, 15 Sup. Ct. 377, 39 L. Ed. 440.

When the interest evidenced by a coupon is due, the demand based on the promise contained in the coupon is no longer a mere incident of the principal debt, but becomes a principal obligation, and hence is not "interest"; and the amount of such coupons may be added to the amount of the bond to confer jurisdiction. Edwards v. Bates County (1896) 16 S. Ct. 967, 163 U. S. 269, 41 L. Ed. 155, reversing judgment (C. C. 1893) 55 Fed. 436. And see Howard v. Bates County (C. C. 1890) 43 Fed. 276.

In an action on negotiable bonds which have matured, together with the coupons, neither the interest on the bonds after maturity nor the interest on the coupons after their maturity constitutes a part of the matter in dispute, in determining the jurisdiction of the circuit court. Greene County v. Kortrecht (1897) 81 Fed. 241, 26 C. C. A. 381.

Where defendant refused to pay the amount due on an accident policy, and there was no contract for interest in the policy, interest was not a mere incident to the matter in dispute in an action for damages for defendant's failure to perform, but constituted, with the amount of the policy, aggregate damages for the breach. Continental Casualty Co. v. Spradlin (1909) 170 Fed. 322, 95 C. C. A. 112.

Where plaintiff sued a city treasurer and his surety for wrongful refusal to pay a city warrant, the face of the warrant and accumulated interest to the time the liability became fixed was the amount in controversy for the purpose of determining federal jurisdiction. Intermela v. Perkins (1913) 205 Fed. 603, 123 C. C. A. 619.

The word "interest" is used in its usual acceptation as compensation for the use of money for its detention. Howard v. Bates (C. C. 1890) 43 Fed. 276, 277.

Where suit was brought to enforce a mortgage securing a bond for $2,000 and two annual interest coupons severed therefrom, and the bond was not due from lapse of time, but because of nonpayment of interest, the coupons could not be considered as separate obligations, for the purpose of making up the jurisdictional amount, and at the same time be regarded as interest, for the purpose of maturing the bond, and the court was hence without jurisdiction. Home & Foreign Investment & Agency Co. v. Ray (C. C. 1895) 69 Fed. 657.

In a suit to recover excessive premiums alleged to have been exacted by, and paid to, a life insurance company, interest on the several amounts sued for from the dates of their payment to the date of the suit cannot be added, and treated as principal, to determine the amount in controversy for the purposes of federal jurisdiction. Simmons v. Mutual Reserve Fund Life Ass'n (C. C. 1902) 114 F. 785; Gilson v. Mutual Reserve Fund Life Ass'n (C. C. 1904) 129 F. 1003.

99. **Protest fees.**—Protest fees are taxable costs, within R. S. § 983, post, § 1624, providing that "lawful fees for exemplifications and copies of papers necessarily obtained for use on trials" shall be taxed as costs; and, though Comp. St. Neb. c. 41, § 6, provides that the holder of a note may bring "an action for principal, damages, and interest, and charges of protest," yet such fees for protest cannot be considered as part of the "matter in dispute" within this section as formerly enacted. Baker v. Howell (C. C. 1890) 44 Fed. 113.

Where, in an action on a protested bill of exchange, plaintiff was entitled to recover protest fees in addition to interest and costs, which made the amount in controversy exceed the jurisdictional amount, he was entitled to add such fees to the principal in order to establish federal jurisdiction. Dallyn v. Brady (D. C. 1913) 205 Fed. 430.

100. **Attorney's fees.**—An attorney's fee, payment of which is provided for in a promissory note if suit should be brought, may be considered in determining whether the amount necessary to sustain the original jurisdiction of a Federal court is involved in an action

on the note. Springstead v. Crawfordsville State Bank (1913) 34 Sup. Ct. 195, 231 U. S. 541, 58 L. Ed. 354; Howard v. Carroll (D. C. 1912) 195 Fed. 646.

Claims or demands assigned for collection only, the assignors remaining the absolute owners, and paying pro rata the expenses of collection, including costs and attorneys' fees, cannot be added to the amount of the assignee's own claim to create the requisite amount, for the express purpose of enabling suit to be brought in a federal court. Woodside v. Beckham (1910) 30 S. Ct. 367, 216 U. S. 117, 54 L. Ed. 408, affirming judgment (C. C. 1906) 142 Fed. 617.

Where, by express stipulation, valid in the state where made, a debtor becomes liable for a reasonable attorney's fee in case the debt is collected by suit, such fee may be added to the amount of the debt, for the purpose of making up the jurisdictional amount. Such a fee is not a part of the costs which are to be excluded under the judiciary act. Rogers v. Riley (C. C. 1896) 80 Fed. 759.

Under B. & C. Comp. Or. § 5672, which provides that, on a recovery in suits to enforce miners' liens, a reasonable attorney's fee shall be allowed "as part of the costs," the amount prayed for as an attorney's fee cannot be added to the amount of the lien for the purpose of making the requisite amount to give a federal court jurisdiction. Swofford v. Cornucopia Mines of Oregon (C. C. 1905) 140 Fed. 957.

Civ. Code Ga. 1895, § 2140, provides that, when an insurance company refuses to pay a loss within 60 days after demand, it shall be liable to the policy holder, in addition to the loss, for not more than 25 per cent. on the company's liability, and also for all reasonable attorney's fees for the prosecution of the case, provided it shall appear that the insurer's refusal to pay the loss was in bad faith. Held, that the amount recoverable for attorney's fees under such section should be regarded as "costs," defined by the state court to include all charges fixed by statute as compensation for services rendered by officers of the court in the progress of the cause; and hence, where a reasonable amount for attorney's fees, under such statute was necessary to bring the amount in controversy up to the jurisdictional sum, the action, though between citizens of different states, was not within the jurisdiction of the federal court. Peters v. Queen Ins. Co. of America (C. C. 1910) 182 Fed. 113.

(G) Determination of amount

101. Objections to amount and disposition thereof.—Where the complaint on its face shows that the amount in dispute exceeds the requisite amount, and there are no facts alleged from which the court can determine, as a matter of law, that there cannot be a recovery of the jurisdictional amount, the question will not be determined on ex parte affidavits. Holden v. Utah & M. Machinery Co. (C. C. 1897) 82 Fed. 209, writ of error dismissed (1899) 97 Fed. 983, 38 C. C. A. 692.

On a plea in abatement on the ground that the amount in controversy was not sufficient to confer federal jurisdiction, defendant's contention that the dispute involved only his particular interest in certain of the property was unsustainable, since the merits of the case could not be tried on the hearing of the plea. Butters v. Carney (C. C. 1904) 127 Fed. 622.

In an equity suit in the United States court, the question of the jurisdictional amount involved should be raised by special plea rather than in the answer, and, where the question is raised by the answer, the cause will not be dismissed for want of jurisdiction unless the evidence is sufficient to create a legal certainty against the jurisdiction. Bettes v. Brower (D. C. 1911) 184 Fed. 342.

See note under 114, post, this subdivision.

102. Property rights in general.—The law of Arkansas having limited plaintiff's recovery in an action of unlawful detainer to the rent due at the commencement of the suit and up to the time of rendering judgment, or the value of the occupation during the time of the unlawful detention of the premises and damages for withholding the same, a federal court in that state does not have jurisdiction of such an action when the complaint alleges that the amount due is the rent for nine months at $25 per month, though damages are also claimed in a sum exceeding the statutory amount, but without showing that plaintiff is entitled to anything but actual damages. Battle v. Atkinson (1903) 24 S. Ct. 845, 191 U. S. 559, 48 L. Ed. 302, affirming decree (C. C. 1902) 115 Fed. 384.

The federal court in Arkansas, in an action of unlawful detainer, by analogy to the requirements of the state law requiring as a preliminary to the issuance of a writ of possession a bond in double the amount of two years' rent, will, in determining the value of possession as affecting its jurisdiction, regard the amount in controversy as a sum double the amount of the rent of the premises detained for two years. Id.

The jurisdictional amount involved in a suit brought by the New York Cotton Exchange to enjoin the defendant from receiving and using quotations of sales on such exchange until he shall have acquired the right to receive them from the exchange, or, with its consent and approval, from one of the telegraph companies authorized to distribute them, is to be measured by the value to

the exchange of the right to control the quotations, and not by the rate paid by the defendant under his contract with the telegraph company furnishing him with such quotations. Hunt v. New York Cotton Exch. (1907) 27 S. Ct. 529, 205 U. S. 322, 51 L. Ed. 821, affirming decree New York Cotton Exch. v. Hunt (C. C. 1906) 144 Fed. 511.

Its cash price at a forced sale is not the proper criterion for ascertaining the value of property in controversy, on the question of the jurisdiction of the federal courts, but it should be estimated at what it could be sold for in the ordinary course of business. Berthold v. Hoskins (C. C. 1889) 38 Fed. 772.

103, 104. Amount claimed as test.—The amount or value in controversy stated in plaintiff's complaint is the sole test of federal jurisdiction, so far as concerns courts of the first instance. South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co. (1905) 141 Fed. 578, 73 C. C. A. 176; O. J. Lewis Mercantile Co. v. Klepner (1910) 176 Fed. 343, 100 C. C. A. 285 (writ of certiorari denied [1910] 30 Sup. Ct. 575, 216 U. S. 620, 54 L. Ed. 641); Muns v. De Nemours (C. C. 1810) Fed. Cas. No. 9,931; West v. Woods (C. C. 1883) 18 Fed. 665; Hat-Sweat Mfg. Co. v. Porter (C. C. 1891) 46 Fed. 757; Yarde v. Baltimore & O. R. Co. (C. C. 1893) 57 Fed. 913; Insurance Co. of North America v. Svendsen (C. C. 1896) 74 Fed. 346; Green v. Valley (C. C. 1900) 101 Fed. 882; Simmons v. Mutual Reserve Fund Life Ass'n (C. C. 1902) 114 Fed. 785; Eisele v. Oddie (C. C. 1904) 128 Fed. 941; Lake Erie & W. R. Co. v. Juday (1898) 49 N. E. 843, 19 Ind. App. 436; Bacon v. Iowa Cent. Ry. Co. (Iowa, 1912) 137 N. W. 1011; Chicago, R. I. & P. Ry. Co. v. Stone & Bronnenberg (1905) 79 Pac. 655, 70 Kan. 708; Disbrow v. Driggs (N. Y. 1858) 8 Abb. Prac. 305, note, 16 How. Prac. 346; Smith v. Northern Pac. R. Co. (1892) 3 N. D. 17, 53 N. W. 173.

Although, where the law gives no rule, the amount of damages laid in the declaration is not conclusive, yet, if there might be a recovery for the necessary amount, jurisdiction cannot be defeated, unless the court find, as a matter of fact, that the amount of damages stated in the declaration was colorable. Hayward v. Nordberg Mfg. Co. (1898) 85 Fed. 4, 29 C. C. A. 438; American Wringer Co. v. City of Ionia (C. C. 1896) 76 Fed. 6; Greene County Bank v. J. H. Teasdale Commission Co. (C. C. 1902) 112 Fed. 801; Maurel v. Smith (D. C. 1915) 220 Fed. 195; American Sheet & Tin Plate Co. v. Winzeler (D. C. 1915) 227 Fed. 321.

The ad damnum controls, although the actual damages are alleged to be greater. Barber v. Boston & M. R. Co. (C. C. 1906) 145 Fed. 52; Lesh v. Bailey (Ind. App. 1911) 95 N. E. 341; Stark v. Port Blakely Mill Co. (Wash. 1906) 87 Pac. 339.

A suit cannot properly be dismissed by a federal court as not substantially involving an amount sufficient to give it jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion. Wetmore v. Rymer (1898) 18 Sup. Ct. 293, 169 U. S. 115, 42 L. Ed. 682.

A mere ad damnum clause will not confer jurisdiction on a federal court where the plaintiff asserts a claim which he cannot be legally permitted to sustain by evidence to the extent of the jurisdictional amount. North American Transportation & Trading Co. v. Morrison (1900) 20 Sup. Ct. 869, 871, 178 U. S. 262, 44 L. Ed. 1061.

The amount of damages which plaintiff shall recover in an action for rejecting his vote for a member of congress is peculiarly appropriate for the determination of a jury, and therefore, when the damages are laid at more than the necessary sum, no opinion of the court upon that subject can justify it in holding that the amount in controversy is less than that sum, so as to be insufficient to support the jurisdiction of the court of the United States. Wiley v. Sinkler (1900) 21 Sup. Ct. 17, 179 U. S. 58, 45 L. Ed. 84.

Jurisdiction cannot be ousted after it has once attached, although the amount be reduced below the jurisdictional limit by dismissal of the original bill. Kirby v. American Soda Fountain Co. (1904) 24 Sup. Ct. 619, 620, 194 U. S. 141, 48 L. Ed. 911.

In determining whether the matter in dispute exceeds the jurisdictional amount, the principle to be applied is that, where the law gives no rule, the plaintiff's demand, unless colorable, must furnish one, but, where the law does give the rule, the legal cause of action, and not the plaintiff's demand, must be regarded. Hayward v. Nordberg Mfg. Co. (1898) 85 Fed. 4, 29 C. C. A. 438.

To ascertain the amount in dispute the supreme court should recur to the foundation of the original controversy or the matter in dispute when the action was instituted. Levinski v. Middlesex Banking Co. (1899) 92 Fed. 449, 457, 34 C. C. A. 452.

Ann. Code Miss. § 4287, defines what shall amount to railroad extortion, and section 4288 declares that the party injured may recover of the person or corporation guilty of extortion twice the amount of damages sustained by the overcharge or discrimination, as the case may be. Held that, where a declaration against a railroad company for extortion minutely alleged the overcharges claimed, which amount to a stated sum, and the amount of the recovery on that account was alleged to be a certain sum not equalling the jurisdictional amount, the amount in controversy was not sufficient, though the

declaration also alleged that, by the railroad company's failure to pay the damages alleged, plaintiff had been damaged in a sum in excess of the requisite amount. Barataria Canning Co. v. Louisville & N. R. Co. (1906) 143 Fed. 113, 74 C. C. A. 307.

Whether a suit in a federal court involves the necessary jurisdictional amount is not a local question controlled by the statutes of the state or the rulings of its Supreme Court. Heffner v. Gwynne-Treadwell Cotton Co. (1908) 160 Fed. 635, 87 C. C. A. 606.

The court has jurisdiction in covenant where the damages laid exceed the jurisdictional amount, though the penalty named in the contract is less than that sum. Martin v. Taylor (C. C. 1803) Fed. Cas. No. 9,166.

The damages laid in the writ and in the plaintiff's affidavit are equally conclusive, as to the amount in controversy, for the purposes of jurisdiction. Muns v. De Nemours (C. C. 1810) Fed. Cas. No. 9,931.

The court has jurisdiction in debt on a bond for the penalty of the requisite amount, though it appears that less than the jurisdictional amount is due. Postmaster General v. Cross (C. C. 1822) Fed. Cas. No. 11,306.

The limit of jurisdiction as to the amount involved is to be determined by the amount laid in the declaration, and, when it consists of the common counts, by the amount in the bill of particulars. Healy v. Prevost (C. C. 1879) Fed. Cas. No. 6,297.

The question of jurisdiction is governed by the value of the actual matter in dispute as shown by the whole record, and not by the damages claimed or the prayer for judgment alone. Edwards v. Bates County (C. C. 1893) 55 Fed. 436, 439 (reversed on another point [1896] 16 Sup. Ct. 967, 163 U. S. 269, 41 L. Ed. 155); Cabot v. McMaster (C. C. 1894) 61 Fed. 129, 131.

Where plaintiff, in an action on a penal bond, claims less than the jurisdictional amount, the court is without jurisdiction, though the bond exceeds that amount. Cabot v. McMaster (C. C. 1894) 61 Fed. 129, distinguishing Postmaster General v. Cross (C. C. 1822) Fed. Cas. No. 11,306.

It seems that since Act March 3, 1875, the court is not concluded on the question of jurisdiction by the amount laid in the complaint. Holden v. Utah & M. Machinery Co. (C. C. 1897) 82 Fed. 209, writ of error dismissed (1899) 97 Fed. 983, 38 C. C. A. 692.

In an action of ejectment, where no special acts of damage are averred in the declaration, the damages recoverable are nominal only, and the amount of damages laid in the ad damnum clause cannot avail to give a federal court jurisdiction where the value of the land is insufficient. Way v. Clay (C. C. 1904) 140 Fed. 352.

It is sufficient to sustain the jurisdiction of a circuit court, where the requisite jurisdictional facts are shown by the complaint, that it does not at any time thereafter satisfactorily appear to the court that the suit does not really and substantially involve the jurisdictional amount. Maffet v. Quine (C. C. 1899) 95 Fed. 199, denying rehearing (C. C. 1899) 93 Fed. 347.

The amount involved is only $1,900, and therefore not within the jurisdiction of the federal circuit court, where the complaint, in form, states two causes of action, the prayer as to each of which is for a judgment for $1,900, each being for nondelivery of a telegram, the only difference therein being that one is addressed to "Mrs. P.," and the other to "Mr. P.," and it appearing that the complaint, in form, stated two causes of action, because plaintiffs' counsel was uncertain, from the chirography, as to which of the two persons the telegram was addressed. Pooser v. Western Union Telegraph Co. (C. C. 1905) 137 Fed. 1001.

The amount stated in the body of the complaint, and not that in the prayer for judgment, will determine the amount in dispute in action on money demand. Culver v. Crawford County (D. C. 1877) Fed. Cas. No. 3,468.

Where plaintiff filed a complaint containing two causes of action, one alleging damages in the sum of $4,234.50, and the other $1,425, and praying for a recovery of $2,999, without waiving any specific portion of either cause of action, the prayer for judgment was insufficient, and precluded a removal on the ground that the matter involved less than $3,000. Collins v. Twin Falls North Side Land & Water Co. (D. C. 1913) 204 Fed. 134.

The amount in controversy, for the purpose of determining the jurisdiction of the federal court on removal of an attachment suit, in which defendant had not been served nor appeared generally, held limited to the amount claimed in the affidavit for attachment, and not the amount stated in the ad damnum of the complaint. Starke v. Hoerning (D. C. 1913) 206 Fed. 1006.

Though plaintiff in his pleadings need not limit himself to any one theory of the damages, if he does limit himself, the amount of his damages are to be determined by this measure. Armstrong v. Walters (D. C. 1915) 219 Fed. 320, new trial denied (D. C. 1915) 223 Fed. 451.

A complaint in an action for negligent death contained several counts, each demanding damages in a sum less than the jurisdictional amount. Only damages resulting from the death were sought to be recovered. Held, that the cause was not within the jurisdiction of a federal court. Nashville, C. & St. L. Ry. v. Hill (1906) 40 South. 612, 146 Ala. 240.

In an action for unliquidated damages, the prayer in the petition for a judg-

ment in a sum less than the damages alleged therein establishes the amount in controversy. Bacon v. Iowa Cent. Ry. Co. (Iowa, 1912) 137 N. W. 1011.

Where the law prescribes no limitation on the extent of the recovery, the determination of the amount rests with the court and jury. Chicago, R. I. & P. Ry. Co. v. Stone & Bronnenberg (1905) 79 Pac. 655, 70 Kan. 708.

105. —— Actual amount in controversy less than amount claimed.—Where, in an action against election officers to recover damages for the rejection of a vote for members of Congress, the damages were laid at more than the requisite amount, the United States courts had jurisdiction; as the courts could not say that the amount in controversy was less than such amount, although it was claimed that a verdict for that amount would be excessive. Wiley v. Sinkler (1900) 21 Sup. Ct. 17, 20, 179 U. S. 58, 45 L. Ed. 84.

A federal court had no jurisdiction of a suit based on diversity of citizenship, where the amount in controversy, exclusive of interest and costs, was exactly equivalent to, but did not exceed, the jurisdictional amount, even though the complaint alleged that it exceeded that amount, which allegation was admitted by the answer. Royal Ins. Co. of Liverpool, England, v. Stoddard (1912) 201 Fed. 915, 120 C. C. A. 434.

When the complainant's bill asserts an interest in property worth $33,000, by reason of having become responsible therefor under policies of insurance, and alleges that such property will be wholly lost to him through action of the defendants which it is sought to restrain, the amount in controversy is that claimed by the complainant, and the jurisdiction of the circuit court is not defeated by a contention on the part of the defendant that, under the allegations of the bill, the complainant's claim is less than the jurisdictional amount. Insurance Co. of North America v. Svendsen (C. C. 1896) 74 Fed. 346.

An action by heirs to set aside, as fraudulent, judgments rendered by a probate court against the estate, none of which exceeds the necessary amount, cannot be brought within the jurisdiction of the federal court by reason of the fact that the real estate on which the judgments are liens exceeds in value that amount. McDaniel v. Traylor (C. C. 1903) 123 Fed. 338, reversed (1905) 25 Sup. Ct. 369, 196 U. S. 415, 49 L. Ed. 533.

The value of the matter in dispute must be determined by the amount claimed in the pleading, but such amount will not control when the allegations of the petition show that the amount in controversy is less than that for which judgment is prayed. Bacon v. Iowa Cent. Ry. Co. (Iowa, 1912) 137 N. W. 1011.

106. —— Validity of claim.—The amount claimed by a complainant in his bill in good faith determines the amount in controversy for the purpose of federal jurisdiction, and, where such claim exceeds the statutory amount, exclusive of interest and costs, the court has jurisdiction, notwithstanding there may be a good defense apparent on the face of the bill, which will reduce the amount of the recovery below that sum. Schunk v. Moline Milburn & Stoddart Co. (1893) 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255; Vance v. W. A. Vandercook Co. (1898) 18 Sup. Ct. 645, 170 U. S. 468, 42 L. Ed. 1111; Battle v. Atkinson (1903) 24 S. Ct. 845, 191 U. S. 559, 48 L. Ed. 302 (affirming decree [C. C. 1902] 115 Fed. 384); Interstate Building & Loan Ass'n v. Edgefield Hotel Co. (C. C. 1901) 109 Fed. 692; Armstrong v. Walters (D. C. 1915) 219 Fed. 320, new trial denied (D. C. 1915) 223 Fed. 451.

Plaintiff's allegations of value govern in determining the jurisdiction of a federal court, except where, upon the face of his own pleadings, it is not legally possible for him to recover the jurisdictional amount, or where such allegations are fraudulently made to create the jurisdiction. Smithers v. Smith (1907) 27 Sup. Ct. 297, 298, 204 U. S. 632, 51 L. Ed. 656; Armstrong v. Walters (D. C. 1915) 219 Fed. 320, new trial denied (D. C. 1915) 223 Fed. 451.

The matter in dispute is the claim presented on the record for the consideration of the court, and what plaintiff thus claims is the matter in dispute, though it may be incapable of proof, or only in part well founded. Kanouse v. Martin (1853) 15 How. 198, 207, 14 L. Ed. 660.

The amount in dispute, in an action for jurisdictional purposes in a federal court, is determined by the amount claimed by the plaintiff in his pleading, in good faith although such claim is made under a mistake of fact, as subsequently shown by the evidence. Kunkel v. Brown (1900) 99 Fed. 593, 39 C. C. A. 665.

Where the amount claimed in a bill to enforce a lien exceeds the requisite amount, the jurisdiction of a federal court is not defeated by the fact that it appears on the face of the bill that an action to recover a portion of the claim is barred by limitation, under a state statute. Waterfield v. Rice (1901) 111 Fed. 625, 49 C. C. A. 504.

Where the complaint contains the requisite allegations as to the amount in controversy, jurisdiction is not defeated because other matters alleged tend to show that the allegation as to jurisdiction is not well founded, unless such fact is a certainty from the pleadings. T. C. Henry & Sons & Co. v. Colorado Farm & Live Stock Co. (1908) 164 Fed. 986, 91 C. C. A. 16.

Where, in a suit in the federal courts to set aside conveyances as fraudulent

and a cloud on plaintiffs' title, the plaintiffs allege that the value of the land is more than the statutory amount, but it appears by undisputed testimony in support of a plea to the jurisdiction that it was much less, an order of dismissal must be entered. Simon v. House (C. C. 1891) 46 Fed. 317.

It is sufficient to sustain the jurisdiction, where the requisite jurisdictional facts are shown by the complaint, that it does not at any time thereafter satisfactorily appear to the court that the suit does not really and substantially involve the jurisdictional amount. Maffet v. Quine (C. C. 1899) 95 Fed. 199.

A prayer for relief for a stated sum and all other proper relief does not show the requisite amount when, under the pleadings, there was no other proper relief obtainable. Baltimore & O. R. Co. v. Worman (1895) 12 Ind. App. 494, 40 N. E. 751; Baltimore & O. R. Co. v. Ryan (1903) 68 N. E. 923, 31 Ind. App. 597.

107. —— Effect of answer.—An averment in a bill in equity in a federal court that the amount or value in controversy exceeds the jurisdictional amount, exclusive of interest and costs, does not give the court jurisdiction unless sustained by proof where it is put in issue and such issue may be taken by answer. Oregon R. & Nav. Co. v. Shell (C. C. 1904) 143 Fed. 1004, affirming decree on rehearing (C. C. 1903) 125 Fed. 979.

Where a bill in the federal courts to enjoin the business of buying and selling nontransferable railroad tickets alleged that the value of the business sought to be protected amounted to $5,000, exclusive of interest and costs, such averment would be treated as prima facie true for the purpose of sustaining the court's jurisdiction, notwithstanding an allegation in the answer that the amount in controversy was less than the jurisdictional amount, until defendant had sustained the burden of affirmatively showing that the requisite jurisdictional amount was wanting during the progress of the case. Pennsylvania Co. v. Bay (C. C. 1905) 138 Fed. 203.

Where plaintiff, suing in the District Court, demanded in good faith judgment for over $3,000, and defendant pleaded the general issue and an affirmative defense, the District Court had jurisdiction. Brent v. Chas. H. Lilly Co. (D. C. 1913) 202 Fed. 335.

108. Effect of verdict less than jurisdictional amount.—Where an inspection of the declaration does not and could not disclose but that the plaintiff was entitled to recover the amount claimed, a verdict in a sum less than the jurisdictional amount would not defeat the court's jurisdiction. Barry v. Edmunds (1886) 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729; Scott v. Donald (1897) 17 Sup. Ct. 265, 268, 165 U. S. 58, 41 L. Ed. 632; North American Transportation & Trading Co. v. Morrison (1900) 20 Sup. Ct. 869, 871, 178 U. S. 262, 44 L. Ed. 1061; Jones v. McCormick Harvesting Mach. Co. (1897) 82 Fed. 295, 27 C. C. A. 133; Levinski v. Middlesex Banking Co. (1899) 92 Fed. 449, 34 C. C. A. 452; Tennent-Stribling Shoe Co. v. Roper (1899) 94 Fed. 739, 36 C. C. A. 455; Washington County, Neb., v. Williams (1901) 111 Fed. 801, 49 C. C. A. 621; Roessler-Hasslacher Chemical Co. v. Doyle (1905) 142 F. 118, 73 C. C. A. 174; Ung Lung Chung v. Holmes (C. C. 1899) 98 Fed. 323; Armstrong v. Walters (D. C. 1915) 223 Fed. 451, denying new trial (D. C. 1915) 219 Fed. 320.

The amount involved in a suit is not measured by the actual recovery, but by the amount claimed, provided it is claimed in good faith, and is not merely a colorable claim to give the court jurisdiction. Peeler v. Lathrop (1891) 48 Fed. 780, 1 C. C. A. 93; Denver City Tramway Co. v. Norton (1905) 141 Fed. 599, 73 C. C. A. 1; Hampton Stave Co. v. Gardner (1907) 154 Fed. 805, 83 C. C. A. 521; Hulsecamp v. Teel (C. C. 1796) Fed. Cas. No. 6,862; Muns v. De Nemours (C. C. 1810) Id. 9,931; Sherman v. Clark (C. C. 1842) Id. 12,763; Victor Sewing Mach. Co. v. Mingus (C. C. 1878) Fed. Cas. No. 16,936; Hill v. Gordon (C. C. 1891) 45 Fed. 276 (appeal dismissed [1893] 13 S. Ct. 1047, 149 U. S. 775, 37 L. Ed. 963); Risley v. City of Utica (C. C. 1910) 179 Fed. 875; Murphy v. Howard (Super. Ct., Ark. 1833) Fed. Cas. No. 9,949a.

The matter in dispute is the claim presented on the record for the consideration of the court, and what plaintiff thus claims is the matter in dispute, though it may be incapable of proof, or only in part well founded. Kanouse v. Martin (1853) 15 How. 198, 207, 14 L. Ed. 660; Building & Loan Ass'n of Dakota v. Cunningham (1898) 47 S. W. 714, 92 Tex. 155.

(H) Allegations in pleadings

109. Necessity of allegation of jurisdictional amount.—The pleadings must show that the matter in dispute exceeds the jurisdictional value to give the court jurisdiction. Udall v. The Ohio (1854) 17 How. 17, 18, 15 L. Ed. 42; Fuller v. Montague (1893) 59 Fed. 212, 214, 8 C. C. A. 100; Robinson v. Suburban Brick Co. (1904) 127 Fed. 804, 62 C. C. A. 484; U. S. v. Pratt Coal & Coke Co. (C. C. 1883) 18 Fed. 708; Large v. Consolidated Nat. Bank (C. C. 1905) 137 Fed. 168; Mayer v. Cohrs (C. C. 1911) 188 Fed. 443.

In ejectment the estate is the matter in dispute, and its value must appear in the declaration or by proof. Lanning v. Dolph (C. C. 1826) Fed. Cas. No. 8,073; Crawford v. Burnham (C. C. 1871) Fed. Cas. No. 3,366; Greene v. City of Tacoma (C. C. 1892) 53 Fed. 562.

Where a cause transferred from a

late territorial court to a federal court seeks to abate a nuisance caused by obstructions in navigable waters, and the petition fails to show that the plaintiff has suffered damages to the jurisdictional amount, the federal court cannot take jurisdiction, and the case must be remanded. Kenyon v. Knipe (C. C. 1891) 46 Fed. 309.

In a contest over defendant's right to a patent for a mining claim, the only allegations in the record as to the value of the claim were those in defendant's answer, that it had expended over $50,000. Held that, in the absence of any allegation showing this sum to have been expended on the portion of the claim to which plaintiff sets up title, and that such expenditure had benefited the claim, the record did not show that the matter in dispute exceeded the jurisdictional amount, so as to enable the Idaho federal circuit court to retain jurisdiction of the cause, which had been transferred to it from the territorial court. Back v. Sierra Nevada Consol. Min. Co. (C. C. 1891) 46 Fed. 673.

A bill to restrain defendants from issuing a circular alleged to be detrimental to plaintiff's business, and from interfering with that business, which does not allege the amount of damages sustained or apprehended, or the value of the matter in controversy, is not sufficient to give the court jurisdiction. Home Ins. Co. v. Nobles (C. C. 1894) 63 Fed. 641.

In a suit by an adverse claimant to establish his right of possession to a mining claim, it is essential that the bill should show the value of the property in controversy to be sufficient to bring the suit within the requirements of the general statute prescribing the jurisdiction of the court. Yellow Aster Min. & Mill. Co. v. Winchell (C. C. 1899) 95 Fed. 213.

Under the rule that the jurisdiction of a federal court must affirmatively appear from the record, a bill for the partition of lands does not state a case within the jurisdiction where it shows the value of complainant's interest therein to be less than the jurisdictional amount. Southern Land & Timber Co. v. Johnson (C. C. 1907) 156 Fed. 346.

110. Sufficiency of allegation.—A bill by a building and loan association to foreclose a mortgage securing a contract under which the association advanced to a shareholder $2,000 in anticipation of the maturity of his shares, and by which he agreed to make payments until the shares reached the par value of $4,000, less the dues previously paid, alleging a default, and that but $1,200 had been paid, showed on its face that the matter in dispute exceeded the statutory amount, exclusive of interest and costs, and therefore involved the jurisdictional amount. Building & Loan Ass'n of Dakota v. Price (1898) 18 Sup. Ct. 251, 254, 169 U. S. 45, 42 L. Ed. 655.

An allegation that the "amount in dispute" is more than the statutory sum, exclusive of interest and costs, is not insufficient to show that the case is within the jurisdiction of a federal court merely because it says the "amount" instead of the "matter" in dispute. Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 223, 175 U. S. 571, 44 L. Ed. 276.

A bill for injunction against taxes, brought by a railroad company against a revenue agent who represents all the parties interested, sufficiently states the jurisdictional amount when it alleges that the taxes assessed amount to a specified sum, much larger than the jurisdictional limit; and a question not arising on the face of the bill, as to how the taxes, when collected, would be disposed of, and in what proportions and amounts they would be parceled out to interested municipalities, is immaterial. Illinois Cent. R. Co. v. Adams (1901) 21 Sup. Ct. 251, 180 U. S. 28, 45 L. Ed. 410.

The amount of the damages involved in an action for the breach of a written contract to deliver oil at a specified price f. o. b. buyer's tanks at seller's mill is not increased, for jurisdictional purposes, over and above the difference between the contract and market value by allegations in the petition that the seller had notice that the buyer would be compelled to send its tanks from distant points to the seller's mill; that in so doing transportation charges were incurred and the use of the tanks lost for 30 days; that seller was well aware that buyer had contracts over, and "had contracted to that end" with buyer; and that seller, contemplating the breach of its contract, maliciously caused the buyer to send the tanks a specified distance at a specified cost. Globe Refining Co. v. Landa Cotton Oil Co. (1903) 23 Sup. Ct. 754, 755, 190 U. S. 540, 47 L. Ed. 1171.

In the absence of a plea to the jurisdiction, an allegation in a bill for a mandatory injunction that the damage is irreparable, and greatly exceeds $2,000 (the statutory amount at that time), is sufficient to give jurisdiction, though denied by the answer, and not proved. Butchers' & Drovers' Stockyards Co. v. Louisville & N. R. Co. (1895) 67 Fed. 35, 14 C. C. A. 290.

Although one count is for less than the requisite amount, it is sufficient if there are other counts so framed that, in case of failure to establish the first count, it is legally possible for plaintiff to recover a sum exceeding the jurisdictional amount. Hayward v. Nordberg Mfg. Co. (1898) 85 Fed. 4, 29 C. C. A. 438.

In a suit to foreclose a mortgage securing a sum just equal to the statutory amount, the bill alleged that plaintiff advanced an additional $2.25 to pay the

fee for recording the mortgage, "for which defendant is liable to him." Held, that the averment of liability was a mere conclusion of law, and that the bill therefore failed to show that more than the jurisdictional amount was involved. Less v. English (1898) 85 Fed. 471, 29 C. C. A. 275.

Where the declaration in a suit in the federal courts contained the common counts and a special count, each alleging the amount in controversy to be $5,000, and a verdict was directed in favor of plaintiff for more than the statutory sum, the necessary jurisdictional amount sufficiently appeared. State Bank of Chicago v. Cox (1906) 143 Fed. 91, 74 C. C. A. 285.

Allegation that when the bill was filed June 5, 1912, the matter in dispute, exclusive of interest and costs, exceeded $2,000, did not show that the cause of action involving such amount had accrued to complainant prior to the enactment of Judicial Code, § 24. Texas Gum Co. v. Autosales Gum & Chocolate Co. (1915) 219 Fed. 165, 135 C. C. A. 63.

An allegation in a suit to enjoin a county tax that complainant sues "on behalf of all others similarly situated" will not give jurisdiction where it does not appear that complainant's liability equals the statutory amount. Adams v. Douglas County (C. C. 1868) Fed. Cas. No. 52.

The theory of a bill between heirs for an accounting and distribution being that a portion of them entitled to distribution may maintain the action for their respective proportions without joining others, in order to give jurisdiction to the court the interest of each independent of others must amount to the statutory sum; and an allegation that the amount of the property in controversy is unknown, but much more than the jurisdictional amount, over and above all debts and funeral expenses, is not sufficient to confer jurisdiction. Rich v. Bray (C. C. 1889) 37 Fed. 273, 2 L. R. A. 225.

In a suit by a taxpayer to enjoin the passage of an ordinance creating an indebtedness against the town on account of its alleged illegality, the matter in dispute is the taxes which the plaintiff would probably have to pay in discharge of said indebtedness; and a mere allegation in the bill that the amount is in excess of the statutory sum is not sufficient to confer jurisdiction. Murphy v. East Portland (C. C. 1890) 42 Fed. 308.

An allegation that the property in dispute, which is mining property, is worth more than $5,000 at the date of the application, is not sufficient to show that the value at the time of bringing suit was within the jurisdiction of the federal courts, as required by the statute. Strasburger v. Beecher (C. C. 1890) 44 Fed. 209.

An allegation by the mortgagee, in an action by a mortgagee to enjoin the construction of a sewer to the injury of the mortgaged property, that such construction will impair the value of his security to an amount exceeding the sum specified in the statute is sufficient to give jurisdiction to a federal circuit court. Clapp v. City of Spokane (C. C. 1892) 53 Fed. 515.

A bill against a corporation and certain of its stockholders to set aside alleged purchases of stock by the latter with corporate funds, and to enjoin the voting of such stock, filed by complainant as a stockholder in behalf of himself and all other stockholders who desire to intervene, and which alleges that complainant is the owner of "divers shares" of the stock of such corporation, but from which the amount or value of his holding does not appear, fails to show that the amount in controversy is sufficient to give a federal court jurisdiction. Harvey v. Raleigh & G. R. Co. (C. C. 1898) 89 Fed. 115.

A bill to obtain possession and establish title to certain corporate stock, which alleges the amount of stock in controversy to be 153 shares, of the par value of $100 each and of greater market value, shows on its face that the amount in controversy exceeds the jurisdictional amount. Ryan v. Seaboard & R. R. Co. (C. C. 1898) 89 Fed. 397.

Allegations in a complaint for the cancellation of a lease and to enjoin the lessees from using the premises, as to the value of the leased premises and the rental value held sufficient to give jurisdiction to the federal court. Reese v. Zinn (C. C. 1900) 103 Fed. 97.

A bill filed in a federal court by several landowners to enjoin the maintenance of an alleged nuisance by obstructing a stream and causing it to overflow upon the lands of the complainants must clearly show that the amount of damage to each complainant is sufficient to give the court jurisdiction, and an allegation of the difference in the value of the land of a complainant with and without the overflow is not a good allegation of such damage. Hagge v. Kansas City S. Ry. Co. (C. C. 1900) 104 Fed. 391.

In a suit in a federal court against a number of defendants to quiet title to a tract of land alleged to be of the jurisdictional value, to sustain the jurisdiction of the court it must appear from the bill that all the defendants have a privity of interest, derived from a common source of title, or that the separate claim of each defendant is of the jurisdictional amount, since, where the defendants claim separately, the suit is severable, and the requisite amount must be involved in each separate controversy. Cooper v. Preston (C. C. 1900) 105 Fed. 403.

A bill to enjoin defendants from diverting the waters of a stream in violation of complainant's prior right thereto, which is alleged to be of a given

value and also to recover damages in a certain sum alleged to have been sustained by complainant by reason of the joint action of defendants in diverting such waters, held sufficient to give a federal court jurisdiction. Morris v. Bean (C. C. 1903) 123 Fed. 618.

A complaint alleging that plaintiff employed defendant to locate him on a half section of government land, which he entered under the homestead and timber acts, for which service he paid defendant $200, and seeking to recover damages for false and fraudulent representations as to the quantity and quality of timber on such land, does not state a cause of action for the recovery of damages beyond the amount paid defendant, if there can be any recovery, and the action is not within the jurisdiction of a federal court, although the damages are laid in a sum exceeding the jurisdictional amount. Wines v. Cobb Real Estate Co. (C. C. 1904) 128 Fed. 198.

A bill to recover an interest in lands of a decedent, in which the only allegation with respect to the amount or value in controversy is that "complainants are informed and believe that the whole of said lands * * * are worth $12,000, and the amount demanded by them herein is more than the statutory sum, is argumentative, leaving the court to make a calculation, and does not meet the statutory requirement to give a federal court jurisdiction. Dupree v. Leggette (C. C. 1905) 140 Fed. 776.

A declaration containing two counts, each claiming damages in the sum of $1,900, and which alleges that the acts of defendant complained of have caused damage to plaintiff in its present and accrued sales in the sum of $1,900, and also in its future sales and business in a like sum, authorizes a recovery of $3,800, and the amount involved is sufficient. Southern Cash Register Co. v. Montgomery (C. C. 1906) 143 F. 700.

A bill in a federal court for an injunction to restrain defendants from interfering with complainant's business, which alleges that the value of the matter in dispute exceeds, exclusive of interest and costs, the sum of $25,000, and that complainant has been damaged by the acts of defendants in more than such sum, is sufficient, in the absence of any denial of such averments, to sustain the jurisdiction of the court. Spaulding v. Evenson (C. C. 1906) 149 Fed. 913, order affirmed Evenson v. Spaulding (1907) 150 Fed. 517, 82 C. C. A. 263, 9 L. R. A. (N. S.) 904.

In an action for damages for depriving plaintiff of rights secured to him by the Constitution and laws of the United States, it need not be alleged that defendants acted maliciously, and a failure to so allege does not authorize the court to determine as matter of law that only nominal damages are recoverable, and therefore that a federal court is without jurisdiction. Brickhouse v. Brooks (C. C. 1908) 165 Fed. 534.

A complaint alleging that plaintiff was a designer and publisher of maps, and had acquired a reputation as such, that he designed and published a certain map, of which defendant city published and circulated in an official publication a mutilated copy, having thereon plaintiff's name, to his "loss or damage in the sum of $6,000," but which does not allege any special damage to plaintiff's business or reputation, does not state a cause of action for the recovery of more than nominal damages, and hence does not give a federal court jurisdiction. Ohman v. City of New York (C. C. 1909) 168 Fed. 953.

Where a declaration in ejectment in a federal court did not allege the value of the land, and no statement of damages accompanied the declaration, an allegation that defendant withheld possession to plaintiff's damage in the sum of $5,000 is demurrable for failure to show that the land is of greater value than the jurisdictional amount. Elk Garden Co. v. T. W. Thayer Co. (C. C. 1910) 179 Fed. 556.

A suit by a bankrupt's trustee in the federal court, alleging that, by reason of defendant's failure to complete a certain contract and by reason of the consequent loss of the value of their bargain, the bankrupts and plaintiff have been damaged in a large sum of money, to wit, the value of certain jewelry and railroad inspection business agreed to be sold and transferred to defendant, the value of which was peculiarly within defendant's knowledge, was insufficient to show that the matter in dispute exceeded the jurisdictional sum or value. Mayer v. Cohrs (C. C. 1911) 188 Fed. 443.

A declaration in an action on a Georgia note for $3,000 with an attorney's fee of 10 per cent., which demands judgment for $3,300, held to state a cause of action within the jurisdiction of the federal court, though it fails to allege the giving of notice before suit as required by Civ. Code Ga. 1910, § 4252. Howard v. Carroll (D. C. 1912) 195 Fed. 646.

Where plaintiff's statement of his case shows that he cannot recover as much as the jurisdictional minimum, the federal court must not hear the case. Id.

In buyer's action for seller's breach, statement of claim showing extension of time for delivery held not to show to legal certainty that the damages were the difference between the contract and market price at the original time for delivery, so as to limit the amount in controversy to such damages. Armstrong v. Walters (D. C. 1915) 219 Fed. 320, new trial denied (D. C. 1915) 223 Fed. 451.

In action against attorneys for negligence, declaration held insufficient to state cause of action for an amount giv-

ing jurisdiction to federal court. Maryland Casualty Co. v. Price, Smith, Spilman & Clay (D. C. 1915) 224 Fed. 271.

Allegation in bill in federal court that amount involved is greater than $2,000 does not meet Jud. Code, § 24, and the court may not entertain jurisdiction. Nolen v. Riechman (D. C. 1915) 225 Fed. 812.

111. Amendment.—The record must show affirmatively that the jurisdictional value is involved, but, where the omission was apparently remediable, the court merely required that the necessary showing upon that point be made and filed, and disposed of the case as if the record contained the proper allegation of value. Fuller v. Montague (1893) 59 Fed. 212, 214, 8 C. C. A. 100.

Where the facts warrant the exercise of jurisdiction by a federal court, but the pleader has failed to state them properly, as by omitting to allege a proper element of damages, which reduces the amount claimed below the jurisdictional limit, the court is not deprived of the usual power to permit him to do so by amendment, by the mere fact that the amendment will constitute a jurisdictional averment. Whalen v. Gordon (1899) 95 Fed. 305, 37 C. C. A. 70.

Where no objection is made that a bill does not show the requisite amount involved to give a federal court jurisdiction, and it contains allegations from which such amount may be inferred and could properly be alleged by amendment, an appellate court may properly sustain the jurisdiction. Williams v. Molther (1912) 198 Fed. 460, 117 C. C. A. 220, reversing decree (C. C. 1911) 189 Fed. 700.

In an action for damages to property by a railroad company occupying a street, the ad damnum was, in ignorance of a change in the law, laid at less than the jurisdictional amount. Held that an amendment was allowable; it not appearing that the damages were not in fact larger than the original claim. Davis v. Kansas City, S. & M. R. Co. (C. C. 1887) 32 Fed. 863.

Where a bill to enforce a contract for the sale of land is silent respecting the value of the land, except that in the contract its price is fixed at $1,000, an amendment alleging that the present value is $3,000 brought the controversy within the jurisdiction of the court, under the former statute. Johnston v. Trippe (C. C. 1887) 33 Fed. 530.

Where the jurisdiction of a circuit court is challenged on the ground that the record does not show the value of the property in controversy to exceed the jurisdictional amount, the point being made for the first time after a final hearing and decree, the property being in fact of sufficient value, the court will not deny its jurisdiction, but will allow the omission in the record to be supplied by the filing nunc pro tunc of a proper affidavit. Carr v. Fife (C. C. 1891) 45 Fed. 209, decree affirmed (1895) 15 S. Ct. 427, 156 U. S. 494, 39 L. Ed. 508.

Where in a suit to restrain unlawful competition complainant prayed for an injunction and for $50,000 damages, the bill was insufficient to show federal jurisdiction for failure to allege that the value of the injunction exceeded $3,000, but such defect was amendable. Bureau of Natural Literature v. Sells (D. C. 1914) 211 Fed. 379.

112. Disclaimer.—The jurisdiction of the federal court having once attached, no subsequent event can devest it. Roberts v. Nelson (C. C. 1870) Fed. Cas. No. 11,907, 40 How. Prac. 387.

Where disclaimers filed by some of a number of defendants in a suit to quiet title in a federal court are not directed to any particular subdivision of the tract of land described in the bill, but are of any right, title, or interest in any part of such tract, they do not reduce the value of the matter in dispute, which remains, as between the complainant and the remaining defendants, the value of the land involved. Cooper v. Preston (C. C. 1900) 105 Fed. 403.

In an action of ejectment in a federal court to recover a tract of land alleged to be of greater value than the jurisdictional amount, the court is not ousted by jurisdiction because the defendant by his answer disclaims as to all except a portion of the tract which is of less value. Way v. Clay (C. C. 1904) 140 Fed. 352.

(I) Evidence and burden of proof

113. Evidence as to value.—Where pleadings in ejectment do not state the value of the property in controversy, the value may be shown at the trial to show that the case is within the jurisdiction of the federal courts. Beard v. Federy (1865) 70 U. S. (3 Wall.) 478, 18 L. Ed. 88.

As the measure of the value of the matter in dispute in a suit to cancel a written contract of marriage depends upon the value of the wife's rights in the husband's property and the amount of obligation on the part of the husband to support the wife, such amount, when necessary to the jurisdiction, may be shown by evidence in the case or by affidavits filed when the question of jurisdiction is raised. Sharon v. Terry (C. C. 1888) 36 Fed. 337, 1 L. R. A. 572.

In ejectment to recover certain mining land, etc., the burden of proof to sustain a plea in abatement on the ground that the value of the property is insufficient to confer jurisdiction on the federal courts is on the defendant, and must be established by a preponderance of the evidence. Butters v. Carney (C. C. 1904) 127 Fed. 622.

114. Sufficiency.—Where it is sought to enjoin the collection of taxes for certain years, and there is evidence of

e amount of taxes for but one of such ars, it will not be assumed, to make the jurisdictional amount, that a like x was assessed for each of the other ars. Citizens' Bank of Louisiana v. nnon (1896) 17 S. Ct. 89, 164 U. S. 9, 41 L. Ed. 451.

Recitals in an agreed statement of cts, in a suit to enjoin state officers om seizing records imported into the ate by plaintiff, that defendants had zed and intended and threatened to ze all records imported, and that the lue of the right to import records exeded the statutory amount, are a conssion that the value of plaintiff's hts in controversy is sufficient to e jurisdiction. Scott v. Donald 897) 17 Sup. Ct. 262, 263, 165 U. S. 7, 41 L. Ed. 648.

The jurisdiction of a federal court in controversy between citizens of difent states is not terminated by ex rte affidavits denying that the propty is of the value alleged, unless this ct is made to appear to the satisfacn of the court. Put-in-Bay Waterrks, Light & Ry. Co. v. Ryan (1901) S. Ct. 709, 181 U. S. 409, 45 L. Ed. 7.

The effect of testimony in a suit by e New York Cotton Exchange to enn the defendant from receiving and ing quotations of sales on such exange that the value of the right to ntrol these quotations is much greater an the jurisdictional amount is not paired by evidence that the value of otations of sales varies with the volne of business. Hunt v. New York tton Exch. (1907) 27 S. Ct. 529, 205 S. 322, 51 L. Ed. 821, affirming dee New York Cotton Exch. v. Hunt . C. 1906) 144 Fed. 511.

An attorney for one of the claimants ainst a decedent's estate and for the ministrator as well will not be premed to have been acting for all the imants in advising the administrator allow all the claims, so as to make e aggregate amount of the claims alwed the amount in dispute in a suit to t aside judgments of the probate urt establishing claims against the tate which are a lien on the real propty inherited by complainants, on the ound that such judgments were fraudently obtained by defendants, acting in ncert, although he is also the attorney several of the claimants in such t. McDaniel v. Traylor (1909) 29 Ct. 343, 212 U. S. 428, 53 L. Ed. 1.

Where, in an action for breach of a ntract for the sale of a drug business ought in a federal court, there was dence that the business and good will s of such a value that plaintiff's re thereof, together with $500 adnced by plaintiff as a part of the price which he also sued, would amount the jurisdictional value, an objection t the amount in controversy was not own to equal the jurisdictional amount because there was no proof of any market value of the goods inventoried or what they would sell for was unsustainable. Markell v. Matteson (1907) 153 Fed. 564, 82 C. C. A. 518.

The matter in dispute was the undivided half of a patent for an invention. There was evidence that $^{21}/_{155}$ was sold for $5,000, 17 months before the suit was commenced; that defendant was a citizen of Missouri; that one of the complainants was a corporation of Maine, and the other a stockholder, director, and president thereof; and that the articles of incorporation recited his residence in Indiana. Held sufficient evidence to sustain the conclusion that the property involved was worth more than the amount necessary to the jurisdiction of the federal court. Howe v. Howe & Owen Ball Bearing Co. (1907) 154 Fed. 820, 83 C. C. A. 536.

Evidence held to show that damages sought to be recovered in an action did not exceed the statutory amount, exclusive of interest and costs, so as to give the Circuit Court jurisdiction. Hayne v. Woolley (C. C. 1910) 180 Fed. 573, judgment affirmed Baley v. Same (1910) 183 Fed. 1021, 105 C. C. A. 663, writ of certiorari denied (1911) 31 S. Ct. 724, 220 U. S. 621, 55 L. Ed. 613.

Upon a petition by nonresident plaintiffs, in an action to set aside a sale of land for taxes, to transfer the action to the United States court, four witnesses, in their separate affidavits, stated that the land was worth less than $500, the jurisdictional amount at that time, but none of them gave a description of the land, nor did they state or show that they knew the value of other land of like character in the same locality. One witness for plaintiffs testified that he was a land agent, familiar with the land in controversy, and with land generally in that locality; that he had sold land of no better quality in the same locality at $7.50 per acre, at which rate the tract in dispute would be worth $1,200; and that he believed such tract to be worth $1,600. The evidence of this witness was supported by the sworn statement of the plaintiffs. Held, that the evidence was sufficient to require the court to find that the land was worth more than $500, and to grant the motion. Corbin v. Pike (1873) 37 Iowa, 637.

V. SUITS UNDER THE CONSTITUTION, FEDERAL LAWS OR TREATIES

(A) Federal question as jurisdictional ground

See, also, Const. art. 3, § 2, cl. 1, and notes thereunder.

115. In general.—This section gives jurisdiction to the federal court over cases involving federal questions. Ames v. Kansas ex rel. Johnston (1884) 4 Sup. Ct. 437, 443, 444, 111 U. S. 449, 28 L. Ed. 482; Fischer v. Neil (C. C.

1881) 6 Fed. 89; Crescent City Live Stock, Landing & Slaughterhouse Co. v. Butchers' Union Live Stock, Landing & Slaughterhouse Co. (C. C. 1882) 12 Fed. 225; Sawyer v. Parish of Concordia (C. C. 1882) 12 Fed. 754; Leonard v. City of Shreveport (C. C. 1886) 28 Fed. 257; Lefkowitz v. Foster Hose Supporter Co. (C. C. 1908) 161 Fed. 367; Fribourg v. Pullman Co. (C. C. 1910) 176 Fed. 981; Hubbard v. Chicago, M. & St. P. Ry. Co., Id. 994; Van Brimmer v. Texas & P. Ry. Co. (C. C. 1911) 190 Fed. 394; McConnaughy v. Pennoyer (D. C. 1890) 43 Fed. 339, affirmed (1891) 11 Sup. Ct. 699, 140 U. S. 1, 35 L. Ed. 363.

When federal questions arise in causes pending in the state courts, the latter are competent to decide them. Missouri Pac. R. Co. v. Fitzgerald (1896) 16 Sup. Ct. 389, 396, 160 U. S. 556, 40 L. Ed. 536.

If state legislation impairs the obligation of a contract, or deprives of property without due process of law, or denies the equal protection of the laws, remedies are found in this section. Holt v. Indiana Mfg. Co. (1900) 20 Sup. Ct. 272, 273, 176 U. S. 68, 44 L. Ed. 374.

State courts have concurrent jurisdiction with federal courts to determine the constitutionality of a state statute which is attacked as in violation of the federal Constitution. Blythe v. Hinckley (1901) 21 Sup. Ct. 390, 392, 180 U. S. 333, 45 L. Ed. 557.

A statement of claim which seeks to recover damages for acts of defendant done in his capacity as judge of a state court does not raise a federal question, and, where there is no diversity of citizenship, a circuit court of the United States is without jurisdiction, and it is its duty, on motion therefor, to dismiss the suit. Kinney v. Mitchell (C. C. 1905) 138 Fed. 270, writ of error dismissed (1906) 27 Sup. Ct. 784, 203 U. S. 586, 51 L. Ed. 329.

116. Necessity of existence of other jurisdictional grounds.—Where the right claimed is founded on a federal question, diversity of citizenship of the parties is immaterial and unnecessary. Elk v. Wilkins (1884) 5 Sup. Ct. 41, 43, 112 U. S. 94, 28 L. Ed. 643; U. S. Exp. Co. v. Allen (C. C. 1889) 39 Fed. 712 (decree reversed Shelton v. Platt [1890] 11 S. Ct. 646, 139 U. S. 591, 35 L. Ed. 273); Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co. (C. C. 1891) 47 Fed. 771, 773 (appeal dismissed [1895] 16 Sup. Ct. 189, 159 U. S. 698, 40 L. Ed. 311); San Joaquin & King's River Canal & Irrigation Co. v. Stanislaus County (C. C. 1898) 90 Fed. 516; Kimball v. Cedar Rapids (C. C. 1900) 99 Fed. 130, 131; Central Stockyards Co. v. Louisville & N. R. Co. (C. C. 1902) 112 Fed. 823; Risley v. City of Utica (C. C. 1909) 168 Fed. 737; Wilmington City Ry. Co. v. Taylor (D. C. 1912) 198 Fed. 159; Hodgson v. Millward (Pa. 1861) 3 Grant, Cas. 418.

It is no objection to the jurisdiction of the courts of the United States, in cases arising under the constitution and laws of the United States, that one of the parties is a state and the other a citizen of that state. Virginia Coupon Cases (C. C. 1885) 25 Fed. 654.

117. Character of federal question as dependent upon form of proceedings.—In that class of cases in which a federal question is involved, and on which jurisdiction in the courts of the United States depends, the character of the question is the same whether the jurisdiction exercised is appellate, original, or by removal, the jurisdiction in either form depending upon the constitutional grant of power. Nashville, C. & St. L. Ry. v. Taylor (C. C. 1898) 86 Fed. 168.

Decisions of the supreme court in cases from the circuit courts, and those on writ of error to a state court, are equally instructive in determining when there is a "federal question," such as to support the original jurisdiction of the circuit court. Id.

118. Materiality of question.—A suit does not arise under the constitution or laws of the United States unless it really and substantially involves a dispute or controversy as to the effect or construction of the constitution, upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form. Cooke v. Avery (1893) 13 Sup. Ct. 340, 344, 147 U. S. 375, 37 L. Ed. 209; McCain v. City of Des Moines (1899) 19 Sup. Ct. 644, 645, 174 U. S. 168, 43 L. Ed. 936 (affirming decree [C. C. 1898] 84 Fed. 726); Arbuckle v. Blackburn (1903) 24 Sup. Ct. 148, 150, 191 U. S. 405, 48 L. Ed. 239; Spencer v. Duplan Silk Co. (1903) 24 Sup. Ct. 174, 176, 191 U. S. 526, 48 L. Ed. 287; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. (1899) 93 Fed. 274, 35 C. C. A. 1; Earnhart v. Switzler (1910) 179 Fed. 832, 165 C. C. A. 260; Hare v. Birkenfield (1910) 181 Fed. 825, 104 C. C. A. 335; Manhattan Ry. Co. v. City of New York (C. C. 1883) 18 Fed. 195; Levy v. City of Shreveport (C. C. 1886) 28 Fed. 209; Murray v. Bluebird Min. Co. (C. C. 1891) 45 Fed. 385; California Oil & Gas Co. of Arizona v. Miller (C. C. 1899) 96 Fed. 12; Henuy v. La Compagnie Generale Transatlantique (C. C. 1899) 96 Fed. 497.

A federal question to give the federal court jurisdiction must not be merely colorable or set up fraudulently for the mere purpose of endeavoring to give the court jurisdiction. Newbury port Water Co. v. Newburyport (1904) 24 Sup. Ct. 553, 556, 193 U. S. 561, 48 L. Ed. 795; St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co. (1895) 68 Fed. 2, 15 C. C. A. 167 (decree af-

med [1897] 18 S. Ct. 946, 42 L. Ed. 12); Risley v. City of Utica (C. C. 09) 173 Fed. 502.

The federal court cannot be given jusdiction by the suggestion of the imirment of a contract, in respect of nich the complainant seeks no relief. ew Orleans v. Benjamin (1894) 14 ıp. Ct. 905, 912, 153 U. S. 411, 38 L. d. 764.

The assertion in a suit to enjoin mucipal construction of an underground ilway that complainants had a prior xclusive right to the use of the city reets for that purpose does not bring e cause within the jurisdiction of a deral court as really and substantial- involving a dispute or controversy specting the federal Constitution, here such contention is based upon e effect claimed for the filing of a ap and profile of the proposed route d for the payment of an incorporaon tax, and involves the unfounded asmption that the determination by the pid transit board created by Laws Y. 1891, c. 4, to construct an underound railway, together with the conents of the municipal authorities and utting owners to the municipal conruction of such road, was the equivant of the requisite consents to the nstruction of complainants' proposed ad, which had never been obtained. nderground R. of City of New York City of New York (1904) 24 Sup. Ct. 4, 193 U. S. 416, 48 L. Ed. 733, afming decree (C. C. 1902) 116 Fed. 2.

The federal courts do not acquire jusdiction because a federal statute ust be referred to to explain a conact or a local law. St. Paul, M. & M. y. Co. v. St. Paul & N. P. R. Co. 895) 68 Fed. 2, 15 C. C. A. 167, decree firmed (1897) 18 Sup. Ct. 946, 42 L. d. 1212.

A case does not arise under the conitution or laws of the United States it can be decided without deciding a deral question. Manhattan Ry. Co. v. ity of New York (C. C. 1883) 18 Fed. 5.

The federal court cannot consider hether Const. La. art. 209, probiting a municipal tax of more than mills on the dollar, is invalid as imiring the remedy to collect a debt of municipality, entered into prior to at act, unless, in an action to enforce at debt, it has first been judicially deded that the article cited stands in e way of its collection. Levy v. City Shreveport (C. C. 1886) 28 Fed. 209.

A case in which the disputed quesons are questions of fact purely, or estions of mixed law and fact, which ay be decided by a jury, under inructions of the court, not involving decision of any controverted point as the applicability or construction of y provision of the constitution or of y statute of the United States, does t come within the jurisdiction of a court of the United States, by virtue of this clause. Murray v. Bluebird Min. Co. (C. C. 1891) 45 Fed. 385.

The mere fact that in the progress of the trial of a case it may become necessary to construe the constitution or laws of the United States does not give the federal courts jurisdiction of such case; but the decision must depend on such construction, and this must appear by the complainant's statement of his own claim, irrespective of what the contention of the defendant may be. Wise v. Nixon (C. C. 1897) 78 Fed. 203.

In a suit in a federal court by a nonresident of a state to enjoin the enforcement of an ordinance, adopted in a local option district of such state, prohibiting the sale of liquors therein except for certain purposes, the only questions which can be considered are those affecting the rights of complainant under the Constitution and laws of the United States. In questions relating to the validity and effect of the law, or the regularity of the election, complainant has no legal interest, except as they may affect such rights. August Busch & Co. v. Webb (C. C. 1903) 122 Fed. 655, appeal dismissed Busch v. Webb (1904) 24 S. Ct. 857, 194 U. S. 640, 48 L. Ed. 1162.

119. Settled legal propositions.—In a bill by a telegraph company for specific performance of a contract for the use of a railroad right of way and to enjoin interference with its rights, an averment that it had the right to maintain its telegraph line on the railroad "under the provisions of the statute of the United States" did not show that the suit arose under the constitution and laws of the United States, where it had been settled that the statute (Act July 24, 1866, c. 230) did not confer on telegraph companies the right to enter on private property without the consent of the owner. Western Union Telegraph Co. v. Ann Arbor R. Co. (1900) 20 Sup. Ct. 867, 869, 178 U. S. 239, 44 L. Ed. 1052.

After a proposition of law has been decided by the Supreme Court of the United States it ceases to be a "federal question." Orr v. Baltimore & O. R. Co. (City Ct. 1913) 145 N. Y. S. 378, 83 Misc. Rep. 221.

120. Jurisdiction by consent.—See 414, post, this subdivision.

121. Existence and decision of other questions.—A complaint charging a continuing trespass, and demanding a lump sum as damages, states but a single cause of action, though the title under which the plaintiff claimed was different at different periods of the time covered by the trespass; and, if the adjudication of one such title involves a federal question, the case is one of federal cognizance, though no such question is involved in the other title. Ev-

ans v. Durango Land & Coal Co. (1897) 80 Fed. 433, 25 C. C. A. 531.

The fact that questions may arise, in the course of the litigation, besides those under the acts of congress, and which depend upon general principles of law, cannot withdraw the cause from the jurisdiction of the federal courts. Fisk v. Union Pac. R. Co. (C. C. 1871) Fed. Cas. No. 4,828; Connor v. Scott (C. C. 1876) Fed. Cas. No. 3,119.

A federal court has jurisdiction of a suit to enjoin an assessment where a question involved is the right of the taxpayer to an exemption on account of United States bonds owned by him, regardless of the citizenship of the parties, and, having such jurisdiction, it may adjudicate other questions involved in the case, although it decides the federal question adversely to complainant. People's Sav. Bank v. Layman (C. C. 1905) 134 Fed. 635.

The federal court, obtaining jurisdiction on the ground that a federal question is involved because of the question whether a state statute violates the federal constitution, may decide all questions in the case, though it decides the federal questions adversely to the party raising it or omits to decide it. Risley v. City of Utica (C. C. 1909) 173 Fed. 502.

When suit is brought in the United States Court, and both state or local questions and federal questions are involved, the federal questions give jurisdiction, assuming that the amount involved is sufficient, and the federal court may decide the case on the federal questions or on the local questions alone, if the latter dispose of the whole controversy. Risley v. City of Utica (C. C. 1910) 179 Fed. 875.

Where a claim is made in good faith in a federal court that an ordinance violates the federal Constitution, the court will take jurisdiction of the entire case, though a substantial doubt exists as to the validity of the ordinance under state law and some of the questions involved are not federal questions. City of St. Louis v. United Rys. Co. of St. Louis (Mo. 1915) 174 S. W. 78, 109, 110; Same v. St. Louis & S. Ry. Co., Id. 109.

For other decisions, see 429, post, this subdivision.

122. Elimination of question after jurisdiction has attached.—While an allegation in a complaint that a question under the constitution or laws of the United States is involved confers jurisdiction upon the federal court to determine whether there is a substantial controversy, such allegation confers no jurisdiction after it is made to appear that there is no such substantial controversy. Minnesota v. Northern Securities Co. (1904) 24 Sup. Ct. 598, 602, 194 U. S. 48, 48 L. Ed. 870.

Jurisdiction of a federal court having been properly invoked for relief against assessments as discriminating against complainant, and thus depriving it of the equal protection of the laws, the bill, where complainant fails to show discrimination, may be retained to administer relief on other grounds, though the state courts could afford adequate remedy. Louisville Trust Co. v. Stone (1901) 107 Fed. 305, 46 C. C. A. 299.

A horse car company, claiming to have an exclusive franchise, sought in the federal courts to enjoin a cable company, a resident of the same state, from laying its tracks, on the ground that the act incorporating the cable company was a state law impairing the obligation of contracts. The court held that the exclusiveness of the plaintiff's franchise was limited to a mere horse railway, but, the constitution of the state forbidding the damaging as well as the taking of private property for public use without compensation, referred the case to commissioners to report what damage, if any, plaintiff would suffer by the laying of the cable line. Held that, a substantial federal question having been involved in the case at the outset, the elimination of that question did not oust the court of jurisdiction of the question of damages. Omaha Horse Ry. Co. v. Cable-Tramway Co. of Omaha (C. C. 1887) 32 Fed. 727, appeal dismissed Cable-Tramway Co. of Omaha v. Omaha Horse Ry. Co. (1891) 11 S. Ct. 1018, 140 U. S. 674, 35 L. Ed. 600.

The fact that federal questions are raised by a bill is sufficient to give a federal court jurisdiction, although such questions are decided adversely to complainant, or the court finding it unnecessary to pass upon them decides the case on state questions alone. Mutual Film Co. v. Industrial Commission of Ohio (D. C. 1914) 215 Fed. 138.

For other decisions, see 429, post, this subdivision. See, also, notes under § 1019, post.

123. Ancillary and supplemental proceedings.—The federal courts have jurisdiction of suits on marshals' bonds without reference to the citizenship of the parties. Wetmore v. Rice (C. C. 1858) Fed. Cas. No. 17,468; U. S. v. Davidson (C. C. 1864) Id. 14,921; Adler v. Newcomb (C. C. 1872) Id. 83.

While the federal courts have jurisdiction of actions between citizens of the same state when federal questions are involved, and may in such actions determine issues otherwise triable by the state courts, their jurisdiction cannot be extended to other questions and issues raised by supplemental bill filed after the determination of the original cause. Omaha Horse Ry. Co. v. Cable Tramway Co. (C. C. 1888) 33 Fed. 689, appeal dismissed Cable Tramway Co. of Omaha v. Omaha Horse Ry. Co. (1891) 11 S. Ct. 1018, 140 U. S. 674, 35 L. Ed. 600.

Where jurisdiction of a bill to enjoin enforcement of a city ordinance authorizing a street railroad company to con-

emn for its use certain parts of the rack of another company is taken by he circuit court on the ground that he claimed violations of a previous rant to the latter company involves a ederal question arising under the contract clause of the constitution, it does not give it jurisdiction to decide a question arising on a supplemental bill as to the right of condemnation by the former company under its charter, pursuant to which the city pendente lite decided that the streets where the tracks were located were not wide enough for two companies to lay tracks side by side, as the matter involved is beyond the scope of the controversy which gave the court jurisdiction of the case originally. Mercantile Trust & Deposit Co. v. Collins Park & Belt R. Co. (C. C. 1900) 107 Fed. 762.

Where suit for the foreclosure of a railroad mortgage was instituted in the federal court, and such court had appointed a receiver, and the railroad had been sold under such proceedings, the court had jurisdiction of an intervention by a creditor having obtained a judgment in a state court to determine priority of such judgment, as a lien on the property of the railroad. State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. 1902) 115 Fed. 367.

A federal court has jurisdiction of a suit the purpose of which is to modify and correct one of its own decrees, without regard to the citizenship of the parties, and as incidental to such relief to grant an injunction to restrain a party from acting upon the decree as originally entered. Thompson v. Schenectady Ry. Co. (C. C. 1903) 124 Fed. 274.

Where an action is brought in a federal court on an arbitrator's award, a suit by the defendant therein to set aside the award for fraud is ancillary, but such fact does not give the court jurisdiction to bring in another party who is a citizen of the same state as the complainant to impeach an award in its favor made at the same arbitration, but which is separate and distinct from that between the other parties. Hecht v. Youghiogheny & Lehigh Coal Co. (C. C. 1908) 162 Fed. 812.

A petition by railroad receivers appointed by a federal court in a foreclosure suit for an injunction to restrain the enforcement of a state statute fixing fares or rates which affect the earnings of the road, on the ground that it is confiscatory and unconstitutional, is ancillary to the main suit and within the jurisdiction of the court. Trust Co. of America v. Chicago, P. & St. L. Ry. Co. of Illinois (D. C. 1912) 199 Fed. 593.

For other decisions, see 430 et seq., post, this subdivision.

124. Construction of state laws.—A suit does not arise under the constitution and laws of the United States when the public acts of one state are to be construed in an action pending in a court of another state. Chicago & A. R. Co. v. Wiggins Ferry Co. (1883) 1 Sup. Ct. 614, 108 U. S. 18, 27 L. Ed. 636.

While, under R. S. §§ 916, 967, post, §§ 1540, 1608, judgments recovered in federal courts were liens in all cases where they were such by the laws of the states, these sections did not recognize any rights in the states to regulate the operation of federal judgments; and, in a case where the laws of the state respecting the liens of judgments were changed after the enactment of these sections into the Revised Statutes, the question whether a judgment thereafter recovered in a federal court constituted a lien upon land was one which depended upon a construction of the federal laws and rules of court, and was therefore a question of federal jurisdiction. Cooke v. Avery (1893) 147 U. S. 375, 13 Sup. Ct. 340, 37 L. Ed. 209.

Where no federal question is involved, it is hardly within the province of a federal court to declare void a municipal ordinance, passed under a general grant of power from the legislature, on the ground that its provisions are unreasonable, and therefore in excess of the powers to be inferred from the grant. Southern Bell Telephone & Telegraph Co. v. City of Richmond (1900) 103 Fed. 31, 44 C. C. A. 147, affirming decree (C. C. 1899) 98 Fed. 671, and appeal dismissed (1901) 22 Sup. Ct. 934, 46 L. Ed. 1264.

Whether, the objectionable part of the Georgia Local Option Act of September 18, 1885, being separated, the rest may stand alone, is not a question arising under the United States constitution, or a law or treaty of the United States. Ex parte Kinnebrew (C. C. 1888) 35 Fed. 52.

Whether or not a supersedeas bond in a prosecution in a state court is a substitute for a bail bond when a motion for a new trial is pending or has been granted, or what effect it has under the state procedure, is not a federal question. In re Shaner (C. C. 1889) 39 Fed. 869, 870.

A suit to obtain a construction of a state law, which complainant alleges is being misinterpreted and misapplied in violation of his constitutional rights, does not involve a federal question. Kiernan v. Multnomah County (C. C. 1899) 95 Fed. 849.

125. Questions dependent on validity of ordinances or statutes or acts done under state law.—A suit to prevent enforcement of an ordinance which was not passed under supposed legislative authority would not be one arising under the Constitution of the United States, but the right of the federal court to entertain the action is based on the right of the city to enact the ordinance under a statute giving it the power to pass such ordinance. Hamilton Gaslight &

Coke Co. v. Hamilton (1892) 13 Sup. Ct. 90, 92, 146 U. S. 258, 36 L. Ed. 963.

A federal court has jurisdiction, and, when the question is properly presented, it may often become its duty to pass upon an alleged conflict between a statute and the state Constitution, even before it has been considered by the state tribunals. Michigan Cent. R. Co. v. Powers (1906) 26 Sup. Ct. 459, 461, 201 U. S. 245, 50 L. Ed. 744.

That a log boom constructed under authority of a state statute on a river lying wholly within the state may not conform to the regulations prescribed by the state statute does not make it an unlawful structure, so as to be cognizable in the federal courts. The question whether it does comply with the provisions of the state statute is a state, and not a federal, question. U. S. v. Bellingham Bay Boom Co. (1897) 81 Fed. 658, 26 C. C. A. 547, affirming judgment (C. C. 1896) 72 Fed. 585, judgment reversed (1900) 20 Sup. Ct. 343, 176 U. S. 211, 44 L. Ed. 437.

A citizen of Ohio engaged in the business of selling liquors applied for an injunction against a village in the same state, to restrain it from enforcing an ordinance "to prohibit ale, beer, and porter houses, and other places where intoxicating liquors are sold at retail," which was passed under the provisions of an act of the legislature called the "Dow Law," on the ground that it was in violation of the constitution of the state, and of the United States. Held, that the court had no jurisdiction to afford the relief asked, the bill and the affidavits not making a federal question, and all the parties being citizens of the state of Ohio. Tanner v. Village of Alliance (C. C. 1886) 29 Fed. 196.

In a suit to enjoin the enforcement of city ordinances, federal jurisdiction cannot be predicated on an allegation that in passing the ordinances the city exceeded its charter powers; such question being one for the determination of the state courts. Glucose Refining Co. v. City of Chicago (C. C. 1905) 138 Fed. 209.

Objections that Act Ga. Aug. 6, 1907 (Acts 1907, p. 81), prohibiting the manufacture and sale of intoxicating liquor within the state, etc., was violative of the state Constitution because its title contained two subjects, and that it was not properly passed, were matters primarily within the jurisdiction of the state courts. Christian Moerlein Brewing Co. v. Hill (C. C. 1908) 166 Fed. 140.

Where the bill in a suit in equity shows that the state statute complained of violates the federal Constitution, the federal court has jurisdiction of the controversy, though it may appear that the act contravenes the Constitution of the state and is for that reason invalid. San Francisco Gas & Electric Co. v. City & County of San Francisco (C. C. 1911) 189 Fed. 943.

A federal court of equity may grant relief where a valid state law is wrongfully administered by officers of the state so as to make the administration an illegal burden on individuals, provided the necessary diversity of citizenship exists. Chicago, B. & Q. R. Co. v. Oglesby (D. C. 1912) 198 Fed. 153.

A federal court of equity has jurisdiction of a suit to enjoin the enforcement, through repeated criminal prosecutions for its violation, of a municipal ordinance which is void as in violation of the federal Constitution. Kansas City Gas Co. v. Kansas City (D. C. 1912) 198 Fed. 500.

Where a city, in the exercise of delegated state powers, transgresses the federal Constitution, the federal courts have jurisdiction, though the act is not authorized or may have been forbidden by the state. Portland Ry., Light & Power Co. v. City of Portland (D. C. 1914) 210 Fed. 667.

Laws N. Y. 1907, p. 124, c. 91, declaring that the total expense of widening L. street in the borough of Brooklyn shall be borne by the city of New York, notwithstanding any assessment theretofore levied on the property benefited, and directing the cancellation of all such assessments remaining unpaid, and the refunding of any such assessments paid, passed after the entry of a final order by which the various steps, including the fixing of a district of assessment and the apportionment of the assessment against each parcel to be benefited, were confirmed, which assessments so fixed and apportioned were entered on the appropriate tax and assessment books, and thereupon became liens on the separate parcels against which entered, does not raise any question under the provisions of the Constitution of the United States; the rule being that the imposition of new burdens on a municipal corporation, or the taking from it of a former right or property by the legislative action of the state, does not raise a federal question. In re Lockitt (1908) 110 N. Y. S. 32, 58 Misc. Rep. 5.

126. Exhaustion of remedies in state court.—A federal District Court may not decline jurisdiction of a suit to enjoin enforcement of municipal ordinance as violating the due process clause of Const. U. S. Amend. 14, because it was also in conflict with a similar provision of the state Constitution until the court of last resort of the state had adjudged to the contrary. Home Telephone & Telegraph Co. v. City of Los Angeles (1913) 33 Sup. Ct. 312, 227 U. S. 278, 57 L. Ed. 510.

A federal district court may entertain a suit by a railway company to restrain the Vermont public service commission from enforcing its order concerning a passenger station as violative of the federal Constitution, although the company has not taken the appeal from the order to the supreme court of the state

t is provided for by P. S. Vt. 4599, 0, since it is apparent on the face of se sections that they do not attempt confer legislative powers upon the rt, but only provide an alternative l more expeditious way of doing what ght be done by a bill in equity. Bacon Rutland R. Co. (1914) 34 S. Ct. 283, 2 U. S. 134, 58 L. Ed. 538.

A suit to enjoin the enforcement of a nicipal ordinance on the ground that will deprive complainant of property hout due process of law is not with- the jurisdiction of the federal courts involving a constitutional question, ere the state Constitution contains a ilar prohibition, and the ordinance, invalid under one, is equally so under other, the rule being that in such es the remedy must be first sought the state courts. Seattle Electric . v. Seattle R. & S. Ry. Co. (1911) 5 Fed. 365, 107 C. C. A. 421.

An objection that Act Ga. Aug. 6, 07 (Acts 1907, p. 81), prohibiting the nufacture and sale of intoxicating uors, etc., was violative of the federal nstitution, was available as a de- se to a prosecution in the state urts for violation of the act, which uld finally be determined by the Unit- States Supreme Court on writ of or from the highest court of the te, and therefore was not ground of deral jurisdiction to restrain the en- cement of the act. Christian Moer- n Brewing Co. v. Hill (C. C. 1908) 3 Fed. 140.

27. Jurisdiction in equity.—A federal urt is not vested with jurisdiction of uit in equity to enjoin the collection a state tax, because the case is one sing under the Constitution and laws the United States, unless there is ap- rent some ground of equitable ju- diction recognized by the federal urts. Indiana Mfg. Co. v. Koehne 903) 23 Sup. Ct. 452, 455, 188 U. S. 1, 47 L. Ed. 651.

28. Instances of controversies in- ving federal questions.—An action ich questions an act done or omit- l under color of authority claimed to derived from the government in- ves the question whether such au- rity existed, or could in law exist, l falls within the jurisdiction of the licial power of the United States. tchell v. Clark (1884) 4 Sup. Ct. 170, 4, 110 U. S. 633, 28 L. Ed. 279.

Both under Rev. St. Ohio 1880. § 48, which expressly authorizes suits enjoin the illegal levy of taxes and as- sments, and upon general principles de from such statute, a federal court Ohio may entertain a suit to enjoin enforcement of a special assessment de under a rule or system in viola- n of the constitution of the United ates. Village of Norwood v. Baker 898) 19 Sup. Ct. 187, 172 U. S. 269, L. Ed. 443.

A suit by the United States to deter- ne the question of fraud in obtaining an award against Mexico, brought under authority of the act of congress of December 28, 1892, is a "case," within the meaning of Const. U. S. art. 3, § 2, extending the judicial power of the United States to cases in law and equity arising under that instrument, the laws of the United States, or treaties, since the proceeding involves a right which in its nature is susceptible of judicial determination; and the statute makes the decision of the court of claims a final and indisputable basis of action by the parties, and not simply an ancillary or advisory decision. La Abra Silver Min. Co. v. U. S. (1899) 20 Sup. Ct. 168, 175 U. S. 423, 44 L. Ed. 223, affirming decree (1897) 32 Ct. Cl. 462.

A federal court has jurisdiction, on the ground of a federal question, of a suit by citizens of a town to enjoin a levy on their property of a tax to pay a county indebtedness, which levy was ordered by mandamus from a federal court to enforce payment of a judgment against the county. First Nat. Bank v. Society for Savings (1897) 80 Fed. 581, 25 C. C. A. 466.

A federal court has jurisdiction of an action at law brought on an injunction bond taken by such court as one to enforce a right secured to the plaintiff by the constitution and laws of the United States and arising thereunder. Leslie v. Brown (1898) 90 Fed. 171, 32 C. C. A. 556.

A creditors' bill based on a decree in admiralty recovered in a district court held not a case arising under the constitution or laws of the United States. Winter v. Swinburne (C. C. 1881) 8 Fed. 49.

Where two corporations, chartered under a state law, hold conflicting grants from a municipality, which was also chartered by the legislature, a case is presented "arising under the constitution or laws of the United States." Saginaw Gaslight Co. v. City of Saginaw (C. C. 1886) 28 Fed. 529.

In a suit in a federal court by a nonresident of a state to enjoin the enforcement of an ordinance, adopted in a local option district of such state, prohibiting the sale of liquors therein except for certain purposes, the only questions which can be considered are those affecting the rights of complainant under the Constitution and laws of the United States. In questions relating to the validity and effect of the law, or the regularity of the election, complainant has no legal interest, except as they may affect such rights. August Busch & Co. v. Webb (C. C. 1903) 122 Fed. 655, appeal dismissed Busch v. Webb (1904) 24 Sup. Ct. 857, 194 U. S. 640, 48 L. Ed. 1162.

The district court has jurisdiction, by reason of the presence of federal questions, of a suit by a West Virginia corporation against the Ohio Industrial Commission, to restrain the commission from enforcing Act Ohio Feb. 5, 1914

(104 Ohio Laws, p. 181), regulating the weighing of coal at the mines, on the ground of its unconstitutionality. Rail & River Coal Co. v. Yaple (D. C. 1914) 214 Fed. 273.

129. Allegations in pleadings—Necessity of pleading federal question.—To give jurisdiction of a case as one arising under the constitution, laws, or treaties of the United States, that it does so arise must appear from the plaintiff's own statement of his claim. Ex parte Smith (1876) 94 U. S. 455, 24 L. Ed. 165; Metcalf v. City of Watertown (1888) 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; Tennessee v. Union & Planters' Bank (1894) 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; Press Pub. Co. v. Monroe (1896) 17 Sup. Ct. 40, 41, 164 U. S. 105, 41 L. Ed. 367; Muse v. Arlington Hotel Co. (1897) 18 Sup. Ct. 109, 111, 168 U. S. 430, 42 L. Ed. 531; Florida Cent. & P. R. Co. v. Bell (1900) 20 Sup. Ct. 399, 176 U. S. 321, 44 L. Ed. 486 (reversing judgment [1898] 87 Fed. 369, 31 C. C. A. 9); Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co. (1903) 23 Sup. Ct. 434, 188 U. S. 632, 47 L. Ed. 626; Id. (1903) 23 Sup. Ct. 440, 188 U. S. 645, 47 L. Ed. 634; Bankers' Mutual Casualty Co. v. Minneapolis, etc., R. Co. (1904) 24 Sup. Ct. 325, 330, 192 U. S. 371, 48 L. Ed. 484; Montana Catholic Missions v. Missoula County (1906) 26 Sup. Ct. 197, 200, 200 U. S. 118, 50 L. Ed. 398; Joy v. St. Louis (1906) 26 Sup. Ct. 478, 480, 201 U. S. 332, 50 L. Ed. 776; Louisville & N. R. Co. v. Mottley (1908) 29 Sup. Ct. 42, 211 U. S. 149, 53 L. Ed. 126; In re Winn (1909) 29 Sup. Ct. 515, 516, 213 U. S. 458, 53 L. Ed. 873; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. (1899) 93 Fed. 274, 35 C. C. A. 1; Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 49 C. C. A. 637; Earnhart v. Switzler (1910) 179 Fed. 832, 105 C. C. A. 260; Hare v. Birkenfield (1910) 181 Fed. 825, 104 C. C. A. 335; Seattle Electric Co. v. Seattle, R. & S. Ry. Co. (1911) 185 Fed. 365, 107 C. C. A. 421; Illinois Cent. R. Co. v. Chicago, B. & N. R. Co. (C. C. 1886) 26 Fed. 477; Pacific Gas Imp. Co. v. Ellert (C. C. 1894) 64 Fed. 421; State of Indiana v. Alleghany Oil Co. (C. C. 1898) 85 Fed. 870; Dewey Min. Co. v. Miller (C. C. 1899) 96 Fed. 1; California Oil & Gas Co. of Arizona v. Same, Id. 12; Henuy v. La Compagnie Generale Transatlantique, etc., Id. 497; Joy v. City of St. Louis (C. C. 1903) 122 Fed. 524 (order affirmed [1906] 26 Sup. Ct. 478, 201 U. S. 332, 50 L. Ed. 776); The Dalles & Rockland Ferry Co. v. Hendryx (C. C. 1911) 189 Fed. 266.

When federal jurisdiction is invoked on the ground that federal questions are involved, jurisdiction depends on the questions presented by the pleadings, and not on the ultimate determination thereof. Interstate Stockyards Co. v. Indianapolis U. Ry. Co. (C. C. 1900) 99 Fed. 472, 479; Portland Ry., Light & Power Co. v. City of Portland (D. C. 1914) 210 Fed. 667.

The want of jurisdiction at the outset is not cured by an answer or plea suggesting a federal question. Metcalf v. City of Watertown (1888) 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543.

A suggestion in plaintiff's bill that defendant will claim that acts relied on by plaintiff violate the constitution of the United States cannot give jurisdiction. Tennessee v. Union & Planters' Bank (1894) 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; Pacific Gas Imp. Co. v. Ellert (C. C. 1894) 64 Fed. 421.

The jurisdiction of a federal court on the ground of a federal question is to be determined by the allegations of the bill, and not on the facts as they subsequently appear. City Ry. Co. v. Citizens' St. R. Co. (1897) 17 S. Ct. 653, 166 U. S. 557, 41 L. Ed. 1114, modifying decree Citizens' St. R. Co. v. City Ry. Co. (C. C. 1894) 64 F. 647; State of Indiana v. Alleghany Oil Co. (C. C. 1898) 85 Fed. 870.

To give the federal courts jurisdiction on the ground that a question as to the effect or construction of the constitution or laws of the United States is involved, a real and substantial dispute as to the construction of such constitution or law must appear on the record by a statement in legal and logical form. Defiance Water Co. v. Defiance (1903) 24 Sup. Ct. 63, 66, 191 U. S. 184, 48 L. Ed. 140.

It is not enough that it appears that defendant may find in the federal laws or the constitution some ground of defense. In re Winn (1909) 29 Sup. Ct. 515, 516, 213 U. S. 458, 53 L. Ed. 873.

When the jurisdiction of a federal court depends upon the case being one arising under the Constitution or laws of the United States, the facts necessary to make such a case must be plainly shown upon the record, and it is not enough that such question may arise. City of Louisville v. Cumberland Telephone & Telegraph Co. (1907) 155 Fed. 725, 84 C. C. A. 151, 12 Ann. Cas. 500.

The federal question must appear from plaintiff's statement of his own claim unaided by defensive allegations interposed. Earnhart v. Switzler (1910) 179 Fed. 832, 105 C. C. A. 260; Hare v. Birkenfield (1910) 181 Fed. 825, 104 C. C. A. 335.

It must appear from the pleadings, by a statement in legal and logical form, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States. Seattle Electric Co. v.

attle, R. & S. Ry. Co. (1911) 185 d. 365, 107 C. C. A. 421.

A federal question must appear from mplainant's statement of his own use of action, without aid of any alation as to what defendant claims. iff v. Union Nat. Bank of Oakland C. C. 1909) 173 Fed. 333.

See 174–178, 241, 247, post, this subvision.

130. —— **Sufficiency of allegations.**— ejectment to recover lands purased under tax laws of the United ates, it is not enough to show that aintiff claims under those laws; he ust show that his title in that respect disputed. The jurisdiction cannot aided by any presumption. Ex parte nith (1876) 94 U. S. 455, 24 L. Ed. 5.

A suit will not lie in the federal court r relief against exorbitant wharfage, a case arising under the constitution laws of the United States, even if it alleged that the wharfage was inded as a duty of tonnage; the alged intent not being traversable. arkersburg & O. R. Transp. Co. v. ty of Parkersburg (1883) 2 Sup. Ct. 2, 745, 107 U. S. 691, 27 L. Ed. 584.

, when all the pleadings are in, it apars that the averments are immarial in the determination of the matter ally in dispute, and especially if they ere evidently made to create a case gnizable by the United States court, e court should immediately dismiss e case. Carson v. Dunham (1887) 7 p. Ct. 1030, 1032, 121 U. S. 421, 30 Ed. 992.

A bill does not show that the suit ises under the constitution and laws the United States by an averment. in suit by a telegraph company for spefic performance of a contract for the e of a railroad right of way and for injunction against interference with rights, to the effect that it has a ght to maintain its telegraph line on e railroad "under the provisions of the atute of the United States," as it s long been settled that the statute es not confer on telegraph companies e right to enter on private property thout the consent of the owner. estern Union Tel. Co. v. Ann Arbor Co. (1900) 20 S. Ct. 867, 178 U. S. 9, 44 L. Ed. 1052, reversing decree 898) 90 Fed. 379, 33 C. C. A. 113.

A complaint in ejectment against priate individuals, which alleges that aintiff was ousted in violation of onst. U. S. Amend. 5, and of the prosion of the treaty with France of ctober 21, 1803, for the protection of e inhabitants of the territory ceded the enjoyment of their property, does t show a cause arising under the nstitution or a treaty of the United ates, of which the court of the United ates has jurisdiction, where no right, le, privilege, or immunity is asserted derived from the constitution or eaty, as against the defendants, and it is not charged that they took possession by direction of the United States government. Filhiol v. Maurice (1902) 22 Sup. Ct. 560, 185 U. S. 108, 46 L. Ed. 827.

The jurisdiction of the federal court does not arise simply because an averment is made that a constitutional question exists, if it plainly appears that such averment is not real and substantial, but is without color of merit. Newburyport Water Co. v. Newburyport (1904) 24 Sup. Ct. 553, 556, 193 U. S. 561, 48 L. Ed. 795.

A substantial controversy respecting rights under the federal Constitution, presented by the averments of the bill, is sufficient to support the jurisdiction of a federal court, irrespective of the actual sufficiency of the facts alleged to justify the relief sought, or of the facts as they may subsequently turn out. Pacific Electric R. Co. v. Los Angeles (1904) 24 Sup. Ct. 586, 589, 194 U. S. 112, 48 L. Ed. 896.

An allegation in a complaint that full faith and credit will not be given to the public acts of Minnesota if a New Jersey corporation organized for the purpose of acquiring the control of two competing interstate railway companies engaged in business in Minnesota is allowed to carry out the object of its incorporation does not present a cause arising under the federal Constitution. Minnesota v. Northern Securities Co. (1904) 24 Sup. Ct. 598, 605, 194 U. S. 48, 48 L. Ed. 870.

The claim that grazing land actually owned by a Jesuit society was exempt from state taxation either because the society's income was devoted to the charitable work among the Indians on a reservation in a state so that the entire beneficial ownership was in tribal Indians, or because the federal government by permitting and aiding this work constituted it an agency in carrying out its obligations to the Indians, was so clearly lacking in merits as to confer no jurisdiction on a federal court. Montana Catholic Missions v. Missoula County (1906) 26 Sup. Ct. 197, 200, 200 U. S. 118, 50 L. Ed. 398.

Allegations in a bill to quiet title, framed under a state statute, that defendant's adverse claims are based upon an erroneous construction of Treaty of Guadalupe Hidalgo (9 Stat. 922), and Act March 3, 1851, c. 41, 9 Stat. 631, and upon certain enumerated acts of the State Legislature, and ordinances and charters of a city adopted and approved in pursuance of such construction, do not present a case arising under the federal Constitution, laws, or treaties, of which a federal court has jurisdiction without diversity of citizenship. Devine v. Los Angeles (1906) 26 Sup. Ct. 652, 202 U. S. 313, 50 L. Ed. 1046.

Allegations in a bill to enjoin the enforcement, as in violation of Const. U. S. Amend. 14, of an order of a State

Railroad Commission, that such commission was not vested with power to make that order, do not defeat the jurisdiction of a federal court, because in such case the action of the commission is not that of the state, where the bill sets up several entirely separate federal questions, some of which are directed to the invalidity, on various constitutional grounds, of the state statute under the supposed authority of which the order was made, and some of which are founded upon the terms of the order. Siler v. Louisville & N. R. Co. (1909) 29 Sup. Ct. 451, 455, 213 U. S. 175, 53 L. Ed. 753; Same v. Illinois Cent. R. Co. (1909) 29 Sup. Ct. 458, 213 U. S. 199, 53 L. Ed. 760.

Where, in a suit by a private person against state judges of general jurisdiction, the statement of plaintiff's claim did not show diverse citizenship, or that the action involved a federal question, a mere allegation that defendants were liable under R. S. §§ 1979, 1980, post, §§ 3932, 3933, prohibiting the deprivation of rights, privileges, and immunities secured by the Constitution and laws, etc., was insufficient to establish federal jurisdiction, in the absence of an allegation of facts showing a substantial dispute as to the effect or construction of the Constitution, or of some law of the United States on the determination of which the recovery depended. U. S. v. Bell (1905) 135 Fed. 336, 68 C. C. A. 144, affirming judgment (C. C. 1904) 127 Fed. 1002.

A federal court is without jurisdiction of a suit to enjoin the enforcement of a municipal ordinance, on the ground that it impairs the obligation of a contract or deprives complainant of property without due process of law, in violation of the Constitution of the United States, when the bill alleges that no power had been granted to the municipality by the Constitution or Legislature of the state to pass such ordinance; the prohibition of the federal constitution being against state action only. City of Louisville v. Cumberland Telephone & Telegraph Co. (1907) 155 Fed. 725, 84 C. C. A. 151, 12 Ann. Cas. 500.

A bill by an express company to restrain a messenger's wife from suing a railroad company for her husband's death because of the messenger's contract to save the express company and any of its contracting roads harmless from any liability resulting from personal injuries did not state a case arising under Const. U. S. art. 1, § 10, or under the fourteenth amendment. Rountree v. Adams Express Co. (1908) 165 Fed. 152, 91 C. C. A. 186.

In an action to recover certain premises, plaintiff averred that he acquired title "through a deed of the United States, executed by the commissioner of internal revenue, with the approval of the secretary of the treasury," by virtue of authority conferred by Act June 8, 1872, and that "the validity of said act, and his title thereunder, are the only questions in controversy in this case." Held, that these averments presented a federal question. Eaton v. Calhoun (C. C. 1880) 47 Fed. 422.

Parties will not be allowed to resort to the jurisdiction of the federal courts on simple averments that the case is one involving a federal question, unless such clearly appears to be the case. Manhattan Ry. Co. v. City of New York (C. C. 1883) 18 Fed. 195.

Where plaintiffs allege that their property has been seized under color of a state law, which is alleged to be void as against the federal constitution, a federal question is sufficiently presented, on demurrer, without formally alleging that the circumstances of the arrest were such as to call forth the operation of the state law. Booth v. Lloyd (C. C. 1887) 33 Fed. 593.

A bill was filed by a gas company against a city of the same state under whose laws the gas company was organized, alleging that certain prices for gas had been fixed by the city under a statute authorizing it to regulate the price of gas; that such prices were not reasonable; and that the ordinance fixing such prices violated the federal constitution, by impairing the obligation of the contracts of the gas company with the state in its charter, and with the city in an agreement for the use of the streets, by taking the property of the plaintiff without just compensation, depriving it of its property without due process of law, and depriving it of the equal protection of the laws. Held, that such bill presented a controversy for federal jurisdiction, irrespective of the citizenship of the parties. Capital City Gas Co. v. City of Des Moines (C. C. 1896) 72 Fed. 818.

In order to confer jurisdiction of a suit as arising under the United States constitution, the pleadings need not show what particular clause of the constitution is in question. Crystal Springs Land & Water Co. v. City of Los Angeles (C. C. 1896) 76 Fed. 148.

When a suit in equity by stockholders to restrain action by the corporation alleged to be in violation of the rights of complainants arises upon a constitutional provision which gives a court of the United States jurisdiction, the question whether complainants have complied with rule 94 by alleging want of collusion is immaterial. Ball v. Rutland R. Co. (C. C. 1899) 93 Fed. 513.

In a suit to quiet title, complainant need not do more than to allege his own title, and that defendant claims adversely to him. The nature of the adverse claim, its source, and the manner in which it originated are immaterial; and, if such matters are alleged, they must be disregarded, for the purpose of determining whether the bill discloses a

eral question. California Oil & Gas of Arizona v. Miller (C. C. 1899) Fed. 12.

. petition in a state court based upon tate statute, although its sufficiency challenged by defendant by demurrer, hout any additional averments in de-se, upon a ground found in the fed-l Constitution, does not disclose a e arising under such Constitution. elds v. Boardman (C. C. 1899) 98 l. 455.

Vhere the declaration in an action for gally denying to plaintiff the right to e at a national election shows that sole ground of defendants' action the refusal of plaintiff to comply h a state law, which is admittedly d, and applies alike to all voters hin the districts where it is in force, which was extended to the district which plaintiff resided by an act ch he claims is in conflict with the te constitution and void, it affirma-ly appears from such declaration t the case involves no federal ques-which can give a court of the Unit-States jurisdiction. Swafford v. npleton (C. C. 1901) 108 Fed. 309, ersed (1902) 22 S. Ct. 783, 185 U. 187, 46 L. Ed. 1005.

nonresident stockholder in a domes-corporation, who brings himself with-equity rule 94 by showing demand on corporation to refuse compliance h a state statute, and to contest its dity, and a formal refusal of the poration by resolution of its board directors, cannot be charged with g in collusion with the corporation give a federal court jurisdiction of a brought to enjoin the enforcement the statute, and compliance there-h by the corporation, where, among principal grounds alleged against validity of the statute, is that it is in ation of the constitution of the Unit-States; such allegations raising a eral question, which gives the court isdiction of the suit, and to deter-e all the issues made therein, re-dless of the citizenship of the par-, and whether brought by the stock-lers or the corporation itself. Simp-v. Union Stockyards Co. (C. C. 1) 110 Fed. 799.

Vhere a bill shows that by legisla-action of city council, enacted in suance of the powers granted to it the legislature of the state, the ob-tion of a contract between the city complainant has been impaired, or t complainant has been deprived of property without due process of law, federal court has jurisdiction: the ount involved exceeding $2,000, ex-ive of interest and cost. American terworks & Guarantee Co. v. Home ter Co. (C. C. 1902) 115 Fed. 171, eal dismissed (1904) 24 Sup. Ct. 194 U. S. 639, 48 L. Ed. 1162.

federal court is not given jurisdic-of a suit to enjoin officers of a e from a contemplated act by an allegation that such act will be in violation of the fifth constitutional amendment; such amendment being a limitation only upon the powers of Congress. St. Louis, I. M. & S. Ry. Co. v. Davis (C. C. 1904) 132 Fed. 629.

If it appears from a bill filed in a federal court that in any aspect which the case may assume the right to relief may depend upon the construction of a provision of the Constitution or laws of the United States, and that such claim is not merely colorable, but rests upon a reasonable foundation, the court has jurisdiction of the cause. Id.

A stockholders' suit in a federal court is not subject to the requirements of equity rule 94, where it involves a constitutional question which gives the court jurisdiction, regardless of the citizenship of the parties, and complainant and the corporation and its directors are evidently united in interest. Lindsley v. Natural Carbonic Gas Co. (C. C. 1908) 162 Fed. 954.

Where the bill in a suit in equity shows that the state statute complained of violates the federal constitution, the federal court has jurisdiction of the controversy, though it may appear that the act contravenes the constitution of the state, and is for that reason invalid. San Francisco Gas & Electric Co. v. City & County of San Francisco (C. C. 1911) 189 Fed. 943.

131. —— Anticipation of defenses.—Jurisdiction of a federal court cannot be invoked by averments in plaintiff's pleadings anticipatory of the defense and allegations that such defense is based on the Constitution or laws of the United States. Florida Cent. & P. R. Co. v. Bell (1899) 20 Sup. Ct. 399, 402, 176 U. S. 321, 44 L. Ed. 486; Boston & Montana Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co. (1903) 23 Sup. Ct. 434, 437, 188 U. S. 632, 47 L. Ed. 626; Id. (1903) 23 Sup. Ct. 440, 188 U. S. 645, 47 L. Ed. 634; Louisville & N. R. Co. v. Mottley (1908) 29 Sup. Ct. 42, 211 U. S. 149, 53 L. Ed. 126; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. (1899) 93 Fed. 274, 35 C. C. A. 1; Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 49 C. C. A. 637; Joy v. City of St. Louis (C. C. 1903) 122 Fed. 524 (order affirmed [1906] 26 S. Ct. 478, 201 U. S. 332, 50 L. Ed. 776); People's U. S. Bank v. Goodwin (C. C. 1908) 160 Fed. 727.

The federal question relied upon as conferring original jurisdiction cannot arise from mere allegations in the bill of the defense which the defendants intend to set up, or which they rely upon. Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co. (1903) 23 S. Ct. 434, 188 U. S. 632, 47 L. Ed. 626; Id. (1903) 23 S. Ct. 440, 188 U. S. 645, 47 L. Ed. 634; Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 49 C.

C. A. 637; Joy v. City of St. Louis (C. C. 1903) 122 Fed. 524, order affirmed (1906) 26 S. Ct. 478, 201 U. S. 332, 50 L. Ed. 776.

In an action for false imprisonment, averments in the declaration that defendants, acting as judges of an election, caused plaintiff's arrest and imprisonment under color of a state law which is repugnant to the constitution of the United States, are not open to the objection of anticipating the defense for the purpose of showing that a federal question is involved. Cox v. Gilmer (C. C. 1898) 88 Fed. 343.

132. —— Effect of defenses presented.—Jurisdiction, if conferred on a court of the United States by averments in the bill as to the defense which defendants intend to assert, is ousted by the filing of answers which disclaim any intention of relying on such defense. Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co. (1903) 23 S. Ct. 434, 188 U. S. 632, 47 L. Ed. 626; Id. (1903) 23 S. Ct. 440, 188 U. S. 645, 47 L. Ed. 634.

The jurisdiction of the federal courts, where it is claimed by reason of a federal question being involved, depends on the issues raised by plaintiff's petition, which are necessary to be determined to afford him an adequate remedy, and cannot be devested by the character of the defense made. Sawyer v. Parish of Concordia (C. C. 1882) 12 Fed. 754.

In ejectment in the United States court, plaintiff alleged that it derived title to the lands from acts and grants of congress, and that defendant denied the validity of those grants. Defendant answered, admitting the validity of the acts and grants, and claimed that the land in controversy lay outside of the grants. Held, that no federal question was presented, and the action must be dismissed. Southern Pac. R. Co. v. Whittaker (C. C. 1891) 47 Fed. 529.

In ejectment plaintiff claimed title under a railroad land grant, alleging that defendants denied the validity of the grant. The pleadings and evidence showed that defendants not only asserted the validity of the grant, but themselves claimed title through one holding under the grant. Held, that the action must be dismissed for want of jurisdiction. Stayton Min. Co. v. Woody (C. C. 1892) 50 Fed. 633.

When the only ground of federal jurisdiction grows out of allegations in the bill that defendant's claim of title is based in part on certain acts of a state legislature which attempt to transfer to him the title held by complainant's grantors at the time of their passage, the court will not retain jurisdiction when an answer is filed by the defendant denying such allegations and disclaiming any title or claim of title not held by him before the passage of said acts. Crystal Springs Land & Water Co. v. City of Los Angeles (C. C. 1897) 82 Fed. 114, decree reversed (1900) 20 Sup. Ct. 573, 177 U. S. 169, 44 L. Ed. 720.

See 429, post, this subdivision.

133. —— Amendments.—An amendment to the declaration, designed to raise a question "under the constitution and laws of the United States," and thereby to create a case cognizable by the federal court, irrespective of the citizenship of the parties, will not be permitted unless it appears that it will be likely to avail the plaintiff. Rae v. Grand Trunk R. Co. (C. C. 1882) 14 Fed. 401.

See 453, post, this subdivision.

(B) Cases arising under the constitution

See, also, Const. art. 3, § 2, cl. 1, and notes thereunder.

134. Constitutional question as ground for jurisdiction.—Where some title, right, privilege, or immunity on which a recovery depends will be defeated by one construction of the federal constitution or sustained by opposite construction, the case arises under the constitution of the United States within this section. Little York Gold Washing & Water Co. v. Keyes (1877) 96 U. S. 199, 201, 24 L. Ed. 656; Railroad Co. v. Mississippi (1880) 102 U. S. 135, 26 L. Ed. 96; Starin v. New York (1885) 6 Sup. Ct. 28, 31, 115 U. S. 248, 29 L. Ed. 388; Cooke v. Avery (1893) 13 Sup. Ct. 340, 344, 147 U. S. 375, 37 L. Ed. 209; New Orleans v. Benjamin (1894) 14 Sup. Ct. 905, 909, 153 U. S. 411, 38 L. Ed. 764; Patton v. Brady (1902) 22 Sup. Ct. 493, 494, 184 U. S. 608, 46 L. Ed. 713; New Orleans Waterworks Co. v. St. Tammany Waterworks Co. (C. C. 1882) 14 Fed. 194 (decree affirmed St. Tammany Waterworks Co. v. New Orleans Waterworks Co. [1887] 7 Sup. Ct. 405, 120 U. S. 64, 30 L. Ed. 563; King v. Lawson (C. C. 1897) 84 Fed. 209, 210; Huff v. Union Nat. Bank (C. C. 1909) 173 Fed. 333.

A case arises under the constitution of the United States whenever the decision depends on the correct construction thereof. Little York Gold Washing & Water Co. v. Keyes (1877) 96 U. S. 199, 201, 24 L. Ed. 656; U. S. v. Old Settlers (1893) 13 Sup. Ct. 650, 667, 148 U. S. 427, 37 L. Ed. 509; Van Allen v. Atchison, C. & P. R. Co. (C. C. 1880) 3 Fed. 545, 546; King v. Lawson (C. C. 1897) 84 Fed. 209, 210; Anthony v. Burrow (C. C. 1904) 129 Fed. 783; Cound v. Atchison, T. & S. F. Ry. Co. (C. C. 1909) 173 Fed. 527.

Ordinarily the question of the repugnancy of a state statute to the constitution does not involve a dispute as to the effect or construction of the constitution upon the determination of which the result depends. New Orleans v. Benjamin (1894) 14 Sup. Ct. 905, 909, 153 U. S. 411, 38 L. Ed. 764.

No federal question is involved in the inquiry whether a party has been given or refused the benefit of the law of es-

oppel. Weyerhaueser v. State of Minnesota (1900) 20 Sup. Ct. 485, 176 U. S. 550, 44 L. Ed. 583, affirming judgment State v. Weyerhaueser (1898) 75 N. W. 718, 72 Minn. 519.

An action to recover damages from state election officers for their asserted wrongful refusal to permit the plaintiff to vote for a member of the house of representatives, at a national election held in the district where he resided, is one arising under the constitution of the United States. Swafford v. Templeton (1902) 22 S. Ct. 783, 185 U. S. 487, 46 L. Ed. 1005, reversing judgment (C. C. 1901) 108 Fed. 309; Knight v. Shelton (C. C. 1905) 134 Fed. 423.

A case does not necessarily arise under the Constitution of the United States every time that a writ of error would lie to the judgment of a state court. Bradley v. Lightcap (1904) 24 Sup. Ct. 753, 754, 195 U. S. 24, 49 L. Ed. 75.

A federal court has jurisdiction, on the ground of a federal question, of a suit by citizens of a town to enjoin a levy on their property of a tax to pay county indebtedness, which levy was ordered by mandamus from a federal court to enforce payment of a judgment against the county. First Nat. Bank v. Society for Savings (1897) 80 Fed. 831, 25 C. C. A. 466.

A constitutional question is not presented in a case where the court has occasion to apply the rules of the common law regulating transportation charges, whether or not the carriage be interstate. Murray v. Chicago & N. W. Ry. Co. (1899) 92 Fed. 868, 35 C. C. A. 62, affirming judgment (C. C. 1894) 62 Fed. 24.

Alleged error of a state court in not allowing the law of another state does not raise a federal question. Terry v. Davy (1901) 107 Fed. 50, 46 C. C. A. 31.

A suit to recover taxes erroneously levied by the officials of a county, under a state statute, does not involve any federal question, although the invalidity of such taxes has been established by the decree of a federal court. Berger v. County Com'rs of Douglas County (C. C. 1880) 5 Fed. 23, 25.

The jurisdiction of a federal court cannot be invoked on the ground that the act of a state legislature under which the proceedings complained of here had violates the constitution of the state, unless it also violates some provision of the federal constitution. Gillette v. City of Denver (C. C. 1884) 21 Fed. 822.

The federal courts have jurisdiction of suits involving the validity of a tax imposed by a state, alleged to be in violation of the United States constitution, without regard to the citizenship of the parties thereto. U. S. Exp. Co. v. Allen (C. C. 1889) 39 Fed. 712, decree reversed Shelton v. Platt (1890) 11 S. Ct. 646, 139 U. S. 591, 35 L. Ed. 273.

To constitute a suit arising under the constitution, two elements must concur to give the court jurisdiction: First the suit must be one actually and not potentially arising under the constitution; and, second, it must appear at the outset that the alleged deprivation of a right guaranteed by the constitution was by an act of the state. Farson v. Chicago (C. C. 1905) 138 Fed. 184, 186.

A suit to enjoin officers or agents of a state from exercising powers conferred on them by a state statute, on the ground that their action is in violation of the property rights of complainant under the Constitution of the United States, is within the jurisdiction of a federal court. Douglas Park Jockey Club v. Grainger (C. C. 1906) 146 Fed. 414, order reversed Grainger v. Douglas Park Jockey Club (1906) 148 Fed. 513, 78 C. C. A. 199, 8 Ann. Cas. 997.

The provisions of the fourteenth constitutional amendment, securing personal rights, are directed against the states and their agencies, and not against the acts of private individuals, which give no right of action in the federal courts on the ground that a constitutional question is involved. Marten v. Holbrook (C. C. 1907) 157 Fed. 716.

The federal courts should not decline because of comity to take jurisdiction of a suit in equity involving rights under the Constitution of the United States, where its determination depends upon questions of fact, since, if brought in a state court, the case can only be reviewed by the Supreme Court of the United States on writ of error, where findings of fact made by the state court are conclusive. St. Louis & S. F. R. Co. v. Hadley (C. C. 1909) 168 Fed. 317, decree modified Knott v. Chicago, B. & C. R. Co. (1913) 33 Sup. Ct. 975, 230 U. S. 474, 57 L. Ed. 1571, decree reversed Same v. St. Louis, K. C. & C. R. Co. (1913) 33 Sup. Ct. 983, 230 U. S. 512, 57 L. Ed. 1596, and appeal dismissed Same v. St. Louis Southwestern R. Co. (1913) 33 Sup. Ct. 985, 230 U. S. 509, 57 L. Ed. 1595.

Whether a state statute violates the federal constitution involves a federal question and gives the federal court jurisdiction. Risley v. City of Utica (C. C. 1909) 173 Fed. 502.

It does not appear that the New York court of appeals have decided that so much of the act of April 24, 1862, as gives a materialman a lien upon a vessel for supplies furnished in her home port is void because in conflict with the grant of admiralty jurisdiction to the United States; and, if it did, this court is not bound to follow it, because the question as to its validity arises under the constitution of the United States, and not the state, and is therefore a federal one. The Canada (D. C. 1881) 7 Fed. 730.

A federal court of equity has jurisdiction of a suit to enjoin the enforcement, through repeated criminal prosecutions for its violation, of a municipal ordinance which is void as in violation of the federal Constitution. Kansas City Gas Co. v. Kansas City (D. C. 1912) 198 Fed. 500.

Where a city, in the exercise of delegated state powers, transgresses the federal Constitution, the federal courts have jurisdiction, though the act is not authorized or may have been forbidden by the state. Portland Ry., Light & Power Co. v. City of Portland (D. C. 1914) 210 Fed. 667.

135. Impairment of obligation of contracts.—The federal court cannot be given jurisdiction by the suggestion of the impairment of a contract, in respect of which the complainant seeks no relief. New Orleans v. Benjamin (1894) 14 Sup. Ct. 905, 912, 153 U. S. 411, 38 L. Ed. 764.

The constitutional provision against the impairment by a state of the obligation of contracts does not afford basis for a suit in equity in a federal court by a party defeated in an action in a state court to set aside the judgment on the ground that it impaired the obligation of a contract. Allen v. Allen (1899) 97 Fed. 525, 38 C. C. A. 336.

A federal court has jurisdiction of a suit to restrain state officers from executing an unconstitutional state statute in violation of a contract of the state with complainants. McComb v. Board of Liquidation (C. C. 1874) Fed. Cas. No. 8,707.

A suit to enforce a contract where the refusal to perform is the result of the passage of an act in violation of the constitution, impairing the obligation of contracts, is a suit arising under the constitution of the United States. Sawyer v. Parish of Concordia (C. C. 1882) 12 Fed. 754.

Where jurisdiction of a federal court is predicated on the ground that the obligation of a contract has been impaired by a state, the questions to be considered are: (1) The existence or not of the contract; (2) the obligation arising under it; and (3) whether there has been state legislation impairing the contract obligation. American Telephone & Telegraph Co. of Alabama v. Town of New Decatur (C. C. 1910) 176 Fed. 133.

136. —— Existence and validity of contract.—The court in determining whether a federal question arises on the ground of impairment of obligation of a contract must determine whether there is a contract as alleged, and the existence of the contract is a part of the federal question. Clark v. City and County of San Francisco (1888) 8 Sup. Ct. 659, 662, 124 U. S. 639, 31 L. Ed. 553; American Telephone & Telegraph Co. of Alabama v. Town of New Decatur (C. C. 1910) 176 Fed. 133.

A city council passed an ordinance relinquishing to plaintiff and other persons in possession for a public land within the corporate limits the city's claim to such land, and then, by a later ordinance, took part of the land in plaintiff's possession for a public square. Congress afterwards granted the land within the corporate limits to the city for the uses and purposes specified in these two ordinances. Held that, plaintiff's title being based upon the grant, which referred to both ordinances, he acquired through the first ordinance no vested right to the land taken by the second. Clark v. City and County of San Francisco (1888) 8 Sup. Ct. 659, 124 U. S. 639, 662, 31 L. Ed. 553.

It is not essential to the jurisdiction of a federal court of a suit based on an alleged impairment of a contract by a state in violation of section 10 of article 1 of the constitution that there should be a valid contract, or that the impairment complained of should in fact be effected, but it is sufficient for jurisdictional purposes if the plaintiff claims the existence of such contract, and its impairment, in good faith. Riverside & A. Ry. Co. v. City of Riverside (C. C. 1902) 118 Fed. 736; Pacific Electric Co. v. City of Los Angeles, Id. 746, decree affirmed (1904) 24 Sup. Ct. 586, 194 U. S. 112, 48 L. Ed. 896.

Two canal companies in Colorado constructed irrigation ditches appropriating water from the Arkansas river. The second to commence the work first recorded its plat, in compliance with Act Colo. Feb. 11, 1881, which under said act gave it priority of right; but in subsequent litigation between the parties the Supreme Court of the state held such act and the amendment thereto of April 20, 1887, unconstitutional and void, because not legally enacted. Held, that the compliance with said act by the second company, while it was recognized as the law of the state, did not give such company any contract rights with the state, or under the laws of the United States, which entitled it or the owner of a water right thereunder to invoke the jurisdiction of a federal court on the ground that it had a vested contract right to priority in the use of the water of the river, which was impaired by the state decision. Mohl v. Lamar Canal Co. (C. C. 1904) 128 Fed. 776.

137. Specific instances of impairment of obligation—Contracts for electric power.—A suit to enjoin a city from carrying into effect a resolution of its council by which it declared its purpose to discontinue the furnishing of electric power to complainant under a contract, on the ground that such action was an impairment of the obligation of the contract and deprived complainant of its property without due process of law, is not one for the specific performance of the contract, but one for the protection of complainant's consti-

tutional rights, of which a federal court has jurisdiction. Riverside & A. Ry. Co. v. City of Riverside (C. C. 1902) 118 Fed. 736.

138. —— Franchises of gas, light, and water companies.—The federal court sitting in equity has jurisdiction of a suit to enjoin a city from executing an ordinance providing for supplying itself with water, and thereby violating a previous contract with a private company. Knoxville Water Co. v. Knoxville (1906) 26 Sup. Ct. 224, 226, 200 U. S. 22, 50 L. Ed. 353; Mercantile Trust & Deposit Co. v. Columbus (1906) 27 Sup. Ct. 83, 85, 203 U. S. 311, 51 L. Ed. 198; City of Walla Walla v. Walla Walla Water Co. (1898) 19 Sup. Ct. 77, 80, 172 U. S. 1, 43 L. Ed. 341; Defiance Water Co. v. City of Defiance (C. C. 1898) 90 Fed. 753.

A case presented by a bill in equity alleging that a contract right of a waterworks company with whose predecessors a municipality contracted for a water supply is impaired by an ordinance notifying the company that the city denied any liability on any contract for the use of hydrants, and by a subsequent election to authorize bonds to buy or construct municipal waterworks and in refusing to pay the amount due under the contract, is one so arising under the laws and constitution of the United States as to give the court jurisdiction. Vicksburg Waterworks Co. v. Vicksburg (1902) 22 Sup. Ct. 585, 586, 185 U. S. 65, 46 L. Ed. 808.

A municipality's formal repudiation of its contract with a waterworks company and its refusal to perform its obligations under it did not, from the mere fact that it was a municipality, impair the obligation of contracts. Dawson v. Columbia Ave. Saving Fund, Safe Deposit, Title & Trust Co. (1905) 25 Sup. Ct. 420, 422, 197 U. S. 178, 49 L. Ed. 713.

A suit to enjoin the officers of a municipality from violating its contract to take over the laterals of a drainage company, to be paid for by tax warrants, can present no real or substantial federal question respecting the impairment of contract obligations. Shawnee Sewerage & Drainage Co. v. Stearns (1911) 31 S. Ct. 452, 220 U. S. 462, 55 L. Ed. 544.

Where two corporations, chartered under a state law, hold conflicting grants from a municipality, which was also chartered by the legislature, a case is presented "arising under the constitution or laws of the United States." Saginaw Gaslight Co. v. City of Saginaw (C. C. 1886) 28 Fed. 529.

The grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of the service by the grantee, is the grant of a franchise vested in the state, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it; and this is equally the case whether the grant is made directly by the legislature, or by municipal authorities to whom the right has been delegated by a charter, and the courts of the United States have jurisdiction of a suit to protect such contract rights from impairment by subsequent legislation by either the state or the municipality, as the case may be. Decree Walla Walla Water Co. v. City of Walla Walla (C. C. 1894) 60 Fed. 957, affirmed City of Walla Walla v. Walla Walla Water Co. (1898) 19 Sup. Ct. 77, 81, 172 U. S. 1, 43 L. Ed. 341.

A federal court has jurisdiction of a suit by a water company to enjoin the enforcement of a municipal ordinance fixing rates of charge for water, on the ground that it impairs the obligation of a contract between the city and the company, although the contract, as set out in the bill, expired by its terms prior to the passage of the ordinance, where it is alleged to be still in force. Los Angeles City Water Co. v. City of Los Angeles (C. C. 1900) 103 Fed. 711.

A federal court held to have jurisdiction of a suit to enjoin the enforcement of a municipal ordinance alleged to impair the obligation of a prior contract between the city and a gas company. Kansas City Gas Co. v. Kansas City (D. C. 1912) 198 Fed. 500.

Where a water company alleges in good faith that it has a contract with a city, a federal court has jurisdiction of a suit to enjoin its impairment, and also to decide all other questions arising in the case. Washington-Oregon Corp. v. City of Chehalis (D. C. 1913) 202 Fed. 591.

139. —— Franchises of railroad companies.—The question whether the contract rights created by the charter of a railroad company by a state are violated by subsequent acts of the state, limiting the right to collect tolls, is one for the determination of which a citizen of another state, who, under the laws of the state creating the corporation, has become the beneficial owner of its property, may invoke the judgment of the federal courts, in a suit to restrain state officers from enforcing such acts. Reagan v. Farmers' Loan & Trust Co. (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014.

If there had not been in fact any breach of the contract by the railroad company which either in law or fact would authorize a forfeiture of its rights by a resolution of a city council, such resolution, in assuming to devest the company of its title and right of possession thereunder, was an impairment of the obligation of the contract, and a circuit court of the United States has original jurisdiction of a suit by the company to declare the resolution unconstitutional, and enjoin its enforcement, though such suit involves the de-

termination of questions both of law and fact. Iron Mountain R. Co. of Memphis v. City of Memphis (1899) 96 Fed. 113, 37 C. C. A. 410.

A resolution of a city council, ordering a railroad company to open and put in condition for public travel a street through its station yards, previously vacated by an ordinance which constituted a contract with the company, where disobedience of such order subjected the railroad company to a penalty under the laws of the state, is a legislative act, which impairs the obligation of the contract and entitles the company to relief by injunction in a federal court of equity. Atchison, T. & S. F. Ry. Co. v. City of Shawnee (1910) 183 Fed. 85, 105 C. C. A. 377.

140. —— Franchises of street railroads.—A city ordinance granting a street railway franchise for a fixed period, during which the city is not to grant interfering privileges to any other company, constitutes, when accepted, a contract between the city and the company. City Ry. Co. v. Citizens' St. R. Co. (1897) 17 Sup. Ct. 653, 655, 166 U. S. 557, 41 L. Ed. 1114, modifying decree Citizens' St. R. Co. v. City Ry. Co. (C. C. 1894) 64 Fed. 647.

The jurisdiction of a federal court of a suit by a street railway company to enjoin the enforcement of a municipal ordinance as impairing contract rights cannot be sustained where such ordinance, after reciting that questions as to the company's rights have been raised, orders it to remove its tracks, and directs the city solicitor to take action to enforce the city's position, since such direction must contemplate enforcement by suit, and not the forcible removal of the tracks. City of Des Moines v. Des Moines City Ry. Co. (1909) 29 Sup. Ct. 553, 214 U. S. 179, 53 L. Ed. 958, reversing decree Des Moines City Ry. Co. v. City of Des Moines (C. C. 1907) 151 Fed. 854.

Where complainant street railroad company sued to restrain a city from proceeding to construct a municipal railroad along certain streets, claiming that the ordinance providing for such construction was in violation of both complainant's franchise and Civ. Code Cal. § 499, providing that two or more lines of street railway operated under different managements may be permitted to use the same street or tracks for a distance of five blocks without lease or contract, but in no case shall the company owning or operating one line of street railway be allowed to condemn the right to occupy and use the same street or tracks for more than five blocks consecutively, such bill alleged that the city's action was at most a violation of the city's covenant and of the express paramount law of the state, and therefore void, and hence did not show state action so as to sustain federal jurisdiction on the ground that the ordinance was violative of the constitutional provision prohibiting the state from passing any law impairing the obligation of contracts. City and County of San Francisco v. United Railroads of San Francisco (1911) 190 Fed. 507, 111 C. C. A. 339, writ of certiorari denied United Railroads of San Francisco v. City & County of San Francisco (1912) 32 Sup. Ct. 840, 225 U. S. 710, 56 L. Ed. 1268.

A federal court has jurisdiction of a suit to enjoin the repeal of a street railroad franchise alleged to be valid, and to constitute a contract with the city as one involving a constitutional question. City of Denver v. Mercantile Trust Co. of New York (1912) 201 Fed. 790, 120 C. C. A. 100, modifying decree Mercantile Trust Co. of New York v. City of Denver (C. C. 1908) 161 Fed. 769.

Before the adoption of Const. Tenn. 1870, art. 11, § 8, which required the general assembly to provide by general laws for the organization of all corporations thereafter created, "which laws may at any time be altered or repealed," certain street railroad companies had been incorporated, and authorized to construct and operate street railways on all or any of the streets in a certain city, without any reservation of power to alter or repeal their charters. After the constitution of 1870 took effect, these companies became consolidated into one corporation, pursuant to Milliken & V. Code Tenn. §§ 1263–1272, providing for consolidation of railroad companies, made applicable to street railroad companies by Act Tenn. March 26, 1887. Held that, no intention to subject the previously existing charters to alteration or repeal appearing in the constitution of 1870 or the subsequent legislation, the consolidation did not subject rights granted by the original charters to the dominion of the state, and neither the state nor the city, under authority delegated by the state, could prohibit the consolidated company from occupying a street in the city, in the exercise of the right granted by the original charters; and, as such prohibition would impair the obligation of those charters, a suit by the consolidated company to restrain the city from interfering with such use of the street by the company involved a federal question. Citizens' St. R. Co. v. City of Memphis (C. C. 1893) 53 Fed. 715.

A federal court has jurisdiction of a bill in equity alleging that complainant has a valid contract with a city conferring upon it the privilege of laying tracks and operating street railway lines on all the streets of the city, and that the contract provides that the city shall not confer any privilege upon any person or corporation so as to conflict with the rights granted to complainant, and alleging, further, that the city has granted the right to lay tracks and operate street railways on certain

streets to respondent, and that respondent cannot do so without interfering with and substantially destroying the complainant's lines, and impairing the privileges before granted to complainant. Citizens' St. R. Co. v. City Ry. Co. (C. C. 1893) 56 Fed. 746.

The prohibition of state laws impairing the obligation of contracts (Const. art. 1, § 10) should not be read into a state statute conferring on a city the power to grant street railway franchises, so as to make ultra vires an ordinance granting such a franchise which impairs the obligation of a contract, and thereby to deprive a federal court of jurisdiction. Id.

Where a company, incorporated under the general statutes for the purpose of constructing and operating a railroad in the streets of New York City, has never obtained the consent of the city authorities, it cannot maintain a suit in a federal court to enjoin the city from constructing a railroad along or under the streets selected for its line, under the rapid transit act (Laws N. Y. 1891, c. 4, as amended), on the ground that such act impairs the obligation of a contract. Underground R. R. of City of New York v. City of New York (C. C. 1902) 116 Fed. 952, decree affirmed (1904) 24 Sup. Ct. 494, 193 U. S. 416, 48 L. Ed. 733.

Under the settled doctrine that the courts can only deal with the question of the constitutionality of a legislative act after it has been passed, and are without jurisdiction to interfere with proposed or pending legislation, either state or municipal, the action of a city council in adopting the report of a committee finding that the franchise of a street railway company will expire at a certain time, contrary to contention of the company, and recommending that the council take measures to dispossess the company at the expiration of such time unless there is a previous renewal, does not give a federal court jurisdiction of a suit to determine the controversy between the company and the city in respect to the term of the grant, on the ground that it presents a constitutional question as to the impairment of the contract rights of the company. Elkins v. City of Chicago (C. C. 1902) 119 Fed. 957.

A suit to restrain the passage of a municipal ordinance repealing a prior ordinance granting a franchise to a street railroad company, which had been accepted by the company, is one involving the question of the impairment of the obligation of a contract in violation of the constitutional rights of the company, and is within the jurisdiction of a federal court, regardless of the citizenship of the parties. Missouri & K. I. Ry. Co. v. City of Olathe (C. C. 1907) 156 Fed. 624.

Where ordinances granting a city railway franchise reserved a conditional right of repeal in case the franchise was not operated in accordance with the provisions of the ordinances, a determination of the city council of the question of fact that the grantee had violated the ordinances, and that they should be repealed, was not conclusive, and hence a suit to restrain the city and its officers from repealing the franchise ordinances, and from enforcing such repealing ordinance on the ground that it constituted an impairment of complainant's contract rights in violation of the federal Constitution, involved a federal question, and was therefore within the jurisdiction of a federal court. Seattle, R. & S. Ry. Co. v. City of Seattle (C. C. 1911) 190 Fed. 75.

141. —— Franchises of telephone companies.—A claim made by a telephone company in its bill, in good faith, that, by reason of the construction of its system of poles and wires in the streets of a city with the consent of the city, a contract was created which entitles it to maintain such system where it was erected, and that such contract is impaired by an ordinance subsequently passed by the city, states a federal question, which gives a circuit court of the United States jurisdiction of a suit to enjoin the enforcement of the ordinance. Michigan Tel. Co. v. City of Charlotte (C. C. 1899) 93 Fed. 11.

The passage by a municipal council of an ordinance and resolutions repealing a prior ordinance granting a franchise to a telephone company, ordering it to remove its poles and wires from the streets as a nuisance, and in the event of its failure to do so directing suit against it to compel such removal, does not constitute laws impairing the obligation of the contract made by the franchise ordinance so as to confer upon a federal court jurisdiction of a suit to enjoin their enforcement. American Telegraph & Telephone Co. of Alabama v. Town of New Decatur (C. C. 1910) 176 Fed. 133.

142. —— Grants, sales, and purchases.—A suit to enjoin the officers of a municipality from violating its contract to take over the laterals of a drainage company to be paid for by tax warrants can present no real or substantial question respecting the impairment of contract obligations which will sustain jurisdiction. Shawnee Sewerage & Drainage Co. v. Stearns (1911) 31 Sup. Ct. 452, 455, 220 U. S. 462, 55 L. Ed. 544.

Where the gravamen of the suit was a breach of license contract to manufacture and sell a patented article, by the refusal to renew and the relief sought a reformation or renewal of such contract, the court was without jurisdiction on the ground that a federal question was involved. Lefkowitz v. Foster Hose Supporter Co. (C. C. 1908) 161 Fed. 367.

143. —— Municipal ordinances.—A municipal ordinance legislative in character, in the exercise of delegated au-

thority to make laws which the Legislature might have made, has the force of a state law within the contract clause of the Constitution, and, where such ordinance impairs the obligation of a prior contract made by the city, a suit to enjoin its enforcement involves a question arising under the Constitution of the United States. Mercantile Trust & Deposit Co. of Baltimore v. Collins Park & B. R. Co. (C. C. 1900) 99 Fed. 812; Anoka Waterworks, Electric Light & Power Co. v. City of Anoka (C. C. 1901) 109 Fed. 580; Nelson v. City of Murfreesboro (C. C. 1909) 179 Fed. 905; Portland Ry., Light & Power Co. v. City of Portland (D. C. 1912) 201 Fed. 119.

A claim that a municipal ordinance impairs the obligation of a contract will not sustain the jurisdiction of a federal court unless the ordinance is authorized, or supposed to be authorized, by a law of the state. Hamilton Gaslight & Coke Co. v. City of Hamilton (1892) 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963.

A federal court of equity may grant relief by injunction against a city ordinance which impairs the contract rights of complainant. Cleveland City Ry. Co. v. City of Cleveland (C. C. 1899) 94 Fed. 385.

A suit to restrain the enforcement of enactments of a city, passed in the exercise of its delegated legislative powers, on the ground that they attempt to annul a contract made by a prior ordinance without notice to the other party or due process of law, involves a question arising under the constitution of the United States. American Waterworks & Guarantee Co. v. Home Water Co. (C. C. 1902) 115 Fed. 171, appeal dismissed American Waterworks & Guaranty Co. v. Little Rock (1904) 24 Sup. Ct. 855, 194 U. S. 639, 48 L. Ed. 1162.

144. —— Refusal to fund state obligations.—A citizen of New York had a right to maintain mandamus against the sinking fund commissioners of Virginia, in a federal court in Virginia, to obtain a construction of the state statutes under which the defendants refused to fund certain state obligations held by plaintiff. Virginia Coupon Cases (C. C. 1885) 25 Fed. 647, 649.

145. —— Regulation of rates.—An objection that no question as to the impairment of contract obligations could arise from the enforcement of a municipal ordinance reducing street railway rates, because the right to regulate such rates was expressly reserved in a prior ordinance, cannot be successfully urged to defeat the jurisdiction of a federal court of a suit to enjoin such enforcement, where complainant relies wholly upon contracts alleged to have resulted from subsequent ordinances which, it was in substance asserted, had deprived the municipality of the power to exercise such reserved right. Cleveland v. Cleveland City Ry. Co. (1904) 24 Sup. Ct. 756, 760, 194 U. S. 517, 48 L. Ed. 1102; Same v. Cleveland Electric Ry. Co. (1904) 24 Sup. Ct. 764, 194 U. S. 538, 48 L. Ed. 1109, affirming decree Cleveland City Ry. Co. v. City of Cleveland (C. C. 1899) 94 Fed. 385.

A bill was filed by a gas company against a city of the same state under whose laws the gas company was organized, alleging that certain prices for gas had been fixed by the city under a statute authorizing it to regulate the price of gas; that such prices were not reasonable; and that the ordinance fixing such prices violated the federal constitution, by impairing the obligation of contracts of the gas company with the state in its charter, and with the city in an agreement for the use of streets. Held, that such bill presented a controversy for federal jurisdiction, the controversy being a constitutional question, and not an ordinary issue of fact, even though the reasonableness of such rates, in the operation and effect of the ordinance could not be decided from an inspection of the ordinance itself, but required for its decision the determination and application of extrinsic facts. Capital City Gas Co. v. City of Des Moines (C. C. 1896) 72 Fed. 818.

A federal court has jurisdiction of a suit by a water company to enjoin the enforcement of a municipal ordinance fixing rates of charge for water, on the ground that it impairs the obligation of a contract between the city and the company, although the contract, as set out in the bill, expired by its terms prior to the passage of the ordinance, where it is alleged to be still in force. Los Angeles City Water Co. v. City of Los Angeles (C. C. 1900) 103 Fed. 711.

146. —— Repeal of laws forming part of contract.—A suit in equity against several municipalities, issuing warrants and certificates under an act uniting such municipalities in a police district, and creating therefor a police board with power to issue warrants and certificates for payment of police expenses, and to make apportionments of such expenses against the municipalities, which were to be binding upon them, respectively, and to be paid by taxes raised by them, and subsequent acts making such warrants and certificates receivable for municipal licenses, taxes, and debts, which acts were repealed by another act which transferred the police system to the municipalities brought by a holder of warrants and certificates issued by the board, for the application thereto, as assets of the board, of amounts due to it on apportionments made and taxes levied and collected, was not a case arising under the constitution of the United States, on the ground that the repealing act impaired the obligation of the contract arising on the warrants and certificates,

as that act left in force substantially the mode of payment provided, and the bill did not seek to enforce the acceptance of the warrants and certificates for taxes. City of New Orleans v. Benjamin (1894) 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764.

Decree of state court avoiding a conveyance by commissioners of the Caddo levee district under supposed authority of Act La. No. 74 of 1892, § 9, on the ground that the board had no authority to sell until a deed conveying the land to the board had been executed by proper state officers, does not give effect to Act La. No. 171 of 1902, repealing the earlier act, so as to present a question of impairment of contracts. Cross Lake Shooting & Fishing Club v. State of Louisiana (1912) 32 Sup. Ct. 577, 224 U. S. 632, 56 L. Ed. 924, dismissing writ of error State v. Cross Lake Shooting & Fishing Club (1909) 48 South. 891, 123 La. 208.

Where the legislature of a state has authorized a municipality to issue bonds, and provided in the same act for the levy of taxes to pay the principal and interest of the same, such provision becomes a part of the contract on the issuance of the bonds, which cannot be impaired by any subsequent legislation; and a federal court which has rendered a judgment against the municipality on such bonds or their coupons may compel the levy of a tax for its payment by mandamus, notwithstanding the attempted repeal of the provisions therefor by the legislature. Hicks v. Cleveland (1901) 106 Fed. 459, 45 C. C. A. 429; Padgett v. Post (1901) 106 Fed. 600, 45 C. C. A. 488.

The federal court has jurisdiction of a bill to restrain enforcement of an act repealing the charter of a lottery company and making it a penal offense to carry on the business, which charges that the repealing act impaired the obligations of a contract between the state and the company. Louisiana State Lottery Co. v. Fitzpatrick (C. C. 1879) Fed. Cas. No. 8,541.

Where at the time complainant entered into a contract with a municipality the law gave him certain remedies to enforce the contract, and subsequently an act was passed attempting to repeal the provision as to such remedies, an action on the contract to enforce the remedies given by the original law, on the ground that the repealing act violated the federal constitution as to the impairment of the obligation of contract involves a federal question. Sawyer v. Parish of Concordia (C. C. 1882) 12 Fed. 754.

A petition that alleges the repeal of laws which were constituent and material parts of the obligation of the contract of certain bonds at the time of their issue presents a case within the jurisdiction of a federal court. Dorian v. City of Shreveport (C. C. 1884) 20 Fed. 401.

In an action in the nature of quo warranto, brought in the name of the state, by her attorney general, to prevent a railroad company from controlling certain lands, defendant petitioned for removal, alleging that it acquired ownership in the land under an act of the legislature, and in accordance therewith exercised rights of ownership; that subsequently the act granting the land was repealed; and that such repealing act was a law impairing the obligation of contracts, and depriving persons of property without due process of law. Held, that the petition showed an issue arising under the constitution, which is not eliminated by the attorney general's disclaimer of reliance on the repealing act. State of Illinois v. Illinois Cent. R. Co. (C. C. 1888) 33 Fed. 721.

147. —— **Taxation.**—A proceeding under the Act of assembly of Virginia approved January 14, 1882, as amended by Act of March 12, 1884, for the "identification and verification" of coupons tendered in payment of taxes, debts, and demands due the state, is not a suit of a civil nature arising under the constitution or laws of the United States. Stewart v. Virginia (1886) 6 Sup. Ct. 922, 117 U. S. 612, 29 L. Ed. 1006.

In an action against a municipal corporation to recover an alleged balance due on a contract, plaintiff alleged that, by a constitutional provision of the state relative to taxation by municipalities, defendant could not raise funds to pay its just debts, and that by reason thereof plaintiff could not enforce payment by the levy of taxes, though his contract was entered into prior to the adoption of the constitution, and that such provision impaired the obligations of his contract. Held insufficient to confer jurisdiction on the federal circuit court, as involving a question arising under the constitution and laws of the United States, especially as the constitutional provision did not indicate on its face that it was to be applied to antecedent contracts, and the state supreme court had held that it could not be so applied. City of Shreveport v. Cole (1889) 129 U. S. 36, 9 Sup. Ct. 210, 32 L. Ed. 589; Currie v. U. S. (1889) 129 U. S. 44, 9 Sup. Ct. 213, 32 L. Ed. 592.

A federal question is presented by a bill which alleges contract exemptions of a railroad company from taxation, existing and recognized for many years, which the state statutes are now attempting to impair and destroy. Illinois Cent. R. Co. v. Adams (1901) 21 Sup. Ct. 251, 180 U. S. 28, 45 L. Ed. 410.

A case under the federal constitution held presented by a bill alleging that a contract exemption from taxation is by subsequent legislation destroyed. Jetton v. University of the South (1908) 28 Sup. Ct. 375, 208 U. S. 489, 52 L. Ed. 584.

A provision of a state constitution

limiting the rate of taxation to a figure so low as to necessitate the breach of a contract for the payment of money, previously made by the taxing power, may be contested in a federal court as involving a question under the constitution of the United States. Leonard v. City of Shreveport (C. C. 1886) 28 Fed. 257.

A federal court of equity is without power to enjoin the collection of a tax levied under the authority of a state on the ground of its illegality alone, although such power is conferred by statute on the courts of the state. Illinois Life Ins. Co. v. Newman (C. C. 1905) 141 Fed. 449.

Where officers of a state are prosecuting proceedings under a state statute relating to taxation, the effect of which will be to impair the obligation of a contract, the right of a party to such contract to invoke the jurisdiction of a federal court for the protection of his constitutional rights is not affected by the fact that such officers may be proceeding upon an erroneous construction of the statute, and that properly construed, it is not unconstitutional. University of the South v. Jetton (C. C. 1907) 155 Fed. 182, decree reversed Jetton v. University of the South (1908) 28 Sup. Ct. 375, 208 U. S. 489, 52 L. Ed. 584.

The persistent and systematic undervaluation by the assessing officers of a city of the property of other owners, in violation of the Constitution and laws of the state, in order to cast an unlawful and unjust burden of taxation on the property of a railroad company, denying the equal protection of the laws, gave a federal court jurisdiction of a suit for redress. Central R. Co. of New Jersey v. Jersey City (D. C. 1912) 199 Fed. 237.

148. Proceeding without due process of law—Contempt proceedings.—A fine and imprisonment imposed by a state court for contempt in disobeying a writ of habeas corpus are not "without due process of law," and the federal court has no jurisdiction of a petition by defendant for a writ of habeas corpus on that ground, whether the action of the state court in imposing the punishment was or was not erroneous. Ex parte Young (C. C. 1892) 50 Fed. 526.

149. —— Criminal proceedings.—The refusal of a motion to quash an indictment on the ground that the grand jury law was a local or special law, and not constitutionally enacted, does not present a federal question. Murray v. Louisiana (1896) 16 Sup. Ct. 990, 992, 163 U. S. 101, 41 L. Ed. 87.

150. —— Deprivation of liberty in general.—The federal courts will have jurisdiction of a writ of habeas corpus, alleging the arrest and imprisonment of petitioner, without authority under the state laws, under Const. U. S. Amend. 14, § 1, which provides: "Nor shall any state deprive any citizen of life, liberty, or property, without due process of law." In re Monroe (C. C. 1891) 46 Fed. 52.

151. —— Deprivation or destruction of property in general.—Regulations respecting the pursuit of a lawful trade or business, being an exercise of the police power, are within the authority of the state, and form no subject for federal interference, unless they are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary interfered with or destroyed without due process of law. Gundling v. City of Chicago (1900) 20 S. Ct. 633, 177 U. S. 183, 44 L. Ed. 725, affirming judgment (1898) 52 N. E. 44, 176 Ill. 340, 48 L. R. A. 230.

Whenever the right or title of either party is grounded upon state legislation which undertakes to transfer to him property belonging to the other, without due process of law, there is a controversy as to the operation and effect of the constitution, to which the federal jurisdiction attaches. Crystal Springs Land & Water Co. v. City of Los Angeles (C. C. 1896) 76 Fed. 148.

A federal court of equity may grant relief by injunction against a city ordinance which deprives complainant of his property without due process of law. Cleveland City Ry. Co. v. City of Cleveland (C. C. 1899) 94 Fed. 385.

A suit to enjoin a threatened taking of complainant's property, by an individual, which it is alleged will be without any authority of law, does not involve a federal question; the prohibition applying to the states only. Kiernan v. Multnomah County (C. C. 1899) 95 Fed. 849.

The Court of Appeals of New York having changed its holding that the right of action by an abutting property owner for injuries by an elevated railroad in the street could not be tolled by prescriptive title arising on an alleged entry in subordination to an owner's easements, such change did not authorize the institution of such a suit between citizens of the same state in the federal courts, on the theory that the ruling involved a deprivation of the landowner's property rights. Gundall v. Manhattan Ry. Co. (D. C. 1913) 205 Fed. 410.

152. —— Eminent domain.—When a local board or body attempts to exercise a power of eminent domain not conferred on it by the Legislature, its action is subject to review and control by the courts, state or federal. Chicago, R. I. & P. Ry. Co. v. Williams (C. C. 1906) 148 Fed. 442.

Where a municipal corporation without statutory authority was attempting to take a portion of complainant's right of way for a street, and to deprive complainant of its property without due

process of law, a federal court had jurisdiction of a suit to restrain such action. Portland Ry., Light & Power Co. v. City of Portland (C. C. 1910) 181 Fed. 632.

153. —— **Fence and stock laws.**— Complainant filed his bill for an injunction against certain owners of trespassing cattle, alleging that defendants committed the injury complained of under an unconstitutional state act which deprived complainant of the use of his property without due process of law. Defendants denied that they did anything under color of the act, but it was shown that they had applied to the legislature for its enactment, that before it was passed they had paid complainant for pasturage, and that since its passage they had refused to pay. Held, that a federal question was involved. Smith v. Bivens (C. C. 1893) 56 Fed. 352.

154. —— **Jury trial.** — The federal courts have no jurisdiction over the question of an alleged denial of the right of a jury trial, by defects in the constitution and laws of the state. Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. of Virginia (1897) 36 A. 712, 85 Md. 684.

155. —— **Local improvements.** — A suit to enjoin the levy and collection of a special tax for local improvements by a city cannot be enjoined by a federal court, where the only ground of jurisdiction is a claim that its collection would be a taking of complainants' property without due process of law in violation of the federal constitution, because violating the state constitution; a question which must be determined by the laws of the state and involves no construction of the federal constitution. McCain v. Des Moines (1899) 19 Sup. Ct. 644, 647, 174 U. S. 168, 43 L. Ed. 936.

Whether or not complainant is personally liable for an assessment made for the improvement of a street before he became the owner of property abutting thereon is not a federal question. Murdock v. City of Cincinnati (C. C. 1891) 44 Fed. 726.

No determination of the constitutional question involved in the making of a special assessment for street improvements by an administrative board or special tribunal created by the state can bar a suit in a national court to test the question whether by means of such determination the state has deprived the complainant of his property without due process of law. White v. City of Tacoma (C. C. 1901) 109 Fed. 2.

Where a bill in a federal court to set aside certain assessment certificates for a street improvement alleged that complainant was in possession of the land in controversy through his tenant, and the contractor holding the certificates was not claiming a lien on the street or parkway, a complainant was not entitled to sustain the jurisdiction of the court by claiming that the improvement ordinance which vacated a 75-foot street had the effect to immediately vest the title to the middle of the street in the adjoining owners, and that the subsequent act of the city in appropriating a part of the property for a street and parkway without condemnation and compensation to complainant was illegal. Shewalter v. City of Lexington (C. C. 1906) 143 Fed. 161.

156. —— **Municipal ordinances.**—A municipal ordinance not passed in accordance with legislative authority is not a law of the state within the meaning of the prohibitions of the Constitution of the United States, and a suit to enjoin the enforcement of an ordinance alleged to have been passed in violation of the requirements of the state law presents no question arising under the Constitution. City of Savannah v. Holst (1904) 132 Fed. 901, 65 C. C. A. 449, reversing decree Holst v. Savannah Electric Co. (C. C. 1904) 131 Fed. 931.

A federal court is without jurisdiction of a suit to enjoin the enforcement of a municipal ordinance, on the ground that it deprives complainant of property without due process of law, in violation of the Constitution of the United States, when the bill alleges that no power had been granted to the municipality by the Constitution or Legislature of the state to pass such ordinance; the prohibition of the federal Constitution being against state action only. City of Louisville v. Cumberland Telephone & Telegraph Co., (1907) 155 Fed. 725, 84 C. C. A. 151, 12 Ann. Cas. 500.

A suit to restrain the enforcement of enactments of a city, passed in the exercise of its delegated legislative powers, on the ground that they attempt to annul a contract made by a prior ordinance without notice to the other party or due process of law, involves a question arising under the constitution. American Waterworks & Guarantee Co. v. Home Water Co. (C. C. 1902) 115 Fed. 171, appeal dismissed American Waterworks & Guaranty Co. v. Little Rock (1904) 24 S. Ct. 855, 194 U. S. 639, 48 L. Ed. 1162.

A suit to enjoin a city from carrying into effect a resolution of its council by which it declared its purpose to discontinue the furnishing of electric power to complainant under a contract, on the ground that such action deprived complainant of its property without due process of law, is not one for the specific performance of the contract, but one for the protection of complainant's constitutional rights, of which a federal court has jurisdiction. Riverside & A. Ry. Co. v. City of Riverside (C. C. 1902) 118 Fed. 736.

Where the validity of a city ordinance

regulating the sale of nonintoxicating beverages depends wholly on state statutes, no federal question can be injected into a prosecution for violating the ordinance unless it be that accused is being held contrary to the inhibition of the fourteenth amendment of the federal Constitution. Kroschel v. Munkers (D. C. 1910) 179 Fed. 961.

157. —— **Occupation of street by carriers or electric companies.**—The exercise by a city of its general power given it by the legislature of controlling the streets and of making and enforcing contracts with reference to their occupancy by individuals or corporations is action by the state, within the meaning of the provision of the first section of the fourteenth constitutional amendment, and the passage of a resolution by the council of a city, assuming to declare a forfeiture of a contract previously made with a railroad company, under which the company occupies a street with its tracks, and a declaration by the city of its intention to dispossess the company, and take possession of the street by the use of its police, is a threatened violation of the constitutional rights of the company, which a federal court has jurisdiction to restrain by injunction. Iron Mountain R. Co. of Memphis v. City of Memphis (1899) 96 Fed. 113, 37 C. C. A. 410.

Where a franchise to construct and operate a street railroad on certain streets was granted to complainant by an ordinance which expressly provided that the grant was not exclusive, and reserved the right to the city to grant other franchises in the same streets or to itself construct and operate railways thereon, a bill setting out a subsequent ordinance granting a similar franchise to another company covering in part the same streets, but expressly providing that, before tracks should be in any location where any person or company should be entitled to compensation for damages occasioned thereby, such damages should be ascertained and settled according to law, does not state a case within the jurisdiction of the federal court in a suit to enjoin the grantee from proceeding under the ordinance as involving a real and substantial controversy depending on the construction of the provision of the federal Constitution which forbids the deprivation of a person of his property without due process of law. Seattle Electric Co. v. Seattle, R. & S. Ry. Co. (1911) 185 Fed. 365, 107 C. C. A. 421.

Where a company, incorporated under the general statutes for the purpose of constructing and operating a railroad in the streets of the city of New York, has never obtained the consent of the city authorities, it cannot maintain a suit in a federal court to enjoin the city from constructing a railroad along or under the streets selected for its line, under the rapid transit act, on the ground that such act deprives it of property without due process of law. Underground R. R. of City of New York v. City of New York (C. C. 1902) 116 Fed. 952, decree affirmed (1904) 24 S. Ct. 494, 193 U. S. 416, 48 L. Ed. 733.

The owners of property fronting on a street may maintain a suit in equity in a federal court against the city and a street railroad company, both of which are corporations of the state, to enjoin the laying of tracks in the street under a void enactment by the city council purporting to authorize such act, where irreparable injury will result to their property, as a taking of property under color of authority from the state without due process of law. Holst v. Savannah Electric Co. (C. C. 1904) 131 Fed. 931, decree reversed City of Savannah v. Holst (1904) 132 Fed. 901, 65 C. C. A. 449.

An attempt by a city to summarily oust an electric company, which has acquired, by irrevocable grant or contract, the right to maintain its poles and wires in the streets, is an attempt to deprive it of its property without due process of law, in violation of Const. U. S. Amend. 14, and a federal court has jurisdiction of a suit to enjoin such action. Ashland Electric Power & Light Co. v. City of Ashland (D. C. 1914) 217 Fed. 158.

158. —— **Probate proceedings.**—The contention that a state court, in admitting a nuncupative will to probate without giving the statutory notice to the next of kin, violated the due process of law clause of Const. U. S. Amend. 14, is too lacking in merit to afford a basis for the jurisdiction of a federal court of a suit to set aside the probate, even assuming that such notice is essential to the preliminary probate, where the bill proceeds on the theory, which finds support in the law of the state, that, despite the mere preliminary admission to probate, there remained a right to assail the existence of the will and its probate, which was not lost by the failure to give notice. Nor does the assertion that, because real estate cannot be devised by a nuncupative will, the attempt of a probate court to exert authority over property of that character by admitting such a will to probate deprived the heirs of such property without due process of law, give federal jurisdiction to pass upon the construction and effect of such will, where this question is wholly subordinate to the determination of another question, of which that court had no jurisdiction, such as the nonexistence of the will and the consequent invalidity of its probate. O'Callaghan v. O'Brien (1905) 25 Sup. Ct. 727, 736, 199 U. S. 89, 50 L. Ed. 101, affirming judgment Carrau v. O'Calligan (1903)

ed. 657, 60 C. C. A. 347, which ed judgment O'Callaghan v. ien (C. C. 1902) 116 Fed. 934.

159. —— **Regulation of carriers.**—A suit to compel the specific performance by a carrier of its agreement to issue free passes annually to the complainants is not brought within the original jurisdiction of a federal court as one arising under the Constitution or laws of the United States, by allegations in the bill that the refusal to comply with the contract is based on Act June 29, 1906, c. 3591, 34 Stat. 584, and that such act does not prohibit the giving of passes under the circumstances of the case, and, if construed as having such effect, violates Const. Amend. 5, by denying due process of law. Louisville & N. R. Co. v. Mottley (1908) 29 Sup. Ct. 42, 43, 211 U. S. 149, 53 L. Ed. 126, reversing judgment Mottley v. Louisville & N. R. Co. (C. C. 1907) 150 Fed. 406.

A suit to enjoin the enforcement of an ordinance requiring a street railroad company to carry without pay passengers holding transfers from other car lines is cognizable in equity on the ground of preventing a multiplicity of suits, and is within the jursdiction of a federal court, where the invalidity of the ordinance is alleged on the ground that it deprives the company of its property without due process of law in violation of the federal Constitution. Chicago City Ry. Co. v. City of Chicago (C. C. 1905) 142 Fed. 844.

160. —— **Regulation of charges and rates.**—A bill to annul a city ordinance fixing rates to be charged by a water company, which are claimed to be so unreasonably low as to amount to a practical taking of the company's property mortgaged to complainant, without due process of law, etc., in violation of the United States constitution, presents a federal question. Consolidated Water Co. v. City of San Diego (1899) 93 Fed. 849, 35 C. C. A. 631; Consolidated Water Co. v. City of San Diego (C. C. 1897) 84 Fed. 369.

Whether or not the enforcement of a state statute providing for the establishment of rates for railroad transportation will take property of the railroad companies without due process of law raises a federal question, although its determination may incidentally involve a question of fact. Ex parte Young (1908) 28 Sup. Ct. 441, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

The federal court has jurisdiction at the suit of stockholders of a railroad company to enjoin the company from putting in force transportation rates established by a state statute, which are so low as to be confiscatory of the company's property, and, as preliminary thereto, to institute an inquiry as to whether or not the rates are in fact too low. Id.

A federal court, if properly appealed to, cannot decline to take jurisdiction of a suit to enjoin the enforcement of state statutes fixing gas rates which are asserted to violate the federal constitution. Willcox v. Consolidated Gas Co. (1909) 29 Sup. Ct. 192, 195, 212 U. S. 19, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134.

Under the federal Constitution, a municipal corporation, although having power to regulate the rates to be charged by a telephone company, may not reduce such rates below a rate which will pay operating expenses, maintain the plant, and pay a fair return on the capital actually invested, and a bill to restrain the enforcement of a rate alleged to be confiscatory presents a federal question. City of Owensboro v. Cumberland Telephone & Telegraph Co. (1909) 174 Fed. 739, 99 C. C. A. 1.

A bill was filed by a gas company against a city of the same state under whose laws the gas company was organized, alleging that certain prices for gas had been fixed by the city under a statute authorizing it to regulate the price of gas; that such prices were not reasonable; and that the ordinance fixing such prices violated the federal Constitution, by taking the property of plaintiff without just compensation, depriving it of its property without due process of law. Held, that such bill presented a controversy for federal jurisdiction. Capital City Gas Co. v. City of Des Moines (C. C. 1896) 72 Fed. 818.

A suit to restrain the enforcement of a city ordinance limiting charges for artificial gas, on the ground that it allows no profit to the gas company, and therefore deprives it of its property without due process of law, contrary to the fourteenth amendment, is one involving a federal question, and a federal court has jurisdiction, regardless of the citizenship of the parties. Indianapolis Gas Co. v. City of Indianapolis (C. C. 1897) 82 Fed. 245.

A federal court has jurisdiction of a suit by an irrigation company of California to restrain the enforcement of a schedule of rates to be charged consumers for water, established by a county board under the statute, when the allegations of the bill show that the effect of such rates will be to render it impossible for the company to earn a fair dividend upon the value of its property actually used in, and useful to, the appropriation and furnishing of such water, and will therefore deprive it of its property without due process of law. San Joaquin & King's River Canal & Irrigation Co. v. Stanislaus County (C. C. 1898) 90 Fed. 516.

Questions of the reasonableness of rates fixed by a state corporation commission are federal questions growing out of Const. U. S. Amend. 14. Matthews v. Board of Corp. Com'rs (C. C. 1901) 106 Fed. 7.

The question whether rates fixed by

a municipal body to be charged by a water company are just and reasonable or confiscatory and unconstitutional, is a judicial one, for the determination of which the company has the right to invoke the jurisdiction of a federal court. Spring Valley Water Co. v. City and County of San Francisco (C. C. 1904) 165 Fed. 657; Id. (C. C. 1908) 165 Fed. 667.

A bill by a telephone company to enjoin the enforcement of a city ordinance fixing maximum rates of charge for telephone service, which alleges that the ordinance was passed in the exercise of power to fix rates conferred upon the city by an act of the Legislature, and that if enforced complainant cannot make any net earnings whatever on its large capital invested in the business, nor sufficient to pay its necessary expenses, and will be deprived of its property without due process of law, states a cause of action arising under the fourteenth amendment to the Constitution of the United States, of which a federal court has jurisdiction, although it is further averred, as a legal conclusion, that the ordinance is also in violation of the state Constitution, prohibiting the impairment of the freedom of contract. Ozark Bell Telephone Co. v. City of Springfield (C. C. 1905) 140 Fed. 666.

A federal court of equity has jurisdiction of suits to determine the constitutionality of state statutes regulating railroad rates which are attacked on the ground that the rates fixed are unremunerative to the railroad companies, and that their effect, if enforced, will be to deprive the companies affected of their property without due process of law, and such suits are appropriate means for determining the question. St. Louis & S. F. R. Co. v. Hadley (C. C. 1907) 155 Fed. 220.

A suit to enjoin the enforcement of state enactments regulating railroad rates, on the ground that the same are confiscatory and would deprive the railroad companies of their property without due process of law, in violation of the fourteenth constitutional amendment, is one arising under the Constitution of the United States, of which a federal court has jurisdiction on that ground. Perkins v. Northern Pac. Ry. Co. (C. C. 1907) 155 Fed. 445.

A suit by a gas company to enjoin enforcement of a municipal ordinance fixing the price of gas, passed in the exercise of powers conferred by the state Constitution, as being confiscatory and depriving complainant of its property without due process of law, in violation of the fourteenth constitutional amendment, presents a federal question under such provision which gives a federal court jurisdiction, notwithstanding the fact that the state Constitution contains a like provision, and on the facts alleged in the bill the ordinance would be invalid thereunder. San Francisco Gas & Electric Co. v. City and County of San Francisco (C. C. 1911) 189 Fed. 943.

A public utility board, acting as a state instrumentality, having ordered the resumption by certain street railways of the sale of 6 fares for 25 cents without due process of law, the railway companies were entitled to invoke federal jurisdiction to restrain the enforcement of such order. Wilmington City Ry. Co. v. Taylor (D. C. 1912) 198 Fed. 159.

Where, after the Missouri maximum freight rate law as amended and the Missouri two-cent passenger rate law had been sustained by the United States Supreme Court, the state sued certain railroads to recover overcharges in the interim for the benefit of shippers, such suits did not involve a federal question, so as to confer federal jurisdiction, on the theory that they necessarily included a claim that the statutes were not violative of the federal Constitution. State of Missouri ex rel. Barker v. Chicago & A. R. Co. (D. C. 1914) 216 Fed. 562.

161. —— Right to public office.—Where the removal of one from the office of police judge will deprive him by state authority of life, liberty, or property without due process of law, the federal courts may interfere. In re Sawyer (1888) 8 Sup. Ct. 482, 492, 124 U. S. 200, 31 L. Ed. 402.

162. —— Self-incrimination by witnesses.—The provisions of the New York state Constitution in regard to self-incrimination by witnesses do not raise any question under Const. U. S. Amend. 14. In re Tracy & Co. (D. C. 1910) 177 Fed. 532.

163. —— Taxation of property.—A suit to enjoin the diversion or intended diversion by a municipality of certain funds which, under legislative sanction, it had collected from taxpayers for a specific public object, but which were not applied to that object, on the theory that such failure of duty on the part of the municipality may ultimately cause increased taxation, and thereby deprive the taxpayers of their property without due process of law guarantied by Const. U. S. Amend. 14, if the full amount originally intended to be applied to the particular object named by the Legislature is to be collected, is not one arising under the Constitution of the United States. Owensboro Waterworks Co. v. Owensboro (1906) 26 Sup. Ct. 249, 251, 200 U. S. 38, 50 L. Ed. 361.

The claim that the action of a state board of equalization in making an assessment for a tax pursuant to mandamus was the act of the state, and, if carried out, would violate Const. U. S. Amend. 14, by taking property without due process of law, constitutes a federal question. Raymond v. Chicago Union Traction Co. (1907) 28 Sup. Ct.

7, 12, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757; Same v. Chicago Edison Co. (1907) 28 Sup. Ct. 14, 207 U. S. 42, 52 L. Ed. 90.

A United States District Court had jurisdiction of a suit to enjoin a sale of land for taxes on the ground that the land was assessed at its full value, while other property was assessed at 70 per cent. or less of its value, in violation of Const. U. S. Amend. 14. Jersey City v. Central R. Co. of New Jersey (1914) 212 Fed. 76, 128 C. C. A. 532.

Whether or not complainant is personally liable for an assessment made for the improvement of a street before he became the owner of property abutting thereon is not a federal question. Murdock v. City of Cincinnati (C. C. 1891) 44 Fed. 726.

A suit by property owners to enjoin city officials from exercising any jurisdiction over annexed territory, on the ground that the statute extending the corporate limits is void under the state constitution, cannot be maintained in a federal court, on the theory that the assessment of taxes, etc., by the city, being without warrant of any valid law, will be a taking of property without due process of law, and a denial of the equal protection of the laws. The real issue is whether the statute enlarging the corporate limits is invalid under the state constitution, and no federal question is involved. McCain v. City of Des Moines (C. C. 1898) 84 Fed. 726, decree affirmed (1899) 19 S. Ct. 644, 174 U. S. 168, 43 L. Ed. 936.

Complainant brought suit in the federal circuit court in Tennessee against the state board of equalizers to enjoin the certification by them to the state comptroller of the assessed valuation on complainant's property for taxation for 1897 and 1898, upon the ground, among others, that under the laws applicable to railroad and telephone properties it had been deprived of the constitutional right of equalization provided for and allowed in respect to all other property in the state subject to taxation, and in consequence its property had been assessed at 25 to 40 per cent. more in proportion to value than other classes of property. The state constitution provides that "all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property * * * shall be taxed higher than any other species * * * of the same value." Held, that the suit involved a federal question, under the fourteenth amendment to the federal constitution. Nashville, C. & St. L. Ry. v. Taylor (C. C. 1898) 86 Fed. 168.

A suit by a railroad company to restrain the authorities of a state from collecting a tax levied on its property, on the grounds that the assessment on which such tax was levied was made without authority of law, and that such assessment was discriminative, and intended to impose on railroad property an undue share of the burdens of state taxation, is one which involves the construction and application of the provisions of the constitution. Southern Ry. Co. v. North Carolina Corp. Commission (C. C. 1899) 97 Fed. 513.

Under the statute of Illinois of 1898 the state board of equalization is constituted the final tribunal for fixing the value of property for the purposes of taxation, and in such action it acts in a quasi judicial capacity, between the state on the one hand and the taxpayer on the other. A federal court is not authorized to grant an injunction against such board, prohibiting it from exercising its statutory powers in the assessment of certain property, on the assumption that it will so administer the law as to deprive the owner of his property without due process of law, in violation of the federal constitution, but it must be conclusively presumed until it has acted that it will proceed fairly and determine the value of the property upon proper evidence. Chicago Union Traction Co. v. State Board of Equalization (C. C. 1901) 112 Fed. 607.

A suit by a domestic corporation to restrain the collection of taxes imposed by the state on personal property alleged to have its situs for purposes of taxation in another state involves a federal question and is within the jurisdiction of a federal court. Central of Georgia Ry. Co. v. Wright (C. C. 1908) 166 Fed. 153.

Where a city is vested with authority to levy taxes generally for municipal purposes, in exercising such power in a manner or for a purpose not expressly prohibited by statute, it acts as an instrumentality of the state, and its action must be deemed to have been taken with the sanction of the state; and, if it deprives a person of property without due process of law, a suit by him to protect his rights is one arising under the Constitution, and within the jurisdiction of a federal court. Risley v. City of Utica (C. C. 1909) 173 Fed. 502.

Exercise by a city council of the taxing power is the act of the state, within the fourteenth constitutional amendment, and a person who is deprived of property without due process of law may invoke the jurisdiction of a federal court on the ground of a violation of such amendment; but, where such action is without the authority of or contrary to state law, no question arises under the Constitution. Id.

A city given by the state the power to contract for a supply of water for extinguishment of fires, and to tax property in the city to pay therefor, made and continued a contract which was unreasonable, and provided for an exces-

sive compensation to the water company. The state itself had not approved or sanctioned the contract by its legislative, executive, or judicial authority. Held, that any illegal act of the city under the contract was done without the authority of or contrary to the state law, and persons who had paid the taxes could not seek equitable relief in the federal court, on the ground of deprivation of property without due process of law. Risley v. City of Utica (C. C. 1910) 179 Fed. 875.

164. Denial of equal protection of the law—Civil remedies and proceedings.—A state law requiring a foreign corporation, as a condition precedent to doing business in the state, to file in the Secretary of State's office a resolution of its directors authorizing service of process on its agents in the state, and requesting the issuance of a permit to do business therein, with a stipulation that such permit shall be subject to "each of the provisions of this act," one of which provisions is that the permit shall be void if the corporation removes any case from the state to the federal courts on the ground of nonresidence or local prejudice, is void as requiring a surrender of rights secured by the constitution and laws of the United States. Southern Pac. Co. v. Denton (1892) 13 Sup. Ct. 44, 46, 146 U. S. 202, 36 L. Ed. 942.

Where the effect of a state statute limiting the right of foreign corporations to sue in its courts is to deprive a corporation of another state of the equitable right to set off against a judgment rendered against it in such courts a judgment in its favor against the plaintiff therein, rendered in another state, such corporation is deprived of the right to the full and equal benefit of all laws and proceedings given it by R. S. § 1977, post, § 3925, and a federal court may render appropriate relief. Anglo-American Provision Co. v. Davis Provision Co. (C. C. 1900) 105 Fed. 536.

165. —— Discrimination based on residence.—A suit in which a city charter and an ordinance pursuant thereto denying licenses as stationary engineer to nonresidents of the city were attacked as violative of Const. U. S. Amend. 14, might be maintained in the United States District Court, though there was no diversity of citizenship. Williams v. McCartan (D. C. 1914) 212 Fed. 345.

166. —— Discrimination on account of race or color.—Whether jurisdiction of a civil action for damages arising out of a violation of the equality guarantied by the first section of the Civil Rights Act of March 1, 1875, post, § 3926, is conferred upon the United States courts by that act, quære; but held that, if that act is constitutional, jurisdiction is conferred by the judiciary act, as being a case "arising under the constitution or laws of the United States." Smoot v. Kentucky Cent. Ry. Co. (C. C. 1882) 13 Fed. 337.

The fourteenth and fifteenth amendments of the federal Constitution are limitations on the states, and did not confer primary rights enforceable by a person of color in the first instance in the federal courts. Brawner v. Irvin (C. C. 1909) 169 Fed. 964.

A suit by citizens of African descent and residents of a city to restrain discrimination in the distribution of public school taxes, on the ground that they are deprived of the equal protection of the law, arises under the federal constitution. Claybrook v. Owensboro (D. C. 1883) 16 Fed. 297, 303.

167. —— Election of members of Congress.—The right to vote for members of Congress has its foundation in the constitution of the United States. Wiley v. Sinkler (1900) 21 Sup. Ct. 17, 19, 179 U. S. 58, 45 L. Ed. 84.

An action to recover damages from state election officers for their asserted wrongful refusal to permit the plaintiff to vote for a member of the house of representatives, at a national election held in the district where he resided, is one arising under the constitution of the United States, of which a federal court of the United States has jurisdiction. Swafford v. Templeton (1902) 22 S. Ct. 783, 185 U. S. 487, 46 L. Ed. 1005 (reversing judgment [C. C. 1901] 108 Fed. 309); Knight v. Shelton (C. C. 1905) 134 Fed. 423.

While the power to fix the number of representatives in Congress and to apportion them among the several states is vested in Congress the power to divide a state into congressional districts for the election of representatives resides in the Legislature of the state, and the question whether a county is lawfully included in a congressional district where it was placed by an act of the Legislature does not depend on the construction of any law of the United States, so as to give a federal court jurisdiction of a suit for its determination, but upon the validity of the act of the Legislature, which is a question for determination by the state courts. Anthony v. Burrow (C. C. 1904) 129 Fed. 783.

State legislation relating to the selection of candidates for representatives in Congress does not, because of its subject-matter, become a part of the federal law, the construction of which raises a federal question. Id.

An action against election officers to recover damages for the wrongful rejection of plaintiff's vote for a member of Congress is one arising under the Constitution of the United States, and is within the jurisdiction of a federal court. Brickhouse v. Brooks (C. C. 1908) 165 Fed. 534.

168. —— Election of presidential electors.—The judicial power of the Unit-

d States extends to all cases in law or equity arising under the constitution and laws of the United States, and therefore the question whether a state law regulating the election of presidential electors is invalid as in conflict with the United States constitution is properly within the jurisdiction of the United States courts, and the fact that the judgment to be reviewed may be rendered in a proceeding for mandamus is not material. McPherson v. Blacker (1892) 13 Sup. Ct. 3, 6, 146 U. S. 1, 36 L. Ed. 869.

169. —— Enforcement of state penal laws.—A law of a state, intended to prevent the sale of adulterated food products, which is constitutional and valid in its language and purpose, is not rendered unconstitutional, so as to authorize a federal court to entertain a suit to enjoin prosecutions thereunder, because the state food commissioner, charged with the duty of enforcing it by instituting criminal prosecutions against those who, in his judgment, have been guilty of violating its provisions, may give it an erroneous construction. Arbuckle v. Blackburn (1902) 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864, appeal dismissed (1903) 24 S. Ct. 148, 191 U. S. 405, 48 L. Ed. 239.

170. —— Regulation of charges and rates.—Whether or not a railroad company is deprived of the equal protection of the laws by a state statute providing for the establishing of rates of transportation, because the penalties fixed for violation of the statute are so enormous as to require obedience to the law rather than risk the penalties in testing it, although such obedience might, in the end, result in confiscation of the railroad property, is a federal question, within the jurisdiction of the circuit court of the United States. Ex parte Young (1908) 28 Sup. Ct. 441, 209 U. S. 123, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764.

A bill was filed by a gas company against a city of the same state under whose laws the gas company was organized, alleging that certain prices for gas had been fixed by the city under a statute authorizing it to regulate the price of gas; that such prices were not reasonable; and that the ordinance fixing such prices violated the federal constitution, by impairing the obligation of the contracts of the gas company with the state in its charter, and with the city in an agreement for the use of the streets, by taking the property of the plaintiff without just compensation, depriving it of the equal protection of the laws. Held, that such bill presented a controversy for federal jurisdiction, irrespective of the citizenship of the parties. Capital City Gas Co. v. City of Des Moines (C. C. 1896) 72 Fed. 818.

A suit to restrain the enforcement of a city ordinance limiting charges for artificial gas, on the ground that it allows no profit to the gas company, and therefore denies it the equal protection of the laws, contrary to the fourteenth amendment, is one involving a federal question, and a federal court has jurisdiction, regardless of the citizenship of the parties. Indianapolis Gas Co. v. City of Indianapolis (C. C. 1897) 82 Fed. 245.

A federal court has jurisdiction of a suit by an irrigation company of California to restrain the enforcement of a schedule of rates to be charged consumers for water, established by a county board under the statute, when the allegations of the bill show that the effect of such rates will be to render it impossible for the company to earn a fair dividend upon the value of its property actually used in, and useful to, the appropriation and furnishing such water, and will therefore deprive it of the equal protection of the laws. San Joaquin & King's River Canal & Irrigation Co. v. Stanislaus County (C. C. 1898) 90 Fed. 516.

A suit by a stockholder in a waterworks company to restrain a city from putting in force and fixing water rates on the ground that they are so low as to deprive the stock of any earning ability, thus depriving complainant of the equal protection of the law, in violation of Const. Amend. 14, being one in which complainant and the company are united in interest, though the latter is named as defendant, a federal court will not refuse to entertain jurisdiction, under equity rule 94, as being framed to invoke such jurisdiction, by using the name of the stockholder, where, if the suit was brought in the name of the corporation, jurisdiction would not exist; the case being one of federal cognizance irrespective of citizenship. Kimball v. City of Cedar Rapids (C. C. 1900) 99 Fed. 130.

A suit to enjoin the enforcement of state enactments regulating railroad rates, on the ground that the same are confiscatory and would deny the railroad companies the equal protection of the laws, in violation of the fourteenth constitutional amendment, is one arising under the Constitution of the United States, of which a federal court has jurisdiction on that ground. Perkins v. Northern Pac. Ry. Co. (C. C. 1907) 155 Fed. 445.

171. —— Right to public office.—Where the removal of one from the office of police judge will deny to him the equal protection of the laws, the courts of the United States may interfere. In re Sawyer (1888) 8 Sup. Ct. 482, 492, 124 U. S. 200, 31 L. Ed. 402.

172. —— Taxation of property.—A systematic continuing omission or undervaluation of other taxable property, in violation of the Constitution or statute, by the taxing officers under a rule

adopted by them, the effect of which is an unjust discrimination in taxation against the property of complainant and all other property similarly situated, will sustain a bill in a federal court to enjoin the collection of the tax. Louisville Trust Co. v. Stone (1901) 107 Fed. 305, 46 C. C. A. 299; Atchison, T. & S. F. Ry. Co. v. Sullivan (1909) 173 Fed. 456, 97 C. C. A. 1; Central R. Co. of New Jersey v. Jersey City (D. C. 1912) 199 Fed. 237.

Inequality in valuation for taxation of a franchise, as compared with other taxable property, must be systematic and intentional in order to justify a federal court in enjoining the apportionment and certification of the tax to the several counties, where the assessment does not appear to have been made on such a different scale of values from that adopted elsewhere as to deny the equal protection of the laws which was the only ground invoked to sustain the federal jurisdiction. Coulter v. Louisville & N. R. Co. (1905) 25 Sup. Ct. 342, 344, 196 U. S. 599, 49 L. Ed. 615, reversing decree Louisville & N. R. Co. v. Coulter (C. C. 1903) 131 Fed. 282.

The claim that the action of a state board of equalization in making an assessment for a tax pursuant to mandamus was the act of the state, and, if carried out, would violate Const. U. S. Amend. 14, by denying the equal protection of the laws, constitutes a federal question within the original jurisdiction of a federal Circuit Court. Raymond v. Chicago Union Traction Co. (1907) 28 Sup. Ct. 7, 12, 207 U. S. 20, 52 L. Ed. 78, 12 Ann. Cas. 757; Same v. Chicago Edison Co. (1907) 28 Sup. Ct. 14, 207 U. S. 42, 52 L. Ed. 90.

A United States District Court had jurisdiction of a suit to enjoin a sale of land for taxes on the ground that the land was assessed at its full value, while other property was assessed at 70 per cent. or less of its value, in violation of Const. U. S. Amend. 14. Jersey City v. Central R. Co. of New Jersey (1914) 212 Fed. 76, 128 C. C. A. 532.

The equality clause of the fourteenth amendment does not give the court of the United States jurisdiction of a suit by corporations to restrain the collection of taxes assessed against them by state officers, on the ground that the assessment was made without deducting the amount of incumbrances and that complainants were assessed for real property held by them as lessees, while individual lessees are not so assessed for real property thus held, and that a discrimination is made against complainant corporations in favor of other corporations which are not taxed in the same manner as complainants, because, conceding that defendants are endeavoring to collect taxes not levied in conformity with the statutes of the state, and that the taxing authorities under color of law are proceeding illegally, such acts are the acts of the defendants and of the taxing authorities as individuals, which cannot be imputed to the state. Manhattan Ry. Co. v. City of New York (C. C. 1883) 18 Fed. 195.

The United States court cannot consider whether Const. La. art. 209, prohibiting a municipal tax of more than 10 mills on the dollar, is invalid as impairing the remedy to collect a debt of a municipality, entered into prior to that act, unless, in an action to enforce that debt, it has been first judicially determined that the article cited stands in the way of its collection. Levy v. City of Shreveport (C. C. 1886) 28 Fed. 209.

A suit by property owners to enjoin city officials from exercising any jurisdiction over annexed territory, on the ground that the statute extending the corporate limits is void under the state constitution, cannot be maintained in a federal court, on the theory that the assessment of taxes, etc., by the city, being without warrant of any valid law, will be a taking of property without due process of law, and a denial of the equal protection of the laws. The real issue is whether the statute enlarging the corporate limits is invalid under the state constitution, and no federal question is involved. McCain v. City of Des Moines (C. C. 1898) 84 Fed. 726, decree affirmed (1899) 19 Sup. Ct. 644, 174 U. S. 168, 43 L. Ed. 936.

Complainant brought suit in the federal circuit court in Tennessee against the state board of equalizers to enjoin the certification by them to the state comptroller of the assessed valuation on complainant's property for taxation for 1897 and 1898, upon the ground, among others, that under the laws applicable to railroad and telephone properties it had been deprived of the constitutional right of equalization provided for and allowed in respect to all other property in the state subject to taxation, and in consequence its property had been assessed at 25 to 40 per cent. more in proportion to value than other classes of property. The state constitution provides that "all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property * * * shall be taxed higher than any other species * * * of the same value." Held, that the suit involved a federal question, under the fourteenth amendment to the federal constitution. Nashville, C. & St. L. Ry. v. Taylor (C. C. 1898) 86 Fed. 168.

A suit by a railroad company to restrain the authorities of a state from collecting a tax levied on its property, on the grounds that the assessment on which such tax was levied was made without authority of law, and that such assessment was discriminative, and in-

tended to impose on railroad property an undue share of the burdens of state taxation, is one which involves the construction and application of the constitution. Southern Ry. Co. v. North Carolina Corp. Commission (C. C. 1899) 97 Fed. 513.

The assessment by a state board of the property of a railroad company at a higher percentage of its actual value than property of other classes is assessed, in violation of a provision of the state Constitution requiring uniform taxation of all classes of property, without statutory authority and contrary to the law of the state as declared by its Supreme Court, is not an act of the state within the meaning of the provision of the fourteenth constitutional amendment, prohibiting a state from denying to any person the equal protection of the laws; and the jurisdiction of a federal court cannot be invoked for redress on the ground that the action of the board is a violation of such provision, the remedy of the company being in the state courts. St. Louis, I. M. & S. Ry. Co. v. Davis (C. C. 1904) 132 Fed. 629.

173. —— **Validity of ordinances under state law.**—Where the validity of a city ordinance regulating the sale of nonintoxicating beverages depends wholly on state statutes, no federal question can be injected into a prosecution for violating the ordinance unless it be that accused is being held contrary to the inhibition of the fourteenth amendment of the federal Constitution. Kroschel v. Munkers (D. C. 1910) 179 Fed. 961.

174. **Pleading.**—See 130 ante, this subdivision.

175. —— **Interference with interstate commerce.**—Allegations in a bill to enjoin the enforcement, as in violation of Const. U. S. Amend. 14, of an order of a State Railroad Commission, that such commission was not vested with power to make that order, do not defeat the jurisdiction of a federal court, because in such case the action of the commission is not that of the state, where the bill sets up several entirely separate federal questions, some of which are directed to the invalidity, on various constitutional grounds, of the state statute under the supposed authority of which the order was made, and some of which are founded upon the terms of the order. Siler v. Louisville & N. R. Co. (1909) 29 Sup. Ct. 451, 213 U. S. 175, 53 L. Ed. 753; Same v. Illinois Cent. R. Co. (1909) 29 Sup. Ct. 458, 213 U. S. 199, 53 L. Ed. 760.

A bill by an express company to restrain a messenger's wife from suing a railroad company for her husband's death because of the messenger's contract to save the express company and any of its contracting railroads harmless from any liability resulting from personal injuries to him, etc., did not state a case arising under Const. U. S. art. 1, § 8, relating to interstate commerce, so as to entitle complainant to sue in the federal courts on that ground. Rountree v. Adams Express Co. (1908) 165 Fed. 152, 91 C. C. A. 186.

A bill by a railroad company to enjoin suits at law for damages or in equity to restrain its removal of a division point on the ground, among others, that the enforcement of an alleged contract to maintain the railroad's shops, roundhouses, etc., at the point in question would interfere with interstate commerce, and prevent complainant's compliance with Act March 4, 1907, post, § 8677 et seq., known as the "Hours of Service Law," did not show federal jurisdiction as involving a federal question, under the rule that to give the federal court jurisdiction for that reason the federal question must appear necessarily in the statement of the cause of action, and not as mere allegations of a defense pleaded. Kansas City Southern Ry. Co. v. Quigley (C. C. 1910) 181 Fed. 190.

176. —— **Impairment of obligation of contract.**—Where jurisdiction is invoked on the ground that a city ordinance impairs the obligation of a contract, it is sufficient to show that complainant had, or claimed in good faith to have, a contract with the city, which the city had attempted to impair. City Ry. Co. v. Citizens' St. R. Co. (1897) 17 Sup. Ct. 653, 655, 166 U. S. 557, 41 L. Ed. 1114; Riverside & A. Ry. Co. v. City of Riverside (C. C. 1902) 118 Fed. 736; Pacific Electric Co. v. City of Los Angeles (C. C. 1902) 118 Fed. 746 (decree affirmed [1904] 24 Sup. Ct. 586, 194 U. S. 112, 48 L. Ed. 896); Portland Ry., Light & Power Co. v. City of Portland (D. C. 1914) 210 Fed. 667.

A bill invoking the jurisdiction of the federal court on the ground that the case arises under the Constitution of the United States by reason of the violation and impairment of a contract will be dismissed when it does not aver facts to show such violation. Bienville Water Supply Co. v. Mobile (1899) 20 Sup. Ct. 40, 42, 175 U. S. 109, 44 L. Ed. 92.

A federal question is presented by a bill which alleges contract exemptions of a railroad company from taxation, existing and recognized for many years, which the state statutes are now attempting to impair and destroy. Illinois Cent. R. Co. v. Adams (1901) 21 Sup. Ct. 251, 180 U. S. 28, 45 L. Ed. 410.

The averment that, if a temporary injunction granted by an inferior state court, restraining the future payment of rentals accruing under the alleged contract of a municipality with a water company because of the invalidity of the contract, should ultimately be made perpetual, such company would thereby be deprived of its property without due process of law, does not justify a federal Court in assuming jurisdiction

of a suit by the water company to restrain the municipality from attempting to annul the rental contract, as being a case arising under the federal Constitution or laws. Defiance Water Co. v. City of Defiance (1903) 24 Sup. Ct. 63, 191 U. S. 184, 48 L. Ed. 140.

The assertions in a suit to enjoin municipal construction of an underground railway that complainants had a prior exclusive contract right under the laws of a state to the use of the city streets for that purpose, which the city is seeking to impair, is not sufficient to give the federal court jurisdiction, where the facts alleged are as a matter of law, wholly inadequate to establish the complainants' contract rights. Underground Railroad v. New York (1904) 24 Sup. Ct. 494, 495, 193 U. S. 416, 48 L. Ed. 733.

Averments by patentees from the United States, whose titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners, acting under Act March 3, 1851, c. 41, 9 Stat. 631, that their contract obligations were impaired by certain enumerated California statutes and charters of the city of Los Angeles which conferred upon the city only such rights in respect to the waters of a river as may have been vested in the state, afford no proper basis for the jurisdiction of the federal court, as of a case arising under the federal Constitution. Devine v. Los Angeles (1906) 26 Sup. Ct. 652, 658, 202 U. S. 313, 50 L. Ed. 1046.

The complaint by a water company against a city alleged that the city had contracted to pay to it certain water rents; that it had furnished the water; that the city had paid the rents until the city, by resolution, annulled the contract; that from the date of the resolution the city had refused to pay the rents; and that the resolution was a law impairing the obligation of the contract. Held, that the latter allegation was surplusage, and did not make the action one arising under the federal constitution, within the jurisdiction of the federal courts. Sanborn, Circuit Judge, dissenting. City of Fergus Falls v. Fergus Falls Water Co. (1896) 72 Fed. 873, 19 C. C. A. 212.

A bill alleging that complainant leased a certain oyster bed from the state for a term of years pursuant to a state law, and planted the same, but that by a subsequent act of the Legislature the state undertook to transfer the property in such beds to the owners of the adjacent land, and that defendant, claiming under such law, has excluded complainant from said leased property, and which seeks injunctive relief, states a case which presents a constitutional question of the impairment of a contract by the state, and is within the jurisdiction of a federal court. Green v. Oemler (C. C. 1907) 151 Fed. 936.

177. —— Want of due process of law.—The allegation in the bill filed in the federal court that in certain proceedings, under which the defendant claimed, said court acted "entirely without jurisdiction, and without cover of authority, save as the agent and organ of said territory," is too indefinite to show that such proceedings were wanting in due process of law, so as to confer jurisdiction on the federal courts. Hanford v. Davies (1896) 16 Sup. Ct. 1051, 1053, 163 U. S. 273, 41 L. Ed. 157.

In an action to enjoin a turnpike company from charging tolls in excess of the rates fixed by a statute, the answer set out the average annual receipts and expenses for several years prior to the statute, and alleged that the net earnings for those years had not allowed dividends greater than 4 per cent.; that the statute reduced the rates 50 per cent. below those before allowed; and that such reduction would so diminish its income that it could not maintain its road, meet ordinary expenses, and earn any dividend. Held, that these allegations were sufficient, assuming them to be true, to raise the question whether the statute deprived the defendant of its property without due process of law. Covington & L. Turnpike Road Co. v. Sandford (1896) 17 S. Ct. 198, 164 U. S. 578, 41 L. Ed. 560.

The averment that, if a temporary injunction granted by an inferior state court, restraining the future payment of rentals accruing under the alleged contract of a municipality with a water company because of the invalidity of the contract, should ultimately be made perpetual, such company would thereby be deprived of its property without due process of law, does not justify a federal court in assuming jurisdiction of a suit by the water company to restrain the municipality from attempting to annul the rental contract. Defiance Water Co. v. Defiance (1903) 24 Sup. Ct. 63, 67, 191 U. S. 184, 48 L. Ed. 140.

The averment that the construction of a rapid transit railroad tunnel under a city street will deprive complainant, an abutting owner, of his property without due process of law, will not bring the case within the jurisdiction of the federal courts, where it appears that the action sought to be enjoined was forbidden by state legislation. Barney v. New York (1904) 24 Sup. Ct. 502, 504, 193 U. S. 430, 48 L. Ed. 737.

The averment in a bill that the property of a water company was taken without due process of law by a state law, enabling it to sell its property to a municipality to defeat municipal construction of a water supply system, because such statute was construed by the highest state court as not entitling the company to compensation for its franchise and other incorporeal rights, and the averment that the obligation of

the company's contract with the city to furnish water for fire protection was impaired by the failure to value future profits arising fom such contract, are so devoid of merit, where the water company's charter was not exclusive, and was subject to repeal, alteration, and amendment, as to be insufficient to sustain the jurisdiction of a court of the United States on the theory that the case arose under the federal Constitution, within the meaning of this section. Newburyport Water Co. v. City of Newburyport (1904) 24 S. Ct. 553, 193 U. S. 561, 48 L. Ed. 795; Gloucester Water Supply Co. v. City of Gloucester (1904) 24 S. Ct. 557, 193 U. S. 580, 48 L. Ed. 801, reversing decree (C. C. 1902) 113 Fed. 677.

Averments in a complaint in ejectment that defendant's possession rests upon an infraction by the United States of its treaty obligations, and upon a taking of private property for public use without just compensation, do not bring the case within the jurisdiction of a federal Circuit Court where the averments respecting plaintiff's title disclose no case within the jurisdiction of that court. Filhiol v. Torney (1904) 24 Sup. Ct. 698, 699, 194 U. S. 356, 48 L. Ed. 1014.

Averments that patentees from the United States, whose titles were derived from Spain and Mexico, by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners, were deprived of their property without due process of law, held not to present a federal question. Devine v. Los Angeles (1906) 26 Sup. Ct. 625, 658, 202 U. S. 313, 50 L. Ed. 1046.

A suit to compel the specific performance by a carrier of its agreement to issue free passes annually to the complaints is not brought within the original jurisdiction of a federal court as one arising under the Constitution or laws of the United States by allegations in the bill that the refusal to comply with the contract is based upon the provisions of Act June 29, 1906, c. 3591, 34 Stat. 584, and that such act does not prohibit the giving of passes under the circumstances of the case, and, if construed as having such effect, violates Const. U. S. Amend. 5, by depriving due process of law. Louisville & N. R. Co. v. Mottley (1908) 29 Sup. Ct. 42, 211 U. S. 149, 53 L. Ed. 126, reversing judgments Mottley v. Louisville & N. R. Co. (C. C. 1907) 150 Fed. 406.

An allegation in a bill that a municipal ordinance providing for the summary seizure and destruction of food in cold storage when unfit for human consumption violates Const. U. S. Amend. 14, because it provides neither for notice nor for an opportunity to be heard before such seizure and destruction, presents, although unfounded, a constitutional question within the original jurisdiction of the federal court. North American Cold Storage Co. v. Chicago (1908) 29 Sup. Ct. 101, 103, 211 U. S. 306, 53 L. Ed. 195. 15 Ann. Cas. 276, modifying decree (C. C. 1907) 151 Fed. 120.

Bill to establish a trust in land, brought against trustees of the internal improvement fund of Florida, alleging that their action is a taking of complainant's property without due process of law within Const. U. S. Amend. 14, will not confer jurisdiction on a federal court where the allegations show a breach of contract. Manila Inv. Co. v. Trammell (1915) 36 Sup. Ct. 12, 239 U. S. 31, 60 L. Ed. —.

A bill was filed by a gas company against a city alleging that certain prices for gas had been fixed by the city under a statute authorizing it to regulate the price of gas that such prices were not reasonable, and that complainant was deprived of its property without due process of law. Held, that the bill presented a controversy for federal jurisdiction. Capital City Gas Co. v. City of Des Moines (C. C. 1896) 72 Fed. 818.

An averment by plaintiff that it "is the owner in fee of the said" property in suit, "and by and through its tenants and agents is in possession thereof," if not qualified by subsequent averments, sufficiently alleges plaintiff's ownership upon an issue as to whether property of plaintiff is claimed by defendant under a legislative act, which involves the taking of plaintiff's property without due process of law. Crystal Springs Land & Water Co. v. City of Los Angeles (C. C. 1896) 76 Fed. 148.

A complaint which alleges that defendants entered into a conspiracy by unlawful means to deprive plaintiff of his liberty and property, and that they unlawfully, forcibly, and without due process of law caused his arrest and confinement in a state insane asylum, states a cause of action for false imprisonment, not involving any federal question, and which it is the province of the state, and not the federal courts to redress. Marten v. Holbrook (C. C. 1907) 157 Fed. 716.

A complaint alleging that an ordinance deprived complainant of its property without due process of law presented a federal question. Portland Ry., Light & Power Co. v. City of Portland (D. C. 1914) 210 Fed. 667.

178. —— Denial of equal protection of law.—General averments in a bill against the officers of a municipality, to restrain the collection of taxes by them, alleging that the state, by the laws under which the assessing officers have acted, unlawfully discriminated between the complainants and other individuals, and subjected the property of complainants, for the purpose of taxation, to an unequal share of the public burdens, and abridged the immunities of complainants as citizens of the Unit-

ed States, denying them the equal protection of the laws, contrary to the constitution of the United States, are insufficient to show that the cause is one involving a federal question, where specific averments of the bill show that the state courts are the appropriate tribunals to adjudicate between the parties. Manhattan Ry. Co. v. City of New York (C. C. 1883) 18 Fed. 195.

A bill was filed by a gas company against a city alleging that certain prices for gas had been fixed by the city under a statute authorizing it to regulate the price of gas; that such prices were not reasonable, and that complainant was deprived of the equal protection of the laws. Held, that the bill presented a controversy for federal jurisdiction. Capital City Gas Co. v. City of Des Moines (C. C. 1896) 72 Fed. 818.

A suit by a stockholder in a waterworks company to restrain a city from putting in force and fixing water rates, on the ground that they are so low as to deprive the stock of any earning ability, thus depriving complainant of the equal protection of the laws, being one in which complainant and the company are united in interest, though the latter is named as defendant, a federal court will not refuse to entertain jurisdiction, under equity rule 94, as being framed to invoke such jurisdiction, by using the name of the stockholder, where, if the suit was brought in the name of the corporation, jurisdiction would not exist; the case being one of federal cognizance irrespective of citizenship. Kimball v. City of Cedar Rapids (C. C. 1900) 99 Fed. 130.

A complaint alleging that an ordinance was confiscatory, and provided penalties so excessive as to deprive complainant of the equal protection of the laws, held to present federal questions. Portland Ry., Light & Power Co. v. City of Portland (D. C. 1914) 210 Fed. 667.

(C) Cases arising under federal laws

See, also, Const. art. 3, § 2, cl. 1, and notes thereunder.

179. Federal question as ground for jurisdiction.—A case arises under the laws of the United States whenever the decision depends on the correct construction thereof. U. S. v. Old Settlers (1893) 13 Sup. Ct. 650, 667, 148 U. S. 427, 37 L. Ed. 509; Cleveland, C., C. & St. L. Ry. Co. v. Hirsch (1913) 204 Fed. 849, 123 C. C. A. 145; Van Allen v. Atchison, C. & P. R. Co. (C. C. 1880) 3 Fed. 545, 546; Hughes v. Northern Pac. Ry. Co. (C. C. 1883) 18 Fed. 106; Richards v. Town of Rock Rapids (C. C. 1887) 31 Fed. 505; King v. Lawson (C. C. 1897) 84 Fed. 209, 210; Anthony v. Burrow (C. C. 1904) 129 Fed. 783; Orr v. Baltimore & O. R. Co. (City Ct. 1913) 145 N. Y. S. 378, 83 Misc. Rep. 221.

Where some title, right, privilege, or immunity on which a recovery depends will be defeated by one construction or sustained by opposite construction, the case arises under the laws of the United States within this section. Starin v. New York (1885) 6 Sup. Ct. 28, 31, 115 U. S. 248, 29 L. Ed. 388; Cooke v. Avery (1893) 13 Sup. Ct. 340, 344, 147 U. S. 375, 37 L. Ed. 209; Northern Pac. R. Co. v. Soderberg (1903) 23 Sup. Ct. 365, 366, 188 U. S. 526, 47 L. Ed. 575; Richards v. Town of Rock Rapids (C. C. 1887) 31 Fed. 505; King v. Lawson (C. C. 1897) 84 Fed. 209, 210; Huff v. Union Nat. Bank (C. C. 1909) 173 Fed. 333; McGoon v. Northern Pac. Ry. Co. (D. C. 1913) 204 Fed. 998; Calhoun v. Central of Georgia Ry. Co. (1910) 67 S. E. 274, 7 Ga. App. 528.

A decision by the court of appeals that the acts of congress establishing a system of water supply in the district, and regulating the method of assessment, are constitutional, and that an assessment thereunder without notice to a property holder was valid, involves the validity of statutes of the United States. Parsons v. District of Columbia (1898) 18 S. Ct. 521, 170 U. S. 45, 42 L. Ed. 943.

The question whether a right of selection recognized as between mortgagor and mortgagee is also applicable as between a purchaser upon execution and the mortgagee is not a federal question, even when a purchase has been made under an execution from a federal court, if no discrimination be made against executions from those courts. Avery v. Popper (1900) 21 S. Ct. 94, 179 U. S. 305, 45 L. Ed. 203, dismissing writ of error (Sup. 1899) 49 S. W. 219, 50 S. W. 122, 92 Tex. 337, 71 Am. St. Rep. 849.

A case does not necessarily arise under the constitution or laws of the United States every time that a writ of error would lie to the judgment of a state court. Bradley v. Lightcap (1904) 24 Sup. Ct. 753, 754, 195 U. S. 24, 49 L. Ed. 75.

If it appears that, in any aspect a case may assume, the right of recovery may depend on a federal statute, and the right so claimed is not merely colorable, a federal question is involved, adequate to confer jurisdiction. St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co. (1895) 68 Fed. 2, 15 C. C. A. 167, decree affirmed (1897) 18 S. Ct. 946, 42 L. Ed. 1212.

The nature of the action, and not the character of the defense to it, constitutes the test to determine whether it arises under the laws of the United States; and, if the determination of the claim made in the action invokes a consideration of those laws, and the effect of the acts or omissions of parties to the suit under them, it arises under the laws of the United States, whether the defense to the suit is good or bad. Guarantee Co. of North Dakota v. Han-

way (1900) 104 Fed. 369, 44 C. C. A. 312.

The fact that, upon the trial of an action arising out of contracts or dealings of the parties, a question may arise involving the construction of a federal law, will not give the court jurisdiction. Act March 3, 1875, § 1. Dowell v. Griswold (C. C. 1877) Fed. Cas. No. 4,041.

That a state inspection law was expressly made subject to revision and control by congress does not take away the jurisdiction of the federal courts to determine whether it is an inspection law or not. New York v. Compagnie General Transatlantique (C. C. 1882) 10 Fed. 357, 364, affirmed (1882) 2 Sup. Ct. 87, 107 U. S. 59, 27 L. Ed. 383.

Cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right, privilege, claim, or protection, or defense of a party in whole or in part by whom they are asserted, and it is no objection to the right of removal on that ground that it is invoked in behalf of defendant. Ellis v. Norton (C. C. 1883) 16 Fed. 4; Rothschild v. Matthews (C. C. 1884) 22 Fed. 6, 7.

The federal court has jurisdiction of a suit by a citizen against his own state, where it is brought under act of congress, passed in pursuance of a provision of the national constitution, which is in effect a grant from the state itself. Virginia Coupon Cases (C. C. 1885) 25 Fed. 654, 661.

A court of the United States, since the passage of the act of 1875, has original jurisdiction over all cases where a United States law, whether constitutional or congressional, is involved. Leonard v. City of Shreveport (C. C. 1886) 28 Fed. 257.

Where the parties to a suit in a federal district court are all citizens of the same state, the court has jurisdiction of only so much of the suit as arises under the laws of the United States. St. Luke's Church v. Sowles (C. C. 1892) 51 Fed. 609.

Cases arising under the laws of the United States grow out of the legislation of Congress, whether constituting a right or privilege or claim or protection, or defense in whole or in part by whom asserted. Cound v. Atchison, T. & S. F. Ry. Co. (C. C. 1909) 173 Fed. 527.

Pendency of suit in state courts involving the constitutionality of statutes held not to oust federal court of jurisdiction of causes subsequently brought involving the same question. R. M. Rose Co. v. Southern Express Co. (D. C. 1915) 223 Fed. 868.

Where the United States acquires territory by convention with another sovereign power, it has authority to enact laws for the protection and determination of the property rights of the inhabitants of such territory in accordance with the terms of the treaty, and such laws, affecting title to real property within a state, must be construed by the United States courts. Gardiner v. Miller (1874) 47 Cal. 570.

180. Civil rights acts.—Where the effect of a state statute limiting the right of foreign corporations to sue in its courts is to deprive a corporation of another state of the equitable right to set off against a judgment rendered against it in such courts a judgment in its favor against the plaintiff therein, rendered in another state, such corporation is deprived of its constitutional right to have full faith and credit given to such judgment, and also of the right to the full and equal benefit of all laws and proceedings given it by R. S. § 1977, post, § 3925; and under R. S. §§ 1979 (post, § 3932), and 629, subd. 16, substantially re-enacted in this section, a court of the United States has jurisdiction to afford it appropriate relief. Anglo-American Provision Co. v. Davis Provision Co. (C. C. 1900) 105 Fed. 536.

181. Laws relating to public lands.—A suit involving rights to land acquired under law of the United States does not arise under that law for jurisdictional purposes unless it involves a dispute as to the validity or effect of such law. Shulthis v. McDougal (1912) 32 S. Ct. 704, 225 U. S. 561, 56 L. Ed. 1205.

In an action to enforce the trusts of a will bequeathing property situated on the territory of the United States at Fortress Monroe, where the question arises whether or not the constitution and federal laws have segregated that territory from the state of Virginia, and conferred exclusive jurisdiction over it in the federal courts, those courts will have jurisdiction independently of the citizenship of the parties. Woodfin v. Phoebus (C. C. 1887) 30 Fed. 289.

182. —— Accretions.—The petition in an action of ejectment does not present a case arising under the laws of the United States of which a federal court has jurisdiction without diversity of citizenship because it states that there is a dispute between the parties over the construction of the patent from the United States and several acts of Congress set out as the source of plaintiff's title, where its averments show that the real controversy is over the claim of plaintiff that he is entitled to the land formed by accretion, since the patent was issued, and after the statutes were passed. Joy v. St. Louis (1906) 26 Sup. Ct. 478, 480, 201 U. S. 332, 50 L. Ed. 776, affirming order (C. C. 1903) 122 Fed. 524.

An action involving the right to accretions along the river front by the owners of lands whose title is derived through a patent issued pursuant to the provisions of an act of congress, in

which the lands are described as "lying on the west bank of the Mississippi river," presents a case for the construction of the grant, and is a question arising under a law of the United States, of which a federal court has jurisdiction. King v. City of St. Louis (C. C. 1899) 98 Fed. 641.

183. —— Claims under different laws or grants.—The federal courts have jurisdiction of an action to recover possession of lands which plaintiff claims by virtue of pre-emption under the laws of congress, and which defendant claims under an act of congress granting land to railroads, and where it appears that defendant resisted the plaintiff's pre-emption claim in the different stages of the prosecution thereof. Florida C. & P. R. Co. v. Bell (1898) 87 Fed. 369, 31 C. C. A. 9, judgment reversed (1900) 20 Sup. Ct. 399, 176 U. S. 321, 44 L. Ed. 486.

A bill to protect a homestead entryman in making the improvements required by law, by enjoining interference by defendants, who, as is alleged, claimed a portion of the land under the townsite act, but whose claims were rejected by the secretary of the interior, does not present any question arising under the laws of the United States. King v. Lawson (C. C. 1897) 84 Fed. 209.

184. —— Conflicting claims.—The question of federal jurisdiction is not raised by an issue as to which of two parties is entitled to the benefit of a title claimed under the general government, where the issue turns solely on the personal identity of the individual to whom the records of land titles confirmed a lot of ground. Carpenter v. Williams (1869) 9 Wall. 785, 19 L. Ed. 827.

Plaintiff sued to restrain an alleged continuing trespass on his homestead entry, alleging that he had a subsisting uncanceled homestead entry on the land in controversy, and that proceedings had progressed so far as to entitle him to a patent; also, that defendant had taken possession of the land. The bill did not allege that defendant's possession had been taken under any claim of right, and defendant in his answer did not assert any claim of right under any provision of the land laws of the United States or under any grant or deed, only claiming that proceedings were pending to cancel complainant's title, and that defendant was in possession to make a homestead entry on the land in case plaintiff's entry was finally canceled. The bill further alleged that, though complainant's entry be canceled, his improvements and relinquishment were vendible and worth $4,500. Held that, since a homestead settler's right to transfer his possession and sell his improvements depended on no statute, the complaint did not show a case of federal jurisdiction depending on the Constitution, laws, or treaties of the United States. Hare v. Birkenfield (1910) 181 Fed. 825, 104 C. C. A. 335.

A question involving the right to public land claimed by one of the parties to have been pre-empted by him under a statute of the United States does not fall within the jurisdiction of the circuit court unless it actually involves the construction of a United States statute. Theurkauf v. Ireland (C. C. 1886) 27 Fed. 769.

A bill for possession of lands claimed under the homestead laws alleged that, at the time of complainant's entry, defendants were in actual possession, claiming the right to purchase the land under Act Sept. 29, 1890, providing for the forfeiture of unearned land grants, but that those in possession under "deed, written contract, or license from" the corporation, executed prior to January 1, 1888, or who had entered such land with bona fide intent to secure title from the corporation, should be entitled to purchase it, and that defendants were not within the discretion of those entitled to purchase under said act. Held, that no federal question was presented, so as to give the court jurisdiction. Butler v. Shafer (C. C. 1895) 67 Fed. 161.

A complaint, in an action of ejectment, alleging that the plaintiff claims title to land under a patent issued by the United States, and that the defendants deny the validity of such patent, or that it conveyed any title in or to the lands, is sufficient to give the federal courts jurisdiction. Pierce v. Molliken (C. C. 1897) 78 Fed. 196.

A suit to determine conflicting claims to the right of entry of public lands is one arising under the laws of the United States, and a federal court has jurisdiction without regard to the citizenship of the parties. Linkswiler v. Schneider (C. C. 1899) 95 Fed. 203.

185. —— Derivation of title alone as federal question.—The fact that the title to lands in controversy was originally derived from the United States does not give the federal courts jurisdiction. St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co. (1895) 68 Fed. 2, 15 C. C. A. 167, decree affirmed (1897) 18 S. Ct. 946, 42 L. Ed. 1212.

In ejectment in the United States court, plaintiff alleged that it derived title to the lands from acts and grants of congress, and that defendant denied the validity of those grants. Defendant answered, admitting the validity of the acts and grants, and claimed that the land in controversy lay outside of the grants. Held, that no federal question was presented, and the action must be dismissed. Southern Pac. R. Co. v. Whittaker (C. C. 1891) 47 Fed. 529.

In ejectment, plaintiff claimed title under a railroad land grant, alleging as ground of federal jurisdiction that defendants denied the validity of the grant. The pleadings and evidence

showed that defendants not only asserted the validity of the grant, but themselves claimed title through one holding under the grant. Held, that the action must be dismissed for want of jurisdiction. Stayton Min. Co. v. Woody (C. C. 1892) 50 Fed. 633.

186. —— Forfeiture by state.—A suit instituted by a state against a claimant of land, to enforce a forfeiture of the land and subject it to sale for the benefit of the school fund, was not originally cognizable in the federal courts; there being no federal question presented by the bill, and the state not being a citizen within the judiciary act and removal laws. State of West Virginia v. King (C. C. 1901) 112 Fed. 369.

187. —— Issuance and validity of patent.—A suit in which the complaint sets up an entry of public land by the plaintiff and the subsequent issue of a patent, and seeks to establish an interest in the land during the interval, by an application of the doctrine of relation, is a case of federal cognizance, since the determination of the applicability of such doctrine to the case requires the construction of federal statutes and a consideration of the effect of acts thereunder. Evans v. Durango Land & Coal Co. (1897) 80 Fed. 433, 25 C. C. A. 531, appeal dismissed Durango Land & Coal Co. v. Evans (1898) 19 S. Ct. 875, 43 L. Ed. 1178.

The federal courts have jurisdiction of an action for mesne profits of land during the time between plaintiff's preemption entry and the issuance of the patent. Florida, C. & P. R. Co. v. Bell (1898) 87 Fed. 369, 31 C. C. A. 9, judgment reversed (1900) 20 Sup. Ct. 399, 176 U. S. 321, 44 L. Ed. 486.

The federal court has no jurisdiction of a suit by citizens of Oregon, against a citizen of the District of Columbia, to cancel a United States patent to land to which plaintiffs claim they are entitled to have a patent, where the ground for canceling is fraud alleged to have been committed by defendant in procuring the issuance of the patent to one of the plaintiffs, and where defendant is claiming the land under conveyances purporting to have been executed by the plaintiffs. Such a suit involves no federal question, and the parties are not citizens of different states. Holland v. Hyde (C. C. 1890) 41 Fed. 897.

A complaint, in an action of ejectment alleging that the plaintiff claims title to land under a patent issued by the United States, and that the defendants deny the validity of such patent, or that it conveyed any title in or to the lands, is sufficient to give the federal courts jurisdiction. Pierce v. Molliken (C. C. 1897) 78 Fed. 196.

188. —— Protection of equitable title or possessory rights.—A suit by a homestead settler on unsurveyed public land to protect his possessory right as against an adverse claimant does not involve a federal question. Earnhart v. Switzler (1910) 179 Fed. 832, 105 C. C. A. 260.

A question involving the right to public land claimed by one of the parties to have been pre-empted by him under a statute of the United States does not fall within the jurisdiction of the circuit court unless it actually involves the construction of a United States statute. Theurkauf v. Ireland (C. C. 1886) 27 Fed. 769.

Under Act 1875, giving circuit courts jurisdiction in all cases "arising under the constitution or laws of the United States," such courts have jurisdiction of a bill for an injunction to restrain a railroad company from extending its road across land belonging to the United States, and to which the complainant claims to have an equitable title, where the question in dispute is whether complainant has a right to the land under the land laws of the United States. Jones v. Florida, C. & P. R. Co. (C. C. 1889) 41 Fed. 70.

189. —— Railroad land grants.—Where the only right of a railroad company to build and operate through the Indian Territory is under an act of Congress, a controversy growing out of the exercise of those rights is one arising under the laws of the United States. Southern Kansas R. Co. v. Briscoe (1892) 12 Sup. Ct. 538, 144 U. S. 133, 36 L. Ed. 377, affirming (C. C. 1889) 40 Fed. 273.

Act July 4, 1884, grants to the Southern Kansas Railway Company a right of way through the Indian Territory. Held that, as the company derives from the act all its rights in relation to the construction and operation of its road in the territory, a controversy growing out of the exercise of those rights is necessarily a controversy arising under the laws of the United States, and congress, therefore, had constitutional power to give jurisdiction thereof to the federal circuit and district courts for the Northern district of Texas, Western district of Arkansas and district of Kansas. Id.

A suit over the ownership of real property, in which plaintiff's title rests upon a proper interpretation of the exception of mineral lands in the Northern Pacific Railroad land grant act of July 2, 1864, c. 217, 13 Stat. 365, is one arising under the laws of the United States, of which a circuit court has jurisdiction, wholly independent of citizenship. Northern Pac. R. Co. v. Soderberg (1903) 23 Sup. Ct. 365, 366, 188 U. S. 526, 47 L. Ed. 575, affirming decree (1900) 104 Fed. 425, 43 C. C. A. 620.

A bill by a railroad company alleging that it acquired a right of way for its road over government lands under Act March 3, 1875, post, § 4921, and is pro-

ceeding to construct its road thereon, but did not complete the same within the time limited by the act, and that defendant, claiming that its rights have thereby been forfeited, has taken possession of a portion of such right of way, presents a question of the construction of the statute as supplemented by Act June 26, 1906, post, § 4927, which gives a federal court jurisdiction of the suit regardless of the citizenship of the parties. Columbia Valley R. Co. v. Portland & S. Ry. Co. (1908) 162 Fed. 603, 89 C. C. A. 361.

An act of congress granting to a railway company, organized under territorial legislation, right of way through the public domain, does not create the corporation, but only grants to an existing corporation certain rights, and constitutes no ground of jurisdiction on the part of the federal courts in a case in which the cause of action does not in any sense rest upon or grow out of the grant of such right of way. Adams Exp. Co. v. Denver & R. G. Ry. Co. (C. C. 1883) 16 Fed. 712.

Where complainant, a Washington railroad company, had complied with all the provisions of Act March 3, 1875, § 1, post, § 4921, conferring on railroad companies duly organized, etc., a right of way over the public lands of the United States, sought to restrain defendant railroad company, also incorporated under the laws of Washington, from trespassing on complainant's alleged right of way over public lands along the north bank of the Columbia river, on which complainant alleged it intended to construct its railroad in the future, the jurisdiction of the federal court was sustainable on the ground that the case involved the construction of such federal statute. Wallula Pac. Ry. Co. v. Portland & S. Ry. Co. (C. C. 1906) 154 Fed. 902.

190. —— Riparian or littoral rights.—The contention that rights below the highwater mark of navigable nontidal waters can be asserted by the patentees from the United States as appurtenant to the uplands conveyed to them, as against the title of the state when subsequently admitted into the Union is too clearly unfounded, in view of the prior decisions of the federal Supreme Court, to raise a federal question. McGilvra v. Ross (1909) 30 Sup. Ct. 27, 215 U. S. 70, 54 L. Ed. 95, reversing decree (1908) 164 Fed. 604, 90 C. C. A. 398.

Riparian or littoral rights are not an appurtenance of the land, but a mere incident of its ownership, arising out of the local or common law; and a grant by the United States of the land is not such a conveyance of the riparian rights as will give jurisdiction to a federal court of a contest over such rights, as involving a federal question. Kenyon v. Knipe (C. C. 1891) 46 Fed. 309.

191. —— Spanish, Mexican, and other grants.—The acts of 1824, c. 173, and 1844, c. 95, providing for the enforcing of certain claims to land in the Louisiana purchase by petition in the district court of the United States, apply only to equitable and inchoate titles, and not to perfect legal titles under grants of former governments. U. S. v. Reynes (1850) 9 How. 127, 13 L. Ed. 74; Same v. Cities of Philadelphia and New Orleans (1850) 11 How. 609, 13 L. Ed. 834; Same v. Castant (1851) 12 How. 437, 13 L. Ed. 1056; Same v. Pillerin (1851) 13 How. 9, 14 L. Ed. 28; Same v. McCullagh (1851) 13 How. 216, 14 L. Ed. 118; Same v. D'Auterieve (1853) 15 How. 14, 14 L. Ed. 580; Same v. Roselius (1853) 15 How. 31, 14 L. Ed. 587; Id. (1853) 15 How. 36, 14 L. Ed. 590; U. S. v. Ducros (1853) 15 How. 38, 14 L. Ed. 591.

The title, if any, acquired under a grant of land in Louisiana by the Western or Mississippi Company, in 1817, was a perfect legal title, and therefore the title so acquired, or any confirmation of it by the Spanish government, is not cognizable by the courts of the United States under the acts of 1824 and 1844. U. S. v. D'Auterieve (1853) 15 How. 14, 14 L. Ed. 580.

Where a Spanish grant of land in Louisiana was modified and restricted, and an order for the survey of the land made by the Spanish government, it created an incomplete title in the grantee of which the federal court had jurisdiction, under Act June 14, 1844, providing for the adjustment of certain land claims against the government. But where such a grant was modified and restricted, and an order for the survey of the land made, by the Spanish government, it was held that this right be regarded as an incipient step in the derivation of a title under that government, independent of any previous grant, and therefore cognizable by the courts of the United States. Id.

The nature and extent of the riparian rights and the rights in percolating waters of certain patentees from the United States whose titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners, acting under Act March 3, 1851, c. 41, 9 Stat. 631, are not federal questions which will sustain the jurisdiction of a federal Circuit Court but are questions of state or general law. Devine v. Los Angeles (1906) 26 Sup. Ct. 652, 659, 202 U. S. 313, 50 L. Ed. 1046.

The federal court has jurisdiction of an action involving the title to land held under patents issued upon confirmed Mexican grants, and depending upon a controverted construction of such patents. Hills v. Homton (C. C. 1877) Fed. Cas. No. 6,508.

A suit to quiet title to land covered by two patents issued on confirmations of two Spanish grants does not arise under the constitution or laws of the

United States, where neither party denies to the other any right or claim, under any treaty or act of congress, nor denies the validity of the proceedings of the other for a confirmation of the title, and where the question must be determined by an examination of the proceedings of the Spanish and Mexican governments in making the grants to the respective parties, and the subsequent acts of the parties and the Mexican government under the grants, and on the facts and laws of Mexico in force in a state before its acquisition by the United States. McFadden v. Robinson (C. C. 1884) 22 Fed. 10, 11.

192, 193. —— Telegraph companies.—A federal court has jurisdiction of a suit by a telegraph company which has accepted the provisions of R. S. § 5263, post, § 10072, to enjoin the threatened removal or destruction of its line by the local officers. Ohio Postal Telegraph Cable Co. v. Board of Com'rs of Sandusky County (C. C. 1905) 137 Fed. 947, judgment reversed Ganz v. Ohio Postal Telegraph Cable Co. (1905) 140 Fed. 692, 72 C. C. A. 186.

194. —— Waters on public lands.—One who has acquired a right to the use of water from a stream flowing through the public land for domestic or irrigation purposes, in accordance with the laws of the state, is protected therein by R. S. §§ 2339, 2340, post, §§ 4647, 4648, and the jurisdiction of a federal court to determine the conflicting rights of the parties is not affected by the fact that their lands and their points of diversion of water are in different states. Anderson v. Bassman (C. C. 1905) 140 Fed. 14.

195. Laws relating to mines and mining rights—Abandonment of claim.—The question as to whether a mining claim has been abandoned does not involve the construction of an act of congress so as to give the federal courts jurisdiction since the abandonment of a claim is not provided for in the mining act. Inez Min. Co. v. Kinney (C. C. 1891) 46 Fed. 832.

196. —— Adverse claims.—A suit brought in pursuance of R. S. § 2326, post, § 4623, and based upon an adverse claim made upon the filing of an application for a patent for mining ground, is a suit arising under the laws of the United States. Rutter v. Shoshone Min. Co. (C. C. 1896) 75 Fed. 37, decree affirmed Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 31 C. C. A. 223 (following Burke v. Concentrating Co. [C. C. 1891] 46 Fed. 644, and distinguishing Bushnell v. Smelting Co. [1893] 13 Sup. Ct. 771, 148 U. S. 682, 37 L. Ed. 610, judgment reversed [1900] 20 Sup. Ct. 726, 177 U. S. 505, 44 L. Ed. 864); Burke v. Bunker Hill & S. Mining & Concentrating Co. (C. C. 1891) 46 Fed. 644 (distinguishing Trafton v. Nougues [C. C. 1877] Fed. Cas. No. 14,134, and Water Co. v. Keyes [1877] 96 U. S. 199, 24 L. Ed. 656); McFadden v. Mountain View Min. & Mill. Co. (1899) 97 Fed. 670, 38 C. C. A. 354; Strasburger v. Beecher (C. C. 1890) 44 Fed. 209, 213; Frank G. & S. M. Co. v. Larimer M. & S. Co. (C. C. 1881) 8 Fed. 724.

A suit in support of an adverse claim under the federal mining laws is not one of which a federal court necessarily has jurisdiction. Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 228, 175 U. S. 571, 44 L. Ed. 276; Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 44 L. Ed. 864; Mountain View M. & M. Co. v. McFadden (1901) 21 Sup. Ct. 488, 180 U. S. 533, 45 L. Ed. 656; Butt City Water Co. v. Baker (1905) 25 Sup. Ct. 211, 196 U. S. 119, 49 L. Ed. 409; Larned v. Jenkins (1901) 109 Fed. 100, 48 C. C. A. 252; Willitt v. Baker (C. C. 1904) 133 Fed. 937.

A suit over the ownership of ore taken by defendants from a mining claim alleged to be the property of complainant by virtue of a patent from the United States is not brought within the jurisdiction of a circuit court of the United States by allegations in the bill that defendants intend to assert a defense based on certain other patents and the mining laws of the United States, on the theory that such suit, being alleged to have been brought in equity to avoid a multiplicity of suits, is in effect one to quiet title, and that such averments are therefore necessarily set forth as part of the cause of action. Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co. (1903) 23 S. Ct. 434, 188 U. S. 632, 47 L. Ed. 626; Id. (1903) 23 S. Ct. 440, 188 U. S. 645, 47 L. Ed. 634.

A suit in equity to determine conflicting claims under mining locations on public lands is not within the jurisdiction of a federal court, as involving the construction or effect of the mining laws of the United States, where, so far as appears from the averments of the bill, the only controversy between the parties may be over questions of fact. Dewey Min. Co. v. Miller (C. C. 1899) 96 Fed. 1.

Where the allegations of a bill show that the respective parties to the suit are making adverse claims to the same land under the mineral land laws of the United States, and that the proper determination of such conflicting claims necessarily requires the application and construction of those laws, a federal court has jurisdiction of the suit for such purpose, the property in controversy being alleged to be of the requisite statutory value; and having jurisdiction for that purpose, and such suit being equitable in its nature, the court will entertain and determine all incidental questions between the parties growing out of their conflicting claims, and will grant an injunction or appoint

a receiver, where such course is proper. Nevada Sierra Oil Co. v. Miller (C. C. 1899) 97 Fed. 681.

A bill asserting rights based on the location of a mining claim under the laws of the United States, which shows that the validity of such location depends on the question whether or not the locators discovered a mineral deposit within the limits of the claim prior to its location, within the meaning of such laws, and which sets out in full the facts relating to such alleged discovery discloses a question arising under the laws of the United States, which gives a federal court jurisdiction where the requisite statutory amount is involved. Id.

197. —— Extralateral rights.—Where a controversy between owners of adjoining mining claims as to the right of one to follow the vein outside of the vertical line of his claim clearly depends upon a question of fact under the statutes as finally construed by the supreme court, such controversy no longer presents a federal question. Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co. (1898) 85 Fed. 867, 29 C. C. A. 462.

198. —— Issuance and validity of patent.—A bill alleging that a patent for a mining claim was procured by defendant from the land department by fraud, and without a compliance with the statute as to notice or proofs, and that it was issued without authority of law, and asking that defendant be decreed to hold such patent in trust for complainants, as the legal owners of the claim, states a cause of action necessarily involving the construction or effect of laws of the United States, of which a federal court has jurisdiction. Cates v. Producers' & Consumers' Oil Co. (C. C. 1899) 96 Fed. 7.

199. —— Quieting title.—A suit to quiet title to a mining claim may be maintained in a federal court though the complainant has not yet obtained the legal title from the United States. Gillis v. Downey (1898) 85 Fed. 483, 29 C. C. A. 286.

In a suit to quiet title to a placer mining claim, a claim of title by defendant by reason of a location after issue of the patent, on a quartz vein known to exist before application for the placer patent, involves an interpretation of the federal statute which excludes known lodes or veins of quartz from patents for placer mining claims. Haggin v. Lewis (C. C. 1894) 66 Fed. 199.

A complaint seeking to quiet the title to mining claims, alleging that defendants claim under relocations made by them, on the pretense that the original locators did not do the proper assessment work for one year, and did not resume work before such relocations, and that certain persons made a location of certain claims so as to include 160 acres of land solely in the interest of one of defendants, presents issues of fact merely, and does not involve the construction of R. S. § 2324, post, § 4623, requiring a certain amount of work to be done on mining claims, so as to give jurisdiction to a federal court. Wise v. Nixon (C. C. 1896) 76 Fed. 3.

A bill to quiet title to a mining claim, eliminating all allegations relating to the claims and contentions of defendants, though complainant's claim of title is based on the mining laws of the United States, does not show that the construction or effect of such laws is in dispute, as it is open to defendants to allege any other ground of defense, and the only controversy, after issue has been joined, may be in regard to questions of fact. California Oil & Gas Co. of Arizona v. Miller (C. C. 1899) 96 Fed. 12.

200. —— Trespass.—Parties who attempt to enter beneath the surface, within the side lines of the lands of another, and to mine and take ore therefrom, are prima facie trespassers, and where such entry is claimed to be made under the mining laws of the United States, and the right to enter turns upon the construction to be given to such laws, the case is within the jurisdiction of the United States court. Cheesman v. Shreve (C. C. 1888) 37 Fed. 36.

A trespass upon a mining claim does not raise a federal question, nor does a claim of right based upon a mere location of a mining claim, as against a patent regularly issued by the land department, under authority of law, for the land covered by such location. Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657.

201. Laws relating to water courses and water rights.—The questions of priority of possession of a water right, and of conformity to local customs, laws, and decisions, do not constitute federal questions, under R. S. § 2339, post, § 4647, which will give jurisdiction to a federal court, but are merely preliminary to or the possible basis of a federal question. Telluride Power-Transmission Co. v. Rio Grande W. Ry. Co. (1900) 20 Sup. Ct. 245, 175 U. S. 639, 44 L. Ed. 305, dismissing appeal (1897) 51 P. 146, 16 Utah, 125.

The nature and extent of the riparian rights and the rights in percolating waters of certain patentees from the United States whose titles were derived from Spain and Mexico by virtue of grants to their predecessors from those countries, which were confirmed by the board of land commissioners, acting under Act March 3, 1851, c. 41, 9 Stat. 631, are not federal questions, but are questions of state or general law. Devine v. City of Los Angeles (1906) 26

ıp, Ct. 652, 202 U. S. 313, 50 L. Ed. 46.

A suit by a riparian owner to enjoin e construction of a bridge contiguous d injurious to his property, upon the ound that the defendant is not auorized to build the same by a certain t of congress, as it pretends and ims, arises under said act, and is thin the jurisdiction of the proper cuit court. Hughes v. Northern Pac. . Co. (C. C. 1883) 18 Fed. 106.

One who has acquired a right to the e of water from a stream flowing rough the public land for domestic or igation purposes, in accordance with e laws of the state, is protected erein by R. S. §§ 2339, 2340, post, §§ 47, 4648, and the jurisdiction of a deral court to determine the conflict- rights of parties is not affected by e fact that their lands and their ints of diversion of the water are in ferent states. Anderson v. Bassn (C. C. 1905) 140 Fed. 14.

202. Laws relating to navigable wa-s—Construction of docks.—A suit ich involves the question of the right construct a dock in a navigable riv- under certain acts of Congress and permit from the Secretary of War, ich are alleged to be in execution of e power of Congress, under the Contution, over the navigable waters of e United States, is one arising under e Constitution and laws of the United ates. Cummings v. Chicago (1903) Sup. Ct. 472, 475, 188 U. S. 410, 47 Ed. 525; Calumet Grain & Elevator . v. Same (1903) 23 Sup. Ct. 477, 8 U. S. 431, 47 L. Ed. 532.

203. —— Obstruction of navigation.— bring obstructions and nuisances navigable waters lying within a state ithin the cognizance of the federal urts, there must be some statute of e United States directly applicable to ch streams. U. S. v. Bellingham Bay om Co. (1897) 81 Fed. 658, 26 C. C. 547, affirming judgment (C. C. 1896) Fed. 585, judgment reversed (1900) Sup. Ct. 343, 176 U. S. 211, 44 L. l. 437; Hatch v. Wallamet Bridge Co. . C. 1881) 6 Fed. 780.

The act of Congress admitting Oren into the Union and providing that l navigable waters of the state shall common highways, and forever free the inhabitants of the state and to l other citizens of the United States thout any tax, duty, impost, or toll erefor, does not prohibit obstructions the navigation of such waters, and, the absence of Congress assuming lice power over the Willamette river Oregon, a bill by one citizen of Oren against another to enjoin the erecn of a bridge over the river at Portnd authorized by state act does not esent a case arising under the contution or laws of the United States. illamette Iron Bridge Co. v. Hatch (1888) 8 Sup. Ct. 811, 819, 125 U. S. 1, 31 L. Ed. 629.

The conformity of a log boom to the provisions of a state statute, so as to exempt it from prohibition under section 10 of the river and harbor Act of 1890, is not a question for the state courts alone, but must be decided by a federal court, when suit is brought for an injunction against the boom as an obstruction to navigation prohibited by the federal law. U. S. v. Bellingham Bay Boom Co. (1900) 20 Sup. Ct. 343, 176 U. S. 211, 44 L. Ed. 437, reversing decree (1897) 81 Fed. 658, 26 C. C. A. 547.

The question of what constitutes an unlawful obstruction to navigable waters arises under a law of the United States, and therefore the federal courts have jurisdiction to hear and determine a suit involving the same. Hatch v. Wallamet Iron Bridge Co. (C. C. 1881) 6 Fed. 326; Wallamet Iron Bridge Co. v. Hatch (C. C. 1884) 19 Fed. 347; Sunflower River Packet Co. v. Georgia Pac. R. Co. (C. C. 1889) 39 Fed. 229.

The Wallamet river being declared "a common highway" by congress, the question of what constitutes a needless and therefore unlawful obstruction thereto arises under a law of the United States, and therefore the United States circuit court has jurisdiction to hear and determine a suit involving the same. Hatch v. Wallamet Iron Bridge Co. (C. C. 1881) 6 Fed. 326; Wallamet Iron Bridge Co. v. Hatch (C. C. 1884) 19 Fed. 347, decree reversed Willamette Iron Bridge Co. v. Hatch (1888) 8 S. Ct. 811, 125 U. S. 1, 31 L. Ed. 629.

A suit arises out of a law of the United States, when the controversy involved in it turns upon the proper construction or application of such law; and therefore a suit by the owner of a vessel authorized to engage in the coasting trade upon the Wallamet river, and by riparian owners thereon, to enjoin the erection of a bridge over said river at Portland, as being in violation of the act of congress under which said vessel was enrolled and licensed, and the act (11 Stat. 383) declaring said river a free and common highway, arises under said laws, whether the plaintiffs are entitled to the relief sought or not. Hatch v. Wallamet Iron Bridge Co. (C. C. 1881) 6 Fed. 326.

The federal courts have jurisdiction of an action by a steamboat company to recover damages of a railroad company for obstructing a navigable river of the United States by building a bridge across it, regardless of the citizenship of the parties. Sunflower River-Packet Co. v. Georgia Pac. R. Co. (C. C. 1889) 39 Fed. 229.

A suit by private parties to enjoin the maintenance of a bridge across a navigable river, which is wholly within a state, from which complainants allege they suffer special injury, on the ground that such bridge has been declared by

the secretary of war, acting under the provisions of a federal statute, to constitute an unreasonable obstruction to navigation, and that it is therefore a public nuisance, is one arising under the laws of the United States, of which a federal court has jurisdiction, without regard to the citizenship of the parties. E. A. Chatfield Co. v. City of New Haven (C. C. 1901) 110 Fed. 788.

204. —— Riparian and littoral rights.—Whether the grantee of land on the shores of a navigable bay, under a grant by the United States, takes such an interest in the soil below high-water mark as will enable him to make a valid conveyance thereof, depends upon the local law of the state where the land is situated, and is not a federal question, giving jurisdiction to the federal courts. Kenyon v. Knipe (C. C. 1891) 46 Fed. 309.

Riparian or littoral rights are not an appurtenance of the land, but a mere incident of its ownership, arising out of the local or common law; and a grant by the United States of the land is not such a conveyance of the riparian rights as will give jurisdiction to a federal court of a contest over such rights, as involving a federal question. Id.

The general doctrine that local laws must determine the riparian rights of owners of real estate bounded on navigable rivers is subject, in all cases, to a consideration of the primary right of the United States in navigable waters for the purposes of commerce; and, in construing a grant by the United States bounded on such a river, a consideration of other matters besides the local law may become necessary in determining the intent and scope of the grant. King v. City of St. Louis (C. C. 1899) 98 Fed. 641.

205. —— Waters within national control.—When congress has declared a navigable river to be a common highway, the state cannot authorize an obstruction therein, and anything which materially interferes with or limits the navigability thereof, considering the use which it is or may be subject to, is an obstruction and a violation of such act of congress, over which the United States circuit court has jurisdiction, under the Judiciary Act of 1875 (18 Stat. 470), to prevent or abate by injunction. Hatch v. Wallamet Bridge Co. (C. C. 1881) 6 Fed. 780.

In the absence of a federal statute assuming police jurisdiction of the navigable waters within the limits of a state, a contest as to whether certain erections therein are a public nuisance presents no federal question. Kenyon v. Knipe (C. C. 1891) 46 Fed. 309.

By 24 Stat. 326, appropriations were made for the improvement of certain rivers in California, with a provision that part of such appropriation should not be used until certain hydraulic mining, hurtful to navigation, had ceased on such rivers, and the secretary of war was authorized to institute legal proceedings to prevent the continuance of such mining. Held, that this legislation was a sufficient assumption of national jurisdiction over the waters in question to confer on the federal courts jurisdiction of a suit by the United States to enjoin the deposit of mining débris injurious to navigation. U. S. v. North Bloomfield Gravel Min. Co. (C. C. 1892) 53 Fed. 625.

The question as to the rights of a state over marsh and tide lands on the borders of the sea or its estuaries is one of local law, to be determined by the supreme court of the state. Chisolm v. Caines (C. C. 1894) 67 Fed. 285, following Shively v. Bowlby (1894) 14 Sup. Ct. 548, 152 U. S. 1, 38 L. Ed. 331.

206. Laws relating to commerce.—See, also, post, § 992 et seq., and notes thereunder.

207. —— Enforcement of interstate commerce acts.—A bill by one railroad company against another and its employés to enforce the interstate commerce act by enjoining defendants from refusing to receive plaintiff's cars presents a case arising under the constitution and laws of the United States. Ex parte Lennon (1897) 17 Sup. Ct. 658, 660, 166 U. S. 548, 41 L. Ed. 1110, affirming judgment (1894) 64 Fed. 320, 12 C. C. A. 134; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. (C. C. 1893) 54 Fed. 746, 19 L. R. A. 395, appeal dismissed Ex parte Lennon (1893) 14 Sup. Ct. 123, 150 U. S. 393, 37 L. Ed. 1120.

Jurisdiction, in a federal court, of an original proceeding by mandamus to compel an interstate carrier to make the report which the Interstate Commerce Commission is authorized by the act to regulate commerce to require cannot be inferred from the grant of authority to the commission to enforce that act, or from the direction to district attorneys of the United States or the Attorney General to institute all necessary proceedings for the enforcement of its provisions. U. S. v. Lake Shore & M. S. Ry. Co. (1905) 25 Sup. Ct. 538, 197 U. S. 536, 49 L. Ed. 870.

That property affected by a judgment in ejectment rendered by a state court is used as a highway for interstate commerce and as a national mail route cannot be urged in support of the jurisdiction of a federal court over a suit to restrain the enforcement of the judgment, which is brought by a party not suing or authorized to sue on behalf of the public, and in which the United States or the attorney general is not a party complainant. Central Trust Co. v. Grantham (1897) 83 Fed. 540, 27 C. C. A. 570.

A national court has full jurisdiction to entertain a suit to enjoin state officers from preventing the owner of natural gas from taking it out of the state

r the purpose of interstate commerce. askell v. Cowham (1911) 187 Fed. 3, 109 C. C. A. 235.

Federal courts have jurisdiction of a ll in equity to restrain violations of e interstate commerce law to the ir-parable injury of complainant, be-use of the subject-matter, and with-it regard to the citizenship of the par-es. Kentucky & I. Bridge Co. v. ouisville & N. R. Co. (C. C. 1889) 37 ed. 567; Toledo, A. A. & N. M. Ry. o. v. Pennsylvania Co. (C. C. 1893) 4 Fed. 730, 19 L. R. A. 387, appeal ismissed Ex parte Lennon (1893) 14 . Ct. 123, 150 U. S. 393, 37 L. Ed. 120.

A suit against the state constables to estrain them from acting under the outh Carolina dispensary law, on the round that it is an interference with terstate commerce, involves a federal uestion. Donald v. Scott (C. C. 1895) 7 Fed. 854, decree modified Scott v. onald (1897) 17 Sup. Ct. 262, 165 U. . 107, 41 L. Ed. 648.

A suit to compel an interstate carrier o receive and transport goods tendered o it for shipment, which it wholly re-ses to do, is one to compel the per-ormance of a duty imposed on it by w, and within the jurisdiction of the ourts; and complainant is not required o resort in the first instance to the In-erstate Commerce Commission. Dan-ger v. Wells, Fargo & Co. (C. C. 1907) 54 Fed. 379.

208. —— Federal employers' liability ct.—Act April 22, 1908, post, § 8657, aking railroads engaged in interstate ommerce liable for injuries to em-loyés, creates a statutory right of ac-on not existing at common law or in hancery, and the action is one which, warranted by the federal Constitu-on, may, under the general laws of the nited States, be made subject to judi-ial proceedings in the federal courts s a suit of a civil nature arising under e laws of the United States. Clark . Southern Pac. Co. (C. C. 1909) 175 ed. 122; Hoxie v. New York, N. H. & I. R. Co. (1909) 73 A. 754, 82 Conn. 52.

A bill by an express company to re-train a messenger's wife from suing railroad company for her husband's eath because of the messenger's con-ract to save the express company and ny of its contracting railroads harm-ss from any liability resulting from ersonal injuries to him, etc., did not tate a case arising under Const. U. S. rt. 1, § 10, relating to interstate com-erce, or under the fourteenth amend-ent of such Constitution, so as to en-itle complainant to sue in the federal ourts on that ground. Rountree v. dams Express Co. (1908) 165 Fed. 52, 91 C. C. A. 186.

In an action for injuries to a switch-an in a railroad yard, the declaration eld to sufficiently charge that at the me of decedent's injury both he and defendant company were engaged in interstate commerce within the purview of the federal Employers' Liability Act. Atlantic Coast Line R. Co. v. Reaves (1913) 208 Fed. 141, 125 C. C. A. 599.

Act April 22, 1908, § 2, post, § 8658, which makes common carriers by railroad within the territories of the United States liable for injuries to employés as therein stated, supersedes the common law in the territories with respect to such liability, and any cause of action within its terms is necessarily one arising under a law of the United States, and on that ground within the jurisdiction of a federal Circuit Court, where the requisite amount is involved. Cound v. Atchison, T. & S. F. Ry. Co. (C. C. 1909) 173 Fed. 527.

Where a petition in an action against an interstate carrier for injuries to a brakeman in one of the territories of the United States alleged injury to plaintiff by the negligence of a carrier while plaintiff was in the performance of his duty, it sufficiently showed that the action was based on the Federal Employers' Liability Act of April 22, 1908, § 2, post, § 8658, though it did not so allege in terms. Clark v. Southern Pac. Co. (C. C. 1909) 175 Fed. 122.

Since by the terms of Judiciary Act March 3, 1887, § 1, as amended by Act Aug. 13, 1888, an action for injuries based on federal Employers' Liability Act of April 22, 1908, post, §§ 8657–8665, between citizens of Wisconsin could only be brought originally in the Circuit Court of the United States sitting in the state of Wisconsin for the district in which the defendant resided, federal jurisdiction depending on the contention that the case was one arising under the laws of the United States, and, such suit having been brought in the state courts of Minnesota, it was not removable by the defendant over plaintiff's protest to the federal Circuit Court in the district of Minnesota. Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994.

Where, in an action against an interstate carrier for death of a servant, the complaint alleged that defendant was engaged in transporting both freight and passengers, and of interstate and foreign commerce, such averment did not allege that defendant was engaged in the transportation of freight and passengers "in" interstate and foreign commerce, and must therefore be taken as an averment of the transportation of freight and passengers in both interstate and intrastate commerce. Troxell v. Delaware, L. & W. R. Co. (C. C. 1910) 180 Fed. 871, judgment reversed Delaware, L. & W. R. Co. v. Troxell (1910) 183 Fed. 373, 105 C. C. A. 593, writ of certiorari denied Troxell v. Delaware, L. & W. R. Co. (1911) 31 S. Ct. 469, 219 U. S. 584, 55 L. Ed. 346.

209. —— Killing of stock by carriers.—Act July 4, 1884, granting to the

Southern Kansas Railway Company a right of way through the Indian Territory, and providing that the federal circuit and district courts for the Northern district of Texas, Western district of Arkansas, and district of Kansas shall have jurisdiction, without reference to amount, over "all controversies" arising between said company and the nations or tribes and their inhabitants through whose territory the railway shall be constructed, confers jurisdiction of a suit by an inhabitant of the Chickasaw Nation to recover for the wrongful killing of stock by the company's trains. Southern Kansas Ry. Co. v. Briscoe (1892) 144 U. S. 133, 12 Sup. Ct. 538, 36 L. Ed. 377, affirming Briscoe v. Southern Kansas Ry. Co. (C. C. 1889) 40 Fed. 273.

210. —— Municipal franchises.—A proceeding to exclude a bridge company from the use of a franchise to operate railroad tracks in a public street does not raise a federal question, though such tracks lead to its bridge, built under Acts July 14, 1862, and Feb. 17, 1865, authorizing the construction of a railroad bridge over the Ohio river, and declaring that it "shall be a lawful structure, and shall be recognized and known as a post route," as those acts do not attempt to give the right to the use of the street as an approach. Commonwealth of Kentucky v. Louisville Bridge Co. (C. C. 1890) 42 Fed. 241.

211. —— Rates and charges.—An action by a shipper against a railroad company engaged in interstate commerce to recover damages because of an alleged discrimination in exacting a charge from one class of shippers, which is not required from another class, although the service is the same in both cases, is not within the jurisdiction of a federal court, as one arising under the interstate commerce law, where it is not alleged that the charge is not in accordance with a schedule of rates duly published and filed with the Interstate Commerce Commission, nor that any application has been made to the Commission to correct such alleged discrimination. Clement v. Louisville & N. R. Co. (C. C. 1907) 153 Fed. 979.

A federal court has jurisdiction of a suit by a shipper to enjoin a railroad company from putting into effect a proposed rate alleged to be unlawful, as in violation of the interstate commerce law, either as unreasonable and unjust in itself or discriminatory, when the jurisdictional amount is involved. Jewett Bros. & Jewett v. Chicago, M. & St. P. Ry. Co. (C. C. 1907) 156 Fed. 160.

Court held to have no jurisdiction to enjoin the establishment or enforcement of an interstate rate by a carrier. Columbus Iron & Steel Co. v. Kanawha & M. Ry. Co. (C. C. 1909) 171 Fed. 713 (affirmed [1910] 178 Fed. 261, 101 C. C. A. 621); Houston Coal & Coke Co. v. Norfolk & W. Ry. Co. (C. C. 1909) 171 Fed. 723, affirmed (1910) 178 Fed. 266, 101 C. C. A. 626.

212. —— Special remedies under interstate commerce act.—The special remedies provided by the interstate commerce act are cumulative, and not exclusive of the general remedies given by the federal judiciary act conferring jurisdiction of all suits and controversies arising under an act of congress, regardless of any diversity of citizenship between the parties. Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co. (C. C. 1891) 47 Fed. 771, appeal dismissed (1895) 16 Sup. Ct. 189, 159 U. S. 698, 40 L. Ed. 311.

213. —— Taxation.—Jurisdiction of an action to enjoin the taxation of a bridge by the local authorities as a toll bridge, it being so taxed as a part of complainant's railroad, is not conferred on a federal court on the ground that a federal question is involved, by an allegation that the bridge was built under authority of an act of congress, where the right of the state to tax the bridge is conceded, and the controversy is as to the method of taxation under the state laws. St. Joseph & G. I. R. Co. v. Steele (1897) 17 Sup. Ct. 925, 927, 167 U. S. 659, 42 L. Ed. 315.

The federal courts have no jurisdiction of an original action in mandamus to compel the return of a franchise tax collected under the authority of a state statute, although the basis of the relief sought is the alleged repugnancy of the tax to the commerce clause of the federal Constitution. Covington & Cincinnati Bridge Co. v. Hager (1906) 27 Sup. Ct. 24, 203 U. S. 109, 51 L. Ed. 111.

214. —— Telegraph companies.—The United States District Court has jurisdiction of an action by a telegraph company to restrain the enforcement of a tax of $1,000 by the municipality, on the ground that it is a tax on interstate commerce and is discriminatory; it being alleged that the damage to the complainant was greatly in excess of $2,000. Postal Telegraph-Cable Co. v. City of Mobile (C. C. 1909) 179 Fed. 955.

The question whether a railroad company which cuts down poles and wires belonging to a telegraph company interfering with the road's construction and operation, such telegraph company having duly filed a written acceptance of the restrictions and obligations required by Act July 24, 1866, with the postmaster general, is liable therefor, is a federal question involving the construction of such act, and, in the absence of the express adjudication of such question by the supreme court of the United States, the action will be dismissed. Western Union Tel. Co. v. Franklin

Const. Co. (1900) 47 A. 616, 70 N. H. 37.

215. Laws relating to patents.—Infringement suits.—The provision of the constitution (article 3), declaring that the judicial power of federal courts shall extend to all cases in law and equity arising under the constitution or laws of the United States, and treaties, gives such courts jurisdiction of cases involving patent rights, they being cases arising under a law of the United States. Osborn v. U. S. Bank (1824) 22 U. S. (9 Wheat.) 738, 6 L. Ed. 204.

Under the provision of the patent act, "that all actions, suits, controversies and cases arising under any law of the United States, granting or conferring to inventors the exclusive right to their inventions or discoveries, shall be originally cognizable, as well in equity as in law, in the circuit courts," etc., an action raising a question of infringement of a patent is within the jurisdiction of the federal court, and its jurisdiction will not be ousted, though it involves the construction of a contract as well as the patent. Littlefield v. Perry (1874) 21 Wall. 205, 22 L. Ed. 577.

While the federal courts have no jurisdiction, under the patent laws, of litigation in respect to patents, when it appears that the rights of the parties are governed by contract, yet where a bill for infringement is in the usual form, and asks the usual relief, without any suggestion as to the existence of any contract relation between the parties, the mere fact that the answer sets up an alleged contract for an assignment of an interest in the patent, and that a copy thereof, together with other papers, is embodied in a "stipulation of submission and agreed facts," under a provision that it may be offered in evidence subject to any objections that might be urged against the original, will not warrant a federal court in dismissing the cause for want of jurisdiction, without any finding as to the existence or validity of the alleged contract. White v. Rankin (1892) 144 U. S. 628, 12 Sup. Ct. 768, 36 L. Ed. 569, distinguishing Wilson v. Sandford (1850) 10 How. 99, 13 L. Ed. 344.

A suit by the owner of a patent to make the directors of a corporation answerable for a judgment previously recovered against it for infringing the patent is not within the original jurisdiction of a federal court unless there is diversity of citizenship, since the suit is neither one upon the patent nor one ancillary to the judgment in the former suit. H. C. Cook Co. v. Beecher (1910) 30 Sup. Ct. 601, 217 U. S. 497, 54 L. Ed. 855, affirming judgment (C. C. 1909) 172 Fed. 166.

Supreme Court of United States will not refrain from ruling that a patentee may sell patented articles subject to restrictions as to their use and predicate infringement on a different use on the ground that the ruling might draw to the federal court cases otherwise not within that jurisdiction. Henry v. A. B. Dick Co. (1911) 32 Sup. Ct. 364, 224 U. S. 1, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

216. —— Manufacture, use, and sale of patented article under license.—A suit between citizens of the same state cannot be sustained in the United States court, as arising under the patent laws of the United States, where the defendant admits the validity and his use of the plaintiff's letters patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention, relief in such a suit being found on the contract, and not on the patent laws. Hartell v. Tilghman (1878) 99 U. S. 547, 25 L. Ed. 357.

An action against a patentee for specific performance of a contract to permit the plaintiff to make and use the patented article, and for an injunction restraining defendant from interfering with such use, does not involve a federal question, and is consequently not within the jurisdiction of the United States courts. Marsh v. Nichols, Shepard & Co. (1891) 140 U. S. 344, 11 Sup. Ct. 798, 35 L. Ed. 413.

Agreement for purchase of rotary mimeograph subject to a license restriction held not collateral, so that its validity would be dependent on general law, of which a federal court will have no jurisdiction, and whether a patentee selling a rotary mimeograph under a license restriction reserves to himself, as patentee, the exclusive right to all permitted uses of his invention, is a question of which a federal court has jurisdiction. Henry v. A. B. Dick Co. (1912) 32 Sup. Ct. 364, 224 U. S. 1, 56 L. Ed. 645.

In an action to restrain defendants from using bottles and labels in imitation of those of the plaintiff, where the patent for the design of such bottles has expired, the question whether defendants are using the same in good faith, in which case their acts would be lawful, or for the purpose of misleading the public to believe that they are selling the article made by plaintiff, in which case the expiration of the patent would be no defense, does not arise under the laws of the United States so as to give the federal courts jurisdiction. Société Anonyme de la Distillerie de la Liqueur Benedictine de l'Abbaye de Fecamp v. Cook (C. C. 1889) 40 Fed. 382.

Where a grant of the exclusive right to make, use, and sell a patented article for the full term of the patent is made by the patentee, the federal courts have jurisdiction of a suit by the assignee against the patentee for infringement, as arising under the laws of the United States, even though one issue in the case is whether the grant is still in force. Rapp v. Kelling (C. C. 1890) 41 Fed. 792.

A suit founded on a breach of a pat-

ent license contract for a refusal to renew it does not arise under the Constitution of any law of the United States. Lefkowitz v. Foster Hose Supporter Co. (C. C. 1908) 161 Fed. 367.

217. —— **Sale or assignment of patent.**—A suit to rescind the contract for the exchange of a stock of goods for an invention and letters patent applied for (which were subsequently issued), on the ground of fraudulent representations as to the utility and value of the invention, is a suit arising upon or out of a contract, and does not raise any federal question. Wade v. Lawder (1897) 17 Sup. Ct. 425, 165 U. S. 624, 41 L. Ed. 851.

A suit for the specific performance of a contract to assign a patent is not one arising under the laws of the United States, and the federal courts have no jurisdiction of it as such. Pliable Shoe Co. v. Bryant (C. C. 1897) 81 Fed. 521.

A suit in equity to determine the ownership of a patent claimed by both parties under assignments from the patentee is not one arising under the patent laws of the United States, so as to give a federal court jurisdiction where the parties are citizens of the same state. Atherton Mach. Co. v. Atwood-Morrison Co. (C. C. 1900) 99 Fed. 113.

A suit in equity to set aside a contract for the sale of a patent involves no federal question, and cannot be maintained in a federal court where an indispensable party is a citizen of the same state as complainant. Cely v. Griffin (C. C. 1902) 113 Fed. 981, 982.

218. —— **Unfair competition.**—Unfair competition in trade is not a federal question, and a suit therefor is not within the jurisdiction of a federal court, where the parties are citizens of the same state; nor is that issue drawn within such jurisdiction because the bill also alleges infringement of a patent growing out of the same acts of defendant. Mecky v. Grabowski (C. C. 1910) 177 Fed. 591.

219. **Laws relating to copyrights.**—Act Feb. 15, 1819, conferring equitable jurisdiction in matter of copyright on federal courts, did not extend their equitable powers so that they could make a decree for the penalties imposed by Act Feb. 1831, for a violation of the act. Stevens v. Gladding (1854) 17 How. 447, 15 L. Ed. 155.

Whether the owners of the copyright in a book can have relief in a court of equity by virtue of their rights, independent of statutory copyright, in view of an alleged conditional sale, is a question which the Federal courts cannot consider in a suit to restrain the sale of the book at retail at less than the fixed price, in which there is no claim of damages in the requisite sum, and no diversity of citizenship. Scribner v. Straus (1908) 28 Sup. Ct. 735, 210 U. S. 352, 52 L. Ed. 1094 affirming judgment (1906) 147 Fed. 28, 78 C. C. A. 122.

A suit to restrain state courts from prosecuting actions to restrain complainants from publishing and selling a song in which they relied on a copyright as a defense does not arise under the laws of the United States. Carl Laemmle Music Co. v. Stern (D. C. 1913) 209 Fed. 129, 130.

220. **Laws relating to trade-marks.**—A federal court has jurisdiction of a controversy between foreign subjects and a domestic corporation in which the bill asserts a right under a federal statute by virtue of the registration of a trade-mark. Baglin v. Cusenier Co. (1911) 31 Sup. Ct. 669, 671, 221 U. S. 580, 55 L. Ed. 863.

221. **Revenue laws.**—The federal circuit court has jurisdiction of an action against a collector of customs to recover back money paid as duties, and alleged to have been illegally exacted, irrespective of the citizenship of the parties. Philadelphia v. Collector (1866) 5 Wall. 720, 18 L. Ed. 614; Schmeider v. Barney (C. C. 1875) Fed. Cas. No. 12,462.

A suit against an internal revenue collector to recover taxes alleged to have been illegally collected is cognizable in the federal court, both under subdivision 5 of this section, post, and under this clause. Commissioners of the Sinking Fund of Louisville v. Buckner (C. C. 1891) 48 Fed. 533.

A suit by an express company or its stockholders against the railroad commission of a state to enjoin the enforcement of an order requiring the company to pay the war stamp tax imposed by the United States on its manifests and bills of lading, without any demand on shippers for its payment, does not necessarily involve a construction of the act of congress imposing the tax, as the defendants have no legal interest in the matter which entitles them to demand such construction. Dinsmore v. Southern Exp. Co. (C. C. 1899) 92 Fed. 714.

A suit to determine the validity of the action of state authorities with reference to a tax imposed by the United States involves a federal question. Id.

222. **Territorial laws.**—The laws enacted by a territory subject to disapproval by Congress are not laws of the United States, and a suit arising under them, as where a corporation organized under them is a party to the suit, does not arise under the laws of the United States, and a federal court has no jurisdiction on that ground. Maxwell v. Federal Gold & Copper Co. (1907) 155 Fed. 110, 83 C. C. A. 570.

The legislative power to be exercised by a territorial legislature is the legislative power of the territory, and not of the United States. Territorial statutes have a distinct and well-defined character of their own. A corporation

created by the territorial legislature of Colorado is not a federal corporation, and cannot, therefore, sue in the United States courts as such, even if it were conceded that corporations organized under the laws of the United States possess the right to sue in those courts. Adams Exp. Co. v. Denver & R. G. Ry. Co. (C. C. 1883) 16 Fed. 712.

A mere protest against the payment of a license tax on the ground that the law seeking to impose the same is unconstitutional will not give a federal court jurisdiction to try and determine the constitutionality of the law. Corbus v. Alaska Treadwell Gold-Min. Co. (D. C. 1899) 99 Fed. 334.

223. Actions by or against United States corporations.—A suit by or against a corporation, created by an act of congress, is a suit arising under the laws of the United States. Texas & P. R. Co. v. Cox (1892) 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; In re Dunn (1909) 29 Sup. Ct. 299, 301, 212 U. S. 374, 53 L. Ed. 558; Union Pac. R. Co. v. McComb (C. C. 1880) 1 Fed. 799, 800; A. L. Wolff & Co. v. Choctaw, O. & G. R. Co. (C. C. 1904) 133 Fed. 601; Rural Home Tel. Co. v. Powers (C. C. 1910) 176 Fed. 986.

A suit for personal injuries against a receiver of a corporation which derived its corporate powers from acts of congress is one arising under the constitution and laws of the United States, and is therefore within the federal jurisdiction. Texas & P. R. Co. v. Cox (1892) 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829.

An allegation in a bill that the complainant is a corporation organized under an act of congress makes the case one arising under the laws of the United States, and confers jurisdiction upon a federal court. U. S. Freehold Land & Emigration Co. v. Gallegos (1898) 89 Fed. 769, 32 C. C. A. 470.

It is not the domicile of a corporation created by an act of congress which confers jurisdiction on the federal courts of suits to which it is a party, but the fact that it was so created, and that any suit by or against it arises under a law of the United States. Supreme Lodge, Knights of Pythias, v. England (1899) 94 Fed. 369, 36 C. C. A. 298.

The federal courts have jurisdiction in actions by and against the Union Pacific Railroad Company whenever they would have jurisdiction of the same class of actions between other parties. 12 Stat. 489, § 1. Smith v. Union Pac. R. Co. (C. C. 1872) Fed. Cas. No. 13,121.

The fact that defendant corporation was organized under a federal law is not enough to give the federal court jurisdiction. Magee v. Union Pac. R. Co. (C. C. 1873) Fed. Cas. No. 8,945; Adams Exp. Co. v. Denver & R. G. Ry. Co. (C. C. 1883) 16 Fed. 712.

Union Pacific Railroad Company, under its charter, may sue and be sued in the circuit court of the United States for the district of Nebraska, without reference to citizenship. Bauman v. Union Pac. R. Co. (C. C. 1875) Fed. Cas. No. 1,117.

Though a corporation, incorporated under the provisions of an act of congress, may have adequate remedies in the state courts, it has a right to sue in the United States courts, and is not compelled to seek the jurisdiction of the state. First Nat. Bank v. Bohne (C. C. 1881) 8 Fed. 115.

An act of congress granting to a railway company, organized under territorial legislation, right of way through the public domain, does not create the corporation, but only grants to an existing corporation certain rights, and constitutes no ground of jurisdiction on the part of the federal courts in a case in which the cause of action does not in any sense rest upon or grow out of the grant of such right of way. Adams Exp. Co. v. Denver & R. G. Ry. Co. (C. C. 1883) 16 Fed. 712.

Semble that the Northern Pacific Railway Company, being created by an act of congress, may sue or be sued in the proper circuit court of the United States in all cases; and, quære, of what state, if any, is it a citizen, for the purpose of jurisdiction in such courts? Hughes v. Northern Pac. Ry. Co. (C. C. 1883) 18 Fed. 106.

Where plaintiff, a corporation, sued defendant in a state court and alleged that it was, and at all times had been, a corporation created, organized, and existing under an act approved February 18, 1901, entitled "An act to put in force in the Indian Territory certain provisions of the laws of Arkansas relating to corporations" (Act Feb. 18, 1901, c. 379, 31 Stat. 794), and it appeared that plaintiff was organized as a corporation in the Indian country under the Arkansas laws made applicable thereto by such act of Congress, plaintiff was a corporation existing under an act of Congress, so that the action was one necessarily arising under and involving the Constitution and laws of the United States. Canary Oil Co. v. Standard Asphalt & Rubber Co. (C. C. 1909) 182 Fed. 663.

A suit by the Northern Pacific Railroad to restrain the collection of taxes assessed against its roadbed, on the ground that the same was exempted from taxation under the United States statute creating it, is an action arising under the laws of the United States, and is therefore properly brought in the federal side of the territorial court. Northern Pac. R. Co. v. Carland (1884) 5 Mont. 146, 3 P. 134.

224. Actions by or against national banks or receivers thereof.—The fact that the Bank of the United States was incorporated by act of congress does not give it the right to sue in the feder-

al courts. Bank of U. S. v. Deveaux (1809) 5 Cranch, 61, 3 L. Ed. 38.

The district court for the district of Alabama had no jurisdiction of suits by the bank of the United States; jurisdiction not having been given in the act establishing the court, nor in the act incorporating the bank. Bank of U. S. v. Martin (1831) 5 Pet. 479, 8 L. Ed. 198.

Act Aug. 13, 1888, § 4, substantially incorporated in subdivision 16, post, providing that national banks, for the purposes of all suits by or against them, shall be deemed citizens of the states in which they are located, deprives such banks of the right to sue or be sued in the federal courts, except where the suit is based on the diversity of citizenship of the parties. Ex parte Jones (1897) 17 Sup. Ct. 222, 164 U. S. 691, 41 L. Ed. 601.

A suit which may be brought in a federal Court by or against a citizen of a state, because it arises under the Constitution, laws, or treaties of the United States, may, for the same reason, be brought in such court by or against a national bank located in the same state, notwithstanding Act July 12, 1882, § 4, post, subd. 16, providing that the jurisdiction for suits hereafter brought by or against any national bank, except suits between them and the United States, etc., shall be the same and not other than the jurisdiction for suits by or against state banks, etc. A suit against an insolvent national bank which has gone into voluntary liquidation to enforce a specific lien, or to enforce and judicially administer a trust previously created by contract, or arising from the insolvency and liquidation proceedings, is a suit arising under the laws of the United States. George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40, decree affirmed Wyman v. Wallace (1906) 26 Sup. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, and Frenzer v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 244, 50 L. Ed. 742, and Poppleton v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

A federal question is not raised in a suit on a note by reason of the fact that the complainant is a national bank. State Nat. Bank of Denison v. Eureka Springs Water Co. (C. C. 1909) 174 Fed. 827.

While national banks are deemed "citizens" of the states where located for the purposes of federal jurisdiction, yet, when a right is asserted by a national bank under authority of the law of its creation, the determination of such right involves a federal question, of which a federal court has jurisdiction, without regard to citizenship, if the requisite amount is involved. Larabee v. Dolley (C. C. 1909) 175 Fed. 365, order reversed Dolley v. Abilene Nat. Bank, of Abilene (1910) 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065, and decree affirmed Assaria State Bank of Assaria v. Dolley (1910) 31 S. Ct. 189, 219 U. S. 121, 55 L. Ed. 123.

An actual federal question must be presented by the record in an action against a national bank before the action can be removed by the bank on the ground that the action arises under the statutes or constitution of the United States. Bowers v. First National Bank (C. C. 1911) 190 Fed. 676.

An action for money against a national bank, whose corporate existence is admitted, is not a suit arising under the laws of the United States. Ulster County Sav. Inst. v. Fourth Nat. Bank (1889) 54 Hun, 638, 8 N. Y. Supp. 162.

As to cases by or against national banks, see note under subdivision 16, post.

225. —— **Action against agent to wind up affairs.**—An action against an agent appointed by the shareholders of a national bank to close its affairs is a suit which arises under the laws of the United States, of which a federal court has jurisdiction. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518; International Trust Co. v. Weeks (C. C. 1902) 116 Fed. 898, following Guarantee Co. of North Dakota v. Hanway (1900) 104 Fed. 369, 44 C. C. A. 312, and judgment reversed Weeks v. International Trust Co. (1903) 125 Fed. 370, 60 C. C. A. 236, writ of error dismissed International Trust Co. v. Weeks (1904) 24 Sup. Ct. 853, 193 U. S. 667, 48 L. Ed. 839.

The federal courts have jurisdiction of an action brought against an agent appointed to wind up the affairs of the bank under Act June 30, 1876, as amended by Act Aug. 3, 1892, Act March 2, 1897, post, § 9827, the action being based on the fact that the agent has improperly sold stock as assets of the defunct bank. Guarantee Co. of North Dakota v. Hanway (1900). 104 Fed. 369, 44 C. C. A. 312.

226. —— **Enforcement of stockholder's liability.**—Where a national bank is sought to be charged as stockholder in another corporation, the averment in its answer that the stock was issued to it "without authority of law" must be construed as referring to the law of the United States governing national banks, and therefore raises a federal question. California Nat. Bank v. Kennedy (1897) 17 Sup. Ct. 831, 167 U. S. 362, 42 L. Ed. 198.

A case arising under the laws of the United States, of which a federal court has jurisdiction, was presented by a bill filed by the holder of a nonnegotiable note, given by a national bank which afterwards went into voluntary liquidation, to exact in behalf of himself and all other creditors of the bank the stockholder's liability imposed by former R. S. § 5151. Wyman v. Wallace (1906) 26 Sup. Ct. 495, 496, 201 U. S. 230, 50 L. Ed. 738; Frenzer v.

Same (1906) 26 Sup. Ct. 498, 201 U. S. 244, 50 L. Ed. 742; Poppleton v. Same (1906) 26 Sup. Ct. 498, 201 U. S. 245, 50 L. Ed. 743, affirming decree George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40.

227. —— **Failure to transfer stock on books.**—An action by the assignors of national bank stock against their assignee to recover payments which they have been compelled to make towards the bank's liabilities, owing to the fact that the transfer was not properly registered on the bank's books, is not within federal jurisdiction as arising out of the national banking act, that act imposing no duty on the assignee of shares to register his ownership for his assignor's protection. Lessassier v. Kennedy (1887) 123 U. S. 521, 8 Sup. Ct. 244, 31 L. Ed. 262.

228. —— **Liability of officers and directors.**—A suit by a national bank against its former managing officers to charge them with losses sustained by reason of their having made loans to one individual in excess of 10 per cent. of the capital stock, and other loans without personal security, is one arising under the laws of the United States. National Bank of Commerce v. Wade (C. C. 1897) 84 Fed. 10.

An action against directors of a national bank for damages for inducing the plaintiff, by false representations contained in the reports made by them in accordance with the statutes and the regulations of the comptroller of the currency, to loan money to the bank, which he lost through its insolvency, does not present a controversy arising under the constitution or laws of the United States, of which the federal courts have jurisdiction, either originally or by removal. Bailey v. Mosher (C. C. 1896) 74 Fed. 15.

R. S. § 5200, post, § 9716, limits the total liabilities of any person, firm, or corporation to a national bank to not more than one-tenth of the bank's paid-in capital stock, and R. S. § 5239, post, § 9831, provides that every director participating in or assenting to a violation of the act shall be liable in his personal and individual capacity for all damages which the association and stockholders or any other person shall sustain in consequence thereof. Held, that a suit by a stockholder of a national bank for its benefit against the bank and its officers having charge of its assets individually, alleging that they had made excessive loans of funds to irresponsible and insolvent borrowers without adequate security in violation of the act, and that the bank after proper notice and demand had failed to bring the action, involved the construction of the national bank act, and was therefore a suit arising under the laws of the United States of which the federal courts had jurisdiction, though there was no diversity of citizenship. Huff v. Union Nat. Bank of Oakland (C. C. 1909) 173 Fed. 333.

The United States district court has jurisdiction of an action by a national bank against its former officers for a loss caused by a negligent loaning of the bank's funds. Abbott v. National Bank of Commerce (1899) 56 P. 376, 20 Wash. 552, affirming judgment (1899) 20 S. Ct. 153, 175 U. S. 409, 44 L. Ed. 217.

229. —— **Suits by or against receivers.**—An action against a receiver of a national bank in his official capacity is one arising under the laws of the United States, of which a federal court has jurisdiction. Auten v. U. S. (1899) 19 Sup. Ct. 628, 634, 174 U. S. 125, 43 L. Ed. 920; McDonald v. State of Nebraska (1900) 101 Fed. 171, 41 C. C. A. 278; Hot Springs Independent School Dist. No. 10 v. First Nat. Bank (C. C. 1894) 61 Fed. 417.

An application to secure the application to plaintiff's claim against an insolvent national bank of funds in the hands of a receiver of the bank, appointed by the comptroller of the currency, is within the jurisdiction of the federal circuit court, as being one "arising under the laws of the United States," since the object of the suit is to control the official conduct of the receiver, appointed under the national banking laws, and his defense must rest on the interpretation of those laws. Grant v. Spokane Nat. Bank (C. C. 1891) 47 Fed. 673.

A suit to compel the receiver of a national bank to pay a certain claim out of the bank assets is removable as being a suit arising under the laws of the United States. Hot Springs Independent School Dist. No. 10 v. First Nat. Bank (C. C. 1894) 61 Fed. 417.

A suit, brought against the receiver of an insolvent national bank, as such, to establish a claim of the plaintiff as a depositor in the bank, is a case arising under the laws of the United States, of which the United States circuit court has jurisdiction, irrespective of the citizenship of the parties. Bartley v. Hayden (C. C. 1896) 74 Fed. 913.

230. —— **Suit on officer's bond.**—A suit on the official bond of the cashier of a national bank, conditioned for the faithful performance of the duties thereof "according to law and the by-laws" of the bank, involves a federal question, and is maintainable in a federal court, irrespective of the citizenship of the parties. Walker v. Windsor Nat. Bank (1893) 56 Fed. 76, 5 C. C. A. 421.

231. —— **Taxation of shares.**—An action to enforce a right conferred by R. S. § 5219, post, § 9784, regarding the taxation of property in the shares of national banking associations, is a suit arising "under the laws of the United States." Stanley v. Board of Sup'rs

of Albany Co. (C. C. 1881) 6 Fed. 561.

A bill to enjoin the collection of taxes assessed against a national bank and against the stockholders on their shares, on the grounds that the taxation was double, that the stockholders were not allowed to set off debts against the valuation of their shares, and that the board of equalization illegally increased the assessment, raises the federal question of the validity of the tax, under R. S. § 5219, post, § 9784, prescribing the method in which national bank shares may be taxed. Sioux Falls Nat. Bank v. Swenson (C. C. 1892) 48 Fed. 621; Dakota Nat. Bank v. Same, Id. 626.

232. Actions by or against receivers appointed by federal courts.—An action involving the acts and rights of a receiver appointed by a federal court arises under the laws of the United States, and is within the jurisdiction of a federal court. Keihl v. City of South Bend (1896) 76 Fed. 921, 22 C. C. A. 618, 36 L. R. A. 228; Sullivan v. Swain (C. C. 1899) 96 Fed. 259.

The mere order of a federal court appointing a receiver on a creditor's bill does not enable the receiver to invoke federal jurisdiction apart from the jurisdiction in a creditor's suit, where his action did not originate in the order of appointment, and did not depend on assignments to him by the debtor, and where no right under virtue of the appointment or assignment is alleged to have been denied. Pope v. Louisville, N. A. & C. Ry. Co. (1899) 19 Sup. Ct. 500, 502, 173 U. S. 573, 43 L. Ed. 814.

An action against a receiver of a state corporation does not arise under the Constitution and laws of the United States merely because the receiver was appointed by a federal court. Rural Home Tel. Co. v. Powers (C. C. 1910) 176 Fed. 986.

A petition against a railroad company in the possession of a receiver appointed by the federal court to quiet plaintiff's title or to declare a forfeiture in his favor to certain realty, color of title to which is vested in the railroad company, and the legal custody of which without any other title or interest is held by the receiver, presents no federal question. The title was in the railroad company if not forfeited, and in plaintiff if it was forfeited, and was not in the receiver. Monnett v. Columbus, S. & H. Ry. Co. (1904) 26 Ohio Cir. Ct. R. 469.

A petition against a railroad company in the possession of a receiver under appointment of a federal court for the cancellation of certain writings alleged to have been fraudulently obtained from plaintiff by the receiver involved no federal question. Id.

233. Actions by or against United States officers.—See, also, post, subdivision 20, and notes thereunder.

The federal courts have jurisdiction of suits in the name of the postmaster general on bonds given to him by a deputy postmaster for the faithful performance of his duty. Postmaster General v. Early (1827) 12 Wheat. 136, 6 L. Ed. 577.

A suit on the bond of a clerk of a court of the United States, which depends upon the scope and effect of the bond and the meaning of the statutes in conformity with which it was given, is a suit arising under the laws of the United States, of which a federal court has original jurisdiction without diversity of citizenship. Howard v. U. S. (1902) 22 Sup. Ct. 543, 546, 184 U. S. 676, 46 L. Ed. 754.

In an action against the marshal of the United States court for trespass in seizing, under writs of attachment from the United States court, certain goods belonging to plaintiffs, where the marshal justifies under process from such court, the validity and effect of such process must be settled by laws of the United States in reference thereto. Ellis v. Norton (C. C. 1883) 16 Fed. 4.

An action of trespass against a United States marshal, where a part of the plaintiff's case is to make the marshal liable for the acts of his deputy, and a part of the defense is justification under process from a United States court, arises under the laws of the United States, and must be tested by such laws. Id.

Where a United States marshal, under an execution from a federal court, wrongfully takes possession of real estate, a federal court has jurisdiction of a suit to redress the wrong. Front St. Cable Ry. Co. v. Drake (C. C. 1895) 65 Fed. 539.

A federal court has original jurisdiction of an action against a collector of internal revenue, growing out of the administration of his office, only on the ground of diversity of citizenship, and where the requisite jurisdictional amount is involved. Cincinnati Brewing Co. v. Bettman (C. C. 1900) 102 Fed. 16.

An action to recover damages for the illegal arrest and imprisonment of the plaintiff under the laws of the state, where the claimed illegality is based upon allegations that plaintiff is a tribal Indian, and not subject to state jurisdiction, and that defendants, in instituting the prosecution against him, acted in their official capacity as Indian agent and Indian school superintendent, respectively, of the United States, involves the construction of the laws and treaties of the United States, and is of federal cognizance. Peters v. Malin (C. C. 1900) 104 Fed. 849.

That the defendant was an officer of the United States and claimed to have been acting under an act of Congress in doing the acts complained of did not give a federal court original jurisdiction under Judiciary Act March 3, 1887, §§ 1, 2. City of Stanfield v. Umatilla

River Water Users' Ass'n (C. C. 1911) 192 Fed. 596.

An arrest, by order of the president, of a person not subject to military law, is not warranted by law, so far as to give the federal courts jurisdiction of a case arising thereupon. Jones v. Seward (N. Y. 1863) 40 Barb. 563.

234, 235. Actions on bonds of government contractors.—An action on bond under post. § 6923, is within this provision. Mullin v. U. S. (1901) 109 Fed. 817, 48 C. C. A. 677, writ of error dismissed Fidelity & Deposit Co. of Maryland v. U. S. (1902) 22 Sup. Ct. 940, 46 L. Ed. 1266.

An action by the United States on relation of a materialman against a government contractor and a surety to recover on the contractor's bond to the government, as required by Act Aug. 13, 1894, c. 280, § 1, 28 Stat. 278, for materials furnished to enable him to perform the contract, constituted a case arising under the Constitution or laws of the United States, and was therefore within the jurisdiction of the federal courts, as provided by Act March 3, 1875, as amended by Act March 3, 1887, and corrected by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433. U. S. v. Axman (C. C. 1906) 152 Fed. 816.

236. Obstruction of the mails.—To constitute a knowing and willful obstruction of the passage of the mails, or of a vehicle, horse, or carrier carrying the same, which is prohibited by R. S. § 3995, post, § 10371, the act must be in itself unlawful. The refusal of persons operating a toll road, under a franchise which does not exempt mail carriers from payment of toll thereon, to permit a mail carrier to pass their gates without payment of toll, is not unlawful, or within such section, so as to sustain the jurisdiction of a federal court over a suit by the mail contractor for an injunction and damages, on the ground that it involves a federal question. Harper v. Endert (C. C. 1900) 103 Fed. 911.

237. Bankrupt estates.—Under Bankruptcy Act 1867, c. 176, § 2 (R. S. § 4979), conferring upon United States circuit courts general jurisdiction of bankruptcy proceedings, a circuit court of the United States had, regardless of the citizenship of the parties, jurisdiction of a suit against an assignee in bankruptcy brought by any person claiming an adverse interest in any part of the assets transferable to or vested in the assignee. Burbank v. Bigelow (1875) 92 U. S. 179, 23 L. Ed. 542.

A suit arises under the laws of the United States when brought by persons not parties to a bankruptcy proceeding in opposition to the adjudication and appointment of trustees therein, and to have the trustees restrained from prosecuting an equity suit against them in a state court. Hull v. Burr (1914) 34 Sup. Ct. 892, 234 U. S. 712, 58 L. Ed. 1557, affirming decree (1913) 206 Fed. 1, 124 C. C. A. 135.

A bill by an assignee in bankruptcy to set aside a fraudulent conveyance by the bankrupt is a case arising under the constitution and laws of the United States, of which the federal courts have jurisdiction, irrespective of the citizenship of the parties. Woolridge v. McKenna (C. C. 1881) 8 Fed. 650.

238. Indians and Indian lands.—The claim that grazing cattle owned by a Jesuit society are exempt from state taxation, based either upon the theory that, because the income of the society was devoted to the charitable work of improving and educating the Indians on the Flathead reservation, in Montana, the entire beneficial use or ownership of the property taxed was in tribal Indians, or upon the ground that the federal government, by permitting and approving the work of the society, and by aiding it from time to time by making appropriations in its behalf, had constituted it one of the agencies to carry out its obligation to the Indians, is too clearly lacking in merit to confer jurisdiction on a federal court. Montana Catholic Missions v. Missoula County (1906) 26 Sup. Ct. 197, 200 U. S. 118, 50 L. Ed. 398.

State courts were not given jurisdiction of controversies necessarily involving a determination of the title, and, incidentally, of the right to the possession of Indian allotments while the same were held in trust by the United States, by the provision of Act Aug. 15, 1894, c. 290, 28 Stat. 286, delegating to the federal Circuit Courts the power to determine such questions, since the purpose of that act to continue the exclusive federal control over disputes concerning allotments which, prior to that act, could only have been decided by the Secretary of the Interior, is manifested by its provision that a judgment or decree in any such controversy shall be certified by the court to the Secretary of the Interior, and by the provision of Act Feb. 6, 1901, c. 217, 31 Stat. 760, that in such suits "the parties thereto shall be the claimant as plaintiff and the United States as party defendant." McKay v. Kalyton (1907) 27 Sup. Ct. 346, 204 U. S. 458, 51 L. Ed. 566, reversing judgment Kalyton v. Kalyton (1903) 74 P. 491, 45 Or. 116.

Allegations in an action of ejectment that defendants were asserting ownership under a certain deed, which was void under congressional legislation restricting alienation of lands allotted to the Choctaw and Chickasaw Indians, does not present a case arising under the laws of the United States of which a federal Circuit Court has jurisdiction. Taylor v. Anderson (1914) 34 Sup. Ct. 724, 234 U. S. 74, 58 L. Ed.

1218, affirming judgment (C. C. 1911) 197 Fed. 383.

It is a federal question whether, by force of the ordinance of 1787, and of treaties with the Miami Indians, certain lands in the possession and ownership of a Miami chief and his descendants are exempt from taxation. Wau-pe-man-qua v. Aldrich (C. C. 1886) 28 Fed. 489.

An action by a tribal Indian, living on a reservation, to recover damages for his arrest by defendants for violation of a state statute, on the ground that such statute was not applicable to the plaintiff, involves a construction of the laws and treaties of the United States, and is of federal cognizance. Y-ta-tah-wah v. Rebock (C. C. 1900) 105 Fed. 257.

An action by a tribal Indian against the agent of his tribe for causing plaintiff's arrest upon a false charge of violating the laws of the United States and for fraudulently securing his conviction, the issue being whether plaintiff was in fact guilty of the offense charged, is one arising under the laws of the United States, of which a federal court has jurisdiction. Ma-ka-ta-wah-qua-twa v. Rebok (C. C. 1901) 111 Fed. 12.

The foundation of an action for false imprisonment is the fact that such imprisonment was brought about by the issuance and enforcement of void or irregular process; and where the plaintiff is a tribal Indian, and the wrong complained of is his arrest and imprisonment under process issued by a state court, for the violation of a state law to which it is alleged he was not subject, the issue whether such process was void or not depends primarily upon questions arising under the laws and treaties of the United States, and a federal court has jurisdiction of the action. Peters v. Malin (C. C. 1901) 111 Fed. 244.

Allegation in ejectment to recover certain land that it was part of an Indian allotment, and subject to Act July 1, 1902, held insufficient to show that the construction of the act would come in question, and to establish federal jurisdiction on that ground. Taylor v. Anderson (C. C. 1911) 197 Fed. 383.

239, 240. Federal procedure.—Suit on supersedeas bond given under R. S. §§ 1000, 1007, post, §§ 1660, 1666, to supersede judgment in action for breach of contract pending writ of error, arises out of the laws of the United States within this section. American Surety Co. of New York v. Schultz (1915) 35 Sup. Ct. 525, 237 U. S. 159, 59 L. Ed. 892.

Action to enforce liability on a bond in a proceeding in a federal court arises under the laws of the United States, of which a United States court has jurisdiction. American Surety Co. of New York v. Schultz (1915) 223 Fed. 280, 138 C. C. A. 522.

A supersedeas bond is an indemnity given pursuant to federal law, and the rights of the parties depend on a law of the United States, governing jurisdiction of federal courts. Id.

The laws of a state respecting the enforcement of judgments, adopted, pursuant to R. S. § 916, post, § 1540, by a rule of the federal district court for the government of judgment liens of such court, and for the guidance of the marshal in levying executions, derive their force from the United States, and not from the state; and a suit involving the question whether or not the marshal's proceedings in levying an execution issued out of the federal court were in conformity with such rule is a question arising under the laws of the United States, and cognizable by the federal courts. Sowles v. Witters (C. C. 1891) 46 Fed. 497.

An action on an attachment bond executed in a suit pending in a national court presents a federal question, within the meaning of the judiciary act; the effect of R. S. § 915, post, § 1539, giving the same remedies by attachment in common-law causes in the circuit and district courts as are provided by the laws of the state in which such courts are held, being to make the state statutes in that regard laws of the United States. Files v. Davis (C. C. 1902) 11[illegible] Fed. 465.

241. Pleading.—A mere averment that the action arises out of a law of the United States is insufficient to confer jurisdiction; the facts showing it must be stated. Dowell v. Griswold (C. C. 1877) Fed. Cas. No. 4,041.

An averment that the action involves the "construction and consideration of the laws of the United States on the subject of mines and mining, and the validity and title to mining claims occurring and arising thereunder," held insufficient to show a cause of action arising under the laws of the United States. The complaint must state that there is a controversy between the parties as to the meaning and effect of those laws. It is not sufficient that the right to recover is based upon an act of congress. Holland v. Ryan (C. C. 1883) 1[illegible] Fed. 1.

(D) Cases arising under treaties

See, also, Const. art. 3, § 2, cl. 1, and notes thereunder.

242. Rights involved.—A party litigant must claim title under the treaty himself. It is not enough that he claims it for a stranger in order to defeat the title set up by the other party. Verden v. Coleman (1861) 66 U. S. (1 Black) 472, 17 L. Ed. 161.

A case arising from or growing out of a treaty involves rights given or protected by the treaty. U. S. v. Cook Settlers (1893) 13 Sup. Ct. 650, 6[illegible] 148 U. S. 427, 37 L. Ed. 509.

When both parties claim under M[illegible]

ican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, and the controversy is only as to what were the rights thus granted and confirmed, the suit is not one arising under said treaty, so as to confer jurisdiction on a federal court. Crystal Springs Land & Water Co. v. City of Los Angeles (C. C. 1897) 82 Fed. 114, affirmed (1900) 20 S. Ct. 573, 177 U. S. 169, 44 L. Ed. 720.

A suit to establish water rights connected with lands included in a grant from the Mexican government, which rights are claimed to be within the protection of the treaty with Mexico, is held to involve no federal question for the purpose of giving jurisdiction to the federal courts. Crystal Springs Land & Water Co. v. City of Los Angeles (1900) 20 S. Ct. 573, 177 U. S. 169, 44 L. Ed. 720, affirming decree (C. C. 1897) 82 Fed. 114.

243. Confiscation of property.—Where the question is whether a confiscation of the property of British subjects, under a state law, was complete before the treaty of peace of 1783, the courts of the United States have jurisdiction. Smith v. Maryland (1810) 10 U. S. (6 Cranch) 286, 3 L. Ed. 225.

244. Indian treaties.—It is a federal question whether, by force of the ordinance of 1787, and of treaties with the Miami Indians, certain lands in the possession and ownership of a Miami chief and his descendants are exempt from taxation. Wau-pe-man-qua v. Aldrich (C. C. 1886) 28 Fed. 489.

245. Land grants.—If a defendant in ejectment set up an outstanding title in a British subject, which he contends is protected by the treaty of 1794, and that the title is therefore out of the plaintiff, this is not a case arising under the treaty, but, if the British subject in whom the outstanding title was supposed to have vested or if his heirs had claimed the land, it would have been a case under the treaty. Owings v. Norwood (1809) 9 U. S. (5 Cranch) 344, 3 L. Ed. 120.

An action setting up a claim to land will come within the jurisdiction of the federal courts, if the title set up by the defendants was in any way protected by a treaty of the United States. City of New Orleans v. De Armas (1835) 34 U. S. (9 Pet.) 224, 9 L. Ed. 109.

A suit to establish water rights connected with lands included in a grant from the Mexican government claimed to be within the protection of the treaty with Mexico held to involve no federal question so as to give jurisdiction to the federal courts. Crystal Springs Land & Water Co. v. Los Angeles (1900) 20 Sup. Ct. 573, 177 U. S. 169, 44 L. Ed. 720.

When both parties claim under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadalupe Hidalgo, and the controversy is only as to what were the rights thus granted and confirmed, the suit is not one arising under said treaty, so as to confer jurisdiction on a federal court. Crystal Springs Land & Water Co. v. City of Los Angeles (C. C. 1897) 82 Fed. 114.

An action in ejectment to recover land claimed under a Spanish grant, protected by the Louisiana purchase treaty and subsequent confirmatory acts of Congress, does not involve the effect or validity of a treaty or law of the United States to confer jurisdiction on a federal court on that ground, where it appears from the petition that plaintiff's rights depend solely upon questions of fact as to whether the land in suit was within the boundaries of the original grant, or was occupied by his grantors at the time necessary to bring it within the provisions of the confirmatory acts. Joy v. City of St. Louis (C. C. 1903) 122 Fed. 524, order affirmed (1906) 26 S. Ct. 478, 201 U. S. 332, 50 L. Ed. 776.

246. War claims.—A claim of a citizen of France against the United States for cotton taken during the civil war was, under a treaty between the two nations, submitted to a commission for adjudication, by his widow and administratrix. Held that, after the commission has passed upon the claim, it is no longer a "war claim," and the district court has jurisdiction of an action for its recovery. Bodemuller v. U. S. (D. C. 1889) 39 Fed. 437.

247. Pleading.—A complaint in ejectment against private individuals, which alleges that plaintiff was ousted in violation of Const. U. S. Amend. 5 and of the provision of the treaty with France of October 21, 1803, for the protection of the inhabitants of the territory ceded in the enjoyment of their property, does not show a cause arising under the Constitution or a treaty of the United States, where no right, title, privilege, or immunity is asserted as derived from the Constitution or treaty, as against the defendants, and it is not charged that they took possession by direction of the United States government. Filhiol v. Maurice (1902) 22 Sup. Ct. 560, 561, 185 U. S. 108, 46 L. Ed. 827.

Allegations in a bill to quiet title that defendant's adverse claims are based upon an erroneous construction of the Treaty of Guadalupe Hidalgo (9 Stat. 922), and Act March 3, 1851, c. 41, 9 Stat. 631, creating a board of land commissioners, held not to present a federal question. Devine v. Los Angeles (1906) 26 Sup. Ct. 652, 202 U. S. 313, 50 L. Ed. 1046.

Averments in a complaint in ejectment that defendant's possession rests upon an infraction by the United States of its treaty obligations, and upon a

taking of private property for public use without just compensation, do not bring the case within the jurisdiction of a federal circuit court, where the averments respecting plaintiff's title disclose no case within the jurisdiction of that court. Filhiol v. Torney (1904) 24 Sup. Ct. 698, 699, 194 U. S. 356, 48 L. Ed. 1014.

Allegations in a bill to quiet title, framed under Code Civ. Proc. Cal. § 738, that defendant's adverse claims are based upon an erroneous construction of Treaty of Guadalupe Hidalgo (9 Stat. 922), and Act March 3, 1851, c. 41, 9 Stat. 631, and upon certain enumerated acts of the California Legislature, and ordinances and charters of the city of Los Angeles, adopted and approved in pursuance of such construction, do not present a case arising under the federal Constitution, laws, or treaties, of which a federal court has jurisdiction without diversity of citizenship. Devine v. Los Angeles (1906) 26 Sup. Ct. 652, 657, 202 U. S. 313, 50 L. Ed. 1046.

VI. SUITS BETWEEN CITIZENS OF DIFFERENT STATES

(A) Diversity of citizenship as jurisdictional ground

As to what constitutes citizenship and its acquisition or change, see notes under Const. art. 3, § 2, cl. 1.

248. In general.—A grantee of land who had agreed to pay certain notes of the grantor, secured by mortgage on the land, failed to perform his agreement; whereupon an execution issued on the mortgage, which the heirs of the grantor were obliged to pay. The grantor and grantee were citizens of Louisiana, and all the heirs of the grantor were either aliens or citizens of another state. Held, that said heirs might maintain an action against the grantee, in the circuit court of the United States for Louisiana, for the breach of the agreement. Weems v. George (1851) 13 How. 190, 14 L. Ed. 108.

The courts of the United States have jurisdiction of a suit against a trustee appointed by a state court to liquidate the affairs of a corporation of the state, brought by nonresident stockholders against the trustee and resident stockholders; the nonresident stockholders owning a fifth part of the capital stock of the corporation and suing for themselves and such of the stockholders as were not citizens. Bacon v. Robertson (1855) 18 How. 480, 488, 15 L. Ed. 499.

The theory on which jurisdiction is conferred on the courts of the United States in controversies between citizens of different states has its foundation in the supposition that possibly the state tribunal may not be impartial between its own citizens and nonresidents. Pease v. Peck (1855) 18 How. 595, 599, 15 L. Ed. 518.

This section gives jurisdiction over controversies between citizens of di ferent states. Brown v. Keene (183 8 Pet. 112, 115, 8 L. Ed. 885; Bak v. Morton (1870) 12 Wall. 150, 15 20 L. Ed. 262; Hayden v. Drury (C. 1880) 3 Fed. 782, 786 (reverse [1884] 4 Sup. Ct. 405, 111 U. S. 22 28 L. Ed. 408); Tiffany v. Wilce (C. 1888) 34 Fed. 230; Hubbard v. Ch cago. M. & St. P. Ry. Co. (C. C. 191 176 Fed. 994; Murdock v. Martin (C. 1910) 178 Fed. 307; Van Brimmer Texas & P. Ry. Co. (C. C. 1911) 19 Fed. 394.

A federal court has jurisdiction o the ground of diversity of citizenshi where the parties designated in the bi as plaintiffs and defendants are re spectively citizens of different state and nothing appears from the bill whic requires their rearrangement. Loose Hartford Pulp Plaster Corp. (C. 1908) 159 Fed. 318; Reich v. Tenne see Copper Co. (D. C. 1913) 209 Fe 880.

Two citizens of different states ma maintain an action against a citizen o a third state in the federal court for th district of the latter's residence. Swee ney v. Carter Oil Co. (1905) 26 Su Ct. 55, 56, 199 U. S. 252, 50 L. Ed 178.

The requisite diversity of citizenshi exists where the plaintiff, a citizen o Iowa, sues a citizen of New York an two citizens of Colorado in the federa court of the latter state. Schiffer v Anderson (1906) 146 Fed. 457, 76 C C. A. 667.

The federal court has jurisdiction i equity in the district of Maine, over a respondent, a citizen of New Hamp shire, found in its district, and there served with process, when all the or ators are citizens of other states, an all the other respondents are citizen of Maine. Wiggins v. European & N A. Ry. Co. (C. C. 1868) Fed. Cas. No 17,626.

A federal court has jurisdiction of a suit by a nonresident, where some o defendants reside in the state where the suit is brought, and other defendant reside in other states, where the latte appear and submit to the jurisdiction Act Feb. 28, 1839, § 1. Pond v. Ver mont Val. R. Co. (C. C. 1874) Fed Cas. No. 11,265.

An Illinois corporation brought suit in the United States court for the district of Minnesota against S., F. & Co., a firm composed of citizens of the state of Illinois, and their agents, Y. & H., who were citizens of the state of Minnesota, to restrain them from infringing its trade-mark in the state of Minnesota. Held, on motion to dismiss for want of jurisdiction on the ground that the substantial controversy was between citizens of Illinois, Y. & H. having by answer disclaimed the alleged agency and denied any interest in the suit, that the circuit court had jurisdiction; the controversy being with Y.

& H., notwithstanding the disclaimer. Frazer Lubricator Co. v. Frazer (C. C. 1885) 23 Fed. 305.

Where plaintiff is a citizen of Minnesota, and defendant is a foreign corporation doing business in Minnesota, the federal court for the district of Minnesota has original jurisdiction of the controversy when that question depends solely on the diverse citizenship of the parties. Short v. Chicago, M. & St. P. Ry. Co. (C. C. 1888) 34 Fed. 225.

Defendant held not a citizen of Missouri, so as to confer jurisdiction on a federal court sitting in that state of a suit by complainant, a citizen of New York. Hammerstein v. Lyne (D. C. 1912) 200 Fed. 165.

In an action by a contractor, citizens of states other than Louisiana, and against a Louisiana school board, a nonresident surety on the contractor's bond to claimants under a contract for the construction of a school building, under Act La. No. 167 of 1912, to settle the claims and recover the balance, the parties, grouped with the contractor and surety on one side and the board and the claimants on the other, showed sufficient diversity of citizenship to sustain federal jurisdiction. John W. Hood Co. v. Board of School Directors of Tangipahoa Parish (D. C. 1914) 210 Fed. 384.

A bill by nonresident stockholders and directors against the corporation and resident stockholders and directors for dissolution on the ground that it was without sufficient capital to conduct business, but not alleging any mismanagement or disagreement, and making it appear that their interests were identical, did not disclose a controversy for which a federal court had jurisdiction on the ground of diversity of citizenship. Hirsch v. Independent Steel Co. of America (C. C. 1911) 196 Fed. 104, appeal dismissed Same v. Taylor (1912) 32 Sup. Ct. 841, 225 U. S. 698, 56 L. Ed. 1263.

249. Diversity of citizenship alone as sufficient to confer jurisdiction.—Where federal jurisdiction in a suit by a stockholder was sustainable on the theory that it involved a controversy between citizens of different states, the bill was not demurrable because the controversy was not one arising under the Constitution or laws of the United States. Howard v. National Telephone Co. (C. C. 1910) 182 Fed. 215.

250. Existence of diversity of citizenship as prerequisite to jurisdiction.—Diversity of citizenship between citizens of different states is indispensable to the jurisdiction of a federal court on that ground. New Orleans Mail Co. v. Flanders (1870) 79 U. S. (12 Wall.) 130, 20 L. Ed. 249; Christmas v. Russell (1871) 14 Wall. 69, 80, 20 L. Ed. 762; Maxwell v. Federal Gold & Copper Co. (1907) 155 Fed. 110, 83 C. C. A. 570; Diederich v. W. Schneider Wholesale Wine & Liquor Co. (1912) 195 Fed. 35, 115 C. C. A. 37; Dodge v. Perkins (C. C. 1827) Fed. Cas. No. 3,954; Boucicault v. Hart (C. C. 1875) Fed. Cas. No. 1,692; Chicago, St. L. & N. O. R. Co. v. McComb (C. C. 1879) Fed. Cas. No. 2,670; Lefkowitz v. Foster Hose Supporter Co. (C. C. 1908) 161 Fed. 367; Vose v. Roebuck Weather-Strip & Wire Screen Co. (D. C. 1914) 216 Fed. 523; State of Missouri ex rel. Barker v. Chicago & A. R. Co. (D. C. 1914) 216 Fed. 562; Mills v. Central R. Co. of New Jersey (1884) 7 N. J. Law J. 230; Shohoney v. Quincy, O. & K. C. Ry. Co. (1909) 122 S. W. 1025, 223 Mo. 649.

A marshal of the United States who, under a provisional warrant in bankruptcy, has, after receiving a bond of indemnity under general order No. 13 in bankruptcy, seized goods as the property of the debtor, and been sued for damages for such seizure in an action of trespass in a state court, by a third person, who claims that the goods were his property at the time of the seizure, cannot maintain a suit in equity in a court of the United States for an injunction to restrain the further prosecution of the action of trespass, the parties to the suit in equity being citizens of the same state. Leroux v. Hudson (1883) 3 Sup. Ct. 309, 109 U. S. 468, 27 L. Ed. 1000; Schott v. Same (1883) 3 Sup. Ct. 314, 109 U. S. 477, 27 L. Ed. 1003.

A federal court has no jurisdiction on the ground of diversity of citizenship, of a suit by the mortgagee of a waterworks company to enforce a municipality's contract with the company, where there is no diversity of citizenship between the municipality and the company, and where the interests of the company and the mortgagee are not antagonistic. Dawson v. Columbia Ave. S. F., S. D., T. & T. Co. (1905) 25 Sup. Ct. 420, 421, 197 U. S. 178, 49 L. Ed. 713.

Where both parties to a suit for infringement of a registered trade-mark and for unfair competition were citizens of the same state, federal jurisdiction would not obtain, in the absence of provisions in the bill or decree confining the relief prayed for or granted to commerce with foreign nations, among the several states, or with the Indian tribes. Bernstein v. Danwitz (C. C. 1911) 190 Fed. 604.

Under this section, where absence of diversity of citizenship affirmatively appears on the face of a bill to set aside an adjudication in bankruptcy and for other relief, the bill must be dismissed for want of jurisdiction. Gibbons v. Dexter Horton Trust & Savings Bank (D. C. 1915) 225 Fed. 424.

A judgment entered in a federal court on a bond with warrant of attorney was set aside, both parties being citi-

zens of the state. Byrne v. Holt (C. C. 1808) Fed. Cas. No. 2,272.

251. Necessity of diversity of citizenship between all parties plaintiff and defendant.—A controversy is not "between citizens of different states," so as to give jurisdiction to the federal courts, unless all the persons on one side of it are citizens of different states from all the persons on the other side. Strawbridge v. Curtiss (1806) 3 Cranch, 267, 2 L. Ed. 435; Corporation of New Orleans v. Winter (1816) 1 Wheat. 91, 4 L. Ed. 44; Conolly v. Taylor (1829) 2 Pet. 556, 7 L. Ed. 518; Louisville C. & C. R. Co. v. Letson (1844) 2 How. 497, 11 L. Ed. 353; Ohio & M. R. Co. v. Wheeler (1861) 1 Black, 286, 17 L. Ed. 130; Susquehanna & W. V. Railroad & Coal Co. v. Blatchford (1870) 11 Wall. 172, 20 L. Ed. 179; Gage v. Carraher (1880) 154 U. S. 656, 14 Sup. Ct. 1190, 25 L. Ed. 989; Shainwald v. Lewis (1883) 108 U. S. 158, 2 Sup. Ct. 385, 27 L. Ed. 691; Cambria Iron Co. v. Ashburn (1886) 6 Sup. Ct. 929, 930, 118 U. S. 54, 30 L. Ed. 60; Wilson v. Oswego Tp. (1894) 14 Sup. Ct. 259, 262, 151 U. S. 56, 38 L. Ed. 70; Watson v. Bonfils (1902) 116 Fed. 157, 53 C. C. A. 535, writ of certiorari denied Burlington Trust Co. v. Porter (1902) 23 Sup. Ct. 841, 187 U. S. 641, 47 L. Ed. 345; Bissell v. Horton (C. C. 1808) Fed. Cas. No. 1,448; Ketchum v. Farmers' Loan & Trust Co. (C. C. 1845) Fed. Cas. No. 7,736; Wilson v. Blodget (C. C. 1848) Fed. Cas. No. 17,792; Hubbard v. Northern R. R. Co. (C. C. 1853) Fed. Cas. No. 6,818; Tuckerman v. Bigelow (C. C. 1857) Fed. Cas. No. 14,228; Ex parte Girard (C. C. 1858) Fed. Cas. No. 5,457; Teal v. Walker (C. C. 1877) Fed. Cas. No. 13,812; In re Frazer (C. C. 1878) Fed. Cas. No. 5,068; Chicago, St. L. & N. O. R. Co. v. McComb (C. C. 1879) Fed. Cas. No. 2,670; Burke v. Flood (C. C. 1880) 1 Fed. 541; Ruble v. Hyde (C. C. 1880) 3 Fed. 330; Dormitzer v. Illinois & St. L. Bridge Co. (C. C. 1881) 6 Fed. 217; Walsh v. Memphis, C. & N. W. R. Co. (C. C. 1881) 6 Fed. 797; Smith v. Horton (C. C. 1881) 7 Fed. 270; Hanover Fire Ins. Co. v. Keogh (C. C. 1881) 7 Fed. 764; Karns v. Atlantic & O. R. Co. (C. C. 1881) 10 Fed. 309; Mitchell v. Tillotson (C. C. 1882) 12 Fed. 737; Price v. Foreman (C. C. 1882) 12 Fed. 801; Watson v. Evers (C. C. 1882) 13 Fed. 194; Connell v. Utica, U. & E. R. Co. (C. C. 1882) 13 Fed. 241; Le Mars v. Iowa Falls & S. C. R. Co. (C. C. 1882) 48 Fed. 661, 662; Ouachita & M. R. Packet Co. v. Aiken (C. C. 1883) 16 Fed. 890; Holland v. Ryan (C. C. 1883) 17 Fed. 1; Walser v. Memphis, C. & N. W. Ry. Co. (C. C. 1893) 19 Fed. 152; Grinnell v. Johnson (C. C. 1886) 28 Fed. 2; Saginaw Gaslight Co. v. City of Saginaw (C. C. 1886) 28 Fed. 529; Beebe v. Louisville, N. O. & T. R. Co. (C. C. 1889) 39 Fed. 481, 483; Rich v. Bray (C. C. 1889) 37 Fed. 273, 2 L. R. 225; Arkansas Valley Smelting Co. Cowenhoven (C. C. 1890) 41 Fed. 45 Security Co. v. Pratt (C. C. 1894) Fed. 405; Consolidated Water Co. Babcock (C. C. 1896) 76 Fed. 24 Davis v. County Court of Randol County (C. C. 1898) 88 Fed. 705; Par inson v. Barr (C. C. 1900) 105 Fed. 8 Gage v. Riverside Trust Co. (C. 1906) 156 Fed. 1002; Key West Cig Mfg. Ass'n v. Rosenbloom (C. C. 190 171 Fed. 296; State of Maine Lumb Co. v. Kingfield Co. (D. C. 1914) 2 Fed. 902; Calderwood v. Braly (186 28 Cal. 97; Miller v. Lynde (Cor 1796) 2 Root, 444, 1 Am. Dec. 86; Go don v. Green (1873) 113 Mass. 25 Baxter v. Proctor (1885) 139 Ma 151, 29 N. E. 542; Fisk v. Chicago, I. & P. R. Co. (N. Y. 1868) 53 Ba 472; Miller v. Kent (N. Y. 1881) How. Prac. 451; Smith v. St. Lo Mut. Life Ins. Co. (1876) 2 Tenn. C 656; Clarke v. Figgins (1886) 27 Va. 663; Kennedy v. Ehlen (1888) W. Va. 540, 8 S. E. 398.

If there are several coplaintiffs, ea must be competent to sue, or if the are several defendants, each must liable to be sued, in a federal court, give that court jurisdiction. Stra bridge v. Curtiss (1806) 3 Cranch, 26 2 L. Ed. 435; Cameron v. McRober (1818) 16 U. S. (3 Wheat.) 591, 4 Ed. 467; Susquehanna & W. V. R. C. Co. v. Blatchford (1870) 11 Wa 172, 174, 20 L. Ed. 179; Hooe v. Jami son (1897) 17 Sup. Ct. 596, 597, 1 U. S. 395, 41 L. Ed. 1049; Florida Cen & P. R. Co. v. Bell (1900) 20 Sup. C 399, 403, 176 U. S. 321, 44 L. Ed. 48 Anderson v. Jackson (C. C.) Fed. Ca No. 357; Tuckerman v. Bigelow (C. 1857) Fed. Cas. No. 14,228; Sagina Gaslight Co. v. Saginaw (C. C. 188 28 Fed. 529, 531; Anderson v. Bas man (C. C. 1905) 140 Fed. 10; Mirabi Corp. v. Purvis (C. C. 1906) 143 Fe 926; Gage v. Riverside Trust Co. (C. 1906) 156 Fed. 1002; Blunt v. Sout ern Ry. Co. (C. C. 1907) 155 Fed. 49 A. R. Barnes & Co. v. Berry (C. 1907) 156 Fed. 72.

Where one or more of the complai ants, and one or more of the respon ents, are citizens of the same state, th is fatal to the jurisdiction of the Uni ed States court on the ground of dive sity of citizenship. Shainwald v. Lew (1883) 108 U. S. 158, 2 Sup. Ct. 38 27 L. Ed. 691 (affirming order [D. 1880] 5 Fed. 510, 6 Sawy. 585); Har cock v. Holbrook (1884) 5 Sup. Ct. 11 116, 112 U. S. 229, 28 L. Ed. 714 (r versing decree [C. C. 1881] 9 Fed. 353 Rand v. Walker (1886) 6 Sup. Ct. 76 771, 117 U. S. 340, 29 L. Ed. 90 Brooks v. Clark (1886) 119 U. S. 50 7 Sup. Ct. 301, 30 L. Ed. 482; Brown Trousdale (1891) 138 U. S. 389, 11 Su Ct. 308, 34 L. Ed. 987; Byers v. M Auley (1893) 13 Sup. Ct. 906, 910, 14 U. S. 608, 37 L. Ed. 867; Clauss

Palmer Union Oil Co. (1915) 222 Fed. 870, 138 C. C. A. 296; Hawes v. First Nat. Bank of Madison (1915) 229 Fed. 51, 143 C. C. A. 645; Bargh v. Page (C. C. 1845) Fed. Cas. No. 980; Hubbard v. Northern R. Co. (C. C. 1853) Fed. Cas. No. 6,818; Lovejoy v. Washburne (C. C. 1863) Fed. Cas. No. 8,550; Hatch v. Chicago, R. I. & P. R. Co. (C. C. 1868) Fed. Cas. No. 6,204; Brigham v. Luddington (C. C. 1874) Fed. Cas. No. 1,874; Petterson v. Chapman (C. C. 1876) Fed. Cas. No. 11,042.

The requisite jurisdictional citizenship must exist as to each individual plaintiff. Sawyer v. Switzerland Marine Ins. Co. (C. C. 1878) Fed. Cas. No. 12,408; Van Brunt v. Corbin (C. C. 1878) Fed. Cas. No. 16,832 (affirmed Corbin v. Van Brunt [1881] 105 U. S. 576, 26 L. Ed. 1176); Mitchell v. Tillotson (C. C. 1882) 12 Fed. 737; Le Mars v. Iowa Falls & S. C. R. Co. (C. C. 1882) 48 Fed. 661, 662; Hancock v. Holbrook (C. C. 1886) 27 Fed. 401, 402 (affirmed [1887] 7 Sup. Ct. 341, 119 U. S. 586, 30 L. Ed. 538); Covert v. Waldron (C. C. 1888) 33 Fed. 311; Pittsburgh, C. & St. L. Ry. Co. v. Baltimore & O. R. Co. (1894) 61 Fed. 705, 10 C. C. A. 20 (reversing decree Baltimore & O. Ry. Co. v. Pittsburgh, C. & St. L. Ry. Co. [C. C. 1893] 55 Fed. 701); McDonald v. Seligman (C. C. 1897) 81 Fed. 753, 755; In re Stutsman County, N. D. (C. C. 1898) 88 Fed. 337; Gates Iron Works v. James E. Pepper & Co. (C. C. 1899) 98 Fed. 449; Cely v. Griffin (C. C. 1902) 113 Fed. 981; Elkins v. City of Chicago (C. C. 1902) 119 Fed. 957; Anderson v. Bassman (C. C. 1905) 140 Fed. 10; Mirabile Corp. v. Purvis (C. C. 1906) 143 Fed. 926; Caylor v. Cooper (C. C. 1908) 165 Fed. 757; Key West Cigar Mfg. Ass'n v. Rosenbloom (C. C. 1909) 171 Fed. 296; Carson v. Allegany Window Glass Co. (C. C. 1911) 189 Fed. 791; Carl Laemmle Music Co. v. Stern (D. C. 1913) 209 Fed. 129; Richardson v. Southern Idaho Water Power Co. (D. C. 1913) 209 Fed. 949; Columbia Digger Co. v. Rector (D. C. 1914) 215 Fed. 618; Whitaker v. Coudon (D. C. 1914) 217 Fed. 139; Hidden v. Washington-Oregon Corporation (D. C. 1914) 217 Fed. 303; Miller v. Lynde (Conn. 1796) 2 Root, 444, 1 Am. Dec. 86; Security Co. v. Pratt (1894) 65 Conn. 161, 32 Atl. 396; Paulk v. Ensign-Oskamp Co. (1905) 51 S. E. 344, 123 Ga. 467; Wilson v. Big Joe Block Coal Co. (1907) 113 N. W. 348, 135 Iowa, 531; Howland Coal & Iron Works v. Brown (1878) 76 Ky. (13 Bush) 681; Cincinnati, N. O. & T. P. Ry. Co.'s Receiver v. Finnell's Adm'r (1900) 108 Ky. 135, 55 S. W. 902, 22 Ky. Law Rep. 86, 57 L. R. A. 266; Cincinnati, N. O. & T. P. Ry. Co. v. Cook's Adm'r (1902) 113 Ky. 161, 67 S. W. 383, 23 Ky. Law Rep. 2410; McCabe's Adm'x v. Maysville & B. S. R. Co. (1902) 66 S. W. 1054, 23 Ky. Law Rep. 2328, 112 Ky. 861; Tesson v. Gusman (1874) 26 La. Ann. 248; New Orleans Canal & Banking Co. v. Recorder of Mortgages of Parish of Pointe Coupee (1875) 27 La. Ann. 291; New Orleans v. Seixas (1883) 35 La. Ann. 36; Diamond State Telephone Co. v. Blake (Md. 1907) 66 A. 631; Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co. (1872) 110 Mass. 70, 14 Am. Rep. 579; Broadway Nat. Bank v. Adams (1881) 130 Mass. 431; Danvers Sav. Bank v. Thompson, Id. 490; Danvers Sav. Bank v. Thompson (1882) 133 Mass. 182; Weeks v. Billings (1875) 55 N. H. 371; North River Steamboat Company v. Hoffman (1821) 5 Johns. Ch. 300; Fairchild v. Durand (1859) 8 Abb. Prac. 305; Republic Fire Ins. Co. v. Keogh (1881) 23 Hun, 644; Ludlow's Heirs v. Kidd's Heirs (1827) 3 Ohio (3 Ham.) 48; Middleton's Ex'rs v. Middleton (1878) 7 Wkly. Notes Cas. 144; Thompson v. Fitzgerald (1911) 82 A. 212, 233 Pa. 242; Williams v. Price (1817) 5 Munf. 507; Nulton v. Isaacs (Va. 1878) 30 Grat. 726; Guarantee Co. of North America v. First Nat. Bank (1898) 28 S. E. 909, 95 Va. 480; Bell v. Bell (1869) 3 W. Va. 183. But see National Union Bank v. Dodge (C. C. 1879) Fed. Cas. No. 10,053; Browne v. Browne (C. C. 1806) Fed. Cas. No. 2,035.

Where a petition for tort states a cause of action against a nonresident and a resident jointly, the federal court is without jurisdiction. American Bridge Co. v. Hunt (1904) 130 F. 302, 64 C. C. A. 548; Willard v. Chicago, B. & Q. R. Co. (1908) 165 Fed. 181, 91 C. C. A. 215; Jones' Adm'r v. Illinois Cent. R. Co. (1902) 66 S. W. 609, 26 Ky. Law Rep. 481; Illinois Cent. R. Co. v. Houchins (1905) 89 S. W. 530, 121 Ky. 526, 28 Ky. Law Rep. 499, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205; Illinois Cent. R. Co. v. Proctor (1905) 89 S. W. 714, 28 Ky. Law Rep. 598, 122 Ky. 92; Illinois Cent. R. Co. v. Leisure's Adm'r (1906) 90 S. W. 269, 28 Ky. Law Rep. 768; Illinois Cent. R. Co. v. Cane's Adm'x (1906) 90 S. W. 1061, 28 Ky. Law Rep. 1018; Dobson v. Southern Ry. Co. (1901) 40 S. E. 42, 129 N. C. 289; Jones v. Postal Telegraph Cable Co. (1911) 74 S. E. 492, 91 S. C. 273.

Act Cong. Feb. 28, 1839, making it "lawful for a court to entertain jurisdiction and proceed to the trial and adjudication of a suit between parties who may be properly before it, although there may be other defendants, any one or more of whom are not inhabitants of or found within the district when the suit is brought, or do not voluntarily appear thereto," is an enlargement of jurisdiction as to the character of the parties. The clause exempting absent defendants from the operation of the judgment or decree is an exception to this enlargement of jurisdiction, and

must be strictly applied. Louisville, C. & C. R. Co. v. Letson (1844) 43 U. S. (2 How.) 497, 11 L. Ed. 353.

Where, in an action to recover lands, brought in a state court, the real controversy is about the right to the possession of the land, and, so far as the title is concerned, citizens of New York are the only parties interested, and citizens of other states are made parties, who do not claim either title or possession, the case is not removable to United States courts, although, if plaintiffs establish their title, there may be a recovery against the citizens of other states jointly with a corporation of New York. Corbin v. Van Brunt (1881) 105 U. S. 576, 577, 26 L. Ed. 1176.

A. and B., citizens of Michigan, and C., D., and E., citizens of Ohio, filed a bill in the United States circuit court in Iowa against F., a citizen of New York, an Iowa corporation, an Illinois corporation, and G., a citizen of Ohio, to bring G. and F. to an accounting under a contract made by F. with complainants and others, by which he was to purchase a railroad at foreclosure sale, and hold the property in trust for the bondholders who should surrender their bonds to him to pay the purchase money, and contribute such other sums as might be needed; it being alleged that G. had become a trustee with F. of the proceeds of the sale, and that they claimed the same adversely to complainants and the other bondholders. Held, that although, as between themselves, complainants had separate interests under the contract which they need not have sued jointly to enforce, that having sued jointly, and there being such a conflict of interest between E. and G., both citizens of the same state, that they could not be placed on the same side of the controversy, the circuit court acquired no jurisdiction of the case under the act of March 3, 1875, c. 137, § 2, and could not render a decree dismissing the bill on its merits. Peninsular Iron Co. v. Stone (1887) 121 U. S. 631, 7 Sup. Ct. 1010, 30 L. Ed. 1020.

Where two citizens of Michigan and three citizens of Ohio filed a bill in a United States circuit court in Ohio against a citizen of New York, an Iowa corporation, and an Illinois corporation, and a citizen of Ohio, to bring the latter and the citizen of New York to an account under a contract made by the citizen of New York with complainants and others, by which he was to purchase a railroad at foreclosure sale, and hold the property in trust for the bondholders who should surrender their bonds to him to pay the purchase money and contribute such other sums as might be needed, the circuit court acquired no jurisdiction of the case, although as between themselves complainants had separate interests under the contract which they need not have sued jointly to enforce, but having sued jointly, and there being such a conflict of interest between one of the complainants from Ohio and the defendant from the same place they could not be placed on the same side of the controversy. Peninsular Iron Co. v. Stone (1887) 7 Sup. Ct. 1010, 1011, 121 U. S. 631, 30 L. Ed. 1020.

In an action on a bond secured by a mortgage, brought by citizens of one state against the citizens of another, one of the defendants, by her answer, prayed that the mortgage and bond be declared valid and foreclosed for her benefit and that of plaintiffs. The bond and mortgage were not divisible. All the defendants, including the one praying for relief, were citizens of the same state. Held, that the federal court had no jurisdiction, as it was substantially an action between citizens of the same state. Blacklock v. Small (1888) 127 U. S. 96, 8 Sup. Ct. 1096, 32 L. Ed. 70.

Diverse citizenship is not available to sustain the jurisdiction of a federal circuit court of a suit to enjoin a sale of railway stock by a firm of bankers acting on behalf of the stockholders unless a sum shall first be deposited out of the proceeds of the sale sufficient to satisfy any judgment which may be recovered by complainant in a suit to foreclose a mortgage on the property of the railway company, where some of the members of such firm are citizens of the same state with complainant. Raphael v. Trask (1904) 24 Sup. Ct. 647, 649, 194 U. S. 272, 48 L. Ed. 973.

Where jurisdiction depends on diverity of citizenship, and the bill shows that complainant and one of the defendants are citizens of the same state, and such defendant, though he files a disclaimer, is not dismissed out of the case, the suit should be dismissed. Wetherby v. Stinson (1894) 62 Fed. 173, 10 C. C. A. 243.

When, on foreclosure of a mortgage, judgment creditors and all persons interested are made parties, if any of them are citizens of the same state with complainants, the federal court has no jurisdiction. Tug River Coal & Salt Co. v. Brigel (1895) 67 Fed. 625, 14 C. C. A. 577.

United States courts held to have no jurisdiction of suit against testamentary trustee for distribution and accounting, where a citizen of the same state as the trustee was made a defendant and answered, admitting the allegations of the bill and merely denying that the time for distribution had arrived. Barker v. Eastman (1913) 206 Fed. 865, 124 C. C. A. 525, affirming decree (C. C. 1911) 192 Fed. 659.

When the real controversy in a suit is between citizens of different states, they are entitled to have it tried in the United States courts, though there are other parties who are citizens of the same state with one or more on the

opposite side. Ruckman v. Ruckman (C. C. 1880) 1 Fed. 587, 589.

A citizen of New York filed his bill for partition in the federal circuit in Mississippi against citizens of Mississippi as tenants in common, and also joined as defendant a railroad company, a Mississippi corporation, which claimed title to the land adversely to all the tenants in common. Held, that as to the controversy between the tenants in common in regard to the partition the court had jurisdiction, but as to the controversy between the tenants in common and the railroad company it had no jurisdiction, as the parties having the same rights and interests were not all citizens of states different from those on the other side. Beebe v. Louisville, N. O. & T. R. Co. (C. C. 1889) 39 Fed. 481.

A bill by a mortgagee of a water company against the company and the city in which it was located, both defendants being corporations of the same state, alleged that the city had subjected the company to unjust and oppressive regulations and requirements, against which the company had at all times protested, and which had the effect of jeopardizing complainant's security; that the company had brought an action at law against the city to recover for water which it had been compelled to furnish, and for which the city refused to pay; and that the only remedy at law was by a multiplicity of actions by the company. It further alleged that the company had yielded to the unjust demands of the city to such an extent as to render its right to recover at law contestable, but alleged no act of hostility on the part of the company towards the complainant, or collusion between the defendants. The prayer was for an injunction against both defendants. Held, that the matter in dispute disclosed by the bill was one in which the interests of the complainant and the company were identical, and the court was without jurisdiction. Boston Safe Deposit & Trust Co. v. City of Racine (C. C. 1899) 97 Fed. 817.

Where one of two defendants in an action in a state court, who is a necessary party, is a citizen of the same state as the plaintiff, his suffering a default to be taken against him does not eliminate him from the controversy, so as to render the cause removable by his codefendant on the ground of diversity of citizenship. Lederer v. Sire (C. C. 1900) 105 Fed. 529.

The only ground for federal jurisdiction in a suit to establish complainant's right as an heir of deceased to an undivided interest in land being the diverse citizenship of complainant and defendant's jurisdiction of the dependent controversy between interveners, also claiming undivided interests as heirs of deceased, and defendants, all citizens of the same state, is ousted by dismissal of the case so far as involving any interest of complainant. Kromer v. Everett Imp. Co. (C. C. 1901) 110 Fed. 22.

The Circuit Court has no jurisdiction over an action by a citizen of this state for injuries, brought against both a domestic and a foreign corporation, where there is any right of action, or any reasonable ground to claim a right of action, against the domestic corporation, and where no separable controversy is claimed to exist. Keller v. Kansas City, St. L. & C. R. Co. (C. C. 1903) 135 Fed. 202.

In an action to foreclose a mortgage and adjust liens on the property, where plaintiff and defendant mortgagor are citizens of the same state, and the creditor of the mortgagors, claiming a lien on the property, is a citizen of another state, such mortgage creditor cannot, on the ground of diverse citizenship, remove the case into the federal court. Weldon v. Fritzlen (C. C. 1904) 128 Fed. 608, reversed Boatmen's Bank v. Same (1905) 135 Fed. 650, 68 C. C. A. 288.

A circuit court of the United States is without jurisdiction of a suit against a number of defendants to enjoin the diversion of water from a stream by means of certain irrigation ditches, in some one of which each of the defendants is alleged to own an interest, where any one of the defendants is a citizen of the same state as complainant. Anderson v. Bassman (C. C. 1905) 140 Fed. 10.

A bill by nonresident stockholders and directors against the corporation and resident stockholders and directors for dissolution on the ground that it was without sufficient capital to conduct business, but not alleging any mismanagement or disagreement, and making it appear that their interests were identical, did not disclose a controversy for which a federal court had jurisdiction on the ground of diversity of citizenship. Hirsch v. Independent Steel Co. of America (C. C. 1911) 196 Fed. 104, appeal dismissed Same v. Taylor (1912) 32 S. Ct. 841, 225 U. S. 698, 56 L. Ed. 1263.

A., being entitled to a settlement and pre-emption, sold to B. B. resold to C., and authorized an agent to convey. C. sold to different parties. After many years, it being discovered that said agent had not conveyed to C., the holder of the land and some of the intermediate purchasers filed a bill against B. and the heirs of C. to obtain conveyances. B. and C.'s heirs moved to have the cause removed to the United States circuit court, alleging themselves to be citizens of Virginia. Complainants then amended their bill, making citizens of this state, who had made conveyances of part of said land, defendants; whereupon the court refused to remove the cause to the federal court, and a decree was entered for complainants. Held, that the amend-

ment was proper, and therefore the United States court could not exercise jurisdiction. Parberry's Heirs v. Goram (1813) 6 Ky. (3 Bibb.) 107.

Ejectment was brought by several plaintiffs, some of whom were citizens of New Jersey and some of whom were citizens of other states, against the tenant in occupation of the premises, and the landlord, a citizen of Ohio, being summoned in to defend, sought to remove the action to the United States court. Held that, inasmuch as some of the plaintiffs were not citizens of the state where the action was brought, and as one of the defendants was not a citizen of a different state, the case was not within the act of congress. Meeker v. Boylan (1860) 28 N. J. Law (4 Dutch.) 274.

Where both appellees and all the appellants except one are citizens of Texas, and that one is the partner of the two others, an action against the firm for conversion cannot be transferred to the United States courts. Blum v. Thomas (1883) 60 Tex. 158.

A defendant sued as a member of a partnership is not entitled to remove a cause to the federal court because such defendant is a nonresident of the state, where his codefendants and partners, as well as plaintiff, are citizens of the state. National Bank of Commerce v. Galland (1896) 14 Wash. 502, 45 Pac. 35.

252. —— Parties to cross-actions.— Where a federal court obtains jurisdiction in a suit to enforce a lien on property, by reason of the diversity of citizenship between the complainants and defendants, such jurisdiction extends to the determination of the rights of defendants or interveners, who also assert liens on the same property, by cross-bills against other of the defendants, which give them the right to contest complainants' claims, although there is no diversity of citizenship between the parties to such cross-bills, and notwithstanding the fact that the cross-bills make it necessary to bring in new parties. Lilienthal v. McCormick (1902) 117 Fed. 89, 54 C. C. A. 475.

If a cross-bill in a federal court assumes the character of an original bill, it will be dismissed for want of jurisdiction, where the parties to the controversy presented thereby are citizens of the same state. Patton v. Marshall (1909) 173 Fed. 350, 97 C. C. A. 610, 26 L. R. A. (N. S.) 127.

The fact that the parties plaintiff and defendant to a cross-bill, or some of them, are citizens of the same state, will not prevent its being sustained in the federal court, where necessary to prevent injustice; and defendants, as parties to the original bill, are subject to the jurisdiction of the court. Schenck v. Peay (C. C. 1868) Fed. Cas. No. 12,450.

Where all the defendants are citize of the state, one cannot file a cross-b against the others as to matters n set up in the original bill, in which t original complainants have no intere Putnam v. New Albany (C. C. 186 Fed. Cas. No. 11,481.

Where citizens of Georgia, who a partners, are both sued in equity the courts of the United States, one them cannot, by cross-bill against t other, litigate their disputes inter se Vannerson v. Leverett (C. C. 1887) Fed. 376.

See, also, 436, post, this subdivisio

253. —— Ancillary proceedings. Where a federal court of equity New Jersey, acting under a state la granted an injunction against a corp ration of that state on the ground insolvency and appointed a receiver f its property, it was in accordance wi the recognized federal practice for t complainant, with leave of that cou to institute a suit for the appointme of an ancillary receiver in the feder court of another district in which t corporation had property, and, while stockholder may be permitted to i tervene in the ancillary suit and co test the right of the complainant, cannot in such suit, or on appeal fro the decree therein, question the juri diction of the court in the princip suit, nor obtain a review of its decre McGraw v. Mott (1910) 179 Fed. 64 103 C. C. A. 204.

Where a receiver, appointed by a fe eral court, by reason of the charact of his appointment, or because of loc policy or the rights of local creditor is not permitted to sue in a jurisdictio other than the one in which he was a pointed, a bill may be filed in anoth federal court for the appointment of a ancillary receiver, and, the ultimate o ject of such proceeding being to aid t purpose of the original suit, it is in th sense ancillary, and jurisdiction there does not depend on diversity of citize ship of the parties. Bluefields S. S. C v. Steele (1911) 184 Fed. 584, 106 C. A. 564.

Where a bill by a legatee, a citize of California, against an executor, resident of Massachusetts, sought reach real estate fraudulently mortga ed by the executor to a trustee residin in Illinois to secure a note owned by resident of Illinois, the trustee, made party, was bound by any decree r specting his representative defense, an the trial court could, by ancillary bil bring in the holder of the note if th should be deemed necessary, without a fecting the diversity of citizenshi Fraser v. Cole (1914) 214 Fed. 556, 13 C. C. A. 102.

A bill in equity to enjoin a judgme of the circuit court, brought in suc court, is not an original suit; and it i immaterial that the original plaintiff i a resident and citizen of another stat

Dunlap v. Stetson (C. C. 1827) Fed. Cas. No. 4,164.

The federal court has jurisdiction of a bill filed by defendant in a judgment rendered therein against an assignee of plaintiff, to set aside such judgment for fraud, though both parties are citizens of the same state. O'Brien County v. Brown (C. C. 1871) Fed. Cas. No. 10,399.

See, also, post, this note, "Nature and extent of jurisdiction in general."

Where a suit is auxiliary to one previously commenced and still pending between citizens of different states, it is no objection to the jurisdiction that the parties are citizens of the same state. New Orleans v. Fisher (1901) 21 Sup. Ct. 347, 352, 180 U. S. 185, 45 L. Ed. 485; Stone v. Bishop (C. C. 1878) Fed. Cas. No. 13,482.

Diverse citizenship does not give jurisdiction to a federal court of a bill which seeks a declaration of the nonexistence of a will, and the consequent nullity of its probate in a state court, where the proceeding to contest a will afforded by the laws of that state is but supplementary, or ancillary, to the original probate proceedings, and is not an independent controversy inter partes. O'Callaghan v. O'Brien (1905) 25 Sup. Ct. 727, 735, 199 U. S. 89, 50 L. Ed. 101.

Where a creditor's bill in a federal court to enforce a state judgment sought to establish the existence of a partnership only for the purpose of subjecting the interest of the surviving partner in the partnership funds to the payment of complainant's judgment, the bill was not demurrable on the ground that complainant sought thereby to compel defendants, who were both residents of the state, to litigate in the federal court a demand which one had against the other. Feidler v. Bartleson (1908) 161 Fed. 30, 88 C. C. A. 194, affirming decree Bartleson v. Feidler (C. C. 1906) 149 Fed. 299.

The federal court has jurisdiction of a suit upon a supersedeas bond given in that court, independent of the citizenship of the parties. Seymour v. Phillips & Colby Const. Co. (C. C. 1877) Fed. Cas. No. 12,689.

See, also, 430, post, this subdivision.

254. Necessity of citizenship or residence in state where suit is brought.—A suit by the widow of an employé of the Pullman Company for wrongful death was properly dismissed as to the railway company over whose lines the Pullman Company operated, where neither plaintiff nor defendant railway was a resident of the state wherein suit was brought. Lindsay v. Chicago, B. & Q. R. Co. (1915) 226 Fed. 23, 141 C. C. A. 131.

A federal court has no jurisdiction of suits on the ground of diversity of citizenship except where one of the parties is a citizen of the state where the suit is brought. Shute v. Davis (C. C. 1817) Fed. Cas. No. 12,828; White v. Fenner (C. C. 1818) Id. 17,547; Kitchen v. Strawbridge (C. C. 1821) Id. 7,854; Moffat v. Soley (C. C. 1827) Id. 9,688; Kelly v. Harding (C. C. 1867) Id. 7,670.

A federal court in New York has no jurisdiction of a suit by a citizen of New York and a citizen of Georgia against a citizen of Massachusetts. Moffat v. Soley (C. C. 1827) Fed. Cas. No. 9,688.

A bill filed in one state by a complainant residing in another will be dismissed, where respondent shows that he has his domicile in still another state. Burnham v. Rangeley (C. C. 1845) Fed. Cas. No. 2,176.

If other parties are introduced, and different interests involved, it is to that extent an original bill, and the jurisdiction of the court must then depend on the citizenship of the parties, and one of the parties must be a citizen of the state where the suit is brought. Williams v. Byrne (C. C. 1846) Fed. Cas. No. 17,718.

The sureties of litigants in the federal courts need not be residents of the state in which the suit is pending. Souter v. La Crosse R. R. (C. C. 1865) Fed. Cas. No. 13,180.

Since the act of 1875 it is no longer necessary in suits between citizens of different states that either shall be a resident of the state in which suit is brought. Eureka Consol. Min. Co. v. Richmond C. Min. Co. (C. C. 1880) 2 Fed. 829, 830.

It is immaterial, so far as the jurisdiction of the court is concerned, of what one of the states the plaintiff is a citizen, provided the parties are citizens of different states. Brooks v. Bailey (C. C. 1881) 9 Fed. 438.

A suit brought in a court of a state of which neither party is a resident is not removable into a federal court on the ground of diversity of citizenship, unless both plaintiff and defendant waive objection to the jurisdiction of such court. Such suit is one of which that court would not have had jurisdiction in the first instance except by consent of both parties, nor can it acquire jurisdiction by removal without such consent, and plaintiff cannot be held to have waived his right to object by bringing the suit in a state court. Foulk v. Gray (C. C. 1902) 120 Fed. 156.

A federal court has no jurisdiction to proceed to judgment if plaintiff and all defendants served with process are residents of another state, and the only defendant living in the state where suit is brought is not served. Robinson v. Bennett (1883) 15 N. W. 904, 50 Mich. 560.

255. Necessity of citizenship or residence in district where suit is brought.—See, also, post, § 1033, and notes thereunder.

Under the act of March 3, 1887, as

amended by that of August 13, 1888, a circuit court had no jurisdiction upon the ground of diverse citizenship of a suit brought by residents of other districts than that for which the court sits, against several defendants, only one of whom is a resident of that district. Excelsior Pebble Phosphate Co. v. Brown (1896) 74 Fed. 321, 20 C. C. A. 428.

To authorize the bringing of a suit in a federal court on the ground of diverse citizenship, all of the plaintiffs or all of the defendants must be residents of the district. Turk v. Illinois Cent. R. Co. (1914) 218 Fed. 315, 134 C. C. A. 111.

A federal court has jurisdiction where defendant is a citizen of the state in which the suit is brought, and plaintiff a citizen of another state, without reference to the division of the state into districts, where process has been served in the district in which suit is brought. Vore v. Fowler (C. C. 1869) Fed. Cas. No. 17,003.

A federal court has no jurisdiction over a defendant served with process while temporarily in a district in which he does not reside. Smith v. Tuttle (C. C. 1870) Fed. Cas. No. 13,120.

Where the jurisdiction of the court depends on diverse citizenship of the parties either plaintiff or defendant must be a resident and citizen of the district. Single v. Scott Paper Mfg. Co. (C. C. 1893) 55 Fed. 553, 555.

A bill was filed in the circuit court of Virginia, alleging that complainant was a corporation under the laws of New York, and that the defendant was a corporation under the laws of New Jersey, and a citizen and resident of that state, having a principal place of business at Bristol, Va., in said district. Held, that the court had not jurisdiction of the suit by reason of the diversity of citizenship of the parties neither of them being a resident of the district. Central Trust Co. of New York v. Virginia, T. & C. Steel & Iron Co. (C. C. 1893) 55 Fed. 769, decree reversed Central Trust Co. v. McGeorge (1894) 14 Sup. Ct. 286, 151 U. S. 129, 38 L. Ed. 98.

A suit on the bond of a contractor for public work, brought in the name of the United States for the use and benefit of others, as provided by Act Aug. 13, 1894, incorporated into section 6923, post, as originally enacted, even conceding it to be a suit by the United States for the purpose of conferring jurisdiction on a federal court, regardless of the citizenship of the parties, cannot be maintained in such court on that ground in any district other than the one of which the defendant is an inhabitant. U. S. v. O'Brien (C. C. 1903) 120 Fed. 446.

A federal court has no jurisdiction of a personal action where neither complainant nor defendant is a citizen or resident of the district, unless the parties consent to the court exercising jurisdiction. Hultberg v. Anderson (C. C. 1909) 170 Fed. 657.

256. Citizenship of parties within purview of statute.—See, also, ante, note under Const. art. 3, § 2, cl. 1, "Controversies between a state and citizens of another state," as to who are citizens within the meaning of the grant of judicial power.

See, also, notes under Const. Amend. 14, § 1.

Citizenship, within this section, means permanent residence in a state with an intention of remaining. Hammerstein v. Lyne (D. C. 1912) 200 Fed. 165.

257. —— States.—A state is not a citizen, and under the judiciary acts a suit between a state and a citizen or a corporation of another state is not a suit between citizens of different states. Postal Telegraph Cable Co. v. Alabama (1895) 15 Sup. Ct. 192, 194, 155 U. S. 482, 39 L. Ed. 231.

A state is not a citizen within the meaning of this section. Minnesota v. Northern Securities Co. (1904) 24 Sup. Ct. 598, 601, 194 U. S. 48, 48 L. Ed. 870.

A state is not a citizen, within the law conferring federal jurisdiction in certain cases where diversity of citizenship exists. Deseret Water, Oil & Irrigation Co. v. State of California (1913) 202 Fed. 498, 120 C. C. A. 641.

A suit instituted by a state against a claimant of land, to enforce a forfeiture of the land and subject it to sale for the benefit of the school fund, was not originally cognizable in the federal courts, nor was it removable thereto, there being no federal question presented by the bill, and the state not being a citizen, within the judiciary act and removal laws. State of West Virginia v. King (C. C. 1901) 112 Fed. 369.

258. —— Citizens of District of Columbia.—A citizen of the District of Columbia, not being a citizen of a state within the meaning of the judiciary act, cannot sue in a federal court. Hepburn v. Ellzey (1805) 2 Cranch, 445, 2 L. Ed. 332; Corporation of New Orleans v. Winter (1816) 1 Wheat. 91, 4 L. Ed. 44; Barney v. City of Baltimore (1867) 6 Wall. 280, 18 L. Ed. 825; Westcott v. Fairfield (C. C. 1811) Fed. Cas. No. 17,418; Vasse v. Mifflin (C. C. 1825) Fed. Cas. No. 16,895; Barney v. City of Baltimore (C. C. 1863) Fed. Cas. No. 1,029 (reversed [1867] 6 Wall. 280, 18 L. Ed. 825); Holland v. Hyde (C. C. 1890) 41 Fed. 897.

The jurisdiction of the federal court does not extend to a controversy between an alien and a citizen of the District of Columbia, the latter not being a citizen of a state within the meaning of the acts conferring jurisdiction upon the federal courts. Land Co. of New Mexico v. Elkins (C. C. 1884) 20 Fed. 545.

A federal court in a state is without

jurisdiction of a suit by a national bank of the District of Columbia against a citizen of such state on the ground of diversity of citizenship. American Nat. Bank of Washington v. Tappen (C. C. 1909) 174 Fed. 431, judgment affirmed (1910) 30 Sup. Ct. 697, 217 U. S. 600, 54 L. Ed. 897.

The courts of the United States have no jurisdiction upon the ground of diverse citizenship of cases between citizens of the District of Columbia and citizens of a state. Hooe v. Jamieson (1897) 17 Sup. Ct. 596, 166 U. S. 395, 41 L. Ed. 1049.

259. —— **Citizens of territories.**—The provision for jurisdiction of the federal courts depending on the citizenship of the parties does not extend to a case between a citizen of a state and the citizen of a territory. Goldsmith v. Gilliland (C. C. 1885) 24 Fed. 154, 156.

States are the political bodies referred to in the extension of the judicial power of the United States to controversies between citizens of different states, and the territories of the United States, are not within the statute, and citizenship therein will not give jurisdiction. Seddon v. Virginia, T. & C. S. & I. Co. (C. C. 1888) 36 Fed. 6, 8, 1 L. R. A. 108.

260. —— **Corporations.**—The Baltimore & Ohio Railroad Company, chartered by Maryland to construct a railroad in Maryland and in that part of Virginia afterwards constituting the state of West Virginia, was authorized by statutes of Virginia to complete its road in that state on terms substantially the same as those of its Maryland charter, and which did not affect its corporate identity or unity. Held, that it did not thereby become a corporation of Virginia, and consequently of West Virginia on the admission of that state to the Union. Gerling v. Baltimore & O. R. Co. (1894) 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; Taylor County Court v. Baltimore & O. R. Co. (C. C. 1888) 35 Fed. 161; Baltimore & O. R. Co. v. Ford (C. C. 1888) 35 Fed. 170, following Baltimore & O. R. Co. v. Harris (1870) 79 U. S. (12 Wall.) 65, 20 L. Ed. 354.

There is an entire want of federal jurisdiction when two corporations on opposite sides of a controversy are created under the laws of the same state, whether the suit is brought in that state or in another state, where the defendant corporation has a place of business. Empire Coal & Transportation Co. v. Empire Coal & Mining Co. (1893) 150 U. S. 159, 14 Sup. Ct. 66, 37 L. Ed. 1037.

A railroad formed by the consolidation of three roads chartered respectively by three different states cannot, when sued in the courts of one of those states by a citizen thereof, remove the case into the federal courts, upon the ground that the charters obtained from the other two states give it a foreign citizenship. Johnson v. Philadelphia, W. & B. R. Co. (C. C. 1881) 9 Fed. 6.

As a corporation is a person within the meaning of the act, so also may it be an inhabitant; it not being the intention to make any distinction between natural persons and corporations. Riddle v. New York, L. E. & W. R. Co. (C. C. 1889) 39 Fed. 290, 291.

A corporation cannot be a resident of a state other than that in which it was incorporated. Miller v. Wheeler & Wilson Mfg. Co. (C. C. 1891) 46 Fed. 882.

The federal courts have jurisdiction, on the ground of diverse citizenship, of an action against a foreign corporation, brought in the district in which the plaintiff resides, when such corporation is subjected by statute to the jurisdiction of the courts of the state in which the district is located. Dinzy v. Illinois Cent. R. Co. (C. C. 1894) 61 Fed. 49.

A corporation of one state is not, for the purpose of federal jurisdiction, an inhabitant or resident of another state in which it has a usual place of business. U. S. v. S. P. Shotter Co. (C. C. 1901) 110 Fed. 1.

Where defendant was an alien insurance corporation, it was a nonresident of California, though it had a branch office within the state for the transaction of business. Baumgarten v. Alliance Assur. Co., Limited, of London, England (C. C. 1907) 153 Fed. 301.

A corporation organized under the laws of a territory is not a federal corporation organized under the laws of the United States so as to bring it within this provision. Boyd v. Great Western Coal & Coke Co. (C. C. 1911) 189 Fed. 115.

For jurisdictional purposes a railroad or other corporation of a state is a resident only of the state by which it is incorporated, and of which it is a citizen. Stone v. Chicago, B. & Q. R. Co. (D. C. 1912) 195 Fed. 832.

The Adams Express Company, domiciled in the state of New York, and all of its corporators citizens of other states than Louisiana, has a right, when sued in one of the courts of this state by a citizen of the state, to remove the case to United States court. Rosenfield v. Adams Exp. Co. (1869) 21 La. Ann. 233.

An insurance corporation created under the laws of the Republic of France, is to be regarded, for the purposes of federal jurisdiction, as if it were a natural person, and a citizen of France, and, therefore an alien. Barrowcliffe v. La Caisse Générale des Assurances Agricoles et des Assurance Contre L'Incendie (1879) 1 City Ct. R. 151.

A company incorporated in one state only, and doing business in another state in compliance with conditions imposed upon foreign corporations as prerequi-

sites to their doing business therein, is a nonresident of the latter state. Koshland v. National Fire Ins. Co. (1897) 49 Pac. 845, 31 Or. 205; Id., 49 Pac. 850, 31 Or. 597.

When a corporation sues or is sued, the governing officers, by whatever name called, are the substantial party; and if they are citizens of the state which created the corporation, and the other party is a citizen of another state, the federal courts have jurisdiction. Wheeden v. Camden & A. R. Co. (1856) 1 Grant, Cas. 420.

An insurance company created by the laws of another state did business in Wisconsin in conformity with the laws regulating the transaction of insurance business by foreign companies. The company's agents were authorized to accept service of process from the Wisconsin courts. Held, that the company was not deprived of its right to transfer to the national courts a suit commenced against it in a court of Wisconsin, and by a citizen thereof. Knorr v. Home Ins. Co. of New York (1869) 25 Wis. 143, 3 Am. Rep. 26.

See 223, post, this subdivision.

261. Time of existence of jurisdictional ground.—The test of jurisdiction is not citizenship at the time a contract is made or broken, but at the time the action is commenced. Chamberlain v. Eckert (C. C. 1869) Fed. Cas. No. 2,577; Frank v. Chetwood (C. C. 1879) Fed. Cas. No. 5,051; Seddon v. Virginia, T. & C. S. & I. Co. (C. C. 1888) 36 Fed. 6, 8, 1 L. R. A. 108.

Where a federal court once acquires jurisdiction by diverse citizenship, such jurisdiction is not arrested by the fact that, after the action is begun, defendant does not continue to resist complainant's demands. Park v. New York, L. E. & W. R. Co. (C. C. 1895) 70 Fed. 641.

Where a citizen of the same state as the defendant is a necessary party plaintiff to a suit in a federal court when it is commenced, the court does not acquire jurisdiction because at some time during the pendency of the suit he may cease to be a necessary party. Adams v. City of Woburn (C. C. 1909) 174 Fed. 192.

262. Change of citizenship pending suit.—Jurisdiction of a suit once acquired by a court of the United States by reason of the requisite citizenship of the parties is not lost by a change in the citizenship of either party pending the suit. Morgan's Heirs v. Morgan (1818) 2 Wheat. 290, 4 L. Ed. 242; Dunn v. Clarke (1834) 8 Pet. 1, 3, 8 L. Ed. 845; Clarke v. Mathewson (1838) 12 Pet. 164, 9 L. Ed. 1041; Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co. (1899) 19 Sup. Ct. 817, 821, 822, 174 U. S. 552, 43 L. Ed. 1081; Clarke v. Mathewson (C. C. 1835) Fed. Cas. No. 2,857; U. S. v. Myers (C. C. 1836) Fed. Cas. No. 15,844; Trigg v. Conway (C. C. 1855) Fed. Cas. No. 14,173; Culver v. Woodruff County (C. C. 1878) Fed. Cas. No. 3,469; Moore v. Edgefield (C. C. 1887) 32 Fed. 498, 500; Brigel v. Tug River Coal & Salt Co. (C. C. 1896) 73 Fed. 13; Collins v. City of Ashland (D. C. 1901) 112 Fed. 175; Ex parte Jones (1880) 66 Ala. 202.

Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition, as it was at the commencement of the suit. Morgan v. Morgan (1817) 2 Wheat. 290, 4 L. Ed. 242; Mullan v. Torrance (1824) 9 Wheat. 537, 6 L. Ed. 154; Conolly v. Taylor (1829) 2 Pet. 556, 7 L. Ed. 518.

A., a citizen of Virginia, recovered judgment in ejectment in the circuit court of the United States for Ohio, against B., a citizen of that state. After the death of A., a bill was filed in the same court, the plaintiffs and defendants all being citizens of Ohio, for an injunction to the judgment, and praying that a conveyance of the land might be made to the complainants. Held that, to the extent of the prayer for an injunction, the bill was not an original proceeding, and that the court had jurisdiction for that purpose, not being deprived of its equitable control over the judgment by the change of residence of the parties. Dunn v. Clarke (1834) 33 U. S. (8 Pet.) 1, 8 L. Ed. 845.

Where a suit was instituted by a citizen of Connecticut against citizens of Rhode Island, and, pending reference to a master, complainant died, and a citizen of Rhode Island was appointed administrator, the circuit court had jurisdiction of the suit, revived by the administrator; for change in the residence of the parties after the institution of a suit will not affect the court's jurisdiction. Clarke v. Mathewson (1838) 12 Pet. 164, 170, 9 L. Ed. 1041.

The jurisdiction of the federal court having attached in an action at law against the receivers of a railroad, such jurisdiction is not lost because the ownership of the railroad subsequently passes to citizens of the same state as the plaintiff, nor by reason of an order of a court in another district discharging the receivers, especially when it expressly provides that pending cases shall not be affected. Cross v. Evans (1898) 86 Fed. 1, 29 C. C. A. 523.

Where, pending a suit in a federal court, the jurisdiction of which depended on diversity of citizenship, complainant transferred his interest in the subject-matter to a corporation of the same citizenship as the defendant, the federal court no longer had jurisdiction, and could not proceed to a decree. Pittsburgh, S. & N. R. Co. v. Fiske (1910) 178 Fed. 66, 101 C. C. A. 560.

A creditors' bill for discovery is a continuation of the suit at law, and a change of residence of the complainant does not oust the jurisdiction. Hatch

v. Dorr (C. C. 1846) Fed. Cas. No. 6,206.

The rule that jurisdiction once acquired by virtue of the citizenship of the parties cannot be ousted by a change of residence applies only where jurisdiction has vested by a suit. Thaxter v. Hatch (C. C. 1853) Fed. Cas. No. 13,866.

263. **Change of domicile to create diversity of citizenship.**—It is competent for one to make a change of domicile for the purpose of giving jurisdiction to the federal courts where it could not otherwise exist. Robertson v. Cease (1873) 19 Wall. 94, 106, 22 L. Ed. 178.

While the fact that a change of domicile is induced by the purpose of invoking federal jurisdiction does not affect the right, yet, where the sole object in removing from one state to another is to be enabled to sue in the federal court, and the removal is without any present intention to remain permanently or for an indefinite time, but with a present intention to return as soon as the purposes of the suit are accomplished, held there is no change of domicile. Morris v. Gilmer (1889) 9 Sup. Ct. 289, 293, 129 U. S. 315, 32 L. Ed. 690.

It is not a fraud on the law to remove from one state to another for the purpose of acquiring a right to sue in the federal court, where there is no intention to return. Catlett v. Pacific Ins. Co. (C. C. 1826) Fed. Cas. No. 2,517; Briggs v. French (C. C. 1835) Id. 1,871.

A change of citizenship, although for the purpose of acquiring a right to sue in a federal court, is not unlawful and does not deprive the court of jurisdiction if there is an actual bona fide change, with the intention of remaining in the new domicile. Wiemer v. Louisville Water Co. (C. C. 1903) 130 Fed. 243; Davis v. Dixon (C. C. 1910) 184 Fed. 509.

264. **Transfers as affecting diversity of citizenship, in general.**—Where there is an actual sale and transfer of the subject-matter of the suit, the fact that it was made for the purpose of giving jurisdiction to the federal court is immaterial. Jones v. League (1855) 18 Howard, 76, 15 L. Ed. 263; Lehigh Min. & Mfg. Co. v. Kelly (1895) 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444; Osborne v. Brooklyn City R. Co. (C. C. 1866) Fed. Cas. No. 10,597; Newby v. Oregon Cent. Ry. Co. (C. C. 1870) Id. 10,145; Hawley v. Kepp (C. C. 1878) Id. 6,249; De Laveaga v. Williams (C. C. 1879) Id. 3,759; Blackburn v. Selma, M. & M. R. Co. (C. C. 1879) Id. 1,467.

That a cause of action was transferred to the purpose of enabling the transferee to sue thereon in the federal courts does not deprive such courts of jurisdiction, where the transfer was real and absolute. Cole v. Philadelphia & E. Ry. Co. (C. C. 1905) 140 Fed. 944, decree reversed (1907) Kreider v. Cole (1907) 149 Fed. 647, 79 C. C. A. 339.

In deciding the question of jurisdiction, the court could not inquire into the motives which induced the plaintiff to make the contract for purchasing the land. McDonald v. Smalley (1828) 26 U. S. (1 Pet.) 620, 7 L. Ed. 287.

A citizen of Ohio, being indebted to a citizen of Alabama, offered to sell and convey to him lands in Ohio, in payment of the debt, for much less than their real value, and stated, in the letter by which the offer was made, that the title would most probably be maintained in the courts of the United States, but would fail in the courts of the state. The plaintiff, after the lands were conveyed to him, gave his bond to make a quitclaim title to the land, on condition of receiving $1,100. Held, that the title acquired by the purchaser, whether considered as purchaser or as mortgagee, gave jurisdiction to the courts of the United States. Id.

Where a resident of one state conveys land to a resident of another state without consideration, and with a distinct understanding that the grantor shall retain all his real interest, and that the deed is to have no other effect than to give jurisdiction to the federal court, on the ground of the diverse citizenship of the parties to a suit, the conveyance is merely colorable, and does not clothe the court with jurisdiction. Barney v. City of Baltimore (1867) 73 U. S. (6 Wall.) 280, 18 L. Ed. 825.

In a bill charging that defendant had purchased a valuable tract of land at a foreclosure sale while acting as attorney for the defendant therein, who was the complainant's grantor, it appeared that complainant's grantor and defendant were citizens of the same state, and, after a suit begun in the state court was decided in defendant's favor, and pending an appeal to the supreme court of the state, the conveyance was made to her son-in-law, who was a resident of another state, and who, she testified, offered to "take the matter off her hands." It did not appear that any part of the purchase money stipulated in the deed had ever been paid, or that the deed had ever been delivered to the complainant, or that any bond for costs was ever given by complainant or any one for him. Immediately after the conveyance, suit was begun in his name in the federal court. Held clearly a case of simulated jurisdiction, which should have been dismissed, under Act March 3, 1875, c. 137. Hayden v. Manning (1883) 106 U. S. 586, 1 Sup. Ct. 617, 27 L. Ed. 306.

Where a chose in action is transferred to a nonresident for value, the interest of the assignor thereupon entirely ceasing, the fact that one of the purposes of the transfer is to create a

diversity of citizenship so as to bring the case within the jurisdiction of the federal court does not render the transaction collusive. Cross v. Allen (1891) 12 Sup. Ct. 67, 69, 141 U. S. 528, 35 L. Ed. 843.

The privilege of a purchaser who is a citizen of one state to invoke the jurisdiction of a federal court to protect his rights as against the citizens of another state cannot be impaired merely because of the motive which induced the grantor to convey the property where the title actually passes without any power to compel a reconveyance. Lehigh Min. & Mfg. Co. v. Kelly (1895) 16 Sup. Ct. 307, 309, 160 U. S. 327, 40 L. Ed. 444.

When the jurisdiction of a federal court in an action by the receiver of a national bank depends solely on the official character of the plaintiff as such receiver, such jurisdiction is lost by a sale and transfer by the plaintiff of all his interest in the subject-matter of the litigation. Weaver v. Kelly (1899) 92 Fed. 417, 34 C. C. A. 423.

The conveyance of all the property of a partnership to a corporation organized for the purpose by the partners and the division between them of the stock of the corporation, a small part of such property consisting of lands in controversy in a subsequent action brought by the corporation in a federal court, cannot be held a simulated or sham transfer which will oust such court of jurisdiction because the partnership could not have sued therein, where the conveyance was bona fide and no reconveyance was contemplated. Slaughter v. Mallet Land & Cattle Co. (1905) 141 Fed. 282, 72 C. C. A. 430, writ of certiorari denied (1906) 26 Sup. Ct. 761, 201 U. S. 646, 50 L. Ed. 903.

The facts that a domestic corporation permitted a mortgage on lands owned by it to be foreclosed, and that another corporation having in part the same officers and stockholders was organized in another state, which purchased such lands at the sale and also the stock of the former corporation, which was thereafter dissolved, held not sufficient to establish a collusive transfer of the lands, for the purpose of enabling a suit in respect thereto to be brought in a federal court, such as deprived it of jurisdiction of such suit. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625, affirming decree (C. C. 1907) 156 Fed. 989, and writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346.

A colorable conveyance for the purpose of giving jurisdiction to a federal court will not give it jurisdiction. Maxfield v. Levy (C. C. 1797) Fed. Cas. No. 9,321, 4 Dall. 330, 331, 1 L. Ed. 854; Hurst v. McNeil (C. C. 1804) Fed. Cas. No. 6,936.

A deed which is not intended to give, and which does not give, jurisdiction to the court, cannot be said to be given in fraud of the law, merely because it changes the nature of the suit. Brown v. Arbunkle (C. C. 1806) Fed. Cas. No. 1,990.

The title of one owning shares in a body of land, the legal title to which, originally in three trustees, was conveyed to him, under a six years' lease, with covenant to sue to recover the same, is sufficient to give the federal court jurisdiction. Browne v. Browne (C. C. 1806) Fed. Cas. No. 2,035; Welles v. Newberry (C. C. 1847) Fed. Cas. No. 17,378.

Where a conveyance of land appears to be only colorable with a view to give jurisdiction, the writ will be dismissed on motion or on a plea. Starling v. Hawks (C. C. 1851) Fed. Cas. No. 13,-311.

Where it appears that both parties have an option to rescind within a stipulated time, and that the suit is prosecuted under the direction and at the expense of the grantor, the conveyance will be held to be colorable only. Id.

Conveyances made merely for the purpose of giving federal courts jurisdiction are ineffectual for that purpose. Barney v. Baltimore (C. C. 1863) Fed. Cas. No. 1,029.

Where a sale and conveyance of a mining claim are real, and not merely simulated, the motive of the sale is immaterial, so far as affecting the right of the grantee to maintain a suit for its possession in a federal court on the ground of diversity of citizenship. Willitt v. Baker (C. C. 1904) 133 Fed. 937.

Where the arrangement of parties to a suit in a federal court is merely a contrivance between friends having no real antagonism, to give the court jurisdiction and avoid the effect of state decisions, the suit will be dismissed as collusive, although, if the controversy were real, it would have jurisdiction. Stephens v. Smartt (C. C. 1909) 172 Fed. 466.

See, also, 366 et seq., post, this subdivision.

The complainant cannot voluntarily transfer all or a part of his interest in the subject-matter of the litigation to a citizen of the same state with the defendant without ousting the jurisdiction. Adams Exp. Co. v. Denver & R. G. Ry. Co. (C. C. 1883) 16 Fed. 712.

The jurisdiction of the federal courts, which has once attached by reason of diverse citizenship, is not devested by a subsequent transfer of the cause of action by which the controversy becomes one between citizens of the same state. Jarboe v. Templer (C. C. 1889) 38 Fed. 213.

See, also, notes under § 1019, post.

265. —— **Assignments of bonds, notes, mortgages, and judgments.**— Where a mortgage is assigned by the mortgagee to a citizen of another state, for the purpose of giving the federal

court jurisdiction of an action of ejectment to foreclose the same, this will not devest such court of the jurisdiction unless a knowledge of such motive and purpose is brought home to the assignee. Smith v. Kernochen (1849) 48 U. S. (7 How.) 198, 12 L. Ed. 666.

Pending an action in a New York court against a corporation of that state by a citizen of New Jersey, upon a policy of insurance on the life of her husband, the plaintiff assigned the policy to a citizen of New York in trust for her benefit, and was afterwards nonsuited by order of the court. Upon a subsequent petition by the trustee to another court of the state to be relieved of his trust, a citizen of New Jersey was, at her request, appointed trustee in his stead. One object of this appointment was to enable a suit on the policy to be brought in the federal court, which was afterwards brought accordingly. Held, that the suit should not be dismissed; as the federal court would have had jurisdiction without the assignment. Manhattan Life Ins. Co. v. Broughton (1883) 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878.

A bill in equity against a town in one state by a citizen of another, for relief against the accidental omission of seals from the bonds of the defendant, payable to bearer, and held by the plaintiff, some of which are owned by him, and others of which are owned in different amounts, part by citizens of the state in which the town is located, and part by citizens of other states, and have been transferred to him by the real owners for the mere purpose of bringing the suit, is not maintainable under the latter clause of this section, so far as regards all bonds held by citizens of the same state as the defendant. Bernards Tp. v. Stebbins (1883) 109 U. S. 341, 3 Sup. Ct. 252, 261, 27 L. Ed. 956.

Two years after the decision of a state court pronouncing bonds issued by the defendant municipality void, owners of the bonds, citizens of the state, cut them off the coupons and transferred them to plaintiff, a citizen of another state. under an arrangement by which the latter gave his nonnegotiable note for an amount much less than the face of the coupons, payable in two years from date, and agreed, "as a further consideration for said coupons," that if he succeeded in collecting the full amount thereof he would pay to the owners of the bonds one-half the amount collected above the face of the note. Held, that an action by plaintiff on the coupons, brought in the United States court, should be dismissed. Farmington Village Corporation v. Pillsbury (1885) 114 U. S. 138, 5 Sup. Ct. 807, 29 L. Ed. 114.

Recovery cannot be had in the federal courts on municipal bonds actually owned by citizens of the state where issued, and only transferred to plaintiff, who is a citizen of another state, to collect for their account. Inhabitants of New Providence Tp. v. Halsey (1886) 117 U. S. 336, 6 Sup. Ct. 764, 29 L. Ed. 904.

The assignment of a note, to cut off an anticipated defense to the mortgage by which it is secured, will not be considered collusive, and justify a dismissal of a suit brought in a United States court by the assignee, if the title made by the transfer is such as would enable the assignee to maintain suit in his own name at all. Lanier v. Nash (1887) 121 U. S. 404, 7 Sup. Ct. 919, 30 L. Ed. 947.

When notes and mortgages are transferred to a nonresident of the state for a valuable consideration, and the assignor's interest thereupon entirely determines, the mere fact that one of the purposes of the transfer is to establish the diversity of citizenship necessary to make the case cognizable in a federal court does not render the transaction collusive. Cross v. Allen (1891) 141 U. S. 528, 12 Sup. Ct. 67, 35 L. Ed. 843, affirming Allen v. O'Donald (C. C. 1886) 28 Fed. 346.

Where the transfer of a judgment gives the diversity of citizenship necessary to render a suit thereon cognizable in the federal courts, the fact that this is one of the motives of the transfer does not affect the federal jurisdiction, if the change of title is in fact absolute and for a good consideration. Crawford v. Neal (1892) 144 U. S. 585, 12 Sup. Ct. 759, 36 L. Ed. 552; Neal v. Crawford, Id., affirming Neal v. Foster (C. C. 1888) 36 Fed. 29.

A person can recover on coupons on bonds bought from a bona fide purchaser although his sole purpose, in buying them, was to bring suit on them in the federal court. Foote v. Hancock (C. C. 1878) Fed. Cas. No. 4,911.

Where plaintiff has the legal title to coupons, he can sue upon them, although he bought them merely with the object of bringing suit upon them in the federal court, and intending to pay over a portion of the recovery to some other person. Perrine v. Thompson (C. C. 1879) Fed. Cas. No. 10,997.

Where various parties transferred negotiable securities to a nonresident for the purpose of conferring jurisdiction on the circuit court, it is the duty of the court to dismiss the case on its own motion as soon as such collusion appears. Williams v. Nottawa (Sup. 1881) 13 Fed. 302.

See, also, 366 et seq., post, this subdivision.

266. Character of actions within operation of statute.—A controversy of which a federal court may take jurisdiction is involved whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation, and is presented by the

pleadings for judicial determination. Schunk v. Moline, Milburn & Stoddard Co. (1893) 13 Sup. Ct. 416, 417, 147 U. S. 500, 37 L. Ed. 255; Hilton v. Dickinson (1883) 2 Sup. Ct. 424, 108 U. S. 165, 27 L. Ed. 688, citing Gaines v. Fuentes (1875) 92 U. S. 10, 23 L. Ed. 524.

Where diversity of citizenship between the parties exists, a federal court may take jurisdiction of:

Actions against internal revenue collectors. Cincinnati Brewing Co. v. Bettman (C. C. 1900) 102 Fed. 16.

Actions by or against executors or administrators. Moore v. Petty (1905) 135 Fed. 668, 68 C. C. A. 306 (writ of certiorari denied [1905] 25 Sup. Ct. 800, 197 U. S. 623, 49 L. Ed. 911); Payne v. Hook (1868) 74 U. S. (7 Wall.) 425, 19 L. Ed. 260; Kendall v. Creighton (1859) 23 How. 90, 106, 16 L. Ed. 419.

Actions for breach of contract. Weems v. George (1851) 13 How. 190, 196, 14 L. Ed. 108; Fitch v. Creighton (1860) 24 How. 159, 162, 16 L. Ed. 596.

Actions for injuries to land. Rundle v. Delaware & R. Canal (C. C. 1849) Fed. Cas. No. 12,139.

Actions on bonds. Waite v. City of Santa Cruz (C. C. 1898) 89 Fed. 619; Shepard v. Tulare Irr. Dist. (C. C. 1899) 94 Fed. 1; White v. Vermont & M. R. Co. (1858) 21 How. 575, 576, 16 L. Ed. 221.

Actions on state judgments. Barr v. Simpson (C. C. 1832) Fed. Cas. No. 1,038; Putnam v. New Albany (C. C. 1869) Fed. Cas. No. 11,481; First Nat. Bank v. Steinway (C. C. 1896) 77 Fed. 661; Gorrell v. Dickson (C. C. 1886) 26 Fed. 454.

Actions to enforce an assessment for a local improvement. Stimson v. Scott (1856) 1 Cleve. Law Rec. 45, 4 Ohio Dec. 37.

Claims against decedents, or distribution of their estates. Connecticut Life Ins. Co. v. Schurmeier (1912) 136 N. W. 1; Kendall v. Creighton (1859) 23 How. 90, 107, 16 L. Ed. 419; Maling v. Maling (D. C. 1914) 217 Fed. 127; Johnson v. Johnson (D. C. 1915) 225 Fed. 413; Fraser v. Cole (1914) 214 Fed. 556, 131 C. C. A. 102; Underground Electric Rys. Co. of London, Limited, v. Owsley (C. C. 1909) 169 Fed. 671 (order affirmed [1909] 176 Fed. 26, 99 C. C. A. 500); Byers v. McAuley (1893) 13 Sup. Ct. 906, 910, 149 U. S. 608, 37 L. Ed. 867; Brockett v. Richardson (1884) 61 Miss. 706.

Condemnation proceedings. Mississippi & Rum River Boom Co. v. Patterson (1878) 98 U. S. 403, 25 L. Ed. 206.

Foreclosure suits. McDonald v. Smalley (1828) 1 Pet. 620, 624, 7 L. Ed. 287; Connecticut Mut. Life Ins. Co. v. Crawford (C. C. 1884) 21 Fed. 281; American Trust Co. v. W. & A. Fletcher Co. (1909) 173 Fed. 471, 97 C. C. A. 477 (certiorari denied [1909] 30 Sup. Ct. 400, 215 U. S. 600, 54 L. Ed. 343); Fitch v. Creighton (1860) 65 U. S. (24 How.) 159, 16 L. Ed. 596.

Habeas corpus proceedings. King v. McLean Asylum of the Massachusetts General Hospital (1894) 64 Fed. 331, 12 C. C. A. 145; Bennett v. Bennett (D. C. 1867) Fed. Cas. No. 1,318.

Suits against county supervisors. Cowles v. Mercer County (1868) 74 U. S. (7 Wall.) 118, 19 L. Ed. 86.

Suits by minority stockholders. Hyams v. Calumet & Hecla Mining Co. (1915) 221 Fed. 529, 137 C. C. A. 239.

Suits for accounting. Prest-O-Lite Co. v. Avery Portable Lighting Co. (C. C. 1908) 164 Fed. 60; Bell v. Ohio Life Ins. Co. (C. C. 1858) Fed. Cas. No. 1,261; Vinal v. Continental Const. & Imp. Co. (C. C. 1888) 34 Fed. 228; Earp v. Coleman (C. C. 1886) 28 Fed. 340.

Suits for alimony. Barber v. Barber (1858) 62 U. S. (21 How.) 582, 16 L. Ed. 226.

Suits for specific performance. Massie v. Watts (1810) 6 Cranch, 148, 157, 3 L. Ed. 181; Indiana Mfg. Co. v. Nichols & Shepard Co. (C. C. 1911) 190 Fed. 579.

Suits for the possession of land. McDonald v. Smalley (1828) 1 Pet. 620, 624, 7 L. Ed. 287.

Suits involving the unreasonableness of telephone rates. Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Co. (1909) 29 Sup. Ct. 357, 360, 212 U. S. 414, 53 L. Ed. 577.

Suits involving trade-marks. Battle v. Finlay (C. C. 1892) 50 Fed. 106.

Suits to enjoin collection of illegal taxes. Keithsburg Bridge Co. v. McKay (C. C. 1890) 42 Fed. 427.

Suits to set aside fraudulent transfers. Central Nat. Bank v. Fitzgerald (C. C. 1899) 94 Fed. 16.

Suits to set aside the judgment of a state court. Howard v. De Cordova (1900) 20 Sup. Ct. 817, 818, 177 U. S. 609, 44 L. Ed. 908.

Suits to set aside the probate of wills. McDermott v. Hannon (D. C. 1913) 203 Fed. 1015; Gaines v. Fuentes (1875) 92 U. S. 10, 23 L. Ed. 524.

Or to contest wills. Sawyer v. White (1903) 122 Fed. 223, 58 C. C. A. 587.

Suits to restrain actions at law. Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt (C. C. 1904) 126 Fed. 998.

Suits to restrain the enforcement of unconstitutional statutes. Rail & River Coal Co. v. Yaple (D. C. 1914) 214 Fed. 273.

Suits to restrain illegal competition. Long v. Southern Express Co. (D. C. 1912) 201 Fed. 441, decree reversed Southern Express Co. v. Long (1913) 202 Fed. 462, 120 C. C. A. 568; Modern Woodmen of America v. Hatfield (D. C. 1912) 199 Fed. 270.

Receivership proceedings. Phinizy v.

Augusta & K. R. Co. (C. C. 1893) 56 Fed. 273.

Taxpayers' suits. Seccomb v. Wurster (C. C. 1897) 83 Fed. 856.

267. **Decisions under former statutes.**—Clearwater v. Meredith (1858) 62 U. S. (2 How.) 489, 16 L. Ed. 201; Merchants' Ins. Co. v. Ritchie (1866) 5 Wall. 541, 542, 18 L. Ed. 540; Philadelphia v. The Collector (1866) 5 Wall. 720, 721, 18 L. Ed. 614; Jones v. Andrews (1870) 10 Wall. 327, 331, 19 L. Ed. 935; Gaines v. Fuentes (1875) 92 U. S. 10, 19, 23 L. Ed. 524; Gerling v. Baltimore & Ohio R. Co. (1894) 14 Sup. Ct. 533, 534, 151 U. S. 673, 38 L. Ed. 311; Girardey v. Moore (C. C. 1877) Fed. Cas. No. 5,462.

(B) Joinder, dismissal, and rearrangement of parties

268. **Joinder of necessary party plaintiff as defendant.**—It makes no difference that some of respondents were joined as such because they refused to unite with complainants in the prosecution of the suit. Thus bonds issued by a corporation in Nebraska and secured by mortgage on its land there situate were held by citizens of another state, who, on default on the part of the corporation, applied to the mortgagee, who held the mortgage in trust for the bondholders, to foreclose it, but he declined to act. Held, that the said bondholders were entitled in their own name to file a bill to foreclose in the United States court, and, in addition to the mortgagor corporation, to join as respondents the recusant trustee as well as those bondholders, citizens of Nebraska, who had refused to join as complainants. Omaha Hotel Co. v. Wade (1877) 97 U. S. 13, 24 L. Ed. 917.

In a suit in a federal court by the trustees of an insolvent to recover assets, where one of the trustees refuses to join as a complainant, he may be made a defendant, and the fact that he is a citizen of the same state as another defendant does not deprive the court of jurisdiction. Georgia S. & F. Ry. Co. v. Einstein (1914) 218 Fed. 55, 133 C. C. A. 657.

In an action in a federal court by the bondholders against a nonresident railroad company for a default on the bonds, the trustee for the bondholders, having refused to sue, may be made a party defendant, although his interest is with the plaintiffs. Barry v. Missouri, K. & T. Ry. Co. (C. C. 1886) 27 Fed. 1.

Jurisdiction cannot be conferred by making a necessary party plaintiff a defendant, who is a resident of the state, whose interests are all in common with those of the complainants, and against whom no antagonistic act is alleged. Rich v. Bray (C. C. 1889) 37 Fed. 273, 2 L. R. A. 225.

A federal court is without jurisdiction of a suit by a legatee under a will against the executor and other legatees, who are citizens of the same state, where it appears from the bill that the interests of such other legatees in the matter in controversy are identical with those of plaintiff, and they are made defendants only on an allegation that they refuse to join as plaintiffs. Johnson v. Ford (C. C. 1901) 109 Fed. 501.

A federal court is without jurisdiction on the ground of diversity of citizenship of a suit for an accounting under a written contract, where the defendants are all citizens of the same state, and one of them is a party to the contract on the same side as complainants, made a defendant only because he refused to join as a complainant. Menefee v. Frost (C. C. 1903) 123 Fed. 633.

Where one partner has committed acts which render the continuation of the partnership impossible, all of the other partners are not required to join as complainants in a suit for dissolution; but such suit may be maintained by one, joining the others as defendants, and the facts that the interest of others may be similar to his own, and that they are citizens of the same state as the offending partner, will not defeat the jurisdiction of a federal court, where the complainant is a citizen of another state. Gaddie v. Mann (C. C. 1906) 147 Fed. 960, decree reversed Mann v. Gaddie (1907) 158 Fed. 42, 88 C. C. A. 1.

In a suit by one of two trustees for instructions, the other trustee, who was of the same citizenship as the other defendants, having been misjoined as a defendant, federal jurisdiction was not shown. Caylor v. Cooper (C. C. 1908) 165 Fed. 757.

269. **Joinder of citizens and aliens, or citizens of different states.**—In a suit by a plaintiff, who is a citizen of the state where it is brought, against two defendants, the fact that one of the defendants is a citizen of a different state, and the other an alien, does not deprive a federal court of jurisdiction, or prevent a removal of the suit from a state court, where either defendant would have a right to remove it if sued alone, and when they unite in petitioning for removal. Roberts v. Pacific & A. Ry. & Navigation Co. (1903) 121 Fed. 785, 58 C. C. A. 61; Id. (C. C. 1900) 104 Fed. 577.

Joining an alien with a citizen will not affect the jurisdiction, especially if the alien is not a material party. Rateau v. Bernard (C. C. 1854) Fed. Cas. No. 11,579.

Where federal jurisdiction rests on diversity of citizenship, it is no objection that citizens of different states other than the state in which the suit is instituted are combined as co-complainants. Schultz v. Highland Gold Mines Co. (C. C. 1907) 158 Fed. 337.

In a suit by a foreign corporation to

enjoin strikers, joinder of citizens of Washington and aliens as defendants did not deprive the court of jurisdiction. Puget Sound Traction, Light & Power Co. v. Lawrey (D. C. 1913) 202 Fed. 263.

270. Failure to join necessary parties.—Where a bill is filed in a United States court against several defendants, all of whom are residents of a state other than that where the suit is brought, and are necessary defendants, and some of them refuse to appear, and no service is made on them, the court acquires no jurisdiction, and the bill must be dismissed as to those who appear and move for a dismissal. Herndon v. Ridgway (1854) 17 How. 424, 15 L. Ed. 100.

Federal jurisdiction of an action for fraudulent conspiracy was not ousted by failure to serve two of the defendants, whose citizenship was not proved, where there were three co-conspirators left whose citizenship was such as to give the court jurisdiction of the controversy. Coggey v. Bird (1913) 209 Fed. 803, 126 C. C. A. 527.

A federal court cannot entertain a suit where a party, whose legal presence in the proceeding is necessary, cannot be subjected to its jurisdiction. First Nat. Bank v. Smith (C. C. 1879) 6 Fed. 215; Dormitzer v. Illinois & St. L. Bridge Co. (C. C. 1881) 6 Fed. 217.

Where the federal court has no jurisdiction of a suit to foreclose a mortgage given by an executor, under a power in the will, on land devised to testator's children, because some of the devisees are nonresidents, and are neither made parties defendant nor appear to answer, it cannot proceed with the suit and foreclose the mortgage, without affecting the interest of the devisees who are not parties, since, the mortgage covering all the land, and the devisees being joint tenants, a decree would affect the interest of the nonresident devisees just as if they owned the entire property. Detweiler v. Holderbaum (C. C. 1890) 42 Fed. 337.

Where the jurisdiction of the federal court to grant an injunction is based on a diversity of citizenship, the omission of a necessary party, who cannot be made a party without defeating the jurisdiction of the court, requires a dismissal of the cause. Evans v. Gorman (C. C. 1902) 115 Fed. 399.

271. Nonjoinder of dispensable parties where joinder would oust jurisdiction.—Merely proper or even necessary parties are not required to be joined in a federal court, where the result would be to defeat its jurisdiction. Harrison v. Urann (C. C. 1840) Fed. Cas. No. 6,146; Coca-Cola Co. v. Deacon Brown Bottling Co. (D. C. 1912) 200 Fed. 150.

Act Feb. 28, 1839, provides that, when there shall be several defendants in an action, any one or more of whom shall not be inhabitants of the district where the suit is brought, it shall be lawful for the court to proceed to trial between the parties who may be properly before it, but that the judgment shall not prejudice other parties not served or voluntarily appearing, and that the nonjoinder of persons who are not inhabitants shall constitute no matter of abatement. Held not to affect any case where persons having no interest are not joined because their citizenship would defeat the jurisdiction of the court. Shields v. Barrow (1854) 17 How. 130, 15 L. Ed. 158.

Where bonds issued by a corporation in Nebraska, secured by mortgage, were held by citizens of another state, who on default applied to the mortgagee for the bondholders to foreclose it, but he declined, they were not obliged to join as respondents bondholders in other states, whereby the court would be deprived of its jurisdiction. Omaha Hotel Co. v. Wade (1877) 97 U. S. 13, 24 L. Ed. 917.

Under the forty-seventh equity rule the complainant need not join any but indispensable parties, when their joinder will oust jurisdiction. Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America (1897) 82 Fed. 124, 27 C. C. A. 73, decree affirmed (1899) 19 Sup. Ct. 341, 173 U. S. 99, 43 L. Ed. 628.

The jurisdiction of a federal court is not defeated in a suit brought only against defendants who are citizens of other states than the complainant because the bill discloses that there are other citizens of the same state with complainant who might properly have been made defendants. International Trust Co. v. T. B. Townsend Brick & Contracting Co. (1899) 95 Fed. 850, 37 C. C. A. 396.

A trustee in a street railroad mortgage held entitled to maintain a suit in equity in a federal court to enjoin a repeal of the company's franchise without joining the mortgagor, where it would defeat the jurisdiction of the court. City of Denver v. Mercantile Trust Co. of New York (1912) 201 Fed. 790, 120 C. C. A. 100, modifying decree Mercantile Trust Co. of New York v. City of Denver (C. C. 1908) 161 Fed. 769.

The trial court can retain jurisdiction of a suit by allowing amendments to the pleadings and dismissals as to proper, but not necessary, parties whose presence would oust the jurisdiction of the court. Thomas v. Anderson (1915) 223 Fed. 41, 138 C. C. A. 405.

In a suit in equity brought by aliens against citizens of the district, a person not stated to be a citizen of the state cannot be made a defendant on his application, because the jurisdiction of the court would thereby be

ousted. Drake v. Goodridge (C. C. 1868) Fed. Cas. No. 4,062.

Where, in a suit in the federal courts for an injunction against strikers, the court's jurisdiction depends on the residence of the parties, a party interested in the subject-matter need not be made a party to the suit where his joinder would oust the court of jurisdiction, provided a final decree against the parties before the court, consistent with equity and good conscience, can be made. Ex parte Haggerty (C. C. 1903) 124 Fed. 441.

Where one partner has committed acts which render the continuation of the partnership impossible, all of the other partners are not required to join as complainants in a suit for dissolution; but such suit may be maintained by one, joining the others as defendants, and the facts that the interest of others may be similar to his own, and that they are citizens of the same state as the offending partner, will not defeat the jurisdiction of a federal court, where the complainant is a citizen of another state. Gaddie v. Mann (C. C. 1906) 147 Fed. 960, decree reversed Mann v. Gaddie (1907) 158 Fed. 42, 88 C. C. A. 1.

Where two persons, entitled to separable, though precisely similar, claims charged on real estate, joined in a bill to enforce the same, and the bill was amended by omitting one of them, that it might not fail for want of requisite diversity of citizenship, and was prosecuted by the other on her own claim, the amended bill stating that the person omitted consents to the relief sought and to all proceedings had or decree made or that may be made in the case, the circumstances did not disclose collusion, so as to render the amended bill demurrable. Mathieson v. Craven (C. C. 1908) 164 Fed. 471.

The rule that all persons interested in a suit in equity in a federal court having jurisdiction on the ground of diversity of citizenship must be made parties does not apply, where the bringing in of a dispensable party will oust the jurisdiction of the court. Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (C. C. 1909) 187 Fed. 474.

That persons who might otherwise be proper parties to a suit cannot be made parties because of their nonresidence does not defeat the jurisdiction of a federal court to adjudicate between the parties before it. Lecouturier v. Ickelheimer (D. C. 1913) 205 Fed. 682.

272. Joinder of unnecessary parties.—The jurisdiction of the United States courts cannot be defeated by joining unnecessary parties. Cella v. Brown (1906) 144 Fed. 742, 75 C. C. A. 608; Edgerton v. Gilpin (C. C. 1878) Fed. Cas. No. 4,280; Ruckman v. Ruckman (C. C. 1880) 1 Fed. 587, 590; Mahon v. Somers (C. C. 1901) 112 Fed. 174; Withers v. John Hopkins Place Sav. Bank (1898) 30 S. E. 766, 104 Ga. 89; Louisville & N. R. Co. v. Newman (1907) 57 S. E. 515, 128 Ga. 283; Harper v. Gaitheman (1880) 1 Ky. Law Rep. 419; Calloway v. Ore Knob Copper Co. (1876) 74 N. C. 200; Hadley v. Dunlap (1859) 10 Ohio St. 1.

The mere presence on the record of the state as a party plaintiff will not defeat the jurisdiction of a federal court, if it appears that the state has no real interest in the controversy. Ex parte State of Nebraska (1908) 28 Sup. Ct. 581, 209 U. S. 436, 52 L. Ed. 876.

The subsequent introduction of unnecessary parties into the case on their own petition, even if they be citizens of the same state with complainant, will not oust the jurisdiction. Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America (1897) 82 Fed. 124, 27 C. C. A. 73, decree affirmed (1899) 19 Sup. Ct. 341, 173 U. S. 99, 43 L. Ed. 628.

Where, in a suit to restrain defendants from selling liquor on certain land under a contract with a lumber company which held a timber contract from complainant's grantors, no relief was sought by or against the lumber company, it was not a necessary party, and hence it was not material that it was improperly joined as a defendant, and its joinder as a complainant would have defeated federal jurisdiction because of its citizenship. Paint Creek Co. v. Gallego Coal & Land Co. (C. C. A. 1908) 166 Fed. 62, 91 C. C. A. 648.

Where the writ is returned non est, etc., as to a defendant whose citizenship is not averred, his joinder will not oust the court of jurisdiction. Morrison v. Bennet (C. C. 1838) Fed. Cas. No. 9,-843.

The residence of persons having an equitable interest in the subject-matter of a suit at law is immaterial, where the parties having the legal right are before the court. Adams v. White (C. C. 1859) Fed. Cas. No. 68.

Plaintiff, a citizen of Colorado, brought a stockholder's bill in a state court, in Colorado, making the defendants there to the railroad company (also a citizen of Colorado), in which the plaintiff was a stockholder, viz., the Denver Pacific Railway Company, and also the directors thereof, including two directors, citizens of Colorado, against whom, however, no charges were made, and no relief asked; also making a defendant another railroad company, viz., the Kansas Pacific Railway Company (a citizen of Kansas), and certain individuals all citizens of other states than Colorado. The object of the bill was to secure an accounting in favor of the Denver Pacific Company against the Kansas Pacific Company, and to secure a decree in personam against the nonresident directors of the Denver Pacific Company. Held, that the federal court might take jurisdiction. Arapahoe

County v. Kansas Pac. Ry. Co. (C. C. 1877) Fed. Cas. No. 502.

In an action for the death of plaintiff's intestate, caused by the falling of a building, the owner of the building, a resident of another state, and the tenant, a resident of the state where action was brought, were joined as parties defendant. The complaint did not show that the tenant was responsible for the unsafe condition of the building, or bound to put it in good condition, but alleged merely that he was in occupation. Held, that he was improperly joined as a defendant, and such joinder could not defeat jurisdiction. Nelson v. Hennessey (C. C. 1887) 33 Fed. 113.

273. Improper or collusive making or joinder of parties.—See, also, post, § 1019, and notes thereunder.

The improper joinder of parties in a suit in a United States court, as, if citizens of the same state with the plaintiff be made defendants in a bill with citizens of another state properly made defendants, will not affect the jurisdiction of court as between the parties properly before it. Carneal v. Banks (1825) 10 Wheat. 181, 6 L. Ed. 297; Schultz v. Highland Gold Mines Co. (C. C. 1907) 158 Fed. 337.

The organization, by the individual stockholders and officers of a Virginia corporation, of a corporation under the laws of Pennsylvania for the express purpose of bringing a suit in a federal court for land claimed by the former corporation against citizens of Virginia, and conveyed, without the payment of a valuable consideration, to the Pennsylvania corporation after its organization, and before the bringing of suit, will not enable the grantee to maintain the suit in such court. Lehigh Min. & Mfg. Co. v. Kelly (1895) 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444, affirming (C. C. 1894) 64 Fed. 401.

The provision in the fifth section of the judiciary act of 1875, making it the duty of the court to dismiss a case if it shall appear that it does not really and substantially involve a controversy properly within the jurisdiction of such court, or if the parties have been collusively joined for the purpose of creating a case cognizable therein, was not superseded by Act 1887–88. Board of Com'rs of Lake County, Colo., v. Dudley (1899) 19 Sup. Ct. 398, 173 U. S. 243, 43 L. Ed. 684.

A federal court has no jurisdiction, on the ground of diversity of citizenship, of a suit brought against a municipality by the mortgagee of a waterworks company, to enforce the municipality's contract with that company, where there is no diversity of citizenship between the municipality and the waterworks company, and the interests of the latter and its mortgagee are not antagonistic, it obviously being made a defendant instead of plaintiff solely for the purpose of reopening, in the federal courts, a controversy which had been decided against the waterworks company in the state court. City of Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title & Trust Co. (1905) 25 Sup. Ct. 420, 197 U. S. 178, 49 L. Ed. 713.

The jurisdiction of the Court of the United States for the Northern District of Illinois of a suit brought by a California stockholder of an Illinois gas company, after the company's refusal to sue, to enjoin the city of Chicago from enforcing an ordinance regulating gas rates, on the ground of want of power in the municipality to pass the ordinance, cannot be regarded as collusively or fraudulently invoked because of complainant's motive in preferring a federal tribunal, or because subsequent events made it to the interest of the company to make common cause with him against the enforcement of the ordinance, or because an officer and large stockholder in such company personally contributed to the expenses of the suit, or because complainant's counsel was afterwards retained in a suit then pending between the company and the municipality. City of Chicago v. Mills (1907) 27 Sup. Ct. 286, 204 U. S. 321, 51 L. Ed. 504, affirming decree Mills v. City of Chicago (C. C. 1906) 143 Fed. 430.

Incorporation in Nevada by direction of a California corporation, for the sole purpose of having the matters in dispute between such California corporation and another corporation of that state determined in a federal rather than in the state court, where they were pending and undetermined must be regarded as an attempt collusively to make a party plaintiff simply for the purpose of creating a case cognizable by the federal court, where the new corporation assumes to be the owner of the property rights which the old company had asserted only that it may have a standing in the federal court as a litigant in respect of those rights, and the old corporation can control the conduct of the suit brought by the new corporation at any time up to the date of the decree, and can require the new corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the old corporation without any new or valuable consideration. Miller & Lux v. East Side Canal & Irrigation Co. (1908) 29 Sup. Ct. 111, 211 U. S. 293, 53 L. Ed. 189.

An action brought by a South Dakota corporation against a citizen of Georgia, in a federal court sitting in the latter state will be dismissed as collusive, where such corporation is merely the agent of Georgia attorneys, who brought it into existence as a corporation that individual citizens of Georgia having controversies with other individual citizens of that state might, in their discretion, have the use of its corporate name in order to create cases

apparently within the jurisdiction of the federal court. Southern Realty Inv. Co. v. Walker (1909) 29 Sup. Ct. 211, 211 U. S. 603, 53 L. Ed. 346.

A suit by nonresident taxpayers on behalf of themselves and all other taxpayers to restrain a municipal public utilities commission from acquiring a waterworks system, on the ground that it was an unconstitutional body, should not be dismissed on the theory that the complainants were collusively made parties because solicited to bring the suit and indemnified by the existing waterworks company. Wheeler v. City and County of Denver (1913) 33 Sup. Ct. 842, 229 U. S. 342, 57 L. Ed. 1219.

The formation of a corporation under the laws of New Jersey to take over property in New Hampshire from a corporation of that state having the same name and composed largely of the same persons held not so clearly for the purpose of enabling it to invoke the jurisdiction of the federal courts as to defeat such jurisdiction on the ground of diversity. Percy Summer Club v. Astle (C. C. A.) 163 Fed. 1, 90 C. C. A. 527, rehearing denied (1908) 166 Fed. 1020, 92 C. C. A. 667.

Complainant, a citizen of Texas, the heir of B., sued his coheirs, citizens of Arkansas, claiming from the first defendant, who had obtained the legal title to the ancestor's property, a one-fourth interest, and from the other two defendants, partition. The last two defendants filed a cross-bill, claiming separate ownerships of one-fourth interest, and also partition. Held that, although the interests of the last two defendants and that of complainant were the same as against defendant, who claimed the legal title, their interests were not so identical in other respects as to require their being joined as complainants; and a plea in abatement to the jurisdiction, on the ground that they were collusively made defendants to give the federal court jurisdiction, should be overruled. Belding v. Gaines (C. C. 1887) 37 Fed. 817.

Bill by mining company organized under laws of Nevada against citizens of California held collusive, in that plaintiff was organized to confer jurisdiction on the District Court by diversity of citizenship, so that the court was without jurisdiction. Phœnix-Buttes Gold Mining Co. v. Winstead (D. C. 1914) 226 Fed. 855.

274. Dismissal of parties whose presence would oust jurisdiction.—Where a federal court had jurisdiction of the subject-matter and the necessary parties, the bill could be dismissed as to any defendant who was not an indispensable party to the suit, whose presence would oust or restrict the jurisdiction or the right and be retained as to the other defendants. Conolly v. Taylor (1829) 2 Pet. 556, 7 L. Ed. 518; Hicklin v. Marco (1893) 56 Fed. 549, 6 C. C. A. 10 (affirming decree [C. C. 1891] 46 Fed. 424); Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America (1897) 82 Fed. 124, 27 C. C. A. 73 (decree affirmed [1899] 19 Sup. Ct. 341, 173 U. S. 99, 43 L. Ed. 628); Mason v. Dullagham (1897) 82 Fed. 689, 27 C. C. A. 296; Hopkins v. Oxley Stave Co. (1897) 83 Fed. 912, 28 C. C. A. 99; Smith v. Consumers' Cotton Oil Co. (1898) 86 Fed. 359, 30 C. C. A. 103; Tug River Coal & Salt Co. v. Brigel (1898) 86 Fed. 818, 30 C. C. A. 415 (affirming decree Brigel v. Tug River Coal & Salt Co. [C. C. 1896] 73 Fed. 13); Jackson v. Jackson (1909) 175 Fed. 710, 99 C. C. A. 286; Thomas v. Anderson (1915) 223 Fed. 41, 138 C. C. A. 405; Greeley v. Smith (C. C. 1844) Fed. Cas. No. 5,747; Lockhart v. Horn (C. C. 1871) Fed. Cas. No. 8,445 (affirmed in [1873] 17 Wall. 570); Claiborne v. Waddell (C. C. 1892) 50 Fed. 368 (following Horn v. Lockhart [1873] 17 Wall. 570, 21 L. Ed. 657); Whittle v. Artis (C. C. 1893) 55 Fed. 919; Cookerly v. Great Northern R. Co. (C. C. 1895) 70 Fed. 277; Oxley Stave Co. v. Coopers' International Union of North America (C. C. 1896) 72 Fed. 695; Grove v. Grove (C. C. 1899) 93 Fed. 865; Delaware, L. & W. R. Co. v. Frank (C. C. 1901) 110 Fed. 689; Axline v. Toledo, W. V. & O. R. Co. (C. C. 1903) 138 Fed. 169; Cella, Adler & Tilles v. Brown (C. C. 1905) 136 Fed. 439; Iowa Lillooet Gold Min. Co. v. Bliss (C. C. 1906) 144 Fed. 446; North Carolina Min. Co. v. Westfeldt (C. C. 1907) 151 Fed. 290 (decree reversed Westfeldt v. North Carolina Min. Co. [1909] 166 Fed. 706, 92 C. C. A. 378, writ of certiorari denied North Carolina Min. Co. v. Westfeldt [1909] 29 Sup. Ct. 697, 214 U. S. 516, 53 L. Ed. 1064, appeal dismissed [1909] 30 Sup. Ct. 404, 215 U. S. 586, 54 L. Ed. 339); A. R. Barnes & Co. v. Berry (C. C. 1907) 156 Fed. 72; Irving v. Joint Dist. Council of New York and Vicinity of United Brotherhood of Carpenters, etc. (C. C. 1910) 180 Fed. 896; Columbia Digger Co. v. Rector (D. C. 1914) 215 Fed. 618; Illinois Cent. R. Co. v. Robinson (Ala. 1914) 66 So. 519; Cuyler v. Smith (1887) 78 Ga. 662, 3 S. E. 408.

275. Rearrangement of parties.—In determining the question of diversity of citizenship, where there are several plaintiffs or defendants, on the rule that all the parties on one side must be citizens of different states from all those on the other side, the parties are to be arranged on one side or the other, as their interests require. Meyer v. Delaware R. Const. Co. (1879) 100 U. S. 457, 468, 25 L. Ed. 593; Pacific R. Co. v. Ketchum (1879) 101 U. S. 289, 298, 25 L. Ed. 932; Evers v. Watson (1895) 156 U. S. 527, 15 Sup. Ct. 430, 39 L. Ed. 520; Pittsburgh, C. & St. L. Ry. Co. v. Baltimore & O. R. Co. (1894) 61 Fed. 705, 708, 10 C. C. A. 20, 22 U.

S. App. 359; Boatmen's Bank of St. Louis v. Fritzlen (1905) 135 Fed. 650, 68 C. C. A. 288 (reversing judgment and order Weldon v. Fritzlen [C. C. 1904] 128 Fed. 608); Wood v. Deskins (1905) 141 Fed. 500, 72 C. C. A. 558; Mann v. Gaddie (1907) 158 Fed. 42, 88 C. C. A. 1 (reversing decrees Gaddie v. Mann [C. C. 1906] 147 Fed. 955, 960); Wisner v. Ogden (C. C. 1827) Fed. Cas. No. 17,914; Girardey v. Moore (C. C. 1877) Fed. Cas. No. 5,-462; Burke v. Flood (C. C. 1880) 1 Fed. 541, 542, 6 Sawy. 220; Bybee v. Hawkett (C. C. 1880) 5 Fed. 1, 6; Sayer v. La Salle & P. Gaslight & Coke Co. (C. C. 1880) 14 Fed. 69, 9 Biss. 372; Snow v. Texas Trunk R. R. (C. C. 1882) 16 Fed. 1, 3; Le Mars v. Iowa Falls & S. C. R. Co. (C. C. 1882) 48 Fed. 661; Saginaw Gaslight Co. v. Saginaw (C. C. 1886) 28 Fed. 529, 531; Brown v. Murray Nelson & Co. (C. C. 1890) 43 Fed. 614; Cilley v. Patten (C. C. 1894) 62 Fed. 498; Consolidated Water Co. v. Babcock (C. C. 1896) 76 Fed. 243; Hutton v. Joseph Bancroft & Sons Co. (C. C. 1896) 77 Fed. 481; Jarvis v. Crozier (C. C. 1899) 98 Fed. 753; Kimball v. Cedar Rapids (C. C. 1900) 99 Fed. 130, 132; Huntington v. Pinney (C. C. 1903) 126 Fed. 237; Gage v. Riverside Trust Co. (C. C. 1906) 156 Fed. 1002; Stephens v. Smartt (C. C. 1909) 172 Fed. 466; Stewart v. Mitchell (C. C. 1909) Id. 905; Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (C. C. 1909) 187 Fed. 474; Allen-West Commission Co. v. Brashear (C. C. 1910) 176 Fed. 119; Kelly v. Dolan (D. C. 1914) 218 Fed. 966; Hutton v. Joseph Bancroft & Sons Co. (1896) 67 A. 972, 8 Del. Ch. 55; Boatmen's Bank of St. Louis v. Fritzlen (1907) 89 Pac. 915, 75 Kan. 479.

276. —— **In suits involving bank deposits.**—A suit by a bank was instituted for the purpose of determining to whom a deposit should be paid against the administrator of the deceased depositor, a citizen of the state, who claimed the deposit as a part of the estate of the deceased, and against a third person, a citizen of another state, who claimed the deposit. Held, that it was the duty of the court to transpose the parties, by placing the administrator and third person on opposite sides, and retain jurisdiction. First Nat. Bank v. Bridgeport Trust Co. (C. C. 1902) 117 Fed. 969.

277. —— **Bonds and bondholders.**—In an action by resident taxpayers against county officials and bondholders, one of whom is a nonresident, the citizenship of the county officials will not defeat the right of removal on the part of the nonresident bondholder, as the former must be deemed to be interested on the same side of the controversy with the complainants. Anderson v. Bowers (C. C. 1889) 40 Fed. 708, following Harter Tp. v. Kernochan (1880) 103 U. S 562, 26 L. Ed. 411.

A federal court has jurisdiction of suit brought by a holder of a portion o an issue of bonds made by a school dis trict which exceeded its constitutions limit of indebtedness against the dis trict and the other bondholders, to es tablish the validity of his bonds an enforce their payment, notwithstandin the fact that some of the other bond holders are citizens of the state c which the district is a corporatio since upon the issue as to the amoun of complainant's enforceable indebted ness, to determine which the othe bondholders are joined, their interest and that of complainant are adversar Everett v. Independent School Dist. c Rock Rapids (C. C. 1901) 109 Fed. 69

278. —— **Corporations.**—The fa that the ultimate interest of a corpo rate defendant may be the same as th of the complaining stockholders do not require, in arranging the parties t a cause, for the purpose of determin ing the jurisdiction of federal court, i voked on the ground of diversity of cit zenship, that such corporation b grouped on the side of complainant where the bill alleged that the corpora tion is under a control antagonistic t complainants, and is made to act in way detrimental to their rights. Doc tor v. Harrington (1905) 25 Sup. C 355, 357, 196 U. S. 579, 49 L. Ed. 60 Howard v. National Telephone Co. (C C. 1910) 182 Fed. 215.

A corporate defendant and a com plaining stockholder will not be aligne on the same side of the controversy fo the purpose of determining jurisdictio Venner v. Great Northern Ry. C (1908) 28 Sup. Ct. 328, 209 U. S. 2 52 L. Ed. 666.

In a suit by a stockholder in a do mestic corporation against such corpo ration and a foreign corporation to en join the latter from obtaining and ex ercising control over the property an business of the former, which the bi alleges is about to be accomplishe through an illegal conspiracy betwee the defendants, the domestic corpora tion is not a party in the same intere with complainant, and cannot be aligr ed with him for the purpose of givin the foreign corporation the right of re moval on the ground of diversity c citizenship. MacGinniss v. Boston M. Consol. Copper & Silver Min. C (1902) 119 Fed. 96, 55 C. C. A. 648.

The bill of plaintiff corporation al leged that it was engaged in the busi ness of selling coal and coke; that i had contracts with defendant coal com panies by which it was to take and pa for all their product at the mines, t furnish transportation, and to sell th same at prices fixed by the companie receiving a stipulated sum per ton fo its services; that by the terms of suc contracts defendant companies were no liable for damages for failing to fu

nish coal or coke to plaintiff where such failure was caused by strikes; that in reliance on such contracts plaintiff had made contracts for the sale of large quantities of coal and coke, which could only be supplied from the mines of defendant companies; that the latter were prevented from furnishing the same by the wrongful and illegal acts of individual defendants, who were conducting a strike among the miners, and who, by intimidation and threats, prevented others from working in the mines. Held, that the bill showed such an interest in plaintiff as entitled it to maintain the suit in its own right for its protection independently of the coal companies, which, while properly made defendants, could not be aligned with plaintiff to defeat the jurisdiction of a federal court, their interests, while perhaps not adverse, being based on different rights. Carroll v. Chesapeake & O. Coal Agency Co. (1903) 124 Fed. 305, 61 C. C. A. 49.

To a suit by a mortgagee of a street railroad company to enjoin another street railroad company from condemning the right to use a portion of the mortgagor's track, the mortgagor company is an indispensable party, and, as its interests necessarily range it on the side of the complainant, it will be so placed by the court for jurisdictional purposes, although it is made a defendant by the pleadings; and, where it is a corporation of the same state as its co-defendant, a federal court is without jurisdiction on the ground of diversity of citizenship. Old Colony Trust Co. v. Atlanta Ry. Co. (C. C. 1899) 100 Fed. 798.

In a suit by a stockholder of a corporation of the same state against such corporation and a foreign corporation to charge the latter as trustee because of acts which as majority stockholder it caused the former to do in fraud of its other stockholders, the domestic corporation is not a party in the same interest as complainant, and cannot be aligned with him for the purpose of giving a federal court jurisdiction on the ground of diversity of citizenship. Redfield v. Baltimore & O. R. Co. (C. C. 1903) 124 Fed. 929.

Where a bill filed in a federal court by stockholders against the corporation and others does not conform to the requirement of equity rule 94 by showing the efforts made to secure action by the stockholders, or excuse the failure to make such efforts, the usual rule applies that the parties must be aligned according to their interest for the purpose of determining the jurisdiction of the court, and the corporation must be aligned with the complainants. Waller v. Coler (C. C. 1903) 125 Fed. 821.

Equity rule 94 in no way affects the rule that, in determining federal jurisdiction in suits by stockholders to enforce the rights of the corporation, the corporation is to be aligned with the complainant or the defendants according to the facts. Groel v. United Electric Co. of New Jersey (C. C. 1904) 132 Fed. 252.

In a suit by a stockholder of a corporation against the corporation and other stockholders to prevent the consummation of an alleged conspiracy by the latter to obtain control of the corporation for the purpose of canceling or terminating a contract made by the corporation, and alleged to be for its benefit, and substituting another, by which the conspirators would profit at the expense of the company and its other stockholders, the corporation must be aligned with the complainant for the purpose of determining the removability of the cause, in accordance with its interest as shown by the bill, and especially where it adopts the allegations of the bill by its answer. Lucas v. Milliken (C. C. 1905) 139 Fed. 816.

In a stockholders' suit in a federal court to remove an alleged fraudulent lien from the property of the corporation, where the complainant has not complied with equity rule 94, the corporation will be aligned on the side of the complainant. Gage v. Riverside Trust Co. (C. C. 1906) 156 Fed. 1002.

To a suit in equity instituted by a stockholder in his own name, but upon a right of action in the corporation, such corporation is an indispensable party, and for the purpose of determining the jurisdiction of a federal court will be aligned with the defendants, where the officers or persons controlling it are shown to be opposed to the object sought by the suit. Kelly v. Mississippi River Coaling Co. (C. C. 1909) 175 Fed. 482.

The Federal Mining Company, a Delaware corporation, the Bunker Hill Company, and the January Company, both Oregon corporations, each owned a mining claim, and all three claims conflicted. The Federal Company sued the Bunker Hill Company in the United States court to quiet title and for an accounting for ores taken from the overlaps, and the January Company had a similar suit against the Bunker Hill Company in the state court. The Bunker Hill Company moved to make the January Company a party in the suit in the United States court, which was resisted on the ground that, because of the ownership of the entire January stock by the Federal Company, it could not be a defendant, but must be a plaintiff, which would destroy the jurisdiction of the court by having an Oregon citizen on both sides of the case. Held, that the January Company could be made a defendant, since its claim was adverse to the Federal Company, though the relation between the two companies was not hostile. Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (C. C. 1909) 187 Fed. 474.

In a stockholder's suit in a state court

against the corporation and others, where the allegations of the bill show that the corporation is fully under the control of its codefendants, it is properly aligned with them for the purposes of the removal statute, and, where it is a citizen of the same state as complainant, the suit is not removable. Crawford v. Seattle, R. & S. Ry. Co. (D. C. 1912) 198 Fed. 920.

Where a stockholder sued the corporation's statutory receiver of the same citizenship in a foreign federal court, together with individual defendants of diverse citizenship, the court, to sustain jurisdiction for diversity of citizenship, could realign the parties, making the receiver a complainant. Kelly v. Dolan (D. C. 1914) 218 Fed. 966.

279. —— **Contracts.**—Where a part owner of a distillery joined defendants in a contract to purchase the whole, and for that purpose agreed to convey his existing interest therein, and afterwards, being ready and willing to perform his contract, joins with the other vendors in a suit for specific performance, he is a proper party plaintiff, and cannot be considered a defendant for the purpose of destroying the diverse citizenship necessary to maintain the suit in a federal court. Perin v. Megibben (1892) 53 Fed. 86, 3 C. C. A. 443, affirming Megibben's Adm'rs v. Perin (C. C. 1892) 49 Fed. 183.

A federal court is without jurisdiction of a suit for the specific performance of a contract in which the complainant owns only a part interest, when the owner of the remaining interest, who is joined as a defendant, is a citizen of the same state as his codefendants, the other parties to the contract. In such case he must be arranged by the court on the side of the complainant in the controversy. Joseph Dry Goods Co. v. Hecht (1903) 120 Fed. 760, 57 C. C. A. 64.

280. —— **Estates of decedents.**—In a suit to construe a will, one defendant, who was a citizen of the same state as the other defendant, held to be for jurisdictional purposes a plaintiff, so that the United States court had no jurisdiction. Thomas v. Anderson (1915) 223 Fed. 41, 138 C. C. A. 405.

281. —— **Garnishment.**—A proceeding in garnishment after judgment under a state law held a civil suit in which an issue of fact is or may be joined between the plaintiff and garnishee and in such proceeding, while the judgment defendant is an indispensable party, his pecuniary interest is with the plaintiff on the issues between him and the garnishee, and he is to be ranged on that side of the controversy for the purposes of federal jurisdiction. Baker v. Duwamish Mill Co. (C. C. 1906) 149 Fed. 612.

282. —— **Mortgages and trust deeds.**—Where a trustee in a trust deed made by a Texas corporation was disabled from executing his power of sale by a mistake in drawing the deed, and upon a suit by one of the beneficiaries, a citizen of another state, to foreclose, he was joined as a defendant, as was also one of the beneficiaries under the deed, held, that their interests were not adverse to defendant corporation so as to require them to be arranged on the side of the complainant, and that the court had jurisdiction, although both were citizens of Texas. Kildare Lumber Co. v. National Bank of Commerce (1895) 69 Fed. 2, 16 C. C. A. 107.

Where the bill filed by a bondholder to foreclose a trust deed shows no conflict between complainant and the trustee, and where the bill is such a one as the trustee should himself have filed, the trustee will, for purposes of jurisdiction, be ranged on the same side of the controversy as the complainant. But, where the object of the bill filed by a beneficiary is to procure a decree excluding all other bondholders from the equal benefits of the mortgage, the trustee is properly an opposite party to the subject-matter of that controversy and should, for purposes of jurisdiction be ranged with the other defendants to the suit. First Nat. Bank v. Radford Trust Co. (1897) 80 Fed. 569, 26 C. C. A. 1.

On a motion to remand an action for the foreclosure of a mortgage in which the plaintiff and the mortgagor are residents of the same state, and another mortgagee defendant and resident of another state makes a claim adverse to plaintiff and to mortgagor, the court will not look at the contract between him and the mortgagor to determine the question of jurisdiction. Thompson v. Dixon (C. C. 1886) 28 Fed. 5.

In a suit to foreclose a mortgage where a lien claimant files a cross bill and sets up an alleged prior lien, the validity of which both plaintiff and the mortgagors deny, in determining the citizenship of the parties as affecting the jurisdiction of the federal court they should be arrayed against the lien claimant. Wolcott v. Sprague (C. C. 1893) 55 Fed. 545.

Trustees of a mortgage with power of sale are indispensable parties on foreclosure, and, their interest being antagonistic to those of the mortgagors they must be treated as plaintiffs, and determine the question of diversity of citizenship, though for refusal to act they are properly made parties defendant by the beneficiary. Allen-West Commission Co. v. Brashear (C. C. 1910) 176 Fed. 119.

In an action by a mortgagor to cancel certain mortgages and to foreclose a subsequent trust deed to the same property, although the beneficiaries have a common interest with plaintiff in showing the discharge of said mortgages they are nevertheless his adversary parties as to the other matters in con-

troversy, and will not be rearranged as parties plaintiff, so as to show diversity of citizenship. Springer v. Sheets (1894) 115 N. C. 370, 20 S. E. 469.

283. — **Partnership.**—A bill was filed in the federal court in the name of the four members composing the firm of Kent & Co., two of whom, Kent and Young, were citizens of New York, the state in which several of the defendants resided. Objection being anticipated to the jurisdiction of the court, because some of the plaintiffs and some of the defendants were thus citizens of the same state, an amended bill was filed by Poole and Sherman, two of the partners, making Young and Kent defendants. It appeared that, although the four were partners, their business was conducted by two houses, one in Chicago, managed by Poole and Sherman, and one in New York City, managed by Kent and Young; that the action arose out of a certificate of stock which had been pledged to Kent and Young by the defendant, a debtor of the New York house, and that the New York house, being indebted to the Chicago house, had transferred the debt and stock security in payment. Kent and Young, on being made defendants, filed an answer disclaiming all interest in the stock. Held, they might be made defendants, and there was thereafter no objection to the jurisdiction of the court attaching. Poole v. West Point Butter & Cheese Ass'n (C. C. 1887) 30 Fed. 513.

284. — **Religious societies.**—Neither the attitude of the alleged members of the Board of Publication of the Cumberland Church, incorporated merely as a convenient agency for the publishing work of such church, who believed the alleged union with the Presbyterian Church to have been consummated, nor the fact that it does not appear that such members have surrendered possession, requires that, when testing the jurisdiction of a federal circuit court, invoked on the ground of diversity of citizenship, such corporation be aligned on the side of complainants in a suit to enforce the alleged rights of the members of the united church to use and control the corporate agency and to have the benefit of the corporate property in its denominational work, as against defendants who repudiate the alleged union, and insist that the religious association which they represent is still the original Cumberland Church, continuing with all its separate powers unimpaired. Helm v. Zarecor (1911) 32 Sup. Ct. 10, 222 U. S. 32, 56 L. Ed. 77.

Complainant, a citizen of Georgia, as a member of a church corporation of Tennessee, brought suit in a federal court against the corporation, its governing officers, and other members, alleging that the latter, by reason of an attempted merger of the church with another organization, to which they did not consent, claimed to be entitled to control the corporation and its property, to the exclusion of the officers, and that such officers refused to bring suit to protect the church and its property rights. The bill prayed a decree adjudging that defendant officers were entitled, as representatives of the majority of the membership, to sole control of the church and its property. Held, that the real controversy was between such officers and their codefendants, all of whom were citizens of Tennessee, and that, when the officers were aligned as complainants, as required by their interest, the court was without jurisdiction for want of diversity of citizenship. Stephens v. Smartt (C. C. 1909) 172 Fed. 466.

A controversy between two factions in a local church, each having a pastor and a governing board of elders all of whom are citizens of the same state, and each claiming the exclusive right to control and use the church building and property, cannot be brought by members of one faction who are citizens of other states against the pastor and elders of both factions but asking relief against one side only by injunction to restrain them from interfering with their codefendants in the use and occupation of the property. In such case, the defendants who belong to the same faction as complainants are not merely formal parties but the real controversy is between them and their codefendants and requires that they be considered as complainants for the purpose of determining the court's jurisdiction. Stewart v. Mitchell (C. C. 1909) 172 Fed. 905.

Trustees of church property, joined as defendants in a suit to have the property declared to be held in trust for the use and benefit of one religious society rather than another, merely as title holders, held not required to be aligned with complainants to defeat the jurisdiction of the court, because they are active members of complainants' society and their sympathies are on that side of the controversy. Sharp v. Bonham (D. C. 1913) 213 Fed. 660.

285. — **Sales.**—Where a part owner of a distillery joined defendants in a contract to purchase the whole, and for that purpose agreed to convey his existing interest therein, and afterwards, being ready and willing to perform his contract, joins with the other vendors in a suit for specific performance, he is a proper party plaintiff, and cannot be considered a defendant for the purpose of destroying the diverse citizenship necessary to maintain the suit in a federal court. Perin v. Megibben (1892) 53 Fed. 86, 3 C. C. A. 443, 6 U. S. App. 348, affirming (C. C. 1892) 49 Fed. 183.

Where there was no controversy between one of the joint vendors in a contract for the sale of lands and the

purchaser, but there was a dispute between her and the other vendors as to her share of the purchase money and the amount she should contribute toward clearing the title, and also between such other vendors and the purchaser with respect to taxes, interest, and other matters affecting the amount due under the contract which resulted in a suit by them for specific performance, the said vendor, who refused to join in such suit, was properly made a defendant, and cannot be aligned as a complainant in interest to defeat the jurisdiction of a federal court therein because of the fact that she was a citizen of the same state as the purchaser, although she was necessarily given a decree against him for the share of the purchase money to which the court determined she was entitled. Wood v. Deskins (1905) 141 Fed. 500, 72 C. C. A. 558.

In an action for damages for illegally driving cattle into the state which communicated the Texas fever to plaintiff's cattle, brought against the importer and the purchasers, who had by contract assumed the liability, the importer's interest is not adverse to that of the purchasers, so as to justify his classification as a plaintiff. Woodrum v. Clay (C. C. 1888) 33 Fed. 897.

286. —— Trusts.—In an action by the state, on the relation of the holder of notes illegally executed by a township trustee, on the trustee's official bond, for such illegal execution, the relator will be considered the sole plaintiff, for determining the jurisdiction of the federal court on the ground of diverse citizenship. Indiana v. Glover (1895) 15 Sup. Ct. 186, 188, 155 U. S. 513, 39 L. Ed. 243.

Trustees holding legal title to church property need not, when testing jurisdiction of a federal court invoked for diversity of citizenship, be aligned on plaintiffs' side in controversy between two religious societies over right to control the church property, but are properly made parties defendant. Sharpe v. Bonham (1912) 32 Sup. Ct. 420, 224 U. S. 241, 56 L. Ed. 747.

In a judgment creditor's suit by a citizen of New York against citizens of Massachusetts to set aside an alleged fraudulent conveyance in which the fraudulent grantor's trustee in bankruptcy, also a citizen of Massachusetts intervened as defendant, and admitted plaintiff's judgment, there was no diversity of citizenship making the cause removable to a United States court, as the interests of the trustee and plaintiff were on the same side of the controversy, and the parties must be arranged as their interests in the controversy appear. Casey v. Baker (D. C. 1914) 212 Fed. 247.

In an action against a nonresident to recover land, his codefendants, alleged to hold the legal estate for plaintiff's use, are substantially plaintiffs. Swan v. Myers (1878) 79 N. C. 101.

(C) Particular parties within statut

287. Nominal or formal parties—Effect of joinder or nonjoinder.—Th fact that merely nominal or formal par ties are joined in a suit, either as plain tiffs or defendants, can have no effec in conferring or excluding jurisdictio of the court, as their presence does no affect the substance of the controversy Wormley v. Wormley (1823) 8 Wheat 421, 451, 5 L. Ed. 651; Carneal v Banks (1825) 10 Wheat. 181, 6 L Ed. 297; Wood v. Davis (1855) 18 How 467, 469, 15 L. Ed. 460; Wilson v Oswego Tp. (1894) 14 Sup. Ct. 259, 262 151 U. S. 56, 38 L. Ed. 70; Sioux City Terminal Railroad & Warehouse Co. v Trust Co. of North America (1897) 8 Fed. 124, 27 C. C. A. 73 (decree affirm ed [1899] 19 Sup. Ct. 341, 173 U. S 99, 43 L. Ed. 628); Lake St. El. R. Co v. Ziegler (1900) 99 Fed. 114, 119, 3 C. C. A. 431 (writ of certiorari denie [1900] 20 Sup. Ct. 1029, 177 U. S. 69 44 L. Ed. 946); Jackson v. Jackso (1909) 175 Fed. 710, 99 C. C. A. 286 Ward v. Arredondo (C. C. 1825) Fed Cas. No. 17,148; Hervey v. Illinoi Midland Ry. Co. (C. C. 1876) Fed. Cas No. 6,434; Girardey v. Moore (C. C 1877) Fed. Cas. No. 5,462; Edgerto v. Gilpin (C. C. 1878) Fed. Cas. No 4,280; Taylor v. Rockefeller (C. C 1878) Fed. Cas. No. 13,802; Chicago St. L. & N. O. R. Co. v. McComb (C C. 1879) Fed. Cas. No. 2,670; Foss v First Nat. Bank (C. C. 1880) 3 Fed 185 (decree affirmed Bissell v. Fos [1885] 5 Sup. Ct. 851, 114 U. S. 252, 2 L. Ed. 126); Marvin v. Ellis (C. C 1881) 9 Fed. 367; Hazard v. Robinso (C. C. 1884) 21 Fed. 193; Sioux City & D. M. Ry. Co. v. Chicago, M. & St P. Ry. Co. (C. C. 1886) 27 Fed. 770 Reese v. Zinn (C. C. 1900) 103 Fed 97; Sidway v. Missouri Land & Liv Stock Co. (C. C. 1902) 116 Fed. 381 Slater Trust Co. v. Randolph-Maco Coal Co. (C. C. 1908) 166 Fed. 171 Steiner v. Mathewson (1886) 77 Ga 657; Vose v. Morton (1849) 58 Mass (4 Cush.) 27, 50 Am. Dec. 750.

For purposes of jurisdiction, the federal courts regard the real rather tha the nominal party. Sackett's Harbo Bank v. Barry (C. C. 1857) Fed. Cas No. 12,204; Hollenbach v. Elmore & H. Contracting Co. (C. C. 1909) 174 Fed. 845.

288. —— Actual interest.—A party is not merely nominal where a decree against him is essential to the relief in equity sought by the suit. Wormley v. Wormley (1823) 8 Wheat. 421, 5 L. Ed. 651; Carneal v. Banks (1825) 10 Wheat. 181, 6 L. Ed. 297; Ward v. Arredondo (C. C. 1825) Fed. Cas. No. 17,148.

Where the citizenship of the parties gives jurisdiction, and the legal right to

sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. Bonnafee v. Williams (1845) 3 How. 574, 11 L. Ed. 732; Adams v. White (C. C. 1859) Fed. Cas. No. 68.

D., a citizen of Illinois, brought his bill in the state court against F. and S., citizens of Illinois, and agents of W. and A., citizens of Pennsylvania. and H. and C., citizens of Illinois, and attorneys, praying that a certain note given by D. to W. and A., sent by them to F. and S. as their agents, and by F. and S. lodged with H. and C. for collection, might be canceled, and for an account against W. and A. The defendants removed the cause to the circuit court. Held, that F. and S. and H. and C. were merely nominal parties, that W. and A. were the real defendants, and the federal court had jurisdiction. Wood v. Davis (1855) 18 How. 467, 15 L. Ed. 460.

The jurisdiction of the United States court is not defeated by the fact that with the principal defendant are joined, as nominal parties, the executors of a deceased trustee, citizens of the same state as the complainant, in order that such executors may perform the ministerial act of conveying title, in case the power to do so is vested in them by the laws of the state. Walden v. Skinner (1879) 101 U. S. 577, 25 L. Ed. 963.

Where the only relief prayed for by complainants in a suit in equity was the cancellation of certain deeds through which a defendant claimed title to lands, or that he be decreed to hold the title in trust for complainants, the sole controversy was between complainants and such defendant, and, where there was the requisite diversity of citizenship between them, a removal of the cause was not prevented by the joinder of other nominal defendants, who, as shown by the pleadings, had no interest in the lands. Wirgman v. Persons (1903) 126 Fed. 449, 62 C. C. A. 63, affirming decree Persons v. Beling (C. C. 1902) 116 Fed. 877.

Plaintiff, as widow, brought an action in the state court to recover for the wrongful death of her husband under the California statute, by which she was the only person entitled to receive the proceeds of any recovery. Defendant removed the cause on the ground of diversity of citizenship, and afterward demurred to the complaint on the ground that it did not show that all of the heirs of deceased were parties as required by Code Civ. Proc. Cal. § 377. The demurrer was sustained, and plaintiff amended by joining the parents of deceased as defendants, on an allegation that they refused to join as plaintiffs and that they had no interest in the action. They were served with process, but made default. Held, that they were merely formal parties without interest, and that the fact that they were citizens of the same state as plaintiff did not defeat the jurisdiction of the court. Atchison, T. & S. F. Ry. Co. v. Phillips (1910) 176 Fed. 663, 100 C. C. A. 215.

An insurer of property for a part of its value which paid the amount of its policy on the destruction of the property by fire held under a state statute entitled to join with the owner as plaintiff in an action to recover for the loss from a defendant whose alleged negligence caused the fire, and to be treated as a real and substantial party for the purpose of determining jurisdiction. Turk v. Illinois Cent. R. Co. (1914) 218 Fed. 315, 134 C. C. A. 111.

A corporation which has sold all its property and franchises, except the mere right to exist, and which has no officers or place of business, is only a nominal party in a suit against a stockholder to make him liable for his unpaid subscription, notwithstanding the fact that the corporation has still the power to reorganize and collect the stockholders' dues. Wellman v. Howland Coal & Iron Works (C. C. 1884) 19 Fed. 51.

Where, on the face of the bill, it appears that one of a number of plaintiffs is not entitled to relief, and that the others are the real parties litigant, his presence as a plaintiff will not prevent a removal. McHenry v. New York, P. & O. R. Co. (C. C. 1885) 25 Fed. 65.

The averments of a bill showed that a person joined as defendant of record was merely the attorney of the defendant corporation, that he had no personal interest in the controversy, and that he held possession of certain notes involved in the litigation, not in his own right, but solely for the corporation. Held, that the presence on the record of such person would not affect the jurisdiction. Myers v. Murray, Nelson & Co. (C. C. 1890) 43 Fed. 695, 11 L. R. A. 216.

Where one of the plaintiffs is simply an agent of the other, without any personal interest in the controversy, his presence has no effect on the jurisdiction. Overman Wheel Co. v. Pope Mfg. Co. (C. C. 1891) 46 Fed. 577.

In an action by a train hand against the owner of a railroad for personal injuries, the engineer of the train being joined as a defendant, it was alleged that the injury was caused by the defective sight and hearing of the engineer, and "by a broken bumper on one of the cars which the defendants had negligently permitted to remain broken." No facts were alleged showing that it was the duty of the engineer to control the cars, to see that they were in good repair, or that he had such supervision over the train as a conductor would have. Held, that the engineer was a merely nominal party, and the other defendant could remove the cause to a federal court on showing diversity of citizenship. Rivers v. Bradley (C. C. 1892) 53 Fed. 305, following Nelson v. Hennessey (C. C. 1887) 33 Fed. 113.

Actual participants in frauds charged

are not merely nominal parties who can be disregarded in arranging the parties to a controversy. Fox v. Mackay (C. C. 1894) 60 Fed. 4.

In a suit to impeach for fraud a decree of a state supreme court, a defendant who was not a party to that decree, because he had been dropped from the case, as having no interest in it, before it reached the supreme court, is to be regarded as a mere formal party, whose presence will not defeat a removal, although he is a citizen of the same state with complainant. Carver v. Jarvis-Conklin Mortgage Trust Co. (C. C. 1896) 73 Fed. 9.

In a suit against a national bank and its receiver, to establish a preferred claim against the bank, on the ground of trust arising out of a transaction which took place prior to the receivership, the bank is not merely a nominal party to the record, but is in fact the principal party defendant. Miller v. Le Mars Nat. Bank (C. C. 1902) 116 Fed. 551.

In a proceeding to condemn right of way for a railroad over a portion of the right of way of another road which is under a lease having 90 years to run, in which the lessee, lessor, and the original owners of the land are joined as defendants, neither the lessor nor the owners of the fee have any present interest in the controversy, and they are merely nominal parties. Seaboard Air Line Ry. v. North Carolina R. Co. (C. C. 1903) 123 Fed. 629.

Where the members of a firm owning the right to a trade-name in controversy contracted to transfer the same to a corporation on receipt of $4,000, to be paid as a royalty on hosiery at the rate of 2 cents per dozen, the members of such firm, prior to the payment of the purchase price, had an actual interest in a suit by the purchaser for alleged unfair competition in the use of such trade-name. A. B. Andrews Co. v. Puncture Proof Footwear Co. (C. C. 1909) 168 Fed. 762.

A controversy between two factions in a local church, each having a pastor and a governing board of elders all of whom are citizens of the same state, and each claiming the exclusive right to control and use the church building and property, cannot be brought by members of one faction who are citizens of other states against the pastor and elders of both factions but asking relief against one side only by injunction to restrain them from interfering with their codefendants in the use and occupation of the property. In such case, the defendants who belong to the same faction as complainants are not merely formal parties but the real controversy is between them and their codefendants and requires that they be considered as complainants for the purpose of determining the court's jurisdiction. Stewart v. Mitchell (C. C. 1909) 172 Fed. 905.

Insurance companies which have paid policies on property destroyed through the negligence of a third person and been subrogated and have joined with the owner in an action to recover therefor are real parties in interest under the laws of Washington, and not merely nominal parties. Palmer v. Oregon-Washington R. & Nav. Co. (D. C. 1913) 208 Fed. 666.

Where plaintiffs sued the G. Company, a foreign corporation, and joined D., their local superintendent, of the same citizenship as plaintiffs, for death of plaintiff's decedent while in the G. Company's employ, but no act of misfeasance or positive wrong contributing to decedent's death was charged against D., he was a mere nominal party. Richardson v. Southern Idaho Water Power Co. (D. C. 1913) 209 Fed. 949.

A party plaintiff, who, although not indispensable to the maintenance of a bill in equity, is nevertheless entitled on the face of the bill to a decree, cannot be regarded as no party to the bill; the criterion of a mere nominal party, for such purpose, being whether the party is entitled or subject to a decree. James v. Thurston (1860) 6 R. I. 428.

289. —— Custodians or stockholders. —The assignee of a contractor for work on a railroad, alleging that by arrangement between the contractor, the railroad company, and a trustee, certain township bonds issued to the company had been placed in possession of a bank, to be delivered to the contractor or his assigns when he should complete his contract, and that it had been completed, brought suit against the bank for possession of the bonds, making the company and the trustees parties. The township intervened, asking for cancellation of the bonds. Held, that the bank, being bailee or trustee of the bonds, and the railroad company having an interest in the question whether the contract had been performed, could not be regarded as purely formal and unnecessary parties. Wilson v. Oswego Tp. (1894) 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70.

A trust company, to which bonds are delivered merely to be held by it until the performance of a condition by the payee entitling it to possession, is a necessary, and not merely a formal, party to an action by such payee against it and the maker of the bonds to obtain their possession. Massachusetts & S. Const. Co. v. Cane Creek Tp. (1894) 155 U. S. 283, 15 Sup. Ct. 91, 39 L. Ed. 152.

A note made payable to the cashier of a bank as trustee, the consideration for which was furnished by the bank, which was the real owner, may be sued on by the bank in its own name, or by its receiver, without indorsement or assignment, under the statute of Utah, and the citizenship of the cashier is immaterial to affect the jurisdiction of a federal court in that state of an action thereon. Franklin v. Conrad-Stanford

Co. (1905) 137 Fed. 737, 70 C. C. A. 171.

A defendant in ejectment, who was merely in the custody of the premises as a caretaker for the other defendant, was merely a nominal party, whose citizenship did not affect the question of federal jurisdiction. White v. Chase (1912) 201 Fed. 896, 120 C. C. A. 194.

An action was brought by a widow residing in New York to recover moneys deposited by her late husband, as trustee, in a New York savings bank. On petition of the bank the alleged executor of the decedent, resident in Connecticut, was made a party defendant. The bank subsequently put in an answer, setting up that it could not ascertain which of the two claimants was entitled to the moneys; averred its readiness to pay them to the person lawfully entitled thereto; asked for a stay of proceedings until a legal representative of the estate of the decedent should be appointed and made a party to the action; and prayed that, when all the parties necessary to render the judgment of the court a protection to it should have been brought in, such parties might interplead and settle their rights among themselves, and that such bank might pay the moneys into court to await the final determination of the action and be stricken out as a party to the action, and its liability for the said moneys thereupon cease. Held, that until the moneys had been paid into court, and its liability for the deposit had ceased, the bank was a necessary party to the suit. Bailey v. New York Sav. Bank (C. C. 1880) 2 Fed. 14, 18 Blatchf. 77.

Two or three persons, claiming a certain fund which was in the custody of a national bank, brought their bill in equity against the bank and a third claimant. Held that, even if the bank was a nominal party to such a bill, a cross bill exhibited by it, praying that the parties might interplead conferred jurisdiction. Foss v. First Nat. Bank of Denver (C. C. 1880) 3 Fed. 185, decree affirmed Bissell v. Foss (1885) 5 Sup. Ct. 851, 114 U. S. 252, 29 L. Ed. 126.

In a suit to cancel a note, brought by the maker against the holder and his indorsee for collection, who has been made a defendant merely in order to retain the note within the jurisdiction of the court, such defendant is a stakeholder merely. New York Construction Co. v. Simon (C. C. 1891) 53 Fed. 1.

Where one of the defendants is a mere stakeholder or interested on the side of plaintiff, the fact that he is a citizen of the same state with plaintiff will not defeat federal jurisdiction. Reeves v. Corning (C. C. 1892) 51 Fed. 774.

A suit between a corporation of one state and a corporation of another is removable by the latter, although there are joined with it as defendants a second corporation and two individuals, all citizens of the same state as the complainant, where such second corporation is a mere stakeholder, having no interest in the suit, and the individual defendants are, respectively, the president and treasurer of complainant and their interests are substantially identical. Johnston R. Frog & Switch Co. v. Buda Foundry & Mfg. Co. (C. C. 1906) 148 Fed. 883.

290. —— **Fictitious parties.**—Defendants sued by fictitious names will be regarded as merely formal parties. Parkinson v. Barr (C. C. 1900) 105 Fed. 81; Loop v. Winters' Estate (C. C. 1902) 115 Fed. 362; Bagenas v. Southern Pac. Co. (C. C. 1910) 180 Fed. 887.

In an action against a foreign street railway company and two resident servants, against whom substantial relief was demanded, that they were designated by fictitious names, and not served, did not render them nominal parties. Grosso v. Butte Electric Ry. Co. (D. C. 1914) 217 Fed. 422.

291. —— **Mortgagees.**—The citizenship and residence of the trustee in a mortgage and not of the owner of the claim secured, determines the jurisdiction of a federal court of a suit to foreclose. Smith v. Bell (1914) 217 Fed. 243, 133 C. C. A. 517.

In an action upon a policy of insurance on mortgaged premises, the mortgagee is not a proper party plaintiff, where the policy was issued to the mortgagor, although made payable to the mortgagee. Friemansdorf v. Watertown Ins. Co. (C. C. 1879) 1 Fed. 68.

292. —— **Directors or officers of corporations or associations.**—That defendant and some of the stockholders of the bank for whose use a suit on a nonnegotiable note was brought were citizens of the same state held not a fatal objection to the jurisdiction of a federal court, where the payee, a resident of another state, was the real plaintiff. Irvine v. Lowry (1840) 14 Pet. 293, 298, 10 L. Ed. 462.

A state statute providing that on a cause of action against a joint-stock association of the state an action may be brought against its president or treasurer, the judgment therein, to bind only the property of the association, cannot affect the jurisdiction of a federal court in another state, and, in an action therein against the president of such an association on a cause of action against the association, such president is not a real party, but merely a nominal party, and his citizenship is unavailable to confer jurisdiction on the court; the citizenship of the other members of the association not appearing. Taylor v. Weir (1909) 171 Fed. 636, 96 C. C. A. 438, reversing judgment (C. C. 1908) 162 Fed. 585.

Where the officers of a corporation are made codefendants with the corporation to a suit in equity, but no relief

is prayed for as to any of such officers that is not prayed for in respect to the corporation, and no relief is prayed for against any such officer in his individual capacity, such officers are merely nominal parties to the suit, which may, therefore, be removed as against the corporation. Hatch v. Chicago, R. I. & P. R. Co. (C. C. 1868) Fed. Cas. No. 6,204.

In a suit against a corporation and its directors jointly to cancel subscriptions to stock, and to compel defendants to refund the amounts already paid thereon, the directors are not merely nominal parties. Seddon v. Virginia, T. & C. S. & I. Co. (C. C. 1888) 36 Fed. 6, 1 L. R. A. 108.

Citizens of Tennessee, holding policies of life insurance in a foreign corporation, filed their bill in the chancery court against that corporation and other foreign corporations, for relief, and to subject to the satisfaction of their claims the property of that corporation, and, among oher property, certain state bonds deposited by it with the treasurer of the state "as security for risks taken by citizens of this state," and, for this purpose made the treasurer, a citizen of Tennessee, a party defendant. Held, that the treasurer was a material party defendant. Smith v. St. Louis Mut. Life Ins. Co. (1876) 2 Tenn. Ch. 656.

293. —— **Option holders.**—A defendant whose only interest in the property in suit is the ownership of an option to buy it on condition that a clear title be given, and that he shall pay a certain sum within a given time, is a nominal party merely. Garrard v. Silver Peak Mines (C. C. 1896) 76 Fed. 1.

294. —— **Parties of official character.**—Where the state law required sheriffs to give bond to the government for the faithful performance of their duty, a citizen of another state might sue on that bond; the fact that the governor and party sued are citizens of the same state not ousting the federal courts of jurisdiction. McNutt v. Bland (1844) 2 How. 9, 13, 11 L. Ed. 159.

A state superintendent of insurance vested with the assets of a company sued on policies in another state held entitled, on being made a party, to remove the cause to a federal court. Relfe v. Rundle (1880) 103 U. S. 222, 26 L. Ed. 337.

In Maryland, administrators' bonds are payable to the state, but are held for the security of persons interested in the estate of decedent, and an action on an administrator's bond is brought in the name of the state for the use of the person interested. Held that, for the purposes of jurisdiction depending on citizenship, the use plaintiff will be regarded as the person bringing the suit. State v. Baldwin (1884) 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822.

In an action by the state, on the relation of the holder of notes illegall executed by a township trustee, on th trustee's official bond, for such illeg execution, the relator will be considere the sole plaintiff, for determining th jurisdiction of the circuit court on th ground of diverse citizenship. Indian v. Glover (1895) 155 U. S. 513, 1 Sup. Ct. 186, 39 L. Ed. 243.

Under R. S. § 2653, authorizing a tions by the board of railroad and war house commissioners against railroa charging excessive rates, and imposin a penalty on them, the commissione were merely formal parties; the re party being the state. The state not the real party plaintiff, so as preclude a removal of the cause to federal court for diverse citizenshi in a suit instituted by railroad com missioners under Rev. St. Mo. 189 § 1150, to restrain a railroad compan from violating the law and the order the commissioners with respect rates, although the state is contingent ly liable for the costs of the litigatio and might have some indirect and r mote pecuniary interest by reason the fact that forfeitures and penalti for disobedience of the orders of th court would go to a county school fun Missouri, K. & T. Ry. Co. of Kansa v. Hickman (1901) 22 Sup. Ct. 18, 18 U. S. 53, 46 L. Ed. 78, reversing judg ment Hickman v. Missouri, K. & T Ry. Co. of Kansas (1899) 52 S. W. 35 151 Mo. 644.

Where a state or one of its official is a mere figurehead, a nominal part to a suit on a sheriff's or administra tor's bond, or an action is institute in the name of a United States marsh on an attachment bond, the real part in interest is taken into account on th question of citizenship, notwithstand ing the general rule that the jurisdic tion of the federal courts depends, n on the relative situation of the partie concerned in interest, but on the rela tive situation of the parties named i the record. Mexican Cent. R. Co. Eckman (1903) 23 Sup. Ct. 211, 21 187 U. S. 429, 47 L. Ed. 245.

The United States is the real, an not merely the nominal, plaintiff, so a to sustain the original jurisdiction a federal court authorized by Act Au 13, 1894, § 5, post, § 3297, to be brough in its name, for the use and benefit of materialman, upon the bond of the con tractor for a public work, which th statute requires shall contain the spe cific, special obligation directly to th United States that the contractor sha promptly make payments to all person supplying him labor and materials i the prosecution of the work. U. S. Fi delity & Guaranty Co. v. U. S. (1907 27 Sup. Ct. 381, 382, 204 U. S. 34 51 L. Ed. 516.

Act Aug. 13, 1894, post, § 6923, re quires contractors for public building to execute a bond to the United State to pay for all labor and materials an

authorizes persons supplying labor or materials to sue in the name of the United States for their use on such bond without expense, however, to the United States. Held that, in an action on a bond given after such act, the United States was a mere nominal or formal party whose presence was insufficient to confer federal jurisdiction. Burrell v. U. S. (1906) 147 Fed. 44, 77 C. C. A. 308.

A federal court held to have jurisdiction to determine the rights of a packer and manufacturer of meat food products under the Meat Inspection Act of March 4, 1907, although the Secretary of Agriculture and Chief of the Bureau of Animal Industry, who were made defendants, could not be served, and the only defendant before the court was the chief inspector in charge at the place of suit. St. Louis Independent Packing Co. v. Houston (1914) 215 Fed. 553, 132 C. C. A. 65, reversing order (D. C. 1913) 204 Fed. 120.

When the allegations of the bill filed in a cause do not show that a sheriff and other officials named therein as joint defendants had any real joint interest in the subject in controversy, they are to be deemed mere nominal parties. Sioux City & D. M. R. Co. v. Chicago, M. & St. P. R. Co. (C. C. 1886) 27 Fed. 770, 772.

In an action by the marshal on a forthcoming bond, given after claim to property levied on by attachment, and payable to him, the marshal is merely a formal party, and his residence in the same state with the defendant will not defeat the jurisdiction of the United States courts. Wade v. Wortsman (C. C. 1887) 29 Fed. 754.

Complainant, a citizen of Iowa, filed a bill charging that a judgment had been fraudulently obtained against the city of Cedar Rapids, Iowa, in favor of defendant S., a nonresident, by means of a combination between him and others not made parties to the bill. The relief sought was to have the judgment declared void. The mayor, treasurer, and recorder of the city were made defendants, that they might be restrained from paying the judgment pendente lite, but it was not charged that they participated in the fraud, or that they had any interest adverse to complainant. Held that, though there was no separable controversy between complainant and S., the other defendants were only nominal parties, their interest being in fact adverse to S.; and their joinder as defendants could not affect the right of S. to have the cause removed. May v. St. John (C. C. 1889) 38 Fed. 770.

In a suit to impeach for fraud a decree of state court, and to enjoin the officer appointed to execute it, the fact that he is a citizen of the same state with complainant will not prevent a removal of the cause; for he is a mere formal party, having no interest in the suit. Carver v. Jarvis-Conklin Mortgage Trust Co. (C. C. 1896) 73 Fed. 9.

A suit brought by the railroad commissioners of Missouri, under the statutes of the state, against a railroad company, to enforce obedience to an order of the commission fixing rates, is not one in effect on behalf of the state, or in which the state is the real party in interest, so as to prevent its removal from a state to a federal court by the defendant, where the statutory grounds for removal exist. The real parties in interest in such a suit are the carrier and its patrons, and the state is interested only in a governmental sense. Hickman v. Missouri, K. & T. R. Co. (C. C. 1899) 97 Fed. 113.

Under a state statute attachment bonds are payable to the state, and may be sued on at the instance of any party injured, in the name of the state, to his use, and defendant may avail himself of any set-off he may have against the party to whose use the suit is brought with the same effect as if such party were the plaintiff, etc. Held, that in suits on such attachment bonds the state is merely a formal party, whose presence cannot oust the jurisdiction of the federal court. State of Missouri v. Bowles Milling Co. (C. C. 1897) 80 Fed. 161.

Where a suit was brought to set aside certain land contracts against a nonresident defendant, and the register of deeds of the county in which the suit was brought was joined for the mere purpose of restraining him from recording such contracts pending the litigation, such officer was a mere formal party. Hyde v. Victoria Land Co. (C. C. 1903) 125 Fed. 970.

In a suit to restrain the enforcement of a judgment recovered against complainant by the United States, the clerk of the court in which the judgment was recovered was not a necessary or proper party. Buckley v. U. S. (D. C. 1912) 196 Fed. 429.

An action on a forthcoming bond by the officer to whom it is payable for the use of nonresident plaintiffs, the real parties in interest, may be removed to the federal court, though the officer, the formal plaintiff, is a resident of the same state as defendant. Wortsman v. Wade (1886) 77 Ga. 651, 4 Am. St. Rep. 102.

In an action in the name of the state, by the prosecuting attorney of a judicial circuit, against a railroad company, to recover penalties for the railroad's violation of a state law requiring the posting of trains in passenger depots in which there is a telegraph office, the state is the real party in interest, though one-half of the penalties recovered are payable to the prosecuting attorney. Southern Ry. Co. v. State (1905) 75 N. E. 272, 165 Ind. 613.

A state law requires railroads to post on blackboards erected in telegraph passenger stations the time of the ar-

rival of passenger trains, stating whether the same are late, and, if so, how much, and provides a penalty for a violation of the preceding section, to be recovered in the name of the state by the prosecuting attorney for the benefit of himself and the county school fund. Held, that an action by the state under such section was not removable to the federal courts for diversity of citizenship, on the ground that the prosecuting attorney and the county receiving the penalty, if recovered, were the real parties in interest. Southern Ry. Co. v. State (Ind. App. 1904) 72 N. E. 174.

The fact that the United States is a formal party plaintiff on the record, in a suit against the sureties on the bond of a receiver appointed by the United States circuit court, does not render a cause removable from a state to the federal court, the real controversy being between the relator and the defendant. U. S. v. Douglas (1893) 113 N. C. 190, 18 S. E. 202.

An assignee for the benefit of creditors, a citizen of the state of Rhode Island, filed a bill in equity in the state court, against a Massachusetts creditor of his assignor, who had obtained a state execution, and the officer charged with the service of the execution, who was a citizen of Rhode Island, to establish his trust, and to enjoin the sale of the trust property levied upon by the execution. Upon a petition by the execution creditor to remove the bill into the circuit court of the United States for the Rhode Island district, held, that the officer was not a formal, official, or unnecessary party to the bill, so that his being a codefendant could be disregarded by the court in considering whether the applicant was entitled to the jurisdiction which he invoked; and that the petition must be dismissed. Nye v. Nightingale (1860) 6 R. I. 439.

295. —— **Stockholders.**—That defendant and some of the stockholders of the bank for whose use a suit on a nonnegotiable note was brought were citizens of the same state held not a fatal objection to the jurisdiction of the federal court, the payee, a resident of another state, being the real plaintiff. Irvine v. Lowry (1840) 14 Pet. 293, 298, 10 L. Ed. 462.

A firm owning substantially all the stock of a water company purchased engines for the same, and subsequently suffered judgment by confession for a balance due thereon. In the meantime they sold and transferred all the stock to others, and conveyed the land on which the engines were located to the water company. A suit was subsequently brought by the seller of the engines to assert a vendor's lien thereon, and by an amendment the members of the firm were made parties plaintiff. Held that, as no relief was sought against them, and as they had parted with all their interest, they were merely formal parties, and it was not necessary to make them parties defendant, and the fact that they were citizens of the same state with complainants did not oust the jurisdiction. New Chester Water Co. v. Holly Mfg. Co. (1892) 53 Fed. 19, 3 C. C. A. 399, affirming Holly Mfg. Co. v. New Chester Water Co. (C. C. 1891) 48 Fed. 879.

The right of a stockholder to sue in the federal courts to restrain the corporation and its officers from illegal acts cannot be defeated by the fact that part of defendants are interested with them. Pond v. Vermont Val. R. Co. (C. C. 1874) Fed. Cas. No. 11,265.

296. —— **Sureties.**—In an action against an insurance company and its surety on the bond to secure losses required, by the Arkansas statute, to be given to the state auditor, the surety is not a merely formal party, whose citizenship can be disregarded. Mutual Reserve Fund Life Ass'n v. Farmer (1896) 77 Fed. 929, 23 C. C. A. 574.

297. —— **Trustees.**—Where two persons in one state, trustees, for bondholders, of a mortgage of a railroad owned by a company in another, foreclosed the mortgage, bought in the road in trust for the bondholders, and then leased it to a citizen of the state to which they themselves belonged, and then a majority of the bondholders in the state where the original company was, in pursuance of a statute there, formed themselves into a new corporation, to which the statute gave ownership and control of the road, and suit was brought against the lessee of the road by the trustees who had made the lease, held, that the trustees were not merely nominal parties; they not having been discharged from, or in any way incapacitated from executing, their trust, and there having been, in fact unpaid bondholders who had not joined in the creation of the new corporation and who had yet a right to call on the trustees to provide for the payment of their bonds. Knapp v. Railroad Co. (1873) 20 Wall. 117, 22 L. Ed. 328.

A corporation brought a suit in equity in a state court against persons alleged to be the holders of certain of its stock and bonds, who were all citizens and residents of other states, to obtain an accounting, and the surrender of such stock and bonds, on the ground that they had been obtained by one of the defendants, who was a director of complainant, in fraud of its rights. The bill also alleged that defendants had made a demand on the trustees in the trust deed securing the bonds in suit with others, for the foreclosure of such trust deed, and made the trustees, one of whom was a citizen of the same state as complainant, parties defendants for the purpose of obtaining an injunction restraining such foreclosure. H

that the trustees were not indispensable, but merely formal, parties, having no interest in the controversy, and that their joinder did not deprive a federal court of jurisdiction of the suit. Lake St. El. R. Co. v. Ziegler (1900) 99 Fed. 114, 39 C. C. A. 431.

Where the real contention is between citizens of different states, but some of the parties defendant, who are sued merely in their representative character as trustees, are citizens of the state where the suit is instituted, their citizenship ought not to be considered on the question of jurisdiction. Bates v. New Orleans, B. R. & V. R. Co. (C. C. 1883) 16 Fed. 294.

If the owner of bonds, secured by trust deed or mortgage, has been let in as party to a cause concerning the trust property, and as such has a separate controversy with citizens of another state, federal jurisdiction is not affected by the citizenship of the trustee named in the mortgage deed, who is not a party in fact, and had refused to move to be made party, or otherwise to execute the trust. If brought in, such trustee would be only a nominal party. Hack v. Chicago & G. S. Ry. Co. (C. C. 1885) 23 Fed. 356.

In an action by the bondholders against a nonresident railroad company for a default on the bonds, the fact that the trustee for the bondholders, who has been made a party defendant because of his refusal to sue, is a resident of the same state with plaintiff, is immaterial in determining the jurisdiction of the federal courts. Barry v. Missouri, K. & T. Ry. Co. (C. C. 1886) 27 Fed. 1.

The court is to look to the citizenship of the real owners, and not to that of a party who is a trustee only. Banigan v. City of Worcester (C. C. 1887) 30 Fed. 392.

In an action by two of three trustees against a corporation residing in another state, the fact that one of the trustees, who refused to join as plaintiff in the suit, and was made a defendant, resided in the same state as the corporation, did not deprive the federal court of jurisdiction, on the ground that the trustee residing in the same state with defendant was a necessary party plaintiff, since that trustee was not really a party to the controversy, but only made such in order that the rights of all interested parties might be determined in one proceeding. Einstein v. Georgia Southern & F. Ry. Co. (C. C. 1903) 120 Fed. 1008.

A defendant who is substantially charged in the bill with conspiracy to defraud, and against whom a large judgment is asked on the ground that he refused to surrender on demand property which had been conveyed to him as trustee by complainant, but permitted the same to be sold under foreclosure, cannot be considered a merely nominal party, and the fact that he is a citizen of the same state as complainant deprives a federal court of jurisdiction. Post v. Buckley (C. C. 1909) 119 Fed. 249.

298. —— Use plaintiffs.—The federal courts have jurisdiction of an action between citizens of the same state, where plaintiffs are merely nominal parties suing officially for the use of an alien. Browne v. Strode (1809) 5 Cranch, 303, 3 L. Ed. 108.

Where an action is brought by a party to a nonnegotiable contract for the use of his assignee, citizenship of the party to the contract, and not that of his assignee, determines the question of the removability of the cause. Dimmock v. Doolittle (C. C. 1887) 29 Fed. 545.

An action by the resident owner of property destroyed by fire, against a nonresident railroad company held removable to the circuit court of the United States for diversity of citizenship, without regard to the residence of insurance companies on whose behalf the suit was brought. Southern Ry. Co. v. Barrett, Denton & Lynn Co. (1914) 81 S. E. 863, 141 Ga. 584.

299. Necessary and unnecessary parties.—Indispensable parties are those having an interest in the controversy of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Horn v. Lockhart (1873) 17 Wall. 570, 579, 21 L. Ed. 657; Watson v. Bonfils (1902) 116 Fed. 157, 53 C. C. A. 535 (writ of certiorari denied Burlington Trust Co. v. Porter [1902] 23 Sup. Ct. 841, 187 U. S. 641, 47 L. Ed. 345); South Penn Oil Co. v. Miller (1909) 175 Fed. 729, 99 C. C. A. 305; Taylor v. Holmes (C. C. 1882) 14 Fed. 498 (decree affirmed [1888] 8 Sup. Ct. 1192, 127 U. S. 489, 32 L. Ed. 179); Kuehler v. Greene (C. C. 1908) 163 Fed. 91; Caylor v. Cooper (C. C. 1908) 165 Fed. 757; City of New Orleans v. Seixas (1883) 35 La. Ann. 36.

In the determination of questions involving the jurisdiction of the federal court or the removal of causes, indispensable parties only should be considered. Boatmen's Bank of St. Louis v. Fritzlen (1905) 135 Fed. 650, 68 C. C. A. 288 (reversing judgment Weldon v. Fritzlen [C. C. 1904] 128 Fed. 608, writ of certiorari denied Fritzlen v. Boatmen's Bank of St. Louis, Mo. [1905] 25 Sup. Ct. 803, 198 U. S. 586, 49 L. Ed. 1174); Rogers v. Penobscot Min. Co. (1907) 154 Fed. 606, 83 C. C. A. 380; Kuehler v. Greene (C. C. 1908) 163 Fed. 91.

A bill in equity cannot be maintained in a federal court against a railroad corporation established by the laws of the state in which the court is held, to

restrain them from constructing a railroad under contract with another railroad corporation established by the laws of another state, on the ground of a want of authority in the charter of that corporation to construct such a railroad, without making that corporation a defendant, although that corporation, being established by the same state as the plaintiff's could not be made a defendant without ousting the jurisdiction of the court; notwithstanding the act of 1839, which provides that "where in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, it shall be lawful for the court to entertain jurisdiction; but the judgment or decree shall not conclude or preclude other parties." Northern Indiana R. Co. v. Michigan Cent. R. Co. (1853) 15 How. 233, 14 L. Ed. 674.

Plaintiff and another contracted as partners to do certain work in the construction of a railroad as subcontractors. By a contract between themselves, previously made and known to the principal contractor, it was agreed that plaintiff should furnish the materials and do the work, and receive and disburse the money received therefor, accounting to his associate only for a share of the net profits of the contract. After the completion of the work plaintiff brought suit in a federal court to enforce a mechanic's lien, filed in the name of the partnership, for the balance due therefor under the contract, alleging such facts in his bill and that no net profits were earned under the contract. Held, that it was competent for plaintiff to allege, for jurisdictional purposes, the contract between him and his nominal partner, and that under such agreement the citizenship of such partner did not affect the jurisdiction of the court since he had no interest in the recovery and was neither an indispensable nor necessary party. Ban v. Columbia Southern Ry. Co. (1902) 117 Fed. 21, 54 C. C. A. 407, reversing judgment (C. C. 1901) 109 Fed. 499.

Although certain defendants were made parties to a bill in equity on the allegation that they were indebted to the principal defendant, and thus became real parties to the suit, yet it does not follow that they are indispensable parties to the controversy. Deford v. Mehaffy (C. C. 1882) 14 Fed. 181.

A person having an equitable right in the property of the defendant, which property is not the subject-matter of the action, is not such a party to the controversy as to remove the cause. Gudger v. Western N. C. R. Co. (C. C. 1884) 21 Fed. 81.

Although one may be a proper party, if he is not an indispensable party, he may be treated as a nominal or formal party. McHenry v. New York, P. & O. R. Co. (C. C. 1885) 25 Fed. 65, 68.

A contract with a city to construct and maintain waterworks, having been assigned by the contractor, the city brought suit against the assignee for failure to comply with the contract. Held, that one to whom the assignee had mortgaged, by deed of public record, the contract and franchise, was a necessary party. City of Galesburg v. Galesburg Water Co. (C. C. 1886) 27 Fed. 321.

Where, in an action against a railroad company for goods destroyed in transit, the insurance companies, which have become subrogated to the equitable rights, are joined with the owner, who has the legal title, the federal court will separate the legal cause of action, and will not allow the joinder of parties having only equitable claims to defeat the right of removal on the ground of diverse citizenship. Over v. Lake Erie & W. R. Co. (C. C. 1894) 63 Fed. 34.

Complainants filed a bill in a federal court against a corporation of the same state as owner of a patent and the patentee who was a citizen of another state, alleging that such patentee obtained a decree against complainants in the same court adjudging the validity of the patent and enjoining its infringement, that complainants thereafter entered into a license contract with defendant corporation, giving them the right to manufacture and sell under the patent for a fixed term, with privilege of renewal, subject to the reservation of the right to such defendant to give notice by a time stated that it did not desire to renew, which notice the defendant had given, and that, when the contract was signed, complainants were "orally assured" that no advantage would be taken of the reservation. The bill prayed that the decree in the infringement suit be set aside or suspended, that complainants' right to a renewal of the license contract be established, and that in the meantime defendants be enjoined from proceeding under the decree or bringing suit against complainants for infringement. The bill alleged no facts which would sustain a bill of review in the patent suit. Held, that the court was without jurisdiction on the ground of diversity of citizenship; the patentee being neither a necessary nor proper party to such controversy. Lefkowitz v. Foster Hose Supporter Co. (C. C. 1908) 161 Fed. 367.

The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. This rule, however, is subject to the following qualifications: (1) When a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the

court, when the case is subject to a special rule. (2) Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him, if he can be reached. (3) Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant. Kuehler v. Greene (C. C. 1908) 163 Fed. 91.

The bill alleged that the complainant directed C. to buy certain stock on the New York Stock Exchange; that the order was transmitted by C. to the defendant, or to some other person; that the stock was bought, and the certificate came into the defendant's hands with knowledge that the stock belonged to the complainant; that the complainant, having paid C. in full, demanded the stock both of C. and of the defendant, but failed to obtain it; that if the defendant sold the stock, as the complainant was informed, its proceeds were in the defendant's hands free from lien; that the defendant had been paid in full on account of the transaction. The defendant pleaded that C. was a necessary party to the bill. Held, that the plea should be sustained. Jenney v. Hayden (C. C. 1909) 171 Fed. 898.

300. —Actions for torts.—An action was brought by a citizen of Ohio against the receivers of a New York corporation for injuries sustained in the operation of a road belonging to an Ohio corporation, which had been leased to the New York corporation. Both corporations were joined as defendants with the receivers. Held, that the controversy was between plaintiff and the receivers. Chamberlain v. New York, L. E. & W. R. Co. (C. C. 1895) 71 Fed. 636.

The action against a nonresident railroad company and its trainmaster for injury to plaintiff, its employé, a resident of the state, may be removed to the federal court for diversity of citizenship—a cause of action against the trainmaster not being stated by the complaint alleging that he was empowered to and did employ plaintiff, a minor, and put him to work on one of the company's trains at a business that was obviously hazardous, and did not, as was his duty, instruct plaintiff as to the manner of work and the dangers incident thereto, of which dangers plaintiff was unaware, and with which he was unacquainted, and that because of such negligence of the trainmaster and because of negligence of other employés, plaintiff, while in the discharge of his duty, in letting a train out of a side track and trying to get on the train, was injured; it not being alleged what duty plaintiff was employed to perform, so that it could be seen whether it was dangerous and required instructions to be given in regard to it, or whether he was injured in the performance of his duty; and it not being alleged that the trainmaster knew plaintiff was an infant, or that he was inexperienced, and needed instructions. Slaughter v. Nashville, C. & St. L. Ry. Co. (1906) 91 S. W. 744, 28 Ky. Law Rep. 1195.

301. —— Actions on insurance contracts.—Under the statutes of Montana, in an action by insured under fire policies in which he was joined by nonresident insurers who were subrogated pro tanto to his rights to recover against a railway company through whose negligence the insured's property was destroyed, the insurers were not unnecessary parties. Gaugler v. Chicago, M. & P. S. Ry. Co. (D. C. 1912) 197 Fed. 79.

302. —— Actions on negotiable paper.—Where the legal title to notes passed by delivery, and jurisdiction of the federal court in an action by the holders is claimed on the ground of diversity of citizenship, jurisdiction is not affected by the citizenship of those for whose benefit the action is instituted; they not being necessary parties to the record. Bonnafee v. Williams (1845) 3 How. 574, 577, 11 L. Ed. 732.

303. —— Accounting.—In an action against a trustee and the cestui que trust by the grantor in the trust deed and his assignee in insolvency to prevent a sale of the property and for an accounting between the grantor and cestui que trust, the trustee is a necessary party, and, being a resident of the same state as plaintiffs, the United States court has no jurisdiction. Peper v. Fordyce (1886) 7 Sup. Ct. 287, 288, 119 U. S. 469, 30 L. Ed. 435.

To a bill filed by trustees on behalf of the creditors of a partnership against a corporation, of which one of the partners is president, for an accounting and the appointment of a receiver, upon allegations that the president so managed the affairs of the corporation and the partnership as to defraud the latter, and to devest its funds for the benefit of himself and the corporation, the president of the corporation, his partner in the firm, and the firm itself are indispensable parties defendant, and where they are citizens of the same state as complainants such bill cannot be maintained in a federal court. Cabaniss v. Reco Min. Co. (1902) 116 Fed. 318, 54 C. C. A. 190.

A federal court cannot entertain a suit for collecting moneys due for unpaid subscriptions, where the corporation, which is a necessary party, cannot be subjected to the jurisdiction. First Nat. Bank of Hannibal v. Smith (C. C. 1879) 6 Fed. 215; Dormitzer v. Illinois & St. L. Bridge Co. (C. C. 1881) 6 Fed. 217.

An Ohio corporation filed a bill in a federal court in West Virginia against

B., as trustee and individually, M., A., P., K., and the personal representative and heirs of G. all of whom were citizens of West Virginia and the P. Co., a Pennsylvania corporation, alleging that land claimed by plaintiff and by K. and G. was conveyed to B., as trustee, to sell, and pay the proceeds to plaintiff K., and G.; that B. conspired with M., P., and A., who, on G.'s death qualified as his personal representative and pursuant thereto, the land having greatly increased in value, sold the land to M. for much less than its value, fraudulently concealing from plaintiff the fact of the increase; that the consent of K. to the sale was obtained by permitting him to retain a one-fifth interest in the land, the other four-fifths being held by A., who joined the conspiracy to defraud G.'s heirs, M., P., and B.; and that after title was conveyed by B. to M. the land was leased to the P. Co. for a bonus much larger than the price accounted for by B., with a royalty on oil taken from the land and other rentals and payments,—and praying that M., B., A., P., and K. be decreed to account for and pay over to plaintiff, K., and the heirs of G., moneys received from the P. Co., and that the latter be required to attorn to such beneficiaries. Held, that the real controversy was as to the fraud alleged to have been committed by B., A., M., P., and K.; that plaintiff and the heirs of G. were, on the one side, opposed to the other parties; that such heirs were indispensable parties, and, being citizens of the same state as part of the other defendants, the court was without jurisdiction. Board of Trustees of Oberlin College v. Blair (C. C. 1895) 70 Fed. 414.

A firm of creditors gave an order on a bank, which held a quantity of cotton as security for an amount due it, for the payment of the surplus proceeds of the cotton to another creditor, who agreed to accept the same on behalf of himself and certain other creditors. The bank accepted the order, but made no payment thereon. In a suit to enforce the trust and require an accounting from the bank, held, that the creditor in whose favor the order was given is not a necessary party, since his agreement to act for the others in receiving or enforcing payment thereon was without consideration, and his joinder as a defendant, although his interests are in fact as a complainant, and he is a citizen of the same state as the other defendants, will not defeat the jurisdiction of a federal court; the complainant being an alien, and the amount involved sufficient to give the court jurisdiction. Shearson v. Littleton (C. C. 1900) 105 Fed. 533.

304. —— Administration and probate proceedings.—S., a married woman, had a beneficial life interest in certain property held by a trustee, and a power of testamentary appointment. She conveyed the property to McW., and appointed it to complainants. Held, that if under the laws of Tennessee, her interest was a mere life estate, complainants, being citizens of another state, could maintain a suit in the federal court in Tennessee to enforce their rights against the personal representative of the trustee, and McW., citizens of Tennessee, without joining the personal representative of S., or the other appointee, being citizens of Tennessee. Martin v. Fort (1897) 83 Fed. 19, C. C. A. 428.

In suit to have court assume administration of estate conveyed to trustees for creditors, held, that debtor was an indispensable party. Hawes v. First Nat. Bank of Madison (1915) 229 F. 51, 143 C. C. A. 645.

Where, to a suit in equity against administrator, brought in the United States court by certain heirs, to set aside the administrator's settlement on the ground of fraud, all of the heirs are necessary parties, and their interests are identical, all should be made plaintiffs; and jurisdiction cannot attach where some of them are made defendants, when, had they been made plaintiffs, the diversity of citizenship necessary to give jurisdiction would not have existed. Bland v. Fleeman (D. C. 1887) 29 Fed. 669.

305. —— Adverse claims to mining lands.—One who appears by the proceedings in the land office to be the applicant for a patent to a mining claim and to be asserting his compliance with the statute, is a proper and necessary party defendant in a suit in support of an adverse claim, and not merely a nominal party, who can be disregarded in determining the question of the jurisdiction of a federal court on the ground of diverse citizenship. Blackburn v. Portland Gold-Min. Co. (1900) 20 Sup. Ct. 222, 223, 175 U. S. 571, L. Ed. 276.

306. —— Assignment for benefit of creditors.—A creditor may maintain an action to enforce the execution of an assignment for the benefit of creditors without making the other creditors parties, and hence the federal court have jurisdiction, though the effect of making the other creditors parties would be to oust the jurisdiction. Putnam v. Timothy Dry-Goods & Carpet Co. (C. C. 1897) 79 Fed. 454.

307. —— Assignment of dower.—In an action for the assignment of dower brought by a citizen of Illinois, it appeared that of two defendants, who were in possession of the property, one, who was a citizen of New York, held the legal title as trustee for his codefendant, a citizen of Illinois, though it did not appear that he was authorized to represent his interests in the property for the purposes of the suit. Held, that the beneficiary was a necessary party

Rand v. Walker (1886) 117 U. S. 340, 6 Sup. Ct. 769, 29 L. Ed. 907.

V. L., a citizen of West Virginia, sued H. and wife, citizens of New York, and a land company, a West Virginia corporation, for an assignment of dower in certain lands conveyed by her husband during his life to H., and by him, during the husband's life conveyed to the land company, in whose possession it was at the time of the suit. Held that H. and wife were not necessary parties. Laidly v. Huntington (1887) 121 U. S. 179, 7 Sup. Ct. 855, 30 L. Ed. 883.

308. —— Cancellation of instruments.—Testator bequeathed property to his executors in trust for his daughter for life, and after her death for her children, and also made bequests to two religious societies. All the parties were citizens of Illinois, except the societies which were incorporated elsewhere. In a suit by the daughter to annul the will, where the executors and the religious corporations were made defendants, it was held that the executors representing the children were necessary parties. American Bible Soc. v. Price (1884) 3 Sup. Ct. 440, 441, 110 U. S. 61, 28 L. Ed. 70.

Citizens of New Jersey, stockholders in a New Jersey railroad corporation, brought suit in that state against such corporation, a Pennsylvania railroad corporation, and several individuals, citizens, respectively, of the two states, and directors in one or both of the corporations to set aside a lease executed by the New Jersey to the Pennsylvania corporation. Held, that the New Jersey corporation was necessarily made party defendant. Central R. Co. of New Jersey v. Mills (1885) 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949, affirming judgment Mills v. Central R. Co. of New Jersey (C. C. 1884) 20 Fed. 449.

In a suit by an Alabama stockholder of an Alabama railroad company in behalf of himself and other stockholders for the cancellation of a lease made by his company to a Tennessee railroad corporation, both companies are necessary parties. East Tennessee, V. & G. R. Co. v. Grayson (1886) 119 U. S. 240, 7 Sup. Ct. 190, 30 L. Ed. 382.

Complainant filed a bill for the cancellation of a mortgage for want of consideration, or that he be allowed to redeem; and he made defendants a number of occupants of the land as grantees of the purchaser at the foreclosure sale. One of these occupants was a citizen of the same state as complainant. Held, that he was not an indispensable party, and, as his retention would defeat the jurisdiction of the court, based on the diverse citizenship of the parties, it was proper to dismiss the bill as to him. Hicklin v. Marco (1893) 56 Fed. 549, 6 C. C. A. 10, affirming decree (C. C. 1891) 46 Fed. 424.

In a suit to set aside a deed of trust made for the benefit of creditors, it appeared that plaintiff and the trustee were citizens of the same state, but that the beneficiaries under the deed, other than plaintiff, were citizens of another state. Held, that the trustee was an indispensable party to the suit, and that the federal court, therefore, had no jurisdiction. Rust v. Brittle Silver Co. (1893) 58 Fed. 611, 7 C. C. A. 389.

A citizen of Tennessee filed a bill in equity against an insurance company, chartered by Missouri, to cancel certain policies of insurance, loan and interest notes, for an account of premiums and dividends, and to enjoin a sale of his land under a deed of trust given to secure the loans, and the trustee was a citizen of the same state with complainant. Held, that the trustee was not an indispensable party. Chester v. Wellford (C. C. 1879) Fed. Cas. No. 2,662.

Infants are necessary parties to a bill in equity to set aside a policy of insurance, when they have a contingent interest in such policy. Equitable Life Assur. Soc. v. Patterson (C. C. 1880) 1 Fed. 126.

In a suit to invalidate a marriage settlement in favor of a dead person, and to set aside her will, her heirs at law are parties in interest, and necessary parties to the suit. McDonnell v. Eaton (C. C. 1883) 18 Fed. 710.

The state granted to a county the swamp lands donated to the state by congress, and located in said county, for school purposes. A bill was filed in a state court by the state, on behalf of the county school board, against the county and sundry persons, citizens of other states, to set aside conveyances of such lands. Defendants other than the county sought to remove the cause to the federal court on the ground of diverse citizenship. Held, that the county was a necessary party. Missouri v. New Madrid County (C. C. 1896) 73 Fed. 304.

To a suit by a stockholder to have stock and bonds issued by a railroad company, to be exchanged for a prior issue of bonds, declared ultra vires and void, the company is the only necessary party defendant, and the joinder as defendants of directors or persons interested in the bonds to be retired will not prevent a removal of the cause by the company, where diversity of citizenship exists between it and the complainant. Politz v. Wabash R. Co. (C. C. 1907) 153 Fed. 941.

309-310. —— Condemnation and eminent domain proceedings.—Under state laws which provide that, when proceedings are commenced by a landowner for the assessment of damages where land is taken for public use, a mortgagee may join as a petitioner, and if he does not he must be served with notice and permitted to join, and that the interest of the mortgagee shall be first satisfied before any part of the damages is paid to the mortgagor, a

mortgagee is an "indispensable party" petitioner in such a proceeding in a federal court, and where he is a citizen of the same state as defendant the court is without jurisdiction. Adams v. City of Woburn (C. C. 1909) 174 Fed. 192.

311. —— **Enforcement of stock liability.**—In a suit in a federal court by creditors of an insolvent corporation to enforce the double liability of stockholders on behalf of all creditors, where jurisdiction was based on diversity of citizenship, the court was not ousted of jurisdiction because some of the creditors were citizens of the same state as defendants. Alsop v. Conway (1911) 188 Fed. 568, 110 C. C. A. 366. Writ of certiorari denied (1911) 32 Sup. Ct. 523, 223 U. S. 720, 56 L. Ed. 629.

A corporation is a necessary party defendant to a bill to enforce a judgment against it by compelling contribution from its stockholders. Walsh v. Memphis, C. & N. W. R. Co. (C. C. 1881) 6 Fed. 797.

All the stockholders are necessary parties in a suit to compel contribution if they apply to be heard. Id.

While resident and nonresident stockholders are necessary parties to a suit to enforce double statutory liability to creditors, no valid decree in personam can be rendered against nonresident stockholders not served with process within the state, or voluntarily appearing. Irvine v. Elliott (D. C. 1913) 203 Fed. 82.

312. —— **Establishment of trusts.**—Plaintiff, a citizen of New York, and M., a citizen of Indiana, were trustees under a mortgage executed by an Indiana corporation to secure bonds, in which water hydrant rentals due from defendant, a city of Indiana, were pledged as security; but the mortgage provided that the corporation should receive such rentals until default in the payment of interest on the bonds. The ordinance, however, under which the franchise to the corporation was granted, provided that the rentals in question should be paid to a trustee as the grantee or his assigns might elect, and plaintiff was appointed such trustee. Held, that the trust created by the ordinance was separate from that created by the mortgage, and hence plaintiff was entitled to sue therefor in the federal courts sitting in Indiana, without joining the cotrustee mentioned in the mortgage. City of Seymour v. Farmers' Loan & Trust Co. (1904) 128 Fed. 907, 63 C. C. A. 633.

To a suit by a stockholder in a domestic corporation to charge a foreign corporation as trustee on the ground that as the owner of a majority of the stock of the domestic corporation it caused such corporation to do acts which were in fraud of its other stockholders, the domestic corporation is an indispensable party, and a federal court is without jurisdiction of such suit where complainant and such corporation are citizens of the same state. Redfield v. Baltimore & O. R. Co. (C. C. 1903) 124 Fed. 929.

To a bill in a federal court seeking to establish a trust in favor of complainant corporation in money alleged, in effect, to have been embezzled from it by one of its officers, and deposited by him with defendants, by whom it is still held, such officer is not an indispensable party, but if joined, is only a formal party, whose presence will not defeat the jurisdiction of the court, although he is a citizen of the same state as complainant. White Swan Mines Co. v. Balliet (C. C. 1905) 134 Fed. 1004.

313. —— **Foreclosure suits.**—Under a state statute providing that the foreclosure of a mortgage shall be a bar to any further suit on the debt unless the persons liable therefor are made parties, where the mortgagor and mortgagee are citizens of that state, and the mortgagor has conveyed the premises to a citizen of New York, the mortgagor is a necessary party to foreclosure proceedings against the latter, if it sought to charge him with any deficiency of the appraised value of the land to pay the mortgage debt, and the case is not a controversy wholly between citizens of different states. Coney v. Winchell (1886) 116 U. S. 227, 6 Sup. Ct. 366, 29 L. Ed. 610, affirming order Winchell v. Carll (C. C. 1885) 24 Fed. 865.

In an action against the trustee of a deed of trust and his cestui que trust, brought by the grantor in the deed, and his assignee in insolvency, to permit a sale of the property under the deed, and for an accounting between the grantor and cestui que trust, the trustee is an indispensable party adverse in interest to the plaintiffs. Peper v. Fordyce (1886) 119 U. S. 469, 7 Sup. Ct. 287, 30 L. Ed. 435, reversing decree Fordyce v. Peper (C. C. 1883) 16 Fed. 516, 5 McCrary, 221.

Individual owners of bonds issued by the state of North Carolina, each of which is secured by a separate mortgage of ten shares of railroad stock belonging to that state, are not necessary parties defendant to a suit by the state of South Dakota, as the owner of certain of these bonds, to compel payment and a subjection of the mortgaged property to the satisfaction of the debt. South Dakota v. North Carolina (1904) 24 Sup. Ct. 269, 273, 192 U. S. 286, 48 L. Ed. 448.

In a suit to foreclose a mechanic's lien on works of an irrigation company, a corporation claimant of the same citizenship as complainant held not an indispensable party defendant, and hence failure to join it did not oust federal jurisdiction. Continental & Commercial Trust & Savings Bank v. Corey Bros.

Const. Co. (1913) 208 Fed. 976, 126 C. C. A. 64.

A nonresident trustee is not a necessary party to a suit to foreclose a railroad mortgage where four out of five of such mortgage trustees have been served with process and have duly answered. Stewart v. Chesapeake & O. Canal Co. (C. C. 1880) 1 Fed. 361.

To a suit to foreclose a mortgage, brought in a federal court in one state against a corporation of that state, by bondholders, citizens of another state, other bondholders who are citizens of the state where the suit is brought cannot be made parties plaintiff, the jurisdiction being dependent upon citizenship; but, under such circumstances, the plaintiffs can foreclose the mortgage separately, and the proceeds of sale, if a sale is made, will be distributed according to the rights of all. Jackson & Sharp Co. v. Burlington & L. R. Co. (C. C. 1887) 29 Fed. 474.

Where the circuit court has no jurisdiction of a suit to foreclose a mortgage given by an executor under a power in the will on land devised to testator's children, because some of the devisees are nonresidents, and are neither made parties defendant nor appear to answer, it cannot proceed with the suit, and foreclose the mortgage, without affecting the interest of the devisees who are not parties, since, the mortgage covering all the land, and the devisees being joint tenants, a decree would affect the interest of the nonresident devisees just as if they owned the entire property. Detweiler v. Holderbaum (C. C. 1890) 42 Fed. 337.

Where a mortgagor and the trustee of the mortgage are citizens of the same state, the holders of bonds secured by the mortgage cannot sue in a federal court to foreclose the mortgage in their own name, without showing reason why the suit is not brought by the trustee. Needham v. Wilson (C. C. 1891) 47 Fed. 97.

A mortgage bondholder sued for a foreclosure, in behalf of himself and all the other bondholders, and the latter, though not made parties, intervened, by leave of court, and prayed a foreclosure. The controversy consisted of a cluster of questions, involving the validity of the mortgage, and the right of the bondholders to foreclose it. Held, that all such bondholders were indispensable parties, and, in determining the jurisdiction of the court, they were all to be considered as parties plaintiff; and, it having appeared that one of them was a citizen of the same state with several of the defendants, the jurisdiction failed. Mangels v. Donau Brewing Co. (C. C. 1892) 53 Fed. 513, distinguishing Stewart v. Dunham (1885) 5 Sup. Ct. 1163, 115 U. S. 61, 29 L. Ed. 329.

Persons whose interests in mortgaged property were cut off by a decree foreclosing a first mortgage thereon, and a sale of the property thereunder, are not necessary parties to a suit to redeem brought by a second mortgagee, who was not made a party to the first suit. Title Guarantee & Trust Co. v. Studebaker (C. C. 1900) 100 Fed. 358.

Trustees of a mortgage with power of sale are indispensable parties on foreclosure. But the beneficiaries are not. If the necessary diversity of citizenship exists between the trustees and the mortgagor, the federal court has jurisdiction of an action to foreclose, though the beneficiary and the mortgagors are citizens of the same state, provided the beneficiary is not a party. Allen-West Commission Co. v. Brashear (C. C. 1910) 176 Fed. 119.

Where a mortgage on land within the district was given by mortgagors who were residents of another district to secure the debt of a third person residing within the district, the latter was not an indispensable party to a suit to foreclose; and hence his residence within the district where complainant also resided was not fatal to the court's jurisdiction. Cady v. Barnes (D. C. 1913) 208 Fed. 359.

A citizen of another state, against whom, together with a citizen of Massachusetts, a bill in equity is brought, by one who is also a resident citizen, to foreclose all right of redemption in certain certificates pledged by the nonresident defendant to secure his bond to a corporation who assigned them to one who pledged them to plaintiff as collateral for his note, and whose right to redeem the certificates from the pledge was afterwards acquired by the resident defendant, cannot remove the case, as the resident defendant is a necessary party to a complete determination of the suit. Danvers Sav. Bank v. Thompson (1881) 130 Mass. 490.

Where a resident of New York brought an action in the United States circuit court in Nebraska to foreclose a mortgage against residents of the latter state, though the mortgagee, who was plaintiff's assignor, was also a resident of Nebraska, the court had jurisdiction of the subject-matter, and its decree of foreclosure was hence not a nullity. Tzschuck v. Mead (1896) 47 Neb. 260, 66 N. W. 428.

As by provision of a state statute personal judgment is to be rendered in a suit to foreclose a mortgage against those personally liable for the debt, a corporation and its receiver, made defendants, and shown by the complaint to be personally liable, cannot be held nominal parties merely, so as to make the controversy wholly between plaintiff and the owner of the mortgaged land, though the petition for removal to the federal court alleges that the corporation and its receiver have been duly released and discharged of personal liability; this being a defense personal to them. U. S. Mortg. Co. v. McClure (1902) 70 P. 543, 42 Or. 190, dismissed

(1905) 25 Sup. Ct. 798, 197 U. S. 624, 49 L. Ed. 911.

314. —— **Garnishment.**—Where the necessary parties on the respective sides of the controversy are citizens of different states, the relation to the suit of the executors of the deceased father of the principal defendant, whose interest in his father's estate has been attached in their hands, must be regarded as merely incidental; and, though made formally defendants, they occupy substantially the position of garnishees, and their citizenship is immaterial. Bacon v. Rives (1882) 1 Sup. Ct. 3, 106 U. S. 99, 27 L. Ed. 69.

The fact that plaintiff and garnishees are citizens of the same state is no obstacle to the jurisdiction of a federal court. Cook v. Whitney (C. C. 1877) Fed. Cas. No. 3,166.

Garnishees are not indispensable parties. Macurda v. Globe Newspaper Co. (C. C. 1908) 165 Fed. 104.

315. —— **Injunction.**—Two citizens of West Virginia conveyed to a trustee certain real property in that state, to secure the payment of notes executed by them to a Missouri corporation, which was subsequently dissolved, and its assets placed in the hands of a citizen of the latter state. Upon default in the payment of the notes, the trustee, under authority given by the deed, advertised the property for sale. The grantors thereupon instituted a suit in equity in one of the courts of West Virginia to enjoin the sale, making the trustee, the Missouri corporation, and the persons who held its assets, defendants. Upon the joint petition of that corporation and the defendant holding its assets, the cause was removed to the circuit court of the United States, and was there finally determined. Held that, since the trustee was an indispensable party, his citizenship was material in determining the jurisdiction of the circuit court; and as that was not averred, and did not otherwise affirmatively appear to be such as gave the right of removal, the decree must be reversed, and the cause remanded to the state court. Thayer v. Life Association of America (1885) 112 U. S. 717, 5 Sup. Ct. 355, 28 L. Ed. 864.

In a suit by an Alabama stockholder of an Alabama railroad company in behalf of himself and any other stockholders who will contribute to the expenses, for the cancellation of a lease made by his company to a Tennessee railroad corporation, and for an injunction restraining the latter corporation from operating the Alabama company's road, and to restrain that company from issuing stock to raise funds for the purpose of buying up the lease, and to bring the lessee to an account, both companies are necessarily parties defendant in the suit. East Tennessee, V. & G. R. Co. v. Grayson (1886) 119 U. S. 240, 7 Sup. Ct. 190, 30 L. Ed. 382.

In a suit to enjoin the alleged illegal acts of the individual defendants, the plaintiff is the real party in interest, and not the defendant companies, who have no interest in plaintiff's contract rights which it seeks to protect. Carroll v. Chesapeake & O. Coal Agency Co. (1903) 124 Fed. 305, 61 C. C. A. 49.

Where, in a suit to restrain defendants from selling liquor on certain land under a contract with a lumber company which held a timber contract from complainant's grantors, no relief was sought by or against the lumber company, it was not a necessary party, and hence it was not material that it was improperly joined as a defendant, and its joinder as a complainant would have defeated federal jurisdiction because of its citizenship. Paint Creek Co. v. Gallego Coal & Land Co. (1908) 166 Fed. 62, 91 C. C. A. 648.

A trustee in a street railroad mortgage held entitled to maintain a suit in equity in a federal court to enjoin a repeal of the company's franchise without joining the mortgagor, where it would defeat the jurisdiction of the court. City of Denver v. Mercantile Trust Co. of New York (1912) 201 Fed. 790, 120 C. C. A. 100, modifying decree Mercantile Trust Co. of New York v. City of Denver (C. C. 1908) 161 Fed. 769.

In a suit to enjoin the execution of a lease by a railroad company, the president and directors are not necessary and substantial parties. Pond v. Sibley (C. C. 1881) 7 Fed. 129, 19 Blatchf. 189.

The defendant company was organized in New Jersey to run steamboats between Staten Island and New York, touching at several intermediate points in New Jersey, and thereunder was operating its business and running the steamer D. R. M. The plaintiff claimed that this was a ferry, and was run illegally without plaintiff's license, and brought suit for a perpetual injunction against the company, and made parties defendant the master and engineer of the steamer, and secretary of the company, and one S., who resided in New York, and had been enjoined in the state court in a previous suit, but, as was alleged, had procured this company to be organized as a scheme for his own benefit, and was operating the ferry purporting to be operated by the company. The plaintiff's affidavits showed that S. sedulously avoided all ostensible and legal connection with the company. Held, that no fact was stated whereby it appeared that the defendant company was not the sole party responsible to third persons for its transportation business; that an injunction against the company would bind all its officers, agents, and employés, and stockholders; and, as it did not appear

that S. personally owned or controlled directly any part of the line, the company alone was a necessary party. City of New York v. New Jersey Steamboat Transp. Co. (C. C. 1885) 24 Fed. 817.

A bill was filed—First, to restrain the B. & O. Co. from using or transferring 1,160 shares of stock of the G. & G. Co.; second, if the stock had not been issued, to restrain its issuance; third, to enjoin the collection or negotiation of bonds transferred by the G. & G. to the B. & O. Co. It appeared that the G. & G. Co. had issued the stock, and transferred the bonds to the B. & O. Co., before the commencement of the action. The G. & G. Co.'s answer adopted the B. & O.'s answer, and showed that it had no interest in the controversy. Held that, as it was unnecessary to notice the second prayer, the stock having been issued and as the only relief which could be granted was under the first and third prayers, relating solely to the B. & O. Co., the action was separable, and the G. & G. Co. not a necessary party. County Court v. Baltimore & O. R. Co. (C. C. 1888) 35 Fed. 161.

Where, in a suit to avoid a scheme and contract of B. & Co. to reorganize certain railroads, and to enforce specific performance of B. & Co.'s contract to convey to complainants their share of certain pledged securities of the railroad companies, there was no allegation that the railroads had done or threatened to do any act in violation of, or to prevent performance of, the contracts, and the only prayer affecting the railroads was for an injunction to forbid them doing any act or taking any steps interfering with plaintiff's rights, which prayer was unsupported by any averment of fact, the railroads were not indispensable parties. Cella, Adler & Tilles v. Brown (C. C. 1905) 136 Fed. 439.

Where, in an action against foreign corporations to enjoin their use of plaintiff's corporate name, etc., plaintiff joined certain resident agents and employés of defendant corporations as parties defendant, alleging that they were personally assisting their codefendants in carrying on business in violation of plaintiff's rights, the fact that such individual defendants were not necessary parties did not entitle defendant corporations to remove the case to the federal court. Blackwell's Durham Tobacco Co. v. American Tobacco Co. (1907) 57 S. E. 5, 144 N. C. 352, 9 L. R. A. (N. S.) 270.

316. —— **Payment of bonds.**—State and county officers merely authorized to levy, collect, and disburse the taxes required to pay certain bonds, are not necessary parties to a controversy, between citizens of different states, as to the validity of such bonds. Aroma v. Auditor of Public Accounts (C. C. 1880) 2 Fed. 33.

Since the assignee of a bond is the legal owner, under the statute, where the assignees of a bond sue thereon in a state court in their own names, the question whether the federal court has jurisdiction depends upon the citizenship of the assignees, and not on that of the assignor. Robb v. Parker (1871) 3 S. C. (3 Rich.) 60.

317. —— **Quieting title.**—A lessee is interested in a suit to set aside his lessor's title as fraudulent, and to quiet title in complainant; and when he, being a resident of the same state as complainant, is made a party defendant, though the lessor is a resident of another state, the controversy is not wholly between citizens of different states. Miller v. Sharp (C. C. 1889) 37 Fed. 161.

A state statute giving a tenant under a lease for more than 10 years the right to maintain an action in his own name to remove a cloud upon title will be given effect by a federal court, and under such statute the lessor is not an indispensable party to a suit by a lessee for ninety-nine years, obligated by the terms of the lease to pay all taxes and assessments against the property, to set aside an assessment for local improvements on the ground of its invalidity. New York, N. H. & H. R. Co. v. City of New York (C. C. 1905) 145 Fed. 661.

318. —— **Receivership proceedings.**—A resident and citizen of Maryland, who was a stockholder in a West Virginia corporation, brought a suit in the federal court in West Virginia against the corporation for the appointment of a receiver for its property, which was situated in Maryland, with authority to complete and furnish an unfinished hotel building thereon, and to issue receiver's certificates therefor. Lienholders who were citizens of Maryland were made defendants, but in an amended bill only the corporation was named as defendant. A receiver was appointed, who completed the building, issuing receiver's certificates for the cost. The Maryland lienholders, on their application, were permitted to become parties and to prove their liens. Under a subsequent order the property was sold, and an order distributing the proceeds made, which gave the receiver's certificates priority. Held, that the lienholders were necessary parties to the suit, and being citizens of the same state as complainant, and the property being situated outside of its district, the court was without jurisdiction, and the entire proceedings were coram non judice and void. Baltimore Building & Loan Ass'n v. Alderson (1898) 90 Fed. 142, 32 C. C. A. 542.

319. —— **Recovery of fraudulent preferences.**—Defendant's counsel, in whose hands it is sought to attach money belonging to defendant, are not such necessary parties to an action by a

trustee in bankruptcy to recover an alleged preference received by defendant as would prevent defendant from removing the cause to a federal court, where it is a citizen of a different state from plaintiff, notwithstanding that counsel are citizens of the same state. Corbitt v. President, etc., of Farmers' Bank of Delaware (C. C. 1902) 113 Fed. 417.

320. —— Specific performance.—Where bonds were deposited with a trust company to be delivered to a railroad contractor upon the completion of his contract, the railroad company and the trust company are necessary and not formal parties to a suit by the assignee of the contractor to compel a delivery of the bonds to him, and, where they are citizens of the same state as the plaintiff, the federal court has no jurisdiction, even though the county issuing the bonds and the adverse claimant thereto are citizens of another state. Wilson v. Oswego Tp. (1894) 14 Sup. Ct. 259, 263, 151 U. S. 56, 38 L. Ed. 70.

Where the bill seeks specific performance of an alleged contract between the complainants and the nonresident citizen defendant, claiming that under the contract the complainants are entitled to an allotment of an aliquot proportion of a large mass of bonds and securities controlled by such nonresident defendant, against whom a decree for such allotment would apparently afford the complainants complete relief, a third party defendant, a citizen of the same state as complainants, to whom the nonresident defendant has made an allotment of like apportionment without complainant's consent, is not a necessary party defendant. Cella v. Brown (1906) 144 Fed. 742, 75 C. C. A. 608.

In a suit by the assignee of an equitable title to obtain a conveyance of the legal title, the assignor is not an indispensable party if the assignment is an absolute one; but where the assignee founds his right on an executory agreement, the assignor is a necessary party. Land Co. of New Mexico v. Elkins (C. C. 1884) 20 Fed. 545.

To a suit for the specific performance of a contract, which requires the transfer of stock in a corporation on its books to make the relief prayed for effective, the corporation is a necessary party. Patterson v. Farmington St. Ry. Co. (C. C. 1901) 111 Fed. 262.

Complainants, who were citizens of Missouri, sued B. & Co., nonresidents, to avoid a railroad reorganization contract and for specific performance of a contract of B. & Co. to convey to complainants their share of certain pledged securities of the railroads, without complainants consenting to certain alleged invalid conditions. The bill also alleged that defendant bank, of the same citizenship as complainants, through which the transaction was to be carried out, made the required payment of complainants' share of the railroads' indebtedness on complainants' refusal to consent to the conditions and claimed the right to receive complainants' share of the securities, and demanded, as against the bank, that it be required to deliver to complainants their share of such securities on payment of their share of the indebtedness. Held that the bank was not a necessary party to the determination of the controversies between complainants and B. & Co. Cella, Adler & Tilles v. Brown, (C. C. 1905) 136 Fed. 439.

A bill for specific performance of a contract for the sale to complainant of certain shares of the issued stock of a corporation, and to recover damages for its breach, which does not allege the insolvency of the other party to the contract, nor that he is about to dispose of the stock, does not state any cause of action against the corporation, which is not an indispensable nor a necessary party. Lucas v. Milliken (C. C. 1905) 139 Fed. 816.

321. —— Stockholders' suits.—To a suit in equity instituted by a stockholder in his own name, but upon a right of action in the corporation, such corporation is an indispensable party. Groel v. United Electric Co. of New Jersey (C. C. 1904) 132 Fed. 252; McClelland v. McKane (C. C. 1907) 154 Fed. 164; Kelley v. Mississippi River Coaling Co. (C. C. 1909) 175 Fed. 482.

322. —— Suits to try title or right of possession.—In suit in equity brought by C., a citizen of one state, against a corporation of the same state, and T., a citizen of another state, and W., to obtain a decree that C. owns shares of the stock of the corporation standing in the name of W., but sold by him to T., and that the corporation cancel on its books the shares standing in the name of W., and issue to C. certificates therefor, the corporation is an indispensable party. Crump v. Thurber (1885) 115 U. S. 56, 5 Sup. Ct. 1154, 29 L. Ed. 328.

The vendee of plaintiff in an action to recover possession of real property is not a party thereto, and his citizenship in no way affects the question of jurisdiction. Elliot v. Teal (C. C. 1878) Fed. Cas. No. 4,389.

Where the landlord or real owner appears as a party, being called in by the tenant in trespass to try title in Texas, the controversy is one wholly between him and the plaintiff. Greene v. Klingler (C. C. 1879) Fed. Cas. No. 5,767; Texas v. Lewis (C. C. 1882) 12 Fed. 1.

In a suit in equity to determine the ownership of a bond and mortgage, the mortgagor is not, under the circumstances of the case in controversy, a necessary party defendant. Ruckman v. Ruckman (C. C. 1880) 1 Fed. 587.

The officers of a corporation are not necessary parties to a suit involving the title to lands, alleged to have been

fraudulently conveyed by the corporation. National Bank of Lyndon v. Wells River Mfg. Co. (C. C. 1881) 7 Fed. 750.

In an action claiming the rightful ownership of certain shares of stock in a resident corporation, which are in the name of nonresident stockholders, the corporation is an essential party. Rogers v. Van Nortwick (C. C. 1891) 45 Fed. 513.

Where a bill filed against a stockholder in a corporation shows that the only question involved is the ownership of the stock held by such defendant, the corporation is not a necessary party. Higgins v. Baltimore & O. R. Co. (C. C. 1900) 99 Fed. 640.

Defendants, who were joined in a suit to recover an interest in lands only as trustees holding the paramount title in trust, and whose title as such was not disputed, held not indispensable parties. Lawrence v. Southern Pac. Co. (C. C. 1908) 165 Fed. 241.

Joinder of a tenant at will of the same citizenship as plaintiff as a party in ejectment did not prevent the removal of the cause otherwise removable to the federal court. Wallin v. Reagan (C. C. 1909) 171 Fed. 758.

323. —— **Suits for unfair competition.**—A firm, one of the members of which was a citizen and resident of Pennsylvania, contracted to sell to plaintiff, a New York corporation, the right to use a trade-name, the firm, however, retaining title until payment of $4,000 by way of a royalty, which had not been accomplished at the time the corporation filed a bill against defendant, a Pennsylvania corporation, for unfair competition. Held that, since the interest of the firm was real and substantial, there was no sufficient diversity of citizenship, and that the federal court had no jurisdiction. A. B. Andrews Co. v. Puncture Proof Footwear Co. (C. C. 1909) 168 Fed. 762.

324. —— **Suits for violation of interstate commerce act.**—A terminal or belt railroad company, which owns and leases tracks and switches in and around a city, and entirely within one state, and which has entered into a contract with the several roads entering the city, under which its property is entirely managed and operated by a board of managers composed of a member selected by each of such roads, who pay a fixed rental therefor, is a proper, but not a necessary, party to a suit against such roads for violating the interstate commerce act by discriminating against a business establishment located on its lines, and its joinder in such suit does not deprive a federal court of jurisdiction. Interstate Stockyards Co. v. Indianapolis U. Ry. Co. (C. C. 1900) 99 Fed. 472.

325. —— **Vacation of decrees or judgments.**—One of several attaching creditors joined the others as defendants in a suit to set aside certain judgments obtained against the debtor by confession. Held, that they were necessary parties to the controversy between the plaintiff and his debtor. Pollok v. Louchheim (C. C. 1883) 19 Fed. 465.

When a judgment is recovered by a bank against an independent school district, and the latter issues orders for the payment thereof, which orders the bank transfers to a third person, the transferee claiming to be the owner, the bank, as well as the transferee, is a proper party defendant to a bill to cancel the judgments. Independent District of Rock Rapids v. Bank of Rock Rapids (C. C. 1891) 48 Fed. 2; Same v. Miller (C. C. 1891) Id. 3.

Complainants filed a bill in a federal court against a corporation of the same state as owner of a patent and the patentee, who was a citizen of another state, alleging that such patentee obtained a decree against complainants in the same court adjudging the validity of the patent and enjoining its infringement, that complainants thereafter entered into a license contract with defendant corporation, giving them the right to manufacture and sell under the patent for a fixed term, with privilege of renewal, subject to the reservation of the right to such defendant to give notice by a time stated that it did not desire to renew, which notice the defendant had given, and that, when the contract was signed, complainants were "orally assured" that no advantage would be taken of the reservation. The bill prayed that the decree in the infringement suit be set aside or suspended, that complainants' right to a renewal of the license contract be established, and that in the meantime defendants be enjoined from proceeding under the decree or bringing suit against complainants for infringement. The bill alleged no facts which would sustain a bill of review in the patent suit. Held, that the court was without jurisdiction on the ground of diversity of citizenship; the patentee being neither a necessary or proper party to such controversy. Lefkowitz v. Foster Hose Supporter Co. (C. C. 1908) 161 Fed. 367.

326. **Persons in representative or fiduciary capacity as parties.**—The citizenship of parties which determines federal jurisdiction is that of the parties as persons, and not an official citizenship, acquired in a representative capacity. Davies v. Lathrop (C. C. 1882) 12 Fed. 353, 20 Blatchf. 397; Wilson v. Smith (C. C. 1895) 66 Fed. 81.

The jurisdiction of the federal court when based on the citizenship of the parties depends upon the citizenship of the parties to the record as persons, and not of those whom they may represent. Brisenden v. Chamberlain (C. C. 1892) 53 Fed. 307, 310.

Where plaintiffs sued as individuals,

and the courts of the state in which the suit was brought sustained their right to maintain their suit in such capacity, their individual citizenship must determine the right of a defendant to remove the cause, notwithstanding an averment in the petition for removal that they sued as stockholders of a corporation, and that the recovery they sought was in the sole right and for the benefit of such corporation. Dodd v. Louisville Bridge Co. (C. C. 1904) 130 Fed. 186.

327. —— Agents or attorneys.—The character of a suit brought in a state court of Minnesota by a citizen of that state against a sheriff for trespass in taking possession of plaintiff's stock of goods is not changed for purposes of removal by the justification of the sheriff under an execution in favor of an Illinois corporation and by the intervention of that corporation, and the sureties on the indemnifying bond admitted facts pleaded by the sheriff in justification, and that all that was done by him was done as their agent as the sheriff is still a necessary party and the fact that the intervention was had under a Minnesota statute which provides that in such a suit where judgment goes for plaintiff the property of the interveners must first be exhausted on execution before that of the sheriff is sold, does not alter the case. Thorn Wire Hedge Co. v. Fuller (1887) 7 Sup. Ct. 1265, 122 U. S. 535, 30 L. Ed. 1235.

An agent or trustee, appointed by both parties to a sale of lands to hold the deed, purchase-money notes, and mortgage securing them until certain conditions are performed, is a necessary, and not a merely formal, party to a suit for specific performance brought by the vendor against him and the vendee, wherein part of the relief sought is a decree compelling such trustee to record the deed and deliver the notes and mortgage in accordance with the contract. Scoutt v. Keck (1896) 73 Fed. 900, 20 C. C. A. 103.

Where plaintiff's declaration in an action on a contract in a state court against three defendants alleged that the defendant which made the contract in its own name acted in doing so as the agent for its codefendants, who were the real parties, they cannot be treated as merely nominal or unnecessary parties to the suit, for the purposes of the jurisdiction of the federal courts. Patton v. Meadows Co. (C. C. 1909) 173 Fed. 224.

The rule that the citizenship of an executor, administrator, guardian, or receiver is looked to in determining federal jurisdiction does not apply to a mere agent or trustee whose authority is revocable at any time, and who has no power coupled with an interest. Bogue v. Chicago, B. & Q. R. Co. (D. C. 1912) 193 Fed. 728.

328. —— Administrators and executors.—The personal citizenship of an administrator or executor determines the question of diverse citizenship, on which federal jurisdiction depends. Neither the fact that the representative was appointed such in the state of which the opposite party is a citizen, nor the fact that the beneficiary whom the representative acts for may be a citizen of the same state, affects the question. Childress v. Emory (1823) 8 Wheat. 642, 669, 5 L. Ed. 705; Rice v. Houston (1871) 13 Wall. 66, 67, 20 L. Ed. 484; Blake v. McKim (1880) 103 U. S. 336, 26 L. Ed. 563; Dodge v. Perkins (C. C. 1827) Fed. Cas. No. 3,954; Carter v. Treadwell (C. C. 1843) Fed. Cas. No. 2,480; Hartman v. Fishbeck (C. C. 1883) 18 Fed. 291; McElmurray v. Loomis (C. C. 1887) 31 Fed. 395; Bangs v. Loveridge (C. C. 1894) 60 Fed. 963; Wilson v. Hastings Lumber Co. (C. C. 1900) 103 Fed. 801; McDuffie v. Montgomery (C. C. 1904) 128 Fed. 105; Lemon's Adm'r v. Louisville & N. R. Co. (Ky. 1910) 125 S. W. 701; Hill v. Henderson (1846) 14 Miss. (6 Smedes & M.) 351; Geyer v. John Hancock Mut. Life Ins. Co. (1871) 50 N. H. 224, 9 Am. Rep. 185; Miller v. Sunde (1890) 1 N. D. 1, 44 N. W. 301; Middleton's Ex'rs v. Middleton (Pa. 1878) 7 Wkly. Notes Cas. 144.

An administrator suing for wrongful death is not a mere nominal party, but the real party, whose citizenship, and not that of the beneficiaries, controls the question of federal jurisdiction. Cincinnati, H. & D. R. Co. v. Thiebaud (1900) 114 Fed. 918, 52 C. C. A. 538; Harper v. Norfolk & W. R. Co. (C. C. 1887) 36 Fed. 102; Popp v. Cincinnati, H. & D. Ry. Co. (C. C. 1899) 96 Fed. 465; Bishop v. Boston & M. R. R. (C. C. 1902) 117 Fed. 771; Holmes v. Oregon & C. R. Co. (D. C. 1880) 5 Fed. 75; Laubscher v. Fay (D. C. 1912) 197 Fed. 879.

Where a nonresident citizen who was a coexecutor of an estate was entitled to sue in the federal courts for the benefit of the estate, the fact that another executor qualified in the state of the situs of the estate did not preclude the nonresident executor from resorting to the federal courts. Monmouth Inv. Co. v. Means (1906) 151 Fed. 159, 80 C. C. A. 527.

A federal court has jurisdiction of a suit by a legatee, who is a citizen of another state, against an executor to establish and enforce rights under the will. Higgins v. Eaton (1910) 183 Fed. 388, 105 C. C. A. 608, reversing decree (C. C. 1910) 178 Fed. 153.

The fact that intestate was a citizen of another state will not give the administrator, who is a citizen of the same state with defendant, the right to sue in the federal court. Dodge v. Perkins (C. C. 1827) Fed. Cas. No. 3,954.

Where the will of the deceased owner of lands, sold as having been forfeited to the state, vests the title thereto in his executors and trustees, who are

citizens of another state, the latter may bring suit to set aside the sale in a federal court sitting in the state where the lands lie, though they have not qualified in that state, as they sue in their individual, and not in their representative, capacity. De Forest v. Thompson (C. C. 1889) 40 Fed. 375.

Under the Illinois statute, which gives any one aggrieved by the order of a probate court allowing a claim the right to appeal, as construed by the Supreme Court of the state, any person appealing, other than the administrator, may prosecute the appeal in his own name. Held that, where the claimant was the administrator, and an administrator pro tem. was appointed by the probate court to represent the estate, but the claim was actually contested by an heir of the decedent, who appealed from an order allowing the claim, the question of diversity of citizenship between the parties was to be determined upon the citizenship of such appellant, and not upon that of the administrator pro tem. Schneider v. Eldredge (C. C. 1903) 125 Fed. 638.

A state statute providing that a nonresident cannot act as administrator does not make an administrator appointed therein a citizen of the state for the purpose of the jurisdiction of a federal court, which is determined by his actual citizenship. McDuffie v. Montgomery (C. C. 1904) 128 Fed. 105.

329. —— **Guardians, next friends, and curators.**—The citizenship of the infant determines the jurisdiction, and not the citizenship of the guardian. Toledo Traction Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28; Woolridge v. McKenna (C. C. 1881) 8 Fed. 650; Dodd v. Ghiselin (C. C. 1886) 27 Fed. 405; Wilcoxen v. Chicago, B. & Q. R. Co. (C. C. 1902) 116 Fed. 444.

The guardian, and not the ward, is the party plaintiff, so far as federal jurisdiction invoked solely on the ground of diverse citizenship is concerned, where the guardian has, under the state laws, the right to bring the suit in his own name. Mexican Cent. R. Co. v. Eckman (1893) 23 Sup. Ct. 211, 214, 149 U. S. 429, 47 L. Ed. 245.

The citizenship of the guardian suing, and not that of his ward, is the test of jurisdiction. In re McClean's Estate (C. C. 1885) 26 Fed. 49.

A Circuit Court of the United States has jurisdiction of a suit by the guardian of the person and estate of an incompetent, the guardian residing in North Dakota, where she was appointed, to compel an accounting by a guardian first appointed, residing in Minnesota, where the amount involved is over $2,000. Pulver v. Leonard (C. C. 1909) 176 Fed. 586.

A next friend conducting a suit in behalf of an infant is not a party to the action, and his citizenship is not a test of the jurisdiction of the federal courts. Blumenthal v. Craig (1897) 81 Fed. 320, 26 C. C. A. 427; Williams v. Ritchey (C. C. 1874) Fed. Cas. No. 17,734; Ruckman v. Palisade Land Co. (C. C. 1880) 1 Fed. 367; Wiggins v. Bethune (C. C. 1886) 29 Fed. 51; Voss v. Neineber (C. C. 1895) 68 Fed. 947.

Where the curator of an insane person is not, by virtue of his appointment, vested with the title to his ward's realty, but is merely a custodian of the ward's personal property—as under the statutes of Missouri—and actions to recover real estate must be brought in the name of the ward, or in his name by his curator, the jurisdiction of a federal court in such an action is to be determined with reference to the citizenship of the insane person, and not that of his curator. Stout v. Rigney (1901) 107 Fed. 545, 46 C. C. A. 459.

330. —— **Receivers.**—It is only where the jurisdiction of the federal courts depends upon diverse citizenship that the citizenship of a receiver of an incorporated party is material. If the jurisdiction is asserted on any other ground, the receiver stands upon the same footing as the corporation itself. Smith v. Rackliffe (1898) 87 Fed. 964, 31 C. C. A. 328, judgment affirmed Smith v. Reeves (1900) 20 Sup. Ct. 919, 44 L. Ed. 1140.

The receiver of a national bank is a proper, but not a necessary, party to an action against the bank pending in a state court at the time of his appointment, and while he may properly be admitted as a party, on his application, to defend in behalf of his trust, such admission does not give him the right to remove the cause to a federal court. The right of removal given him by the federal statutes applies only to cases where he is the necessary party to the action. Speckert v. German Nat. Bank (1899) 98 Fed. 151, 38 C. C. A. 682.

Where the receiver of a partnership was a citizen of another state, his right to maintain an action in the federal courts for diversity of citizenship was not affected by the fact that one or more of the members of the firm was a citizen of the state in which the action was brought. Coal & Iron Ry. Co. v. Reherd (1913) 204 Fed. 859, 123 C. C. A. 155.

An independent action by a receiver of a state court against a nonresident defendant to recover money alleged to be due the estate held removable. Porter v. F. M. Davies & Co. (1915) 223 Fed. 465, 140 C. C. A. 11 (rehearing denied [1915] 224 Fed. 451, 140 C. C. A. 288); Id. (1915) 223 Fed. 1022, 138 C. C. A. 664.

A receiver appointed on the voluntary dissolution of a bank, suing in a federal court, must show that such court could have taken jurisdiction as between defendants and the bank. Brad-

ford v. Jenks (C. C. 1840) Fed. Cas. No. 1,769.

A citizen of Massachusetts, appointed a receiver of an Ohio corporation by the United States court in the latter state, may sue in said court for the recovery of the assets of such corporation wrongfully withheld. Farlow v. Lea (C. C. 1877) Fed. Cas. No. 4,649.

The receiver of a railroad company, being a citizen of another state, may remove an action brought against him in his official capacity for death by wrongful act, though the railroad company is a citizen of the state in which the action is brought. Brisenden v. Chamberlain (C. C. 1892) 53 Fed. 307.

Under a state statute which empowers the court in a creditor's suit against an insolvent corporation to adjudge the amount payable by each stockholder under the double liability provided for by the statute, and to appoint a receiver to collect the same with authority to maintain suits therefor against stockholders in other jurisdictions, such a receiver is in the position of a quasi assignee, representing all of the creditors, and may maintain an action in a federal court in another state, and his own citizenship, and not that of the creditors, affords the test of jurisdiction. Irvine v. Bankard (C. C. 1910) 181 Fed. 206.

A receiver for a corporation, appointed by a state court, who as such has recovered a judgment in his own state, may maintain an action thereon in another jurisdiction as a judgment creditor, and his description of himself in his pleading as receiver may be treated as surplusage. McBride v. Oriental Bank of New York (D. C. 1912) 200 Fed. 895.

331. —— Trustees.—Where a trustee is a party to an action in a federal court, brought under the diverse citizenship clause of the federal constitution, the citizenship of the trustee, and not that of the beneficiaries under the trust, determines the jurisdiction. Susquehanna & W. V. R. & Coal Co. v. Blatchford (1870) 11 Wall. 172, 174. 20 L. Ed. 179; Morris v. Lindauer (1893) 54 Fed. 23, 4 C. C. A. 162, 6 U. S. App. 510; Shipp v. Williams (1894) 62 Fed. 4, 10 C. C. A. 247; Johnson v. City of St. Louis (1909) 172 Fed. 31, 96 C. C. A. 617, 18 Ann. Cas. 949; Glenn v. Walker (C. C. 1886) 27 Fed. 577; Griswold v. Bacheller (C. C. 1896) 75 Fed. 470; Dunn v. Waggoner (1832) 11 Tenn. (3 Yerg.) 59.

A suit to foreclose a deed of trust is properly brought in the name of the trustee, and the fact that the beneficiary is a citizen of the same state as the grantor does not defeat the jurisdiction of the federal court, if the trustee is a citizen of a different state. Dodge v. Tulleys (1892) 144 U. S. 451, 12 Sup. Ct. 728, 36 L. Ed. 501.

A testamentary trustee, or a special guardian appointed under a state statute for the sale of infants' land, suing in either capacity, is not a mere guardian ad litem or next friend; and the federal courts have jurisdiction of a suit brought by him against a citizen of a state other than his own. Pennington v. Smith (1897) 78 Fed. 399, 24 C. C. A. 145, reversing decree (C. C. 1896) 75 Fed. 157.

A trustee in a mortgage executed by a water company, claiming the right by virtue of the provisions of such mortgage to collect rentals due the company, cannot maintain an action against a city to recover an amount alleged to be due the company as rentals in a federal court, where the company and city are corporations of the same state; his sole right to maintain such an action being as assignee of the contract between the city and company. City of Eau Claire v. Payson (1901) 107 Fed. 552, 46 C. C. A. 466, rehearing denied (1901) 109 Fed. 676, 48 C. C. A. 608.

A citizen of one state, who holds the title to property in trust for others, may maintain an action for damage to it against the citizens of another state in the proper federal court, without regard to the citizenship of the beneficiary. Johnson v. City of St. Louis (1909) 172 Fed. 31, 96 C. C. A. 617, 18 Ann. Cas. 949.

Where a citizen of Illinois is appointed trustee by an Indiana court of property situated in the latter state, the citizenship of such person for the purpose of jurisdiction is not affected by such appointment, and he may maintain an action in a federal court for Indiana in his trust capacity for damages to such property. Shirk v. City of La Fayette (C. C. 1892) 52 Fed. 857.

A mortgagee of all of the property of a street railroad company as trustee for bondholders has a right of action in equity in its own right to enjoin a city from unlawfully depriving the company of its franchise, and to compel the company to comply with all lawful ordinances and regulations of the city essential to preserve the franchise, and, where it is a citizen of another state, may maintain a suit therefor in a federal court against both the city and company which are citizens of the state in which the suit is brought, its interest, while in some respects the same as that of the company, being separate and distinct therefrom, and such as it has the right to protect independently. Knickerbocker Trust Co. v. City of Kalamazoo (C. C. 1910) 182 Fed. 865.

In a suit by a bankrupt's trustee, jurisdiction of the federal court depends on the citizenship of the bankrupt, and not on the citizenship of the trustee. Mayer v. Cohrs (C. C. 1911) 188 Fed. 443.

The citizenship of the cestui is not a factor to give federal courts jurisdiction, where the trustee and the adverse party are citizens of the same

state. Goodnow v. Oakley (1885) 68 Iowa, 25, 25 N. W. 912.

Trustees, being defendants in whom the legal title is vested, are parties in interest so as to oust the federal courts of jurisdiction, in cases where the trustees reside in the same state with the complainants, but the beneficiaries in another state. Dunn v. Wagoner (1832) 11 Tenn. (3 Yerg.) 59.

A citizen of New York brought suit, in a court of this state, as trustee of a married woman who was a citizen of this state, against a citizen of Illinois, to recover a debt alleged to be due to plaintiff in his capacity of trustee. Held, that an application by defendant for a removal of the cause into the United States court for the district of Wisconsin was properly denied. Mead v. Walker (1859) 15 Wis. 499.

332. Interveners and substituted parties.—Where jurisdiction is acquired by the federal court solely by reason of citizenship, the court will allow third persons to intervene, if necessary to protect their rights, without regard to their citizenship. Lilienthal v. McCormick (1902) 117 Fed. 89, 54 C. C. A. 475; Alsop v. Conway (1911) 188 Fed. 568, 110 C. C. A. 366 (writ of certiorari denied [1911] 32 Sup. Ct. 523, 223 U. S. 720, 56 L. Ed. 629); Fraser v. Cole (C. C. A. 1914) 214 Fed. 556; Conwell v. White Water Val. Canal Co. (C. C. 1868) Fed. Cas. No. 3,148; Belmont Nail Co. v. Columbia Iron & Steel Co. (C. C. 1891) 46 Fed. 336; Henderson v. Goode (C. C. 1892) 49 Fed. 887; Clarke v. Eureka County Bank (C. C. 1902) 116 Fed. 534; King v. Davis (C. C. 1903) 137 Fed. 198 (judgment affirmed Blankenship v. King [1906] 157 Fed. 676, 85 C. C. A. 348); Cole v. Philadelphia & E. Ry. Co. (C. C. 1905) 140 Fed. 944 (decree reversed Kreider v. Cole [1907] 149 Fed. 647, 79 C. C. A. 339).

An intervener, coming into a cause in a state court solely to protect himself against a liability to indemnify the defendant, can confer no jurisdiction on the federal court that the original defendant could not confer. Rouse v. Letcher (1895) 156 U. S. 47, 15 Sup. Ct. 266, 39 L. Ed. 341; Olds Wagon Works v. Benedict (1895) 67 Fed. 1, 14 C. C. A. 285; Farmers' & Merchants' Nat. Bank v. Schuster (1898) 86 Fed. 161, 29 C. C. A. 649; Ex parte Girard (C. C. 1858) Fed. Cas. No. 5,457; Ex parte Turner (C. C. 1858) Fed. Cas. No. 14,245; Burdick v. Peterson (C. C. 1880) 6 Fed. 840, 2 McCrary, 135; Bronson v. St. Croix Lumber Co. (C. C. 1888) 35 Fed. 634; Davies v. Wells (C. C. 1904) 134 Fed. 139; Hebert v. Lefevre (1879) 31 La. Ann. 363; Baltimore & O. Tel. Co. v. Morgan's Louisiana & T. R. & S. S. Co. (1885) 37 La. Ann. 883; Gudger v. Western N. C. R. Co. (1882) 87 N. C. 325.

A party substituted for another in a suit is subject to all the disabilities of him whose place he takes. Houston & T. C. Ry. Co. v. Shirley (1884) 111 U. S. 358, 4 Sup. Ct. 472, 28 L. Ed. 455; Jefferson v. Driver (1886) 117 U. S. 272, 6 Sup. Ct. 729, 29 L. Ed. 897; Burnham v. First Nat. Bank (1892) 53 Fed. 163, 3 C. C. A. 486, 10 U. S. App. 485; Shirley v. Waco Top. R. Co. (C. C. 1882) 13 Fed. 705, 4 Woods, 411; Richmond & D. R. Co. v. Findley (C. C. 1887) 32 Fed. 641; Howard v. Stewart (1892) 34 Neb. 765, 52 N. W. 714.

The attorney general may intervene for the United States and adduce proofs in a suit to fix boundaries between states without making them a party in the technical sense of the term. Florida v. Georgia (1854) 17 How. 478, 491, 15 L. Ed. 181.

Where the jurisdiction of a United States court has completely attached in ejectment against a tenant in possession by a citizen of another state, it is not affected by the substitution of the landlord for such tenant as defendant. Hardenbergh v. Ray (1894) 151 U. S. 112, 14 Sup. Ct. 305, 38 L. Ed. 93.

In a suit in equity in a federal court by one who has established his title in an action at law to an undivided interest in a tract of land, brought in his own behalf alone to recover his share of the value of oil alleged to have been unlawfully taken from the land by defendant, where the only ground of federal jurisdiction is diversity of citizenship, tenants in common with complainant, who are citizens of the same state as defendant, are not entitled to intervene as complainants for the recovery of their shares of such profits made by defendant on the ground that there is a fund in court in which they are interested; nor are they given the right to intervene for such purpose by the fact that a receiver has been appointed, on application of the complainant, to take charge of and operate oil wells on the land pending the suit. Where the complainant in such suit voluntarily assents to the unauthorized intervention of his cotenants, and to the rendition of a joint judgment in favor of himself and such interveners, he cannot be relieved from the consequences of such association, and the entire suit fails for want of jurisdiction. Forest Oil Co. v. Crawford (1900) 101 Fed. 849, 42 C. C. A. 54.

The federal court cannot entertain a bill of revivor where the parties are citizens of the same state, though the original parties were citizens of different states. Clarke v. Mathewson (C. C. 1835) Fed. Cas. No. 2,857.

A person having an interest, though not a party to the suit, may intervene to assert his rights, without reference to the citizenship of the parties. Os-

born v. Michigan Air Line R. Co. (C. C. 1879) Fed. Cas. No. 10,594.

Diverse citizenship between the original parties will not give jurisdiction of a controversy between an intervener and defendant, citizens of the same state, where the property in controversy is not drawn into the court's possession. United Electric Securities Co. v. Louisiana Electric Light Co. (C. C. 1895) 68 Fed. 673.

After the dissolution of a corporation, and the appointment of a receiver, a foreign corporation commenced suit in a state court to have funds in the hands of a trustee of the dissolved corporation applied on a judgment owned by it. The receiver filed an intervening petition, asking to be made defendant. Held, that he and plaintiff were the only real parties, and hence he could remove the case to the federal court. American Nat. Bank of Denver v. National Benefit & Casualty Co. (C. C. 1895) 70 Fed. 420.

The federal court cannot take jurisdiction of an intervention in a merely personal action, in which no fund has come into the possession of the court, by one who is a citizen of the same state as the party against whom his complaint is directed. Seligman v. City of Santa Rosa (C. C. 1897) 81 Fed. 524.

Where ejectment was brought in a federal court in which the requisite diversity of citizenship appeared, and, after judgment against a tenant of a part of the tract, his landlord, who was not a party to the suit, appeared and sought to have the judgment opened, the fact that such landlord is of the same citizenship as plaintiff would not oust the court of jurisdiction. King v. Davis (C. C. 1903) 137 Fed. 198, judgment affirmed Blankenship v. King (1906) 157 Fed. 676, 85 C. C. A. 348.

The lessee under a long-term lease of a railroad assuming all the lessor's obligations is the real party to a suit to compel the lessor to grant switch connections in accordance with a stipulation in its grant of right of way, and is entitled to intervene. Chase v. Beech Creek R. Co. (C. C. 1906) 144 Fed. 571.

The bringing in of a new party in a suit in a federal court by cross-bill or otherwise when the presence of such party as an original defendant would have defeated federal jurisdiction, violates both the constitutional and statutory requirement as to diverse citizenship, and the court is without jurisdiction to entertain a cross-bill by an intervener who could not have been made a party to the original bill, unless such intervener represents an interest already before the court or claims an interest in property of which the court holds possession. Newton v. Gage (C. C. 1907) 155 Fed. 598.

A federal court is not required to permit the intervention as defendants of persons not necessary parties, whos presence would oust the court of juris diction. Kaus v. American Surety Co of New York (D. C. 1912) 199 Fed 972.

In suit to set aside fraudulent trans fer in which fraudulent grantor's trus tee in bankruptcy, a citizen of the sam state as defendants, intervened hel that there was no diversity of citizen ship making the cause removable. Cas ey v. Baker (D. C. 1914) 212 Fed. 247

333. —— **Personal representatives.**- Where the jurisdiction of the federa courts on the ground of diversity o citizenship has once attached, the deat of one of the parties will not depriv them of jurisdiction, and hence, wher the plaintiff in ejectment died after ob taining judgment, the federal court have jurisdiction of a suit by defend ants to restrain execution thereon even though the personal representa tive of plaintiff is a citizen of the sam state of which defendants are citizens Dunn v. Clarke (1834) 8 Pet. 1, 3 8 L. Ed. 845.

Congress manifestly treats the re vival of a suit under this section by o against the representatives of the de ceased party as a matter of right an as a mere continuance of the origina suit without any distinction as to th citizenship of the representative, wheth er he belongs to the same state wher the cause is then pending or to anothe state. Clarke v. Mathewson (1838) 1 Pet. 164, 172, 9 L. Ed. 1041.

Substitution of an administrator hav ing diverse citizenship does not make case removable, if it were not remova ble when commenced. Grand Trun Ry. Co. v. Twitchell (1894) 59 Fed 727, 8 C. C. A. 237.

Where, after a bill by two plaintiffs making proper allegations of divers citizenship, is prepared, one of th plaintiffs dies before it is filed, an the interest of the remaining plainti is sufficient foundation for the suit, suc remaining plaintiff is the only plaintif and the federal court has jurisdiction and does not lose it by the subsequen intervention of the executrix of the de ceased plaintiff, whatever her citizen ship. Society of Shakers v. Watso (1895) 68 Fed. 730, 15 C. C. A. 63 motion to file bill of review denie (1896) 77 Fed. 512, 23 C. C. A. 263.

Where the United States court ac quired jurisdiction of a suit by an ex ecutor against his coexecutor to pre vent the latter from injuring the asset of the estate, no subsequent change i the personnel of the executors of th estate and the substitution of an ad ministrator with the will annexed coul oust such jurisdiction. Monmouth In Co. v. Means (1906) 151 Fed. 159, 8 C. C. A. 527.

The fact that the administrator of th deceased plaintiff in a cause revived i the federal court under the local la is a citizen of the same state with de

fendant will not oust the court of jurisdiction. Hatfield v. Bushnell (C. C. 1849) Fed. Cas. No. 6,211.

An action in a federal court in New York may be maintained on a joint and several bond to the United States, against those of the obligors who are living, and against the administrators or executors of those who are dead. U. S. v. Lawrence (C. C. 1877) Fed. Cas. No. 15,574.

Jurisdiction of the action having once vested in the court, it continues and may be exercised, notwithstanding the administrator may be a citizen of the same state with the defendant. The administrator is not to be considered as an original party to the action for the purpose of this or any other question; but he enters in the right and merely as the representative of such original party. Hatfield v. Bushnell (1849) 22 Vt. 659.

(D) Pleadings, record, objections, and waiver

334. Necessity of allegations or showing by record.—When jurisdiction depends on diverse citizenship, such citizenship, or the facts which in legal intendment constitute it, must be distinctly and positively averred in the pleadings or appear affirmatively in other parts of the record. Emory v. Greenough (1797) 3 U. S. (3 Dall.) 369, 370, 1 L. Ed. 640; Bingham v. Cabot (1798) 3 Dall. 382, 384, 1 L. Ed. 647; Turner v. Enrille (1799) 4 Dall. 7, 8, 1 L. Ed. 717; Course v. Stead (1800) 4 U. S. (4 Dall.) 22, 1 L. Ed. 724; Abercrombie v. Dupins (1803) 1 Cranch, 343, 2 L. Ed. 129; Sullivan v. Fulton Steamboat Co. (1821) 19 U. S. (6 Wheat.) 450, 451, 5 L. Ed. 302; Conolly v. Taylor (1829) 27 U. S. (2 Pet.) 556, 7 L. Ed. 518; Brown v. Keene (1834) 33 U. S. 112, 8 L. Ed. 885; Jackson v. Ashton (1834) 8 Pet. 148, 8 L. Ed. 898; Hornthall v. Keary (1869) 9 Wall. 560, 565, 19 L. Ed. 560; Robertson v. Cease (1878) 97 U. S. 646, 648, 24 L. Ed. 1057; Grace v. American Cent. Ins. Co. (1883) 109 U. S. 278, 3 Sup. Ct. 207, 211, 27 L. Ed. 932; Continental Life Ins. Co. v. Rhoads (1886) 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; Peper v. Fordyce (1886) 119 U. S. 469, 7 Sup. Ct. 287, 30 L. Ed. 435 (reversing decree Fordyce v. Peper [C. C. 1883] 16 Fed. 516); Wolfe v. Hartford Life & Annuity Ins. Co. (1893) 13 Sup. Ct. 602, 603, 148 U. S. 389, 37 L. Ed. 493; Southwestern Telegraph & Telephone Co. v. Robinson (1891) 48 Fed. 769, 1 C. C. A. 91; Texas & P. Ry. Co. v. Rogers (1893) 57 Fed. 378, 6 C. C. A. 403; Toledo Traction Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28; International Bank & Trust Co. v. Scott (1908) 159 Fed. 58, 86 C. C. A. 248; Taylor v. Weir (1909) 171 Fed. 636, 96 C. C. A. 438 (reversing judgment [C. C. 1908] 162 Fed. 585); Davis v. Davis (1909) 174 Fed. 786, 98 C. C. A. 494 (reversing judgment [C. C. 1908] 164 Fed. 281); Atchison, T. & S. F. Ry. Co. v. Frederickson (1910) 177 Fed. 206, 101 C. C. A. 376; Catlett v. Pacific Ins. Co. (C. C. 1826) Fed. Cas. No. 2,517; Dodge v. Perkins (C. C. 1827) Fed. Cas. No. 3,954; Leavitt v. Cowles (C. C. 1841) Fed. Cas. No. 8,171; Bargh v. Page (C. C. 1845) Fed. Cas. No. 980; Tunstall v. Worthington (C. C. 1853) Fed. Cas. No. 14,239; Merserole v. Union Paper Collar Co. (C. C. 1869) Fed. Cas. No. 9,488; Tracy v. Morel (C. C. 1898) 88 Fed. 801; Lownsdale v. Gray's Harbor Boom Co. (C. C. 1902) 117 Fed. 983; Cochran v. Pittsburg, S. & N. R. Co. (C. C. 1907) 150 Fed. 682; A. R. Barnes & Co v. Berry (C. C. 1907) 156 Fed. 72; Loose v. Hartford Pulp Plaster Corp. (C. C. 1908) 159 Fed. 318; Mayer v. Cohrs (C. C. 1911) 188 Fed. 443; Shade v. Northern Pac. R. Co. (D. C. 1913) 206 Fed. 353; Pecos & N. T. Ry. Co. v. Rosenbloom (Tex. Civ. App. 1911) 141 S. W. 175.

Where jurisdiction depends upon the parties, it is those named in the record, and not those interested. Gill v. Stebbins (C. C. 1828) Fed. Cas. No. 5,431; U. S. v. Myers (C. C. 1836) Fed. Cas. No. 15,844; Seccomb v. Wurster (C. C. 1897) 83 Fed. 856; In re Stutsman County, N. D. (C. C. 1898) 88 Fed. 337; Robb v. Parker (1871) 3 S. C. (3 Rich.) 60.

A motion for judgment against a marshal who collected, by execution, money recovered in an action in the federal courts, is not a new suit, but an incident of the original one and hence the residence of the parties in different states need not be averred to give the court jurisdiction. Gwin v. Breedlove (1844) 3 How. 29, 35, 11 L. Ed. 167.

On a bill brought by plaintiff for himself and all others who may be interested, the citizenship of the latter need not be alleged. Vallette v. Whitewater Valley Canal Co. (C. C. 1847) Fed. Cas. No. 16,820.

A bill in a federal court to restrain the enforcement of a judgment rendered by such court in ejectment between the same parties on account of an equitable defense unavailable in ejectment need not allege the citizenship of the parties to give the court jurisdiction. Johnson v. Christian (1888) 8 Sup. Ct. 1135, 1136, 125 U. S. 642, 31 L. Ed. 820.

A judgment obtained upon a note in a federal court is not a nullity, although the record fails to show diverse citizenship of the parties; and it is therefore not subject to collateral attack upon that ground, in garnishment proceedings brought to enforce collection thereof. Cutler v. Huston (1895) 15 Sup. Ct. 868, 871, 158 U. S. 423, 39 L. Ed. 1040.

The judicial competence of the federal court does not depend upon the description of the parties, as belonging to the different states, but upon the

give jurisdiction to a federal court, such reason, even if alleged, will not cure the omission. Farni v. Tesson (1861) 66 U. S. (1 Black) 309, 17 L. Ed. 67.

The citizenship of a defendant in ejectment, residing upon the land, and intending to remain permanently, cannot be alleged as of another state. Bissell v. Horton (C. C. 1808) Fed. Cas. No. 1,448.

A record held not to sufficiently show the diverse citizenship of the parties to confer jurisdiction. Timmons v. Elyton Land Co. (1891) 11 Sup. Ct. 585, 139 U. S. 378, 35 L. Ed. 195.

There is nothing in the language of the fourteenth amendment to the constitution of the United States that renders the bare averment of residence of the parties sufficient to make out a prima facie case of jurisdiction, the presumption being that the cause is without the jurisdiction of the federal court, unless the contrary affirmatively appears. Robertson v. Cease (1878) 97 U. S. 646, 24 L. Ed. 1057.

The declaration speaks from the commencement of the action, and it is not necessary, because the declaration is filed a few days after the præcipe for the writ, that it should specifically allege diverse citizenship at the date of the filing of the præcipe. Chicago Lumber Co. v. Comstock (1896) 71 Fed. 477, 18 C. C. A. 207.

Where a contract, under which a party would be prevented, from want of proper citizenship, from suing in the federal courts, is set out only as inducement to a subsequent one under which he would not be so prevented, the jurisdiction of such courts will not be taken away by the fact that the old contract was set forth as inducement only somewhat indefinitely. De Sobry v. Nicholson (1865) 70 U. S. (3 Wall.) 420, 18 L. Ed. 263.

Where a federal court's jurisdiction depended on diversity of citizenship, and plaintiff's declaration did not sufficiently aver his citizenship, the court was bound to take notice thereof, though no objection was made thereto. Crosby v. Cuba R. Co. (C. C. 1908) 158 Fed. 144, judgment affirmed Cuba R. Co. v. Crosby (1909) 170 Fed. 369, 95 C. C. A. 539, which is reversed (1912) 32 S. Ct. 132, 222 U. S. 473, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40.

336. —— Particular allegations.—In a bill in equity filed in the federal court for the Southern district of New York, one of plaintiffs was described as a citizen of Massachusetts, and others of plaintiffs as citizens of Connecticut and Vermont, and defendants were described as a corporate body, incorporated by the laws of New York for the purpose of navigating by steamboats certain waters in the state of New York. Defendants demurred to the bill, and a decree dismissing it was entered pro forma, by consent, and an appeal was taken to the supreme court. Held that, as it did not appear from the record that the court below had jurisdiction, the respective parties not being described as citizens of different states, the decree dismissing the bill should be affirmed. Sullivan v. Fulton Steamboat Co. (1821) 19 U. S. (6 Wheat.) 450, 5 L. Ed. 302.

An allegation that defendant is "a citizen or a resident" of a certain state is insufficient to confer jurisdiction since, consistently with such averments, he may be either. Brown v. Keene (1834) 33 U. S. (8 Pet.) 112, 8 L. Ed. 885; Jackson v. Ashton (1834) 33 U. S. (8 Pet.) 148, 8 L. Ed. 898.

A bill describing plaintiff as a citizen of Illinois, and three defendants as citizens of Illinois, and one defendant as a Commissioner of Internal Revenue, without averring that he was a citizen of any state, is not a sufficient averment of citizenship to give jurisdiction. Mason v. Rollins (1871) 80 U. S. (13 Wall.) 602, 20 L. Ed. 527.

A bill by plaintiff and others, note holders of a bank, against the bank's receiver and others as stockholders, officers, etc., alleging that complainant was a citizen of Virginia, but not alleging the citizenship of his cocomplainants or of any of the defendants was insufficient to give jurisdiction on the ground of the citizenship of the parties. Godfrey v. Terry (1877) 97 U. S. 171, 174, 24 L. Ed. 944.

Where the jurisdiction of the United States court in an action on a life insurance policy depends alone on the citizenship of the parties, a declaration which alleges that the assured, plaintiff's intestate, was a citizen of Pennsylvania, and that defendant is a citizen of Connecticut, but does not allege plaintiff's own citizenship, is not sufficient to show the jurisdiction of the court, and it cannot be amended on appeal. Continental Life Ins. Co. v. Rhoads (1886) 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380.

An averment that plaintiff is a resident of the state of Delaware will be regarded by an appellate court as a sufficient averment of citizenship in that state, for the purpose of giving jurisdiction to a federal court, where the uncontradicted testimony shows a legal domicile therein, and that any absence from the state was without intention to abandon such domicile. Sun Printing & Publishing Ass'n v. Edwards (1904) 24 Sup. Ct. 696, 194 U. S. 377, 48 L. Ed. 1027.

An allegation in a petition that plaintiff is a citizen "of said county of Monroe, in the said state of Michigan," while inexact as an averment of citizenship of the state of Michigan for the purpose of showing jurisdiction in a federal court, will be treated as sufficient, especially in an appellate court, when it has been so construed and treated by both court and counsel in the trial court, which made a finding of the

fact in accordance therewith. Toledo Traction Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28.

Where, in an action in which federal jurisdiction depended solely on diversity of citizenship, there was nothing in the record to show that either plaintiff or defendant was a citizen of any state, but the complaint alleged that plaintiffs were residents and inhabitants of Kentucky, but did not state the residence of the defendants, and there was nothing to show the domicile of the parties, as distinguished from residence, jurisdiction was not shown. Newcomb v. Burbank (1910) 181 Fed. 334, 104 C. C. A. 164.

Where it was alleged that plaintiffs were citizens of New York and New Jersey, and it was only charged that defendant was tax assessor of Vernon parish, La., diverse citizenship was not alleged by positive averment, and therefore did not appear. Assessor of Vernon Parish, La., v. Gould (C. C. A. 1914) 210 Fed. 894.

A description of defendant as "of the town and county of W., in the Connecticut district, * * * a citizen of the United States, and sheriff of said W. county," is equivalent to describing him as a citizen of Connecticut. Duryee v. Webb (C. C. 1810) Fed. Cas. No. 4,-198.

An averment in the introductory part of a bill that "W. S., of the city of Virginia, state of Nevada, and a citizen of the state of Nevada brings this his bill against S. A. H., of the city and county of San Francisco, state of California, and a citizen of the state of California, * * *" is a sufficient averment of citizenship of the parties to give the United States court jurisdiction. Sharon v. Hill (C. C. 1885) 23 Fed. 353.

Plaintiff's declaration alleged that he was a resident of the city of Dickson, in the state of Tennessee, and that defendant was a corporation organized under and by virtue of the laws of the state of New Jersey. Held that, while such averment sufficiently alleged defendant's citizenship to sustain the jurisdiction of the federal court, the allegation of plaintiff's residence was not a sufficient allegation of citizenship. Crosby v. Cuba R. Co. (C. C. 1908) 158 Fed. 144, judgment affirmed Cuba R. Co. v. Crosby (1909) 170 Fed. 369, 95 C. C. A. 539, which is reversed (1912) 32 Sup. Ct. 132, 222 U. S. 473, 56 L. Ed. 274, 38 L. R. A. (N. S.) 40.

Where plaintiff's declaration filed in a federal court merely alleged that he was a resident of D., in Tennessee, and he testified that he lived "at present in Cuba," he might be granted leave after verdict to take depositions to establish his citizenship, and then amend the declaration so as to sufficiently show diversity of citizenship on which federal jurisdiction depended. Id.

Allegation that plaintiff was a resident of one state and defendants were citizens of another held insufficient to show diversity of citizenship so as to confer federal jurisdiction. McEldowney v. Card (C. C. 1911) 193 Fed. 475.

In an action by a contractor, citizens of states other than Louisiana, and against a Louisiana school board, a nonresident surety on the contractor's bond to claimants under a contract for the construction of a school building, under Act La. No. 167 of 1912, to settle the claims and recover the balance, the parties, grouped with the contractor and surety on one side and the board and the claimants on the other, showed sufficient diversity of citizenship to sustain federal jurisdiction. John W. Hood Co. v. Board of School Directors of Tangipahoa Parish (D. C. 1914) 210 Fed. 384.

The plaintiff, in an action on a judgment obtained against an insurance company on a policy in the United States Court in Indian Territory, alleged in his petition that he was a citizen of the United States and resided in Indian Territory, and that defendant's chief office was in St. Louis, Mo., which allegations were admitted by defendant. Held, that the jurisdiction of the United States Court in Indian Territory over the parties was thereby shown. Kahn v. Mercantile Town Mut. Ins. Co. (Mo. App. 1910) 130 S. W. 492.

337. —— **Associations and copartnerships.**—An averment that parties reside or that a firm does business, in a particular state, or that a firm is "of" that state, is not sufficient to show citizenship in such state. Grace v. American Cent. Ins. Co. (1883) 3 Sup. Ct. 207, 211, 109 U. S. 278, 27 L. Ed. 932; Columbia Digger Co. v. Rector (D. C. 1914) 215 Fed. 618.

A declaration stating that plaintiffs are "merchants and partners trading under the firm and by the name and style of D. & Co. of Philadelphia, in Pennsylvania," is insufficient to give jurisdiction to the court. Ross v. Duval (1839) 13 Pet. 45, 61, 10 L. Ed. 51.

An averment that the plaintiffs were a firm of natural persons, associated for the purpose of carrying on the banking business in Omaha, Nebraska Territory (which place, at the time the suit was brought, was remote from the center of trade and commerce), and had been, for a period of 18 months, engaged in that business, at that place, is equivalent to saying that they had their domicile there, and is a sufficient averment of their citizenship in Nebraska. U. S. Exp. Co. v. Kountze (1869) 75 U. S. (8 Wall.) 342, 19 L. Ed. 457.

An allegation that plaintiff is a joint-stock company organized under the laws of a state other than the state of defendant, the members not being shown to be citizens of some state other than the state of defendant, does not show that the federal court has jurisdiction. Chapman v. Barney (1889) 9 Sup. Ct. 426, 427, 129 U. S. 677, 32 L. Ed. 800.

The citizenship of the individual mem-

bers of a limited partnership association created by the laws of Pennsylvania must be alleged in a suit by that association in a federal court, where jurisdiction depends upon diverse citizenship of the parties. Great Southern Fireproof Hotel Co. v. Jones (1900) 20 Sup. Ct. 690, 177 U. S. 449, 44 L. Ed. 482, reversing judgment Jones v. Great Southern Fireproof Hotel Co. (1898) 86 Fed. 370, 30 C. C. A. 108.

The citizenship of the individual members of the board of trustees of the Ohio State University did not sufficiently appear to confer jurisdiction on a federal court of a suit against the board from averments that while not an Ohio corporation the Board existed as an organized body under its laws, although under the state constitution no person can be elected or appointed to any office in the state unless he is a citizen of the state. Thomas v. Ohio State University Trustees (1904) 25 Sup. Ct. 24, 26, 195 U. S. 207, 49 L. Ed. 160.

The jurisdiction of a federal court on the ground of diverse citizenship over a suit between a citizen of Michigan and the Board of Trustees of the Ohio State University would sufficiently appear without bringing the members of the Board before the court as defendants, where it was averred that it existed as an organized body under the state laws, with power to sue and be sued and that each member was a citizen of the state. Thomas v. Ohio State University Trustees (1904) 25 Sup. Ct. 24, 28, 195 U. S. 207, 49 L. Ed. 160.

An allegation that plaintiff was and is "a citizen of the state of Michigan," plaintiff elsewhere being styled a "partnership association organized and existing under the laws of the state of Michigan," in the absence of some further averment concerning the citizenship of the members of the association, was insufficient to establish that plaintiff was a citizen of the state of Michigan for the purposes of federal jurisdiction, unless plaintiff was a corporation of that state. Fred Macey Co. v. Macey (1905) 135 Fed. 725, 68 C. C. A. 363.

Where diversity of citizenship was the basis of federal jurisdiction in a suit to restrain defendant from prosecuting an action in the state court, and a bill alleged that complainant was a "joint-stock company" duly organized and existing under the laws of the state of New York and a citizen of that state, and that defendant was a citizen of Missouri, where the suit was brought, jurisdiction was not shown, since a "joint-stock company" is not a corporation but a partnership, and it could not be presumed that the members were all nonresidents of Missouri. Rountree v. Adams Express Co. (1908) 165 Fed. 152, 91 C. C. A. 186.

An allegation that defendant, a Lloyds association, was an "association," held insufficient to show citizenship, since an association, which is not a corporation, is not a citizen, within the statutes regulating federal jurisdiction. Rife v. Lumber Underwriters (1913) 204 Fed. 32, 122 C. C. A. 346.

The averment that complainant is a joint stock association, formed in the state of New York, under the laws of such state, neither imports that it is a corporation created by another state, nor that its members are citizens of another state. Dinsmore v. Philadelphia & R. R. Co. (C. C. 1875) Fed. Cas. No. 3,921.

A partnership cannot sue or be sued in its partnership name in a court of the United States without alleging the citizenship of its individual members. Adams v. May (C. C. 1886) 27 Fed. 907, 908; H. L. Bruett & Co. v. F. C. Austin Drainage Excavator Co. (C. C. 1909) 174 Fed. 668.

A bill filed by partners who are citizens of another state, suing for the benefit of the firm, and setting out its constituent members, among whom is a woman who is alleged to have succeeded to the interest in the firm of her deceased husband individually and as guardian of certain minor children is not demurrable because it does not set out the probate proceedings on the husband's will, the manner of her succession to the partnership interest being a matter of proof, nor because it does not show that she has been appointed guardian for the minors named in the state in which the suit is brought, which is not required, since the relief sought is in behalf of the partnership, and not of the minors individually, either directly or through their guardian. Haarmann v. Lueders (C. C. 1901) 109 Fed. 325.

In an action in a federal court on a demand assigned to plaintiff by a partnership, an allegation in the complaint that each and all of the members of such partnership are "citizens of the state of Illinois or of the state of New York" is evasive and insufficient as an allegation of jurisdictional facts. Van Horn v. Kittitas County (C. C. 1901) 112 Fed. 1.

Where a declaration by a partnership organized under a state law providing for the organization of limited partnerships in joint-stock corporations, etc., alleged that plaintiff was such a partnership, organized as stated, having its principal place of business in K., and authorized to sue and be sued in the name of Y. Company, Limited, and that each and every member and partner of such association was a citizen of Michigan, such allegation sufficiently charged the citizenship of the parties comprising the firm to confer jurisdiction; such associations being quasi corporations. Derk P. Yonkerman Co. v. Charles H. Fuller's Advertising Agency (C. C. 1905) 135 Fed. 613.

A partnership cannot sue or be sued in its partnership name in a federal

without alleging the citizenship individual members. H. L. Bruett v. F. C. Austin Drainage Excavator Co. (C. C. 1909) 174 Fed. 668.

Complaint describing plaintiffs as partners, who are residents and citizens of one state, and defendants as C. & Co., residents and citizens of another state, sufficiently shows the adverse citizenship of the parties. Hundley v. Chadick (1896) 109 Ala. 575, 19 South. 845.

338. —— **Corporations.**—The allegations as to a corporation for the purpose of showing a federal court's jurisdiction on the ground of diverse citizenship, that it is a citizen of a certain state, is not enough. It should be shown that it was created by the laws of that state. Lafayette Ins. Co. v. French (1855) 18 How. 404, 405, 15 L. Ed. 451; St. Joseph & G. I. R. Co. v. Steele (1897) 17 Sup. Ct. 925, 927, 167 U. S. 659, 42 L. Ed. 315; Ward v. Blake Manuf'g Co. (1893) 56 Fed. 437, 5 C. C. A. 538; Knight v. Lutcher & Moore Lumber Co. (1905) 136 Fed. 404, 69 C. C. A. 248 (rehearing denied [1905] 139 Fed. 1007, 71 C. C. A. 684); Forsyth Mfg. Co. v. Putnam Hooker & Co. (1905) 139 Fed. 1007, 71 C. C. A. 684; Atlantic Coast Line R. Co. v. Whilden (1912) 195 Fed. 263, 115 C. C. A. 254; Parker Washington Co. v. Cramer (1912) 201 Fed. 878, 120 C. C. A. 216; Chicago, R. I. & P. Ry. Co. v. Stephens (1914) 218 Fed. 535, 134 C. C. A. 263; Lonergan v. Illinois Cent. R. Co. (C. C. 1893) 55 Fed. 550; Frisbie v. Chesapeake & O. Ry. Co. (C. C. 1893) 57 Fed. 1.

An averment that defendant is a foreign corporation created by the laws of another state is a sufficient averment that defendant is a citizen of that state. U. S. Express Co. v. Kountze Bros. (1869) 8 Wall. 342, 351, 19 L. Ed. 457; Block v. Standard Distilling & Distributing Co. (C. C. 1899) 95 Fed. 978; De Biasi v. Normandy Water Co. (D. C. 1915) 228 Fed. 234.

To give the federal court jurisdiction of an action by a corporation created by the laws of one state against a citizen of another state the complaint must allege that all its members are citizens of a state other than that wherein defendant resides. Hope Ins. Co. v. Boardman (1809) 5 Cranch, 57, 3 L. Ed. 36; Bank of Cumberland v. Willis (C. C. 1839) Fed. Cas. No. 885.

Where a bill filed in a court of the United States, by citizens of one state against an incorporated bank of another state, does not aver that the corporators of the bank are citizens of the latter state, the court has no jurisdiction of the case. Breithaupt v. Bank of Georgia (1828) 26 U. S. (1 Pet.) 238, 7 L. Ed. 127.

A corporation created by, and transacting business in, a state, is to be deemed an inhabitant of the state, capable of being treated as a citizen for all purposes of suing and being sued; and an averment of the facts of its creation, and the place of transacting business, is sufficient to give the circuit court of the United States jurisdiction. Louisville, C. & C. R. Co. v. Letson (1844) 43 U. S. (2 How.) 497, 11 L. Ed. 353.

A suit in which the declaration describes the plaintiff as a citizen of France, and the defendant as "The Pennsylvania Railroad Company," without any further averment, may be dismissed, on error, for want of jurisdiction upon the face of the record, though this was not a ground of exception. Piquignot v. Pennsylvania R. Co. (1853) 57 U. S. (16 How.) 104, 14 L. Ed. 863.

Where the declaration avers that the plaintiff is a citizen of Virginia, an allegation that "the defendants are a body corporate, by the act of the general assembly of Maryland," is a sufficient averment that the real defendants are citizens of. Marshall v. Baltimore & O. R. Co. (1853) 57 U. S. (16 How.) 314, 14 L. Ed. 953.

Where jurisdiction is sought on the ground of diversity of citizenship, one of the parties being a foreign corporation, it is unnecessary to aver the citizenship of the corporators, it being conclusively assumed, for the purposes of suit, that they are citizens of the jurisdiction in which it was created. Cowles v. Mercer County (1868) 7 Wall. 118, 121, 19 L. Ed. 86. But see Breithaupt v. Bank of Georgia (1828) 1 Pet. 238, 240, 7 L. Ed. 127.

Averment as to citizenship of a corporation necessary. Piquignot v. Pennsylvania R. Co. (1853) 16 How. 104, 106, 14 L. Ed. 863; Greeley v. Smith (C. C. 1844) Fed. Cas. No. 5,747. But see New York & E. R. R. v. Shepard (C. C. 1853) Fed. Cas. No. 10,198.

An averment that the corporation was created by the laws of the state and has its principal place of business there is sufficient when admitted by demurrer. Lafayette Ins. Co. v. French (1855) 18 How. 404, 405, 15 L. Ed. 451.

An allegation that a company was composed of citizens of the state held sufficient to give the federal courts jurisdiction. Covington Drawbridge Co. v. Shepherd (1857) 20 How. 227, 232, 15 L. Ed. 896.

In an action by a state against a corporation, an averment that defendant is a body politic by the law of another state, and "doing business within it," is not sufficient to give jurisdiction, but it must be alleged that defendant is a citizen of such other state. Pennsylvania v. Quicksilver Min. Co. (1870) 77 U. S. (10 Wall.) 553, 19 L. Ed. 998.

An averment that defendant is a corporation created by the state of New York located in Mississippi and doing business there is not an averment that it is a citizen of Mississippi. Germania F. Ins. Co. v. Francis (1870) 11 Wall. 210, 215, 20 L. Ed. 77.

Where the record shows that the complainant is a citizen of one state,

and the respondents are stockholders of a bank in another state, their citizenship not appearing, and the bank not being a party to the suit, held, that the citizenship of the parties is not sufficiently shown to give the United States Court jurisdiction. Godfrey v. Terry (1877) 97 U. S. 171, 24 L. Ed. 944.

An allegation that a corporation is doing business in a certain state does not necessarily import that it was created by the laws of that state and was a citizen thereof. Brock v. Northwestern Fuel Co. (1889) 9 Sup. Ct. 552, 553, 130 U. S. 341, 32 L. Ed. 905.

An allegation of a complaint admitted by answer that "defendant is a domestic corporation duly organized and existing under the laws of New York, having its principal office for the transaction of business in the northern district of New York," sufficiently avers that the corporation is a citizen of New York, for the purpose of giving jurisdiction to a federal court. Sun Printing & Pub. Asso. v. Edwards (1904) 24 Sup. Ct. 696, 697, 194 U. S. 377, 48 L. Ed. 1027.

An allegation that the defendant, the Board of Trustees of the Ohio State University, was a citizen of and domiciled in that state, and existed under certain statutes, with power to sue and be sued, did not sufficiently aver that the Board was an Ohio corporation within the jurisdictional rule of the federal courts imputing to members of a corporation citizenship in the state creating it, where the highest court of the state had construed the statute creating the Board as not conferring corporate powers by special act in violation of a constitutional prohibition. Thomas v. Ohio State University Trustees (1904) 25 Sup. Ct. 24, 25, 195 U. S. 207, 49 L. Ed. 160.

An averment that defendant is a corporation "duly established by law, and having its principal place of business in Boston, in the state of Massachusetts," is not a sufficient statement of its citizenship to show federal jurisdiction. New York & N. E. R. Co. v. Hyde (1893) 56 Fed. 188, 5 C. C. A. 461.

In a suit by a citizen of Texas, an averment that defendant is a corporation operating a railway in Arkansas, and having an agent in the latter state, is not sufficient to give a federal court jurisdiction. St. Louis, I. M. & S. Ry. Co. v. Newcom (1893) 56 Fed. 951, 6 C. C. A. 172.

An averment, in a suit brought by a citizen of Louisiana, that defendant is "a corporation domiciled and doing business in this city [New Orleans], and a citizen of New Jersey," is not equivalent to an averment that it is a corporation organized under the laws of New Jersey, and hence is insufficient to support federal jurisdiction. American Sugar-Refining Co. v. Johnson (1893) 60 Fed. 503, 9 C. C. A. 110; Same v. Tatum (1893) 60 Fed. 514, 9 C. C. A. 121.

In the absence of specific objection a allegation that a defendant in an actio in the circuit court is a corporatio coupled with a description of it as "Canada," is sufficient to give jurisdi tion. Grand Trunk Ry. Co. v. Tennar (1895) 66 Fed. 922, 14 C. C. A. 190.

An allegation in a declaration th the plaintiff complains "of the C. L. Co who is a citizen of the state of Illinoi defendant in this suit," is a sufficie allegation of the citizenship of the co poration, without alleging that it w incorporated under the laws of Illinoi if no objection is taken by plea in abat ment. Chicago Lumber Co. v. Cor stock (1896) 71 Fed. 477, 18 C. C. 207.

An averment that the defendant in action is an association of persons du incorporated under the laws of a pa ticular state is a sufficient allegation citizenship for the purpose of giving j risdiction to the federal courts. Ba timore & O. R. Co. v. McLaughl (1896) 73 Fed. 519, 19 C. C. A. 551.

The description of complainant, in t title of a bill filed by a resident of Te nessee, as "duly incorporated under t laws of the state of Kentucky," is sufficient allegation of citizenship complainant to support the jurisdicti of the circuit court of the United State as against an objection raised for t first time on appeal, although there no direct averment in the bill that co plainant is a citizen of a different sta from that of the defendant. Peopl Telephone & Telegraph Co. v. Ea Tennessee Tel. Co. (1900) 103 Fe 212, 43 C. C. A. 185.

An allegation of a complaint in action against a corporation that t defendant is "a corporation organiz and existing under the laws of the Un ed States" is sufficient to show that t defendant is a corporation of the Un ed States for the purpose of giving j risdiction to the federal court. San Fé Pac. R. Co. v. Holmes (1905) 1 Fed. 66, 69, 68 C. C. A. 634, affirm (1906) 26 Sup. Ct. 676, 202 U. S. 43 50 L. Ed. 1094.

A pleading averring that plaintiff's a signor was a corporation, with its pri cipal office in Florida, and that defen ant resided in Alabama, insufficient shows the citizenship of the assign and of defendant, and hence is insuf cient to show jurisdiction in the fede al court on the ground of diverse ci zenship. J. J. McCaskill Co. v. Dicks (1908) 159 Fed. 704, 86 C. C. A. 57

A declaration describing defendant a corporation organized under the la of Pennsylvania and plaintiff as bei of New Jersey did not sufficiently alle diverse citizenship to confer jurisdi tion. A declaration alleging plaint was a corporation organized under la of Pennsylvania and letters of admini

tration were taken out by plaintiff in New Jersey was insufficient to confer jurisdiction on ground of diverse citizenship. Yeandle v. Pennsylvania R. Co. (1909) 169 Fed. 938, 95 C. C. A. 282.

Allegations in the petition in an action between two corporations held insufficient to show the requisite diversity of citizenship. Farmers' Oil & Guano Co. v. Duckworth Co. (1914) 217 Fed. 362, 133 C. C. A. 278.

In action by citizen of Tennessee, declaration alleging that defendant, a railroad company, was a corporation existing and doing business in Arkansas and Tennessee, held not to show diverse citizenship. Chicago, R. I. & P. Ry. Co. v. Stephens (1914) 218 Fed. 535, 134 C. C. A. 263.

In a suit by a national bank, an allegation that plaintiff is a citizen of the state of Illinois, and located and residing and doing business in the city of Chicago, in said state, and that defendant is a citizen of New York, is sufficient to give jurisdiction to the federal court in New York. Manufacturers' Nat. Bank v. Baack (C. C. 1871) Fed. Cas. No. 9,052.

The citizenship of a corporate party need not appear in the caption of the petition. It is sufficient when the facts are averred in the body thereof. Mexico Southern Bank v. Reed (C. C. 1879) Fed. Cas. No. 9,514.

An allegation that plaintiff is a New York corporation, and that defendants are "residents" of California, does not show diverse citizenship. Pacific Postal-Tel. Cable Co. v. Irvine (C. C. 1892) 49 Fed. 113.

An allegation in a bill that defendant "claims to be" a corporation organized under the laws of a state as a boom company, coupled with a denial that it has the rights of such a company, is not a sufficient allegation that defendant is a citizen of such state for jurisdictional purposes. Lownsdale v. Gray's Harbor Boom Co. (C. C. 1902) 117 Fed. 983.

339. —— Effect of admissions in pleadings.—A suit by Pennsylvania and New Jersey corporations against a New York corporation operating a street railway system in the city of New York, the bill in which avers an unsatisfied indebtedness due each complainant from the defendant, substantially involves a controversy between citizens of different states, although the defendant admits the indebtedness and the other allegations of the bill, and joins with the complainants in a request that receivers be appointed. In re Reisenberg (1908) 28 Sup. Ct. 219, 223, 208 U. S. 90, 52 L. Ed. 403, dismissing petitions Pennsylvania Steel Co. v. New York City R. Co. (C. C. 1907) 157 Fed. 440.

Where the answer to the averment that plaintiffs are "citizens of the state of W., and residents therein," only puts in issue the question whether the plaintiffs "reside" in that state, the avernment that they are "citizens" of the state—the essential jurisdictional fact—is confessed. Hoppenstedt v. Fuller (1895) 71 Fed. 99, 17 C. C. A. 623.

Where, on the refusal of trustees to bring an action against a citizen of the same state, the cestui que trust, a citizen of another state, brings the action in a federal court, joining the trustees as defendants, the answer of the trustees, admitting all the allegations of the bill, including one that they refuse to sue, does not show that they are no longer antagonistic to complainant, and thus deprive the federal court of jurisdiction of the action, as one no longer between citizens of different states. Bowdoin College v. Merritt (C. C. 1894) 63 Fed. 213.

340. Effect of absence of jurisdictional averments.—Where diversity of citizenship is not positively shown, the judgment will be reversed. Continental Life Ins. Co. v. Rhoads (1886) 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380.

Where the record does not show that the court had jurisdiction of the suit, which depends alone on the citizenship of the party, its judgment will be reversed by the supreme court of the United States; and where the fault rests alone on the plaintiff, whose duty it was in bringing the suit to make the jurisdiction appear, the reversal will be at his cost in that court. If the citizenship of a defendant was in fact such, at the commencement of the suit, as to give the court jurisdiction, it will be in the power of that court, when the case gets back, to allow the necessary amendments to be made, and then proceed to trial. Halstead v. Buster (1886) 119 U. S. 341, 7 Sup. Ct. 276, 30 L. Ed. 462.

A cause was removed from a state court upon a record which failed to show complainant's citizenship at the commencement of the action, and was tried without objection in the federal court. From its judgment an appeal was taken to the supreme court while Act Feb. 25, 1889 (25 Stat. 693), was in force. This act gave the supreme court appellate jurisdiction in all cases in which the jurisdiction of the circuit court was in issue, but provided that, when the judgment or decree did not exceed $500, only the jurisdictional question should be reviewed. Held, that as the supreme court is bound, of its own motion, to take notice that the record fails to show jurisdiction of the court below, it could not dismiss the appeal, even if it appeared that the amount in controversy was not sufficient to sustain the appellate jurisdiction under previous statutes, but must reverse the decree, with directions to remand the cause to the state court. Mattingly v. Northwestern Virginia R. Co. (1895) 158 U. S. 53, 15 Sup. Ct. 725, 39 L. Ed. 894.

In an ancillary action to enforce a judgment of the federal court, the judg-

ment was conclusive as to the diversity of citizenship between the parties, and not open to impeachment for lack of such diversity. New Orleans v. Fisher (1901) 21 Sup. Ct. 347, 352, 180 U. S. 185, 45 L. Ed. 485.

A judgment rendered in a federal court cannot be collaterally attacked because the jurisdictional averment as to the citizenship of plaintiff was insufficient. Rice v. Adler-Goldman Commission Co. (1895) 71 Fed. 151, 18 C. C. A. 15.

The judgment will be reversed where the declaration failed to show the diversity of citizenship necessary to give the court jurisdiction. Houston v. Filer & Stowell Co. (1900) 104 Fed. 163, 43 C. C. A. 457.

341. Amendment.—See, also, as to amendments, § 1591, post, and notes thereunder. And see § 1251c, post, establishing a new rule as to amendments.

A defect in a bill in a federal court which fails to aver the citizenship of a party may be cured by amendment. Howard v. De Cordova (1900) 20 Sup. Ct. 817, 819, 177 U. S. 609, 44 L. Ed. 908; Springstead v. Crawfordsville State Bank (1913) 34 Sup. Ct. 195, 231 U. S. 541, 58 L. Ed. 354; Swayne & Hoyt v. Barsch (1915) 226 Fed. 581; Kelsey v. Pennsylvania R. Co. (C. C. 1877) Fed. Cas. No. 7,679.

It should appear by the declaration or bill of complaint, in an action or suit against a corporation, that it was created by the state in which the adverse party is not a citizen; but a defective averment thereof may be cured by subsequent pleadings. U. S. v. Gillis (1877) 95 U. S. 407, 24 L. Ed. 503.

Failure to allege citizenship of the original payee of a note does not require dismissal of an action brought by the assignee in a federal court based on diverse citizenship of plaintiff and defendant; the error being subject to correction by amendment. Springstead v. Crawfordsville State Bank (1913) 34 S. Ct. 195, 231 U. S. 541, 58 L. Ed. 354.

Curing by amendment in a federal court a failure to allege citizenship of the original payee in an action by the assignee of a note is not objectionable, though after the suit was begun and before amendment the jurisdictional amount was increased. Springstead v. Crawfordsville State Bank (1913) 34 S. Ct. 195, 231 U. S. 541, 58 L. Ed. 354.

An amendment showing diverse citizenship cures any invalidity in a previous attachment, arising from failure of the record to show federal jurisdiction. Bowden v. Burnham (1894) 59 Fed. 752, 8 C. C. A. 248.

The allowance of an amendment to a declaration, changing an allegation as to the citizenship of the plaintiff to conform to the writ, is within the discretion of the court. Pacific Mut. Life Ins. Co. of California v. Tompkins (1900) 101 Fed. 539, 41 C. C. A. 488.

Where a demurrer to a declaration in a federal court was sustained because of an insufficient averment of diversity of citizenship on which jurisdiction depended, plaintiff was entitled to amend the writ to show diversity of citizenship according to the fact. Stockwell v. Boston & M. R. Co. (C. C. 1904) 131 Fed. 153.

The failure of an amended bill filed in a federal court to allege the citizenship of the parties at the time the suit was commenced, as well as at the time the amended bill was filed, is fatal to the jurisdiction of the court where that is dependent on diversity of citizenship. Cochran v. Pittsburg, S. & N. R. Co. (C. C. 1907) 150 Fed. 682.

342. —— Time of amendment.—Where declaration failed to allege diversity of citizenship, held that amendment would be allowed after verdict. Atchison, T. & S. F. Ry. Co. v. Gilliland (1912) 193 Fed. 608, 113 C. C. A. 476; Baglin v. Title Guaranty & Surety Co. (C. C. 1909) 166 Fed. 356 (judgment affirmed Title Guaranty & Surety Co. v. Baglin [1909] 178 Fed. 682, 102 C. C. A. 182); McEldowney v. Card (C. C. 1911) 193 Fed. 475.

Where it appears, on appeal from a United States court, that such court had no proper jurisdiction of the cause on account of defective allegations as to the citizenship of the parties, in the petition removing the cause thereto the supreme court cannot grant leave to amend such petition, so as to give the lower court jurisdiction. Cameron v. Hodges (1887) 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. Ed. 132.

A defective allegation of citizenship may be corrected on appeal by consent of parties. In the absence of such consent, judgment will be reversed, but the verdict allowed to stand, so that the amendment may be made in the court below, if justified by the facts. Fitchburg R. Co. v. Nichols (1898) 85 Fed. 869, 29 C. C. A. 464.

A petition which avers the residence of the parties only cannot be amended on appeal so as to show citizenship; but the judgment may be reversed, and the cause remanded, with instructions to dismiss the suit, unless, by proper amendment below, diverse citizenship is made to appear. Preferred Acc. Ins. Co. v. Barker (1898) 88 Fed. 814, 32 C. C. A. 124.

Where plaintiff was not the real party in interest, and the declaration did not show the real party's interest or citizenship, permission would be granted to amend in such respects within 10 days. Klein v. Title Guaranty & Surety Co. (C. C. 1909) 166 Fed. 365, judgment affirmed Title Guaranty & Surety Co. v. Klein (1909) 178 Fed. 689, 102 C. C. A. 189, 29 L. R. A. (N. S.) 620.

343. —— Form of amendment in general.—Where the original petition in an action contains the requisite averments

to give a federal court jurisdiction, such jurisdiction is not lost because an amended petition alleged plaintiff's citizenship in the present tense only. Mexican Cent. Ry. Co. v. Pinkney (1893) 13 Sup. Ct. 859, 862, 149 U. S. 194, 37 L. Ed. 699; Baltimore & O. R. Co. v. McLaughlin (1896) 73 Fed. 519, 19 C. C. A. 551; Toledo Traction Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28; Campbell v. Johnson (1909) 167 Fed. 102, 92 C. C. A. 554.

An allegation in an amended complaint, stating "that the plaintiffs are now, and at all the times hereinafter mentioned were, citizens" of a different state from that of the defendants, "and are residents" of the district in which the suit is brought, is not sufficient to give jurisdiction, although, under the California practice, the amended complaint supersedes the original. The diversity of citizenship must be alleged as existing at the time when the suit was begun. Laskey v. Newtown Min. Co. (C. C. 1893) 56 Fed. 628.

Where the complaint in an action in a federal court in which jurisdiction depended on diversity of citizenship failed to allege plaintiff's citizenship, an amendment to cure the defect and show jurisdiction must allege the requisite citizenship, not only at the time it is filed, but at the time the action was commenced. Sanbo v. Union Pac. Coal Co. (C. C. 1906) 146 Fed. 80.

344. —— **Change of parties.** — The rule that the jurisdiction of the federal court depends on the condition of the parties at the time of the institution of the suit does not operate to prevent the amendment of a bill by changing a plaintiff to defendant in order to make the necessary diverse citizenship. Connolly v. Taylor (1829) 27 U. S. (2 Pet.) 556, 7 L. Ed. 518.

A bill was filed in the federal court against a citizen of Florida by F. and W., "citizens of the state of New York," as executors. On finding that defendant was in fact a citizen of New York, it was amended by striking out complainant F., who, since the bill was filed, had had his letters testamentary revoked, and leaving W., as "a citizen of Great Britain," as he in fact was, as surviving executor and sole complainant. Held, that the amendment could not give jurisdiction, which depended on the condition and citizenship of the parties when the suit was commenced. Anderson v. Watt (1890) 138 U. S. 694, 11 Sup. Ct. 449, 35 L. Ed. 1078.

When it appears to a court of equity that a case otherwise presenting ground for its action cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to permit complainant to amend by bringing in such parties; but, when it likewise appears that necessary and indispensable parties are beyond the court's jurisdiction or that when made parties the jurisdiction would thereby be defeated leave to amend would be useless. Minnesota v. Northern Securities Co. (1902) 22 Sup. Ct. 308, 326, 184 U. S. 199, 46 L. Ed. 444.

Where the jurisdiction of the United States court depends on the fact that complainant and defendant are citizens of different states, an amendment to a bill making a corporation organized in the state of which defendant is a citizen, and wherein the suit is brought, a party complainant, will not be allowed. Adams Exp. Co. v. Denver & R. G. Ry. Co. (C. C. 1883) 16 Fed. 712.

A limited partnership sued after the manner and style of a corporation, alleging itself to be such under the laws of another state, but it was ruled that it was not entitled to that liberty or privilege in the federal courts. Held, that it should be allowed to amend its pleading, and to sue as individuals, they being citizens of other states than that in which the suit was brought, suing after the manner and style of partners in the ordinary way of suits by partnerships, but not in its partnership name pure and simple; since that would not disclose the facts as to citizenship, but would be to treat them as corporations are treated in that matter in its relation to the jurisdiction of the federal courts. Imperial Refining Co. v. Wyman (C. C. 1889) 38 Fed. 574, 3 L. R. A. 503.

An amendment of the record cannot be allowed after trial to confer jurisdiction which did not in fact exist at the time the suit was commenced or tried; as by striking from the record in a suit in a federal court the name of a plaintiff, whose citizenship deprived the court of jurisdiction, upon an assignment of his interest in the cause of action to his co-plaintiff after the trial. Weller v. Hanaur (C. C. 1900) 105 Fed. 193.

Leave cannot be granted by a federal court to amend a bill by bringing in a new party, which, whether nominally made a complainant or defendant, must be aligned for jurisdictional purposes in opposition to a citizen of the same state, and whose joinder would defeat the jurisdiction of the court, which rests alone on diversity of citizenship. Delaware, L. & W. R. Co. v. Jersey City (C. C. 1909) 168 Fed. 128.

The power of a federal court of equity to allow the amendment of a bill by changing the parties to give the court jurisdiction, and the propriety of exercising such power if it exists, should only be determined on a formal application and due notice and hearing. Riggs v. Brown (C. C. 1909) 172 Fed. 637.

Where, in a nonresident stockholder's suit against a corporation, jurisdiction depended on diversity of citizenship, a motion to amend the original bill, which would result in the addition of certain parties plaintiff residents of the state,

will be denied. Clauss v. Palmer Union Oil Co. (D. C. 1914) 213 Fed. 286.

345. Objections to jurisdiction.—Where in a suit in the federal court on the ground of diversity of citizenship plaintiff gives testimony which defendant claims tends to show that he is not a citizen of the district in which he sues, it is within the discretion of the court to refuse to allow defendant to file a plea to that effect and raise an issue as to jurisdiction on the ground of citizenship. Mexican Cent. Ry. Co. v. Pinkney (1893) 13 Sup. Ct. 859, 862, 149 U. S. 194, 37 L. Ed. 699.

The requisite diversity of citizenship exists where the plaintiff, a citizen of Iowa, sues a citizen of New York and two citizens of Colorado in the federal court of the latter state. The right to object that the citizen of New York is being sued in Colorado is a privilege personal to him and cannot be made by his codefendants; nor is jurisdiction over the defendants, who are citizens of Colorado, affected by the fact that service is not had upon nor appearance made by the citizen of New York, the latter not being an indispensable party. Schiffer v. Anderson (1906) 146 Fed. 457, 76 C. C. A. 667.

A person sued by the payee on a partnership note in the federal court cannot object that the nonresident plaintiff and his codefendant, not served with process, are citizens of the same state. Doremas v. Bennet (C. C. 1847) Fed. Cas. No. 4,001.

If one is not served with process he may enter his appearance and join with the other in a plea to the jurisdiction, and the suit will be dismissed for want of jurisdiction. Lovejoy v. Washburne (C. C. 1863) Fed. Cas. No. 8,550.

It is no longer necessary to take advantage of the want of the requisite citizenship by plea in abatement. If this or any other defect of jurisdiction appears upon the trial, it is the duty of the court upon its own motion to stop the proceedings and dismiss the suit. Rae v. Grand Trunk Ry. Co. (C. C. 1882) 14 Fed. 401.

An objection that there might be other parties entitled to defend, but not named in the record, will not avail to defeat jurisdiction. In re Stutsman County, N. D. (C. C. 1898) 88 Fed. 337.

346. —— Time for objection.—Where the citizenship averred is not such as to support the jurisdiction, the defect may be reached on demurrer or on motion at any stage of the proceedings. Susquehanna & W. V. R. & C. Co. v. Blatchford (1870) 11 Wall. 172, 174, 20 L. Ed. 179; Eldred v. American Palace Car Co. of New Jersey (C. C. 1900) 103 Fed. 209.

It is too late to raise the question on a trial of the merits. Smith v. Kernochen (1849) 48 U. S. (7 How.) 198, 12 L. Ed. 666.

Where defendant appeared to a bill in chancery and defended the suit, an no want of jurisdiction appeared in th record, and the complainant died, a objection that defendant was a citizen o another state came too late when mad to a bill of revivor. Whyte v. Gibbe (1857) 20 How. 541, 542, 15 L. Ed 1016.

A motion in the federal court to dis miss a case, from want of proper citi zenship in the parties, cannot be mad at the trial, and after pleading a gen eral issue and special defenses. D Sobry v. Nicholson (1865) 70 U. S. (Wall.) 420, 18 L. Ed. 263.

Where the federal court has taken ju risdiction on the ground of diverse citi zenship, the proceedings cannot be at tacked in another action between dif ferent parties on the ground that th citizenship of the parties was not i fact diverse. Lacassagne v. Chapui (1892) 12 Sup. Ct. 659, 662, 144 U. S 119, 36 L. Ed. 368.

In a suit wherein federal jurisdictio depends wholly on diversity of the cit zenship, and the record shows that suc diversity has been insufficiently allege the judgment should be reversed in th appellate court for the want of jurisdic tion, although exception to the jurisdic tion was not taken in the trial cour St. Louis, I. M. & S. Ry. Co. v. New com (1893) 56 Fed. 951, 6 C. C. A. 17

Where neither party is a citizen of th state, but defendant served therein doe not plead the matter in abatement, h cannot subsequently set it up. Searl v. Jacksonville, P. & M. R. Co. (C. C 1873) Fed. Cas. No. 12,586.

A federal court is without jurisdictio of a suit by two plaintiffs, one of who is a citizen of a state, and the other a territory, against citizens of anoth state, and where the facts appear in th record the objection may be taken any stage of the proceedings. Well v. Hanaur (C. C. 1900) 105 Fed. 193.

On bill by Nevada company again citizens of California, defendants, aft going to trial on the merits, might o ject that the parties had been collusiv ly made to confer jurisdiction. Phœni Buttes Gold Mining Co. v. Winstead (I C. 1914) 226 Fed. 855.

347. —— Determination as to juri diction and burden of proof.—A questio as to whether the United States cour have jurisdiction by reason of the a tion being one between a state and citizen of another state is to be deci ed by reference only to the parties the record. Governor of Georgia Madrazo (1828) 26 U. S. (1 Pet.) 110, L. Ed. 73.

A citizen of Pennsylvania claiming t equitable title to land in Kentucky, fil a bill in the federal court against B., citizen of Kentucky, who claimed t same equitable title, and made the hei of C., who held the legal title, defen ants. The answer of B. alleged th certain heirs of C. were not citizens

Kentucky. Held, that the question between A. and B. was within the jurisdiction of the court, and might be decided by it, though C.'s heirs were not parties to the suit. Boon v. Chiles (1834) 33 U. S. (8 Pet.) 532, 8 L. Ed. 1034.

Where the plaintiff, in an action brought in a court of the United States, alleges such a residence of the parties as will give the court jurisdiction, the defendant, if he wishes to impeach the jurisdiction for causes not appearing in the pleading, must allege and prove such causes, and cannot show the want of jurisdiction under the general issue. Sheppard v. Graves (1852) 55 U. S. (14 How.) 505, 14 L. Ed. 518; Id. (1852) 55 U. S. (14 How.) 512, 14 L. Ed. 521.

The facts giving the federal courts jurisdiction must appear on the records, and where in a suit brought in the federal court the bill shows that the complainants are citizens of the state, where the suit was brought and contains no allegations as to the defendant's citizenship, and that fact nowhere appears in the record, the supreme court on appeal will take notice of the absence of the averment of the necessary facts, to give the court jurisdiction. Johnson v. Christian (1888) 8 Sup. Ct. 989, 125 U. S. 642, 31 L. Ed. 820.

There is no question for the jury involving jurisdiction, where the averment of diverse citizenship is not controverted as required by the local practice. Deputron v. Young (1890) 10 Sup. Ct. 539, 543, 134 U. S. 241, 33 L. Ed. 923.

An allegation in the petition of diverse citizenship necessary to support federal jurisdiction is negatived by an answer denying "each and every allegation in the petition," and in that event requires the introduction of evidence to show diverse citizenship before the federal court can acquire jurisdiction. Roberts v. Lewis (1892) 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579.

Resort may be had to the entire record for the purpose of curing a defective averment of citizenship, where the jurisdiction of the lower federal court is asserted to depend upon diversity of citizenship. Sun Printing & Publishing Ass'n v. Edwards (1903) 24 Sup. Ct. 696, 194 U. S. 377, 48 L. Ed. 1027.

Plaintiff's allegation that he was a citizen of a certain state other than that of which defendant was a citizen was not overcome by a simple denial in a plea of abatement, but defendant had the burden of showing that there was no diversity of citizenship. Adams v. Shirk (1902) 117 Fed. 801, 55 C. C. A. 25.

Where no objection is made in the trial court to the sufficiency of the proof to sustain the allegations of plaintiff's citizenship, for jurisdictional purposes, the question of want of jurisdiction on that ground will not be considered in the appellate court. North Jersey St. Ry. Co. v. Purdy (1906) 142 Fed. 955, 74 C. C. A. 125.

Proper allegations showing diversity of citizenship made in a declaration filed in a federal court are sufficient prima facie to give the court jurisdiction, and the allegation on plaintiff's citizenship can only be controverted by proper pleading supported by proof. Every Evening Printing Co. v. Butler (1906) 144 Fed. 916, 75 C. C. A. 657.

The citizenship alleged in the declaration need not be proved unless specially denied by plea. Evans v. Davenport (C. C. 1849) Fed. Cas. No. 4,558.

Where the bill avers the citizenship of a defendant, the court will not, on affidavit, and on the hearing of an application for an injunction, dispose of the objection that defendant is an alien, except in a clear case. Rateau v. Bernard (C. C. 1854) Fed. Cas. No. 11,579.

Where the declaration alleges such citizenship of parties as gives the court jurisdiction, and defendant asserts want of jurisdiction by plea in abatement, the burden is on him to show that the residence of parties is such as to defeat the jurisdiction. Gilmer v. City of Grand Rapids (C. C. 1883) 16 Fed. 708.

A bill may be dismissed by the court, on its own motion, where the proper allegations as to citizenship of the parties are not contained in the introductory part, and are not pointed out by counsel elsewhere in the bill. City of Carlsbad v. Tibbetts (C. C. 1892) 51 Fed. 852.

Where a bill in a federal court contains the necessary averments to give the court jurisdiction on the ground of diversity of citizenship, and no plea to the jurisdiction is interposed, but the question is raised for the first time on a hearing, the burden of proof rests upon the defendants to disprove such averments; and affidavits of unknown witnesses, who have not been subjected to cross-examination, obtained by a person shown to have resorted to questionable methods, will not be accepted as sufficient against positive testimony in contradiction. Kilgore v. Norman (C. C. 1902) 119 Fed. 1006.

Where an answer by the maker of a note, in an action thereon against him and the guarantors thereof, the jurisdiction of which depends on diverse citizenship, does not set up a good defense by the allegation that one of the other defendants is a citizen of another state, the privilege of suit in which he has claimed, yet it will not be struck out as frivolous, it requiring an argument and careful examination to answer the defense. Dominion Nat. Bank v. Olympia Cotton Mills (C. C. 1904) 128 Fed. 181.

Where a bill in a federal court properly alleges the requisite jurisdictional facts, the burden is on the defendant both to allege and prove to a legal certainty the facts relied on to defeat the jurisdiction, and, where he alleges a

change of complainant's domicile, he must show both residence in the new locality and the intention to remain there. Gaddie v. Mann (C. C. 1906) 147 Fed. 955, decree reversed Mann v. Gaddie (1907) 158 Fed. 42, 88 C. C. A. 1.

In a suit in equity in a federal court, an allegation of complainant's citizenship in the bill, though denied in the answer, stands admitted, unless a plea to the jurisdiction is filed. Crown Cork & Seal Co. v. Standard Brewery (C. C. 1909) 174 Fed. 252.

Where a petition alleges the necessary diverse citizenship to give the court jurisdiction, the burden of alleging and proving that plaintiff was a citizen of the same state as defendant, to defeat the jurisdiction, rests upon the defendant; but proof that he resided in such state at the time the action was brought is sufficient prima facie, and shifts to plaintiff the burden of showing that his domicile, and consequent citizenship, was not the same as his residence. Collins v. City of Ashland (D. C. 1901) 112 Fed. 175.

The diverse citizenship which must exist both at the time an action is begun in the state court and at the time a petition for removal is filed, in order to entitle the petitioner to have the cause removed, is a diversity of citizenship existent in fact, and not one merely shown to exist from the pleadings. Day v. Oatis (1904) 37 South. 559, 85 Miss. 128.

348. —— **Mode of objection.**—Citizenship, where it gives jurisdiction, is a preliminary inquiry; and, if it be properly averred, the denial of the fact must be made by way of plea. De Wolf v. Rabaud (1828) 1 Pet. 476, 7 L. Ed. 227; Smith v. Kernochen (1849) 7 How. 198, 217, 12 L. Ed. 666; Carter v. Bennett (1853) 15 How. 354, 357, 14 L. Ed. 727; Wickliffe v. Owings (1854) 17 How. 47, 15 L. Ed. 44; Jones v. League (1855) 18 How. 76, 81, 15 L. Ed. 263; Eberly v. Moore (1860) 24 How. 147, 158, 16 L. Ed. 612; Dodge v. Perkins (C. C. 1827) Fed. Cas. No. 3,954; Wood v. Mann (C. C. 1834) Fed. Cas. No. 17,952; Wythe v. Myers (C. C. 1876) Fed. Cas. No. 18,119.

A motion to dismiss a suit in the supreme court of the United States, on the ground that a suit against a state officer is in effect a suit against the state, will not be sustained, since the objection goes to the merits of the case, and, even if it goes to the jurisdiction, should not be raised by motion, but by demurrer or other pleadings in the regular progress of the cause. Illinois Cent. R. Co. v. Adams (1901) 21 Sup. Ct. 251, 180 U. S. 28, 45 L. Ed. 410.

A plea to the jurisdiction of a federal court, based upon the ground that the complainants had collusively made parties complainants and defendants for the purpose of showing the requisite diversity of citizenship, is insufficient law if it does not specify what part are alleged collusively to have be made. Helm v. Zarecor (1911) 32 S Ct. 10, 222 U. S. 32, 56 L. Ed. 77.

Citizenship of plaintiff was in iss where defendants averred that they h no knowledge or information as to su citizenship and would "leave him proof thereof." Gilbert v. David (191 35 Sup. Ct. 164, 235 U. S. 561, 59 Ed. 360.

A general denial does not put in sue averments of citizenship, up which the jurisdiction depends, but t matter of jurisdiction must be challen ed by a special plea. National Maso Acc. Ass'n v. Sparks (1897) 83 F 225, 28 C. C. A. 399.

A complaint filed in a federal co contained the requisite allegations sho ing diversity of citizenship. The a swer was a general denial. No plea the jurisdiction was filed, and there w some evidence tending to show versity of citizenship. At the conc sion of the case, the defendant ask an instruction directing a verdict in favor, but the court was not advis that the instruction was intended challenge the jurisdiction of the court the sufficiency of the proof to show versity of citizenship. Held, that t instruction did not fairly challenge t jurisdiction of the court, and, as t record, considered as a whole, did n show want of jurisdiction, the refu of the instruction was not erroneo Southern Electric Ry. Co. v. Hagem (1903) 121 Fed. 262, 57 C. C. A. 3 writ of certiorari denied (1903) 24 S Ct. 843, 191 U. S. 572, 48 L. Ed. 307

In an action of assumpsit in a fede court, a plea of nonassumpsit does n put in issue the jurisdictional allegatio of the declaration as to the citizens of the parties, and plaintiff is not r quired to prove the same. Donati Cleveland Grain Co. (1915) 221 F 168, 137 C. C. A. 68.

Defendant may take advantage plaintiff's omission to state that he is citizen or subject of a foreign state, motion in arrest of judgment. Shedd v. Custis (C. C. 1793) Fed. Cas. N 12,736.

A motion to dismiss is the proper re edy when it appears that the real pla tiff in interest is a citizen of the sa state with defendant. Maxfield v. Le (C. C. 1797) Fed. Cas. No. 9,321.

A plea in abatement for variance, that the writ did not state citizenship the parties, whereas the declaration d is frivolous, and will be stricken out motion. Burrow v. Dickson (C. 1808) Fed. Cas. No. 2,203.

The want of an averment of citize ship, if not made in the bill or decla tion, or where falsely alleged, is ava able only where raised by pleadi Hilliard v. Brevoort (C. C. 1845) F Cas. No. 6,505.

An insufficient allegation of citizens

is good ground of demurrer. Ketchum v. Driggs (C. C. 1853) Fed. Cas. No. 7,735.

An allegation in a plea of abatement that all of defendants in the action are not citizens of the state is bad for uncertainty. Hinckley v. Byrne (C. C. 1867) Fed. Cas. No. 6,510.

Denial of citizenship of the plaintiff pleaded with matter to the merits becomes frivolous. Gager v. Harrison (C. C. 1877) Fed. Cas. No. 5,171.

It is no longer necessary to take advantage of the want of the requisite citizenship by plea in abatement. If this or any other defect of jurisdiction appears upon the trial, it is the duty of the court upon its own motion to stop the proceedings and dismiss the suit. Rae v. Grand Trunk Ry. Co. (C. C. 1882) 14 Fed. 401.

That one of the complainants is a citizen of the state where suit is brought does not present a question of jurisdiction which can be raised on demurrer to the whole bill. Nebraska City Nat. Bank v. Nebraska City H. G. & C. Co. (C. C. 1883) 14 Fed. 763.

Under the old system of pleadings the issue of citizenship could only be presented by plea in abatement. Draper v. Town of Springport (C. C. 1883) 15 Fed. 328.

Where the citizenship of the parties appears in the petition, defect of jurisdiction on that ground may be raised by demurrer, in the absence of a general appearance. Meyer v. Herrera (C. C. 1889) 41 Fed. 65.

In a suit to enforce the individual liability of stockholders, the defendant stockholders who appear may set up this defense by demurrer. Elkhart Nat. Bank v. Northwestern Guaranty Co. (C. C. 1897) 84 Fed. 76.

Where the requisite diversity of citizenship to give a federal court jurisdiction appears on the face of the bill, the jurisdiction cannot be attacked by evidence dehors the record in a collateral proceeding by one who was not a party to the bill. W. B. Conkey Co. v. Russell (C. C. 1901) 111 Fed. 417, appeal dismissed Bessette v. W. B. Conkey Co. (1904) 133 Fed. 165, 66 C. C. A. 291, writ of certiorari denied (1905) 25 S. Ct. 793, 196 U. S. 638, 49 L. Ed. 630.

In a suit in equity in a federal court, an allegation of complainant's citizenship in the bill, though denied in the answer, stands admitted, unless a plea to the jurisdiction is filed. Crown Cork & Seal Co. v. Standard Brewery (C. C. 1909) 174 Fed. 252.

349. Waiver of objection.—Where the petition in a suit to foreclose a mortgage in the federal court for Louisiana, against the executor of the mortgagor, describes the plaintiff as a citizen of Tennessee and the defendant as a citizen of Louisiana, and no objection appears to have been made by the executor to the jurisdiction on the ground of the residence of the parties, it is too late for a curator, appointed in the place of the executor, to raise the objection in a state court, against a purchaser at the sale in the foreclosure suit, that the residence of the executor was not as stated in the record, and that the federal court therefore had not jurisdiction; and evidence dehors the record cannot be introduced to disprove it. Erwin v. Lowry (1849) 48 U. S. (7 How.) 172, 12 L. Ed. 655.

A delay of several years in forcing to trial a cause in a federal court, where the issue of citizenship was made when the answer was filed, some two years after filing the complaint, is not laches, precluding consideration of such issue at the trial. Gilbert v. David (1915) 35 S. Ct. 164, 235 U. S. 561, 59 L. Ed. 360.

An averment of plaintiff's citizenship in an action in a federal court, in which jurisdiction depends on diversity of citizenship, is a material allegation, within the meaning of the Ohio Code, and is put in issue, under such Code, by a general denial in the answer; and a general verdict finding the issues in favor of plaintiff, followed by judgment thereon, is conclusive on such issue as against a defendant who has participated in the trial without objecting to the jurisdiction, or asking any ruling or instruction on the ground of the insufficiency of the evidence on the issue. Toledo Traction Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28.

Absence of sufficient averments of diversity of citizenship, or of facts in the record showing such diversity, is fatal to the jurisdiction of a federal court, where no other ground of jurisdiction appears, and the defect cannot be waived by the parties. Atchison, T. & S. F. Ry. Co. v. Frederickson (1910) 177 Fed. 206, 101 C. C. A. 376.

Where jurisdiction of a nonresident was sought to be obtained by garnishment of an indebtedness owing by a resident, but it appeared on the face of the record that the indebtedness was unavailable for that purpose, a waiver of the objection would not be found, unless it clearly appeared from a record unambiguous on that point. Lowenstein v. Levy (1914) 212 Fed. 383, 129 C. C. A. 59.

Where the objection as to diversity of citizenship goes only to the proper place of trial, it is waived by defendant's pleading to the merits. Lehigh Valley Coal Co. v. Yensavage (1914) 218 Fed. 547, 134 C. C. A. 275.

Where proper diversity of citizenship is alleged, and defendant pleads to the merits, he does not waive right to plead to the jurisdiction, if, as soon as it appears that the citizenship of the parties has not been properly alleged, he pleads to the jurisdiction. Id.

After a trial on the merits, and a verdict or judgment given, defendant is estopped to controvert the fact of citizenship, as laid in the declaration. Boby-

shall v. Oppenheimer (C. C. 1824) Fed. Cas. No. 1,592.

The voluntary appearance of nonresident defendants who are citizens of the same state with complainants will not give the court jurisdiction. Lockhart v. Horn (C. C. 1871) Fed. Cas. No. 8,445; Parsons v. Howard (C. C. 1873) Fed. Cas. No. 10,777.

Where the jurisdiction depends on the diverse citizenship of corporations, defective averments in regard thereto are waived by the filing of an answer and the taking of testimony. Kennedy v. Solar Refining Co. (C. C. 1895) 69 Fed. 715.

Where, in a suit not local in character, in which federal jurisdiction depends on diversity of citizenship, citizens of other states than that in which the suit is instituted are joined as defendants, such joinder is not a jurisdictional defect, and may be waived by the defendants erroneously joined. Schultz v. Highland Gold Mines Co. (C. C. 1907) 158 Fed. 337.

The federal courts have no jurisdiction of a case in which one of the parties defendant and the plaintiff are residents in different districts from that in which the suit is brought, though it seems such nonresident defendant may waive his privilege and assent to the jurisdiction. Denniston v. Potts (1848) 19 Miss. (11 Smedes & M.) 36. See, also, Cuthbert v. Galloway (C. C. 1888) 35 Fed. 466.

VII. SUITS BETWEEN CITIZENS OF A STATE AND FOREIGN STATES OR CITIZENS

See, also, notes under Const. art. 3, § 2, cl. 1.

350. Suits by aliens.—Alienage on the part of plaintiff gives jurisdiction to the United States court as against citizen defendants. Katalla Co. v. Rones (1911) 186 Fed. 30, 108 C. C. A. 132 (affirming judgment Rones v. Katalla Co. [C. C. 1910] 182 Fed. 946); Suravitz v. Pristasz (1912) 201 Fed. 335, 119 C. C. A. 573; Eldorado Coal & Mining Co. v. Mariotti (1914) 215 Fed. 51; Taylor v. Carpenter (C. C. 1844) Fed. Cas. No. 13,784; Id. (C. C. 1846) Fed. Cas. No. 13,785; Deakin v. Lea (C. C. 1879) Fed. Cas. No. 3,695; Milliken v. Barrow (C. C. 1893) 55 Fed. 148, 149; Fribourg v. Pullman Co. (C. C. 1910) 176 Fed. 981; Bagenas v. Southern Pac. Co. (C. C. 1910) 180 Fed. 887; H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C. 1911) 189 Fed. 224; Lowry v. Erwin (La. 1843) 6 Rob. 192, 39 Am. Dec. 556.

A federal court has jurisdiction of a controversy between foreign subjects and a domestic corporation in which the bill asserts a right under a federal statute by virtue of the registration of a trade-mark. Baglin v. Cusenier Co. (1911) 31 Sup. Ct. 669, 671, 221 U. S. 580, 55 L. Ed. 863.

An alien holding land under a special law of a state may sustain a suit in th circuit court relating to such lan Bonaparte v. Camden & A. R. Co. (C. 1830) Fed. Cas. No. 1,617.

A suit by an alien against citizens the United States to enjoin a conspira to prevent the loading or unloading complainant's ship is within the equi jurisdiction of the federal courts, ind pendently of any question as to inte ference with interstate or foreign co merce. Elder v. Whitesides (C. 1895) 72 Fed. 724, following Hagan Blindell (1893) 56 Fed. 696, 6 C. C. 86, and Arthur v. Oakes (1894) 63 Fe 310, 11 C. C. A. 209, 25 L. R. A. 414.

The United States court has jurisdi tion to determine the validity of forei claims against a decedent's estate. D Valle v. Welsh (C. C. 1886) 28 Fe 342.

An action by a nonresident ali against corporations and individuals f negligent death is within the jurisdi tion of the federal court. Mahopoul v. Chicago, R. I. & P. Ry. Co. (C. 1908) 167 Fed. 165.

Under this section District Court he to have jurisdiction of alien's suit enjoin enforcement of state law requi ing employment of citizens in prefe ence to aliens, without regard to t amount in controversy. Raich v. Tr ax (D. C. 1915) 219 Fed. 273.

A state court has jurisdiction of action for personal injuries to an ali on a ship owned by a corporation of foreign country while at a wharf wit in the state. Faras v. Lower Californ Development Co. (Cal. App. 1915) 1 P. 35.

351. Suits against aliens.—See, al notes under § 991(3), post.

Federal courts will take jurisdicti by removal of suits against alie Lexington v. Butler (1871) 14 Wall. 2 294, 20 L. Ed. 809; Ex parte Gira (C. C. 1858) Fed. Cas. No. 5,457; Dea in v. Lea (C. C. 1879) Fed. Cas. N 3,695; Bentlif v. London & Colonial I nance Corp. (C. C. 1890) 44 Fed. 6 668; Webre v. Duroc (1860) 15 La. A 65.

But on a recognizance for good b havior sued against an alien he is n entitled to remove the case for tr into the federal court. Respublica Cobbet (Pa. 1798) 2 Yeates, 352.

Unless it voluntarily appears, a fo eign corporation cannot be made a pa ty defendant to a suit in a federal cou by one of its creditors, who seeks t appointment of a receiver, an accou ing, and to enforce the individual li bility of stockholders who are wit the jurisdiction of the court. Elkh Nat. Bank v. Northwestern Guaran Loan Co. (1898) 87 Fed. 252, 30 C. A. 632.

Where a suit between citizens of t same state has been brought in a fe eral court, by collusion or otherwi on the ground of defendant's aliena and a default decree entered, such pr

ceedings are wholly without jurisdiction and void, and injunction will lie against the execution of the decree. Broadis v. Broadis (C. C. 1898) 86 Fed. 951.

An action by a citizen of Illinois against an alien insurance company for malicious prosecution was within the original jurisdicton of the federal court sitting in Missouri. Carp v. Queen Ins. Co. (C. C. 1909) 168 Fed. 782.

The grant of jurisdiction to the federal courts by Const. art. 3, § 2, and the judiciary act of controversies between citizens of the United States and citizens and subjects of foreign states, includes suits against, as well as suits by, aliens. H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C. 1911) 189 Fed. 224.

There being statutory provision for acquiring jurisdiction, a corporation of another state can sue an alien corporation in the federal courts. Merchants' Mfg. Co. v. Grand Trunk Ry. Co. (N. Y. 1882) 63 How. Prac. 459.

352. Suits by or against foreign states.—See, also, notes under Const. art. 3, § 2, cl. 1.

Under Const. art. 3, § 2, and this section, the federal court had jurisdiction of a suit between a West Virginia Corporation and the Republic of Colombia. Republic of Colombia v. Cauca Co. (1903) 23 Sup. Ct. 704, 705, 190 U. S. 524, 47 L. Ed. 1159.

A federal court, whose action was invoked by the Republic of Colombia to set aside an award made against it in arbitration proceedings, has the same power to decree the payment of interest from the date fixed for payment by the award as in an ordinary case. Ex parte Republic of Colombia (1904) 25 S. Ct. 107, 195 U. S. 604, 49 L. Ed. 338.

The constitution gives jurisdiction to the federal courts in cases where foreign nations are parties, and this jurisdiction is vested by statute in the federal court. King of Spain v. Oliver (C. C. 1810) Fed. Cas. No. 7,814.

Where a libel was filed to recover compensation for salvage services rendered to a vessel, which, though not commissioned in the navy of the United States, was owned, manned, supplied, and armed by the United States, and used in the transport service, held, that the judicial tribunals of a country cannot entertain suits in which the sovereign power of that country is sought to be made a party respondent. The Thomas A. Scott (D. C. 1864) 90 Fed. 746.

353. Coplaintiffs and codefendants.—All defendants must be aliens to permit of removal of the cause to a federal court. Hervey v. Illinois Midland Ry. Co. (C. C. 1876) Fed. Cas. No. 6,434; People v. Hager (1862) 20 Cal. 167; Davis v. Cook (1874) 9 Nev. 134.

Where plaintiff brought suit in the federal court against one defendant stated to be a citizen of a foreign state, and two other defendants whose citizenship was not alleged, and all appeared and answered, a decree for plaintiff will be invalid for want of jurisdiction unless it appears that the defendant, whose citizenship was alleged, had an interest distinct from the others. Cameron v. McRoberts (1818) 3 Wheat. 591, 593, 4 L. Ed. 467.

A removal on the ground of citizenship cannot be had, when, upon arranging the parties according to their real relation to the primary controversy, it appears that there are one or more alien corporations on each side. Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America (1894) 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195.

Jurisdiction as to resident defendants in suit by aliens is not affected by nonresidence of others. Bell v. Ohio Life Ins. Co. (C. C. 1858) Fed. Cas. No. 1,261.

Where the contract sued on was entered into between plaintiff and defendants, one of whom was a citizen of the same state with the plaintiff, and the other a citizen of a foreign country, and both defendants are not only necessary but indispensable parties to the controversy, as shown from the face of the bill, a United States court is without jurisdiction. Watson v. Evers (C. C. 1882) 13 Fed. 194.

Where a suit was instituted by an alien against a corporation, citizen of the state where suit is brought, the jurisdiction of the federal court is not defeated by the mere fact that a shareholder, a citizen of the state, was admitted by the court upon his own application as a coplaintiff. Graham v. Boston, H. & E. R. Co. (C. C. 1883) 14 Fed. 753, decree affirmed (1886) 6 S. Ct. 1009, 118 U. S. 161, 30 L. Ed. 196.

A suit begun in the state court of New York, in which one of the plaintiffs is a citizen of that state, the other a citizen of New Jersey, and one of the defendants is a citizen of Maryland, and the other a subject of Prussia, is removable to the United States court. Ballin v. Lehr (C. C. 1885) 24 Fed. 193.

In a suit by a foreign corporation to enjoin strikers, joinder of citizens of Washington and aliens as defendants did not deprive the court of jurisdiction. Puget Sound Traction, Light & Power Co. v. Lawrey (D. C. 1913) 202 Fed. 263.

354. Nominal or formal parties.—The courts of the United States have jurisdiction in a case between citizens of the same state, if the plaintiffs are only nominal plaintiffs for the use of an alien. Browne v. Strode (1809) 5 Cranch, 303, 3 L. Ed. 108.

Where alien plaintiffs expressly sue as a class for the benefit of the class, all of whom, whether named or not, may avail themselves of the decree, if obtained, a citizen, member of the class,

joined with them, may be regarded as an unnecessary and formal party, whose joinder does not affect the defendants' right of removal. McHenry v. New York, P. & O. R. Co. (C. C. 1885) 25 Fed. 65.

An action by a county school board against an alien to cancel a deed to certain swamp lands, made by the county commissioner, was brought in the name of the state. The county was made a defendant because it refused to join as a complainant. Held, that both state and county were merely nominal parties. Missouri v. Alt (C. C. 1892) 73 Fed. 302.

355. Persons in representative or fiduciary capacity.—Aliens, though suing as trustees of a resident, are entitled to sue in the federal courts. Chappedelaine v. Dechenaux (1808) 4 Cranch, 306, 2 L. Ed. 629.

A federal court in New York cannot take jurisdiction of a suit against nonresident aliens to establish title to bonds held by them as executors on the theory that they were within the district, because that state, by virtue of probate of testator's will and appointment of defendants as executors, may treat both them and the estate as constructively present and subject to jurisdiction. Chase v. Wetzlar (1912) 32 S. Ct. 659, 225 U. S. 79, 56 L. Ed. 990.

An executor may recover rents for the use of the heir who is an alien. Wise v. Resler (C. C. 1819) Fed. Cas. No. 17,911.

A suit to foreclose, brought by an alien railroad mortgage bondholder in his own right, is maintainable in a federal circuit court, although the trustee under the mortgage, who holds the legal title, is a citizen of the same state with some of the defendants; such suit being in hostility to the trustee, who refuses to act, and who is made a party defendant. Under such circumstances, the court will not look behind the parties to the record. Reinach v. Atlantic & G. W. R. Co. (C. C. 1878) 58 Fed. 33.

356. Suits between aliens.—See, also, notes under Const. art. 3, § 2, cl. 1.

See, also, notes under § 991, subdivision 3, post.

Waiver of objections, see 365, post.

The courts of the United States have no jurisdiction of a case in which both parties are aliens. Mossman v. Higginson (1800) 4 Dall. 12, 1 L. Ed. 720; Montalet v. Murray (1807) 4 Cranch, 46, 2 L. Ed. 545; Hodgson v. Bowerbank (1809) 5 Cranch, 303, 3 L. Ed. 108; Jackson v. Twentyman (1829) 2 Pet. 136, 7 L. Ed. 374; Mossman v. Higginson (1880) 4 Dall, 12, 1 L. Ed. 720; Prentiss v. Brennan (C. C. 1851) Fed. Cas. No. 11,385; Rateau v. Bernard (C. C. 1854) Fed. Cas. No. 11,579; Hinckley v. Byrne (C. C. 1867) Fed. Cas. No. 6,510; Petrocokino v. Stuart (C. C. 1879) Fed. Cas. No. 11,041; Pooley v. Luco (C. C. 1896) 72 Fed. 561; Gage v. Riverside Trust Co. (C. C. 1906) 156 Fed. 1002; Orosco v. Gagliardo (1863) 22 Cal. 83; Barrowcliffe v. La Caisse Générale (N. Y. 1876) 58 How. Prac. 131; Barrowcliffe v. La Caisse Générale des Assurances Agricoles et des Assurance Contre L'Incendie (N. Y. 1879) 1 City Ct. R. 151.

357. Aliens within purview of statute.—Declaration of intention to become a citizen of the United States does not make the citizen or subject of a foreign country cease to be such. Maloy v. Duden (C. C. 1885) 25 Fed. 673; Orosco v. Gagliardo (1863) 22 Cal. 83.

A person born under the dominion of the Mexican republic, who was removed at the age of four years before the declaration of the Texan independence, to a place in Mexico, held to be an alien entitled to sue in the federal courts. Jones v. McMasters (1857) 20 How. 8, 20, 15 L. Ed. 805.

The alienage of a defendant is not to be presumed from the mere fact that he is the consul, in this country, of a foreign government. Bors v. Preston (1884) 111 U. S. 252, 4 S. Ct. 407, 28 L. Ed. 419.

The constitution of a state authorizing resident unnaturalized foreigners to vote at state elections and hold office does not change their status as aliens. Lanz v. Randall (C. C. 1876) Fed. Cas. No. 8,080.

The defendant's affidavit, together with an official passport certifying the naturalization of the defendant as a British citizen, are sufficient prima facie evidence that the requirements of the English statutes of naturalization have been complied with. Maloy v. Duden (C. C. 1885) 25 Fed. 673.

Plaintiff, a native citizen of Louisiana, married a native-born subject of Italy, who, prior thereto, had come to Louisiana, and engaged in business, without intending ever to return to Italy, though he was not naturalized. After her marriage, she and her husband, until his death, lived together in Louisiana, without any intention on the part of either to depart therefrom or ever to reside elsewhere, and she, after his death, continued to live there. Held, that she was not an alien. Comitis v. Parkerson (C. C. 1893) 56 Fed. 556, 22 L. R. A. 148.

Whatever distinction there may be between citizenship enjoyed by a subject of Great Britain resident in the United Kingdom and that possessed by a citizen of the Dominion of Canada, they are subjects of the same sovereignty, and citizens of a foreign state; and the court will take notice of the fact that they are "citizens and subjects of a foreign state," for the purpose of conferring jurisdiction. Lumley v. Wabash Ry. Co. (C. C. 1895) 71 Fed. 21, decree re-

versed (1896) 76 Fed. 66, 22 C. C. A. 60.

Congress having declared by resolution that the people of the Island of Cuba "are and of right ought to be free and independent," and the status of the island in this regard not having been changed by the treaty with Spain of December 10, 1898, a citizen of Cuba is a citizen of a foreign state. Betancourt v. Mutual Reserve Fund Life Ass'n (C. C. 1900) 101 Fed. 305.

The fact that a complainant in a bill, which he afterward dismissed through an error, styled himself a citizen of the District of Columbia, does not estop him from showing in a second bill that he is in fact an alien. Marthinson v. Winyah Lumber Co. (C. C. 1903) 125 Fed. 633.

A British subject became a naturalized citizen and took the oaths of abjuration and allegiance to this state in 1784, and in 1795 took an oath of allegiance to the king of Spain, and was appointed a consul by the Spanish king, and continued to reside in New York without ever changing his domicile. Held, that he was still to be considered as an American citizen, and not an alien or Spanish subject. Fish v. Stoughton (N. Y. 1801) 2 Johns. Cas. 407.

358. Corporations as aliens.—A corporation created by the laws of Great Britain is an "alien." Terry v. Imperial Fire Ins. Co. (C. C. 1874) Fed. Cas. No. 13,838.

A corporation of a foreign country, though having an office and transacting business in this country, will be considered an alien. Petrocokino v. Stuart (C. C. 1879) Fed. Cas. No. 11,041.

A corporation organized under the laws of a foreign country, and having its chief office there, does not become a resident of a state of the United States by doing business and having an office therein. Purcell v. British Land & Mortgage Co. (C. C. 1890) 42 Fed. 465.

An insurance corporation created under the laws of the Republic of France, is to be regarded, for the purposes of federal jurisdiction, as if it were a natural person, and a citizen of France. Barrowcliffe v. La Caisse Générale des Assurances Agricoles et des Assurance Contre L'Incendie (N. Y. 1879) 58 How. Prac. 131, 1 City Ct. R. 151.

359. Nonresident citizens as aliens.—A native-born American citizen carrying on trade in a foreign country, where he is domiciled, can maintain a suit as an alien against a citizen of the state of his birth in a federal court in said state. Wildes v. Parker (C. C. 1839) Fed. Cas. No. 17,652.

Defendant, though residing permanently abroad, held not a foreign citizen or subject. Hammerstein v. Lyne (D. C. 1912) 200 Fed. 165.

360. Partnership including aliens.—A federal court has jurisdiction of a suit by an alien against a partnership consisting of two partners, one of whom is also an alien and one a resident citizen; the partnership being domiciled in Louisiana, and the obligation sought to be enforced originating there. Liverpool, B. & R. P. Nav. Co. v. Agar (C. C. 1882) 14 Fed. 615.

Where certain of the members of a limited partnership organized under the laws of New York were aliens, and such partnership was joined with a foreign corporation as a plaintiff in an action in the federal court in New York against a firm composed of citizens of New York, such limited partnership should not be treated, for the purpose of determining jurisdiction, as if it were a corporation located in New York, but the members thereof retain their individual rights as aliens entitled to sue in the federal courts. Jewish Colonization Ass'n v. Solomon & Germanski (C. C. 1903) 125 Fed. 994.

361. Aliens resident in state.—The residence of aliens within a state will not deprive them of their right to sue in the federal courts. Breedlove v. Nicolet (1833) 7 Pet. 413, 430, 8 L. Ed. 731.

362. Necessary allegations in suits involving aliens.—In order to give federal jurisdiction in an action by an alien, the defendant must be expressly stated to be a citizen of one of the states. Mossman v. Higginson (1800) 4 Dall. 12, 14, 1 L. Ed. 720; Hodgson v. Bowerbank (1809) 5 Cranch, 303, 304, 3 L. Ed. 108; Picquet v. Swan (C. C. 1828) Fed. Cas. No. 11,134; Welch v. Tennent (1854) 4 Cal. 203.

Though one party's alienage is averred, yet it is necessary also to aver that the other party is a citizen. Mossman v. Higginson (1800) 4 U. S. (4 Dall.) 12, 1 L. Ed. 720; Hodgson v. Bowerbank (1809) 5 Cranch, 303, 3 L. Ed. 108; Jackson v. Twentyman (1829) 2 Pet. 136, 7 L. Ed. 374; Conolly v. Taylor (1829) 2 Pet. 556, 7 L. Ed. 518.

Where the jurisdiction of the federal courts depends upon the alienage of the parties to an action, the facts showing such alienage must be set forth on the record. Turner v. Enrille (1799) 4 U. S. (4 Dall.) 7, 1 L. Ed. 717; Course v. Stead (1800) 4 U. S. (4 Dall.) 22, 1 L. Ed. 724; Conolly v. Taylor (1829) 27 U. S. (2 Pet.) 556, 7 L. Ed. 518.

Where an alien instituted an action against a citizen of New York, it was held that his pleading, though there was no averment that the defendant was a citizen of New York, contained all the averments required to give jurisdiction to the United States courts. Bradstreet v. Thomas (1838) 12 Pet. 59, 62, 9 L. Ed. 999.

Though the fact that one is an alien does not affect his right of property in a trade-mark, that fact is a necessary allegation to establish the requisite diversity of citizenship to confer jurisdic-

tion on a federal court. La Croix v. May (C. C. 1883) 15 Fed. 236.

363. Sufficiency of allegations as to alienage.—Where a declaration upon a bill of exchange began with an averment that the drawer and indorser were citizens of the same state, and it was afterwards averred that the indorser, who was also the payee, was an alien and citizen of Texas, it was held sufficient to maintain the jurisdiction of the federal court. Bailey v. Dozier (1848) 47 U. S. (6 How.) 23, 12 L. Ed. 328.

Jurisdiction dependent on the alienage of one of the parties cannot be sustained upon the mere description of such party, throughout the record, as a "citizen of London, England." Stuart v. City of Easton (1895) 15 Sup. Ct. 268, 156 U. S. 46, 39 L. Ed. 341.

Complainants' description of themselves, in a bill in a suit against a citizen of Nebraska, as "all of Cognac in France, and citizens of the republic of France," is sufficient, without any averment of alienage. Hennessy v. Richardson Drug Co. (1903) 23 Sup. Ct. 532, 533, 189 U. S. 25, 47 L. Ed. 697; Same v. Moise (1903) 23 Sup. Ct. 534, 189 U. S. 35, 47 L. Ed. 698.

The alienage of the plaintiff is sufficiently alleged to sustain the jurisdiction of a federal court by an averment in the complaint that "the plaintiff now is, and for more than one year last past has been, a resident of Washington and a citizen of Sweden," although, at the time the action was brought, Sweden was under a monarchical form of government, since the designation "citizen of Sweden" could only have been intended as a statement of the nationality of the plaintiff, viz., the country to which he bore allegiance. C. H. Nichols Lumber Co. v. Franson (1906) 27 Sup. Ct. 102, 203 U. S. 278, 51 L. Ed. 181.

Averments in bill as to foreign citizenship of corporate complainant are not insufficient for jurisdictional purposes because of subsequent allegations from which doubt or inconsistency may argumentively be inferred, where such statements refer to an alleged impairment of a contract and were not addressed to the subject of citizenship. Railroad Commission of Mississippi v. Louisville & N. R. Co. (1912) 32 Sup. Ct. 756, 760, 225 U. S. 272, 56 L. Ed. 1087.

A description of plaintiff as a "resident of Ontario, Canada, and a citizen of the dominion of Canada and of the empire of Great Britain," is not a sufficient averment that he is an alien, and a subject of the queen of England, to show jurisdiction in the circuit court. Rondot v. Township of Rogers (1897) 79 Fed. 676, 25 C. C. A. 145, certiorari denied (1897) 18 Sup. Ct. 945, 168 U. S. 709, 42 L. Ed. 1211.

Where federal jurisdiction of an action by the liquidating committee of a bank depended on diverse citizenship, and plaintiff's petition only alleged that all of such committee resided in the Republic of Mexico, but there was no averment that they were citizens of the Republic of Mexico, jurisdiction was not shown, nor was the defect cured by a recital in a motion for rehearing of a motion to dismiss that it appeared on the face of defendant's pleading that the "plaintiff" is a resident citizen of the Republic of Mexico, the plaintiff referred to being the liquidating committee of the bank, and not the individuals who were the real plaintiffs. International Bank & Trust Co. v. Scott (1908) 159 Fed. 58, 86 C. C. A. 248.

An averment in a petition that plaintiff "is now, and at all times hereinafter mentioned was, a citizen of Ireland," while not technically correct, is a sufficient allegation that plaintiff is an alien, for the purpose of showing jurisdiction in a federal court. Mahoning Valley Ry. Co. v. O'Hara (1912) 196 Fed. 945, 116 C. C. A. 495.

An allegation that plaintiff is a subject of a foreign power does not confer jurisdiction, as he may still be a naturalized citizen. Michaelson v. Denison (C. C. 1808) Fed. Cas. No. 9,523. CONTRA, see Milne v. Huber (C. C. 1843) Fed. Cas. No. 9,617.

The mere allegation that a party is an alien is not sufficient to give jurisdiction. There must be an allegation that he is a subject or citizen of some one foreign state. Wilson v. City Bank (C. C. 1838) Fed. Cas. No. 17,797.

Allegations that defendant has left the United States, and become permanently domiciled in the dominion of Canada, and now resides there, and intends to become a naturalized citizen of that country, does not show his alienage for the purpose of conferring jurisdiction on the federal court. Bishop v. Averill (C. C. 1896) 76 Fed. 386.

It will not be presumed, in the absence of a showing that there is a British law conferring it, that the Canadian parliament has power to naturalize a citizen of the United States, and make him a citizen of Great Britain; and the setting out in a bill of a Canadian statute, under which it is claimed the complainant, who is by birth a citizen of the United States, became a British subject, is insufficient to confer jurisdiction on the ground that complainant is an alien. Jennes v. Landes (C. C. 1897) 84 Fed. 73.

Allegations in a bill against citizens of the state of Washington that complainant was by birth a citizen of that state, but by her marriage with a British subject, and removal to British Columbia, became a citizen of Great Britain, no law of that country making her a citizen by reason of such facts being pleaded, are insufficient to sustain the jurisdiction of the federal court on the ground of diversity of citizenship. Id.

An allegation that plaintiff is a citizen of the British Empire is not a suf-

ficient allegation that he is an alien, and a citizen or subject of some one foreign state, for the purpose of conferring jurisdiction on a federal court in a suit against a citizen of a state. Von Voight v. Michigan Cent. R. Co. (C. C. 1904) 130 Fed. 398.

364. Amendments.—Where aliens file a bill in the federal court against citizens of the United States, and join as a plaintiff a citizen of the United States, as between whom and one of the defendants the court has no jurisdiction, the bill may be amended by omitting him as plaintiff and joining him as defendant. Conolly v. Taylor (1829) 27 U. S. (2 Pet.) 556, 7 L. Ed. 518.

See §§ 1251c, 1591, post, and notes thereunder.

365. Waiver of objection.—In a case of salvage, where the parties on both sides, except the owners of the cargo of the salvor ship, were foreigners, but no protest was made to the jurisdiction, merely an objection being raised by counsel at the argument, it was considered that the considerations drawn from public convenience in favor of the jurisdiction greatly overbalanced those against it, and that, however it might be viewed when the jurisdiction was objected to, there ought to be no doubts where the parties assent to it. Mason v. The Blaireau (1804) 6 U. S. (2 Cranch) 240, 2 L. Ed. 266.

An alien instituted an action by writ of right in the district court for the Northern district of New York against a citizen of that state, but did not aver such citizenship in the declaration. Defendant pleaded to the first count and demurred to the second and third, and plaintiff joined in the demurrer and averred that defendant was a citizen of New York. In subsequent proceedings no exception was taken to the failure to allege the citizenship in the declaration, until the case was a second time brought to the supreme court on writ of error, when defendant moved to dismiss the writ because of such failure. Held, that while the citizenship of defendant should have been averred in the declaration, as the jurisdictional facts appeared in the subsequent pleadings, defendant, by failing to except at the proper time, had waived his right to object, and the writ would not be dismissed. Bradstreet v. Thomas (1838) 37 U. S. (12 Pet.) 59, 9 L. Ed. 999.

Although the federal court is authorized to protect itself of its own motion from impositions upon its jurisdiction by collusion or fraud, the evidence on which it acts must be pertinent to some issue, and where the complaint alleged in good faith that plaintiff was an alien, and that defendant was a citizen of Illinois, and no plea to the jurisdiction was made by defendant, but upon the trial it appeared, from evidence that was irrelevant and pertinent to no issue, that defendant was also an alien, and that consequently, under Act March 3, 1875, § 5, the court had no jurisdiction, the granting of a motion to dismiss in that condition of the record was error. Hartog v. Memory (1886) 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725.

The federal courts have jurisdiction in a controversy between a citizen of one state and a citizen of a foreign state, and the status of the parties is jurisdictional and cannot be waived. Fribourg v. Pullman Co. (C. C. 1910) 176 Fed. 981.

VIII. ASSIGNMENT AND TRANSFERS OF CHOSES IN ACTION

366. Scope and purpose of provision.—A federal court may not take cognizance of a suit on a chose in action brought by an assignee where the original holder could not have maintained the suit. Keary v. Farmers' & Merchants' Bank (1842) 41 U. S. (16 Pet.) 89, 10 L. Ed. 897; Gibson v. Chew (1842) 41 U. S. (16 Pet.) 315, 10 L. Ed. 977; McNutt v. Bland (1844) 2 How. 9, 15, 11 L. Ed. 159; Sheldon v. Sill (1850) 8 How. 441, 449, 12 L. Ed. 1147; Bushnell v. Kennedy (1869) 9 Wall. 387, 390, 19 L. Ed. 736; Walker v. Powers (1881) 104 U. S. 245, 26 L. Ed. 729; Consolidated Rubber Tire Co. v. Ferguson (1910) 183 Fed. 756, 106 C. C. A. 330; Power & Irrigation Co. of Clear Lake v. Craig (1915) 226 Fed. 598; White v. Vermont & M. R. Co. (C. C. 1858) Fed. Cas. No. 17,559; Berger v. County Com'rs of Douglas County (C. C. 1880) 5 Fed. 23, 25; Newgass v. City of New Orleans (C. C. 1888) 33 Fed. 196; Tierney v. Helvetia Swiss Fire Ins. Co. (C. C. 1908) 163 Fed. 82; Troy Bank of Troy, Ind., v. Whitehead (C. C. 1910) 184 Fed. 932 (decree reversed Same v. G. A. Whitehead & Co. [1911] 32 Sup. Ct. 9, 222 U. S. 39, 56 L. Ed. 81); Waterman v. Chesapeake & O. Ry. Co. (D. C. 1912) 199 Fed. 667; Cincinnati, H. & D. Ry. Co. v. Orr (D. C. 1914) 215 Fed. 261; State of Maine Lumber Co. v. Kingfield Co. (D. C. 1914) 218 Fed. 902.

The provision refers only to the requirement of citizenship of the parties, and not to the sum in dispute. Bowden v. Burnham (1894) 59 Fed. 752, 8 C. C. A. 248; Chase v. Sheldon Roller Mills Co. (C. C. 1893) 56 Fed. 625.

This provision is not inconsistent with that part of the third article of the constitution which provides that the judicial power shall extend to controversies between citizens of different states. Sheldon v. Sill (1850) 49 U. S. (8 How.) 441, 12 L. Ed. 1147.

A federal court had no jurisdiction of a suit to enforce a contract originally made between two citizens of Tennessee, and the first assignment of which was voluntary, even if the subsequent sale by an intermediate holder was to be regarded as forced by operation of

law. Coler v. Grainger County (1890) 74 Fed. 16, 20 C. C. A. 267.

The federal court may entertain jurisdiction, either originally or by removal, of a suit based on a chose in action brought by a party thereto, who is a citizen of a state, against an assignee of the other party, who is an alien, without regard to the citizenship of defendant's assignor. Brooks v. Laurent (1899) 98 Fed. 647, 39 C. C. A. 201.

Act March 3, 1887, § 1, as amended by Act Aug. 13, 1888, substantially re-enacted hereby, held not to deprive federal courts of jurisdiction of a suit by an Alabama corporation against a Tennessee county for work and materials under a contract between the county and a Tennessee partnership, assigned to the corporation before the claims accrued. Oak Grove Const. Co. v. Jefferson County (1915) 219 Fed. 858, 135 C. C. A. 528.

Jurisdiction depends on whether it could have been maintained in that court as between the original parties to the instrument. Lipschitz v. Napa Fruit Co. (1915) 223 Fed. 698, 139 C. C. A. 228.

The federal court has jurisdiction of a bill in equity by a judgment creditor against citizens of different states, to set aside conveyances by the judgment debtor as in fraud of creditors, although the ground of the judgment was a negotiable chose in action, on which a suit could not have been maintained in such court. Bean v. Smith (C. C. 1821) Fed. Cas. No. 1,174.

The clause in section 1 of the judiciary act of 1875 prohibiting the assignee of a nonnegotiable contract from maintaining a suit thereon in the federal courts, unless his assignor might have done so, had reference solely to the assignor's right to maintain such suit on account of his citizenship, and not to the amount of the claim or demand arising out of such contract. Hammond v. Cleaveland (C. C. 1885) 23 Fed. 1.

By Act March 3, 1887, substantially re-enacted by this section, it was intended to prohibit suits in the federal court by assignees of choses in action, unless the original assignor was entitled to maintain the suit, in all cases except suits on foreign bills of exchange, and except suits on promissory notes made payable to bearer, and executed by a corporation. Wilson v. Knox County (C. C. 1890) 43 Fed. 481.

Plaintiff sued a citizen of another state on three notes, one of them payable to plaintiff and the others to a citizen of a third state, who assigned them to plaintiff. The assigned notes, together, were for less than $2,000, but the aggregate of the three exceeded that sum. Held, that plaintiff was entitled to maintain the suit; for the provision of the act of Aug. 13, 1888, substantially re-enacted by this section, refers only to the requirement of citizenship of the parties, and not to the sum in dispute. Chase v. Sheldon Roller-Mills Co. (C. C. 1893) 56 Fed. 625.

The words "if such instrument be made payable to bearer, and be not made by any corporation," in Act Aug. 13, 1888, substantially re-enacted hereby, restrain the effect of the words "any subsequent holder," and have no restraining effect upon the general denial to federal courts of cognizance of suits on promissory notes or other choses in action in favor of an assignee, where suit could not have been prosecuted in such courts if no assignment or transfer had been made. Skinner v. Barr (C. C. 1896) 77 Fed. 816.

Judgment creditors of an insolvent corporation may maintain a suit in a federal court to enforce a trust against a third party in property alleged to belong to the corporation, and to have been acquired by defendant in fraud of their rights, where diversity of citizenship appears, and the requisite amount is involved, although complainants' judgments were recovered in a state court in suits on assigned notes, of which the federal court would not have had jurisdiction. Stanwood v. Wishard (C. C. 1905) 134 Fed. 959.

Where the assignee of a cause of action has reduced the same to judgment, in a subsequent action on the judgment in a federal court the citizenship of the original assignor is wholly immaterial on the question of the jurisdiction of such court. Hultberg v. Anderson (C. C. 1909) 170 Fed. 657.

The provisions as to assigned choses in action prevent the creation of jurisdiction by the transfer of claims held by a citizen of the same state with the debtor to a citizen of another state. Davis v. Mills (C. C. 1900) 99 Fed. 39.

The assignment of a chose in action by a national bank does not vest the assignee with the right to maintain an action thereon in a federal court against a citizen of the state in which the bank is located. Sullivan v. Ayer (C. C. 1909) 174 Fed. 199.

The question whether a cause of action was assignable so as to entitle the assignee to maintain a suit thereon in a federal court is to be determined by the law of the state where the transactions took place. Commonwealth S. S. Co. v. American Shipbuilding Co. (D. C. 1912) 197 Fed. 780.

367. Parties within scope of act.—A suit to declare and enforce a lien on certain interests in distributive shares of the property of a decedent in the hands of an ancillary administrator is not within the statute, because plaintiff's right is derived from an heir whose citizenship is the same as that of such administrator, where the plaintiff, who sues as administratrix, and who is a citizen of a different state from the defendant administrator, is suing primarily on the obligation of such heir to her intestate, to secure

which a lien was given upon such heir's distributive share. Ingersoll v. Coram (1908) 29 S. Ct. 92, 211 U. S. 335, 53 L. Ed. 208, reversing decree Coram v. Ingersoll (1906) 148 Fed. 169, 78 C. C. A. 303.

The restriction contained in section 11 (Act 1789), substantially re-enacted herein, does not apply to suits brought by the United States on bonds. U. S. v. Greene (C. C. 1827) Fed. Cas. No. 15,258.

The limitation does not apply to national banks. Commercial Nat. Bank v. Simmons (C. C. 1876) Fed. Cas. No. 3,062.

367½. Effect of assignment in general.—A federal court, which has, by removal, acquired jurisdiction of a suit by a lessor, who is a citizen of the state, against an assignee of his lessee, the defendant being an alien, for a cancellation of the lease, has also jurisdiction to entertain a cross-bill by defendant to enforce specific performance of the lease, which is merely ancillary to the original suit, although by reason of the fact that defendant's assignor is a citizen of the same state as complainant the cross-bill could not have been maintained in that court as an original action. Brooks v. Laurent (1899) 98 Fed. 647, 39 C. C. A. 201.

Where a mortgage was given to secure a prior indebtedness from the mortgagor to the mortgagee, who were citizens of different states, the jurisdiction of a federal court of a suit to foreclose the mortgage is not affected by the fact that it also secured other indebtedness owing by the mortgagor to a third person, who was a citizen of the same state, which had been assigned to the mortgagee. Camp v. Peacock, Hunt & West Co. (1904) 129 Fed. 1005, 64 C. C. A. 490, affirming decree Peacock, Hunt & West Co. v. Thaggard (C. C. 1904) 128 Fed. 1005.

Where the claim made by a railroad company against another is for the retention of rolling stock by receivers appointed by the United States court and by a new corporation to whom it was transferred, after it should have been turned over to claimant, the court, having in the order of transfer reserved the right to determine all claims growing out of the subject-matter, has jurisdiction of the controversy, though the parties are corporations of the same state. Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co. (C. C. 1891) 46 Fed. 156.

A judgment was recovered in a state court against a county, and was assigned to plaintiff, a citizen of another state, who brought an action thereon in a federal court; the original judgment being still in force. Defendant demurred, contending that plaintiff's only remedy was by mandamus to compel the levy of a tax to pay the original judgment. Held that, if this were so, the assignee still had a right to obtain a judgment in the federal court to enable it to invoke the power of that court in the granting and enforcement of the mandamus proceeding. First Nat. Bank v. Duel County (C. C. 1896) 74 Fed. 373.

Where one of complainant's contracts is clearly within the jurisdiction of a federal court, it draws to that court jurisdiction to determine the entire controversy, although others of the contracts, as to which the issues are the same, were acquired by complainant through assignments from persons who could not have sued in such court. Howe & Davidson Co. v. Haugan (C. C. 1904) 140 Fed. 182.

367¾. Collusive or sham transfers.—If the assignment is absolutely and legally made, the motive which induced it in no way affects the right of the assignee to sue. Collinson v. Jackson (C. C. 1882) 14 Fed. 305; Cole v. Philadelphia & E. Ry. Co. (C. C. 1905) 140 Fed. 944, decree reversed Kreider v. Cole (1907) 149 Fed. 647, 79 C. C. A. 339.

Where a mortgagor and mortgagee are citizens of the same state, and the mortgagee assigns it to a citizen of another state for the purpose of conferring jurisdiction on the federal courts, it is necessary in order to devest the court of jurisdiction to bring home to the assignee a knowledge of this motive and purpose. Smith v. Kernochen (1849) 7 How. 198, 216, 12 L. Ed. 666. The assignment of a note to cut off an anticipated defense to a suit to foreclose the mortgage by which it is secured will not be considered collusive and justify a dismissal of a suit brought in a United States court by the assignee if the title made by the transfer is complete and such as would enable the assignee to maintain suit in his own name. Lanier v. Nash (1887) 7 Sup. Ct. 919, 922, 121 U. S. 404, 30 L. Ed. 947.

The conveyance of all the property of a partnership to a corporation organized for the purpose by the partners and the division between them of the stock of the corporation, a small part of such property consisting of lands in controversy in a subsequent action brought by the corporation in a federal court, cannot be held a simulated or sham transfer which will oust such court of jurisdiction because the partnership could not have sued therein, where the conveyance was bona fide and no reconveyance was contemplated. Slaughter v. Mallet Land & Cattle Co. (1905) 141 Fed. 282, 72 C. C. A. 430, writ of certiorari denied (1906) 26 Sup. Ct. 761, 201 U. S. 646, 50 L. Ed. 903.

It is only a sham or fictitious transfer which places titles and rights in assignees to enable them to maintain suits in the federal courts for the benefit of the assignors that are obnoxious to the statute. And the fact that the purpose to bring a cause of action within the

jurisdiction of the federal court is the motive which induces a gift or sale and a conveyance of the cause of action, or property out of which the cause of action arises, does not deprive the assignee of his right to invoke the jurisdiction of that court to determine the cause, provided the transfer was real. O'Neil v. Wolcott Mining Co. (1909) 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200.

Where judgments are assigned absolutely, and for a valuable consideration, it does not affect the jurisdiction of the federal court that the purchase was made with the expressed intention of suing thereon, because the judgment creditors feared they could not enforce them in the state courts. Neal v. Foster (C. C. 1888) 36 Fed. 29, decree affirmed Crawford v. Neal (1892) 12 Sup. Ct. 759, 144 U. S. 585, 36 L. Ed. 552.

Where a sale and conveyance of a mining claim are real, and not merely simulated, the motive of the sale is immaterial, so far as affecting the right of the grantee to maintain a suit for its possession in a federal court on the ground of diversity of citizenship. Willitt v. Baker (C. C. 1904) 133 Fed. 937.

An assignment of a cause of action, although without consideration and for the purpose of suit in a federal court, is not collusive, so as to deprive that court of jurisdiction, where it exceeds the jurisdictional amount, and the assignor might have brought suit in that court thereon. Hartford Fire Ins. Co. v. Erie R. Co. (C. C. 1909) 172 Fed. 899.

See, also, notes under § 1019, post.

368. Foreign bills of exchange.—A bill of exchange drawn in one state on persons living in another will be treated as a foreign bill in the federal courts. Buckner v. Finley (1829) 2 Pet. 586, 590, 7 L. Ed. 528.

369. Promissory notes.—A suit to recover the contents of a promissory note or other chose in action is a suit to recover the amount due upon such note or the amount claimed to be due upon an account, personal contract, or other chose in action. Kolze v. Hoadley (1906) 26 Sup. Ct. 220, 222, 200 U. S. 76, 50 L. Ed. 377.

A note made payable to the cashier of a bank as trustee, the consideration for which was furnished by the bank, which was the real owner, may be sued on by the bank in its own name, or by its receiver, without indorsement or assignment, under the statute of Utah, and the citizenship of the cashier is immaterial to affect the jurisdiction of a federal court in that state of an action thereon. Franklin v. Conrad-Stanford Co. (1905) 137 Fed. 737, 70 C. C. A. 171.

The original beneficial owner may sue in a federal court on a note, although the nominal payee by reason of his citizenship would not have such right. Kirven v. Virginia-Carolina Chemical Co. (1906) 145 Fed. 288, 76 C. C. A. 172, 7 Ann. Cas. 219.

An indorsee of negotiable paper before maturity is entitled to recover against the maker in the federal courts, unless in the transaction by which title was acquired the indorsee had knowledge of facts which would render it invalid, or was guilty of bad faith, the burden of proving which is on the defendant. Young v. Lowry (1912) 192 Fed. 825, 113 C. C. A. 149.

A federal court has jurisdiction where a declaration for money had and received describes the parties as citizens of different states, and plaintiff proves his case by a note to a third person, who is a citizen of the state with him. Brown v. Noyes (C. C. 1846) Fed. Cas. No. 2,023.

A corporation of one state sold coal in another state by its agents resident there, who took a note payable to them "as agents," and indorsed it to the president of the corporation, who resided and had an office in a third state. Held, that an action would lie by the president in a federal court where the complaint contained the common counts as well as a special count on the note. Heckscher v. Binney (C. C. 1847) Fed. Cas. No. 6,316.

The assignee of a promissory note may sue on it in the federal court if the assignor might have done so at the time the suit was commenced. Chamberlain v. Eckert (C. C. 1869) Fed. Cas. No. 2,577.

A corporation executed its promissory note, payable to the order of its president, attaching thereto, before delivery, its corporate seal. After having been indorsed by him, it was discounted by a citizen of the same state, and assigned to a citizen of another state, who brought an action against both maker and indorser. Held that, under section 1 of the act of March 3, 1875, the circuit court had no jurisdiction. Coe v. Cayuga Lake R. Co. (C. C. 1881) 8 Fed. 534.

The rule that the holder of a negotiable note may sue thereon, although he has no interest therein, is not applicable when the question of jurisdiction is to be determined. Hawley v. Kepp (C. C. 1878) Fed. Cas. No. 6,249.

370. —— Accommodation paper. — A federal court has no jurisdiction in a suit by an indorsee of a note against the indorser and maker, where the maker and indorser, at the time of the assignment, both resided in the state where the note is sued on. It is immaterial that the indorser was an accommodation indorser. Small v. King (C. C. 1850) Fed. Cas. No. 12,960; Shuford v. Cain (D. C. 1869) Fed. Cas. No. 12,823.

The federal court has jurisdiction of an action on a note by the indorsee against the maker thereof, although the payee is a citizen of the same state as the maker, where the note was made

for the accommodation of the payee, and he is in legal effect a maker or original promisor, and therefore did not by his indorsement assign or transfer any right of action held by him against the accommodation maker. Holmes v. Goldsmith (1893) 13 Sup. Ct. 288, 289, 147 U. S. 150, 37 L. Ed. 118.

The federal court has no jurisdiction of an action against the maker of a promissory note made payable to one who indorsed the same for his accommodation, where such facts appear from the complaint, unless it appear that the indorser is a citizen of a state other than that of defendant's residence. Noell v. Mitchell (C. C. 1869) Fed. Cas. No. 10,287.

A promissory note executed for the sole benefit of the payee, by whom it is indorsed to nonresidents, who sue the accommodation makers thereon, is not within the restriction, as plaintiffs are really payors, and not assignees. Goldsmith v. Holmes (C. C. 1888) 36 Fed. 484, 1 L. R. A. 816, judgment affirmed Holmes v. Goldsmith (1893) 147 U. S. 150, 37 L. Ed. 118, 13 S. Ct. 288.

The provision does not apply to the indorsement and transfer by the payee of notes which were made to him merely that he might, as agent of the maker, raise money for it by negotiating them with third persons. Wachusett Nat. Bank v. Sioux City Stove Works (C. C. 1893) 56 Fed. 321, following Holmes v. Goldsmith (1893) 13 Sup. Ct. 288, 147 U. S. 150, 37 L. Ed. 118.

K. sold lots to D., taking back notes executed by D. to his own order, and by him indorsed, secured by trust deed on the lots. On the same day D. gave K. a quitclaim of the lots. S., the trusted agent of K., without K.'s knowledge, put up the notes with J. as collateral for a $1,000 note of which complainant was guarantor. The $1,000 note not being paid, M. caused the collateral notes to be sold, and complainant bought them. Held, that the court had jurisdiction of a suit by complainant to foreclose the trust deed; the notes secured thereby being accommodation notes, and K. being in legal effect the maker thereof; he also, in effect, having put them up as collateral; and complainant's title to the note of which she was guarantor being considered to have vested when the collateral was put up, so that the collateral notes are to be treated as made by K. to complainant. Hoadley v. Day (C. C. 1904) 128 Fed. 302.

371. —— Indorsers and Indorsees.— An indorsee, if a citizen of a different state, may sue his immediate indorser in the circuit court, whether the maker could be sued there or not; the indorsement being a new contract. Young v. Bryan (1821) 6 Wheat. 146, 151, 5 L. Ed. 228; Mullen v. Torrance (1824) 9 Wheat. 537, 6 L. Ed. 154; Evans v. Gee (1837) 11 Pet. 80, 83, 9 L. Ed. 639; Kolze v. Hoadley (1906) 26 Sup. Ct. 220, 222, 200 U. S. 76, 50 L. Ed. 377; Codwise v. Gleason (C. C. 1807) Fed. Cas. No. 2,938; Campbell v. Jordan (C. C. 1847) Fed. Cas. No. 2,-362; Dennison v. Larned (C. C. 1855) Fed. Cas. No. 3,798.

An action by the indorsee against the maker and payee, jointly, of a note, cannot be maintained in the federal courts, though plaintiff resides in another state, provided the maker and payee of the note both reside in the same state. Keary v. Farmers' & Merchants' Bank (1842) 41 U. S. (16 Pet.) 89, 10 L. Ed. 897; Dromgoole v. Same (1844) 2 How. 241, 243, 11 L. Ed. 252; State Nat. Bank of Denison v. Eureka Springs Water Co. (C. C. 1909) 174 Fed. 827.

Where the suit is against a remote indorser, and the plaintiff traces his title through an intermediate indorser, he must show that such indorser could have maintained an action in those courts. Mullen v. Torrance (1824) 22 U. S. (9 Wheat.) 537, 6 L. Ed. 154.

While an indorsee of a promissory note, who resides in a different state, may sue in the circuit court his immediate indorser, residing where suit is brought, though the indorser is a resident of the same state with the maker, yet, where suit is brought against remote indorser, the declaration must show that an intermediate indorser could have sustained his action in the federal court. Mullen v. Torrance (1824) 9 Wheat. 537, 538, 6 L. Ed. 154.

In a suit by the first indorser of promissory notes against a second indorser, upon an alleged contract that the second indorser would bear half the loss which might accrue from their nonpayment by the drawer, it is not a sufficient objection to the jurisdiction of the court that the original payee and assignor of the notes and the defendant were citizens of the same state, though such an objection might lie, had the suit been upon the notes. Phillips v. Preston (1847) 46 U. S. (5 How.) 278, 12 L. Ed. 152.

As to application of doctrine that an indorsee, if a citizen of a different state, may sue his own immediate indorser in the federal court, see Coffee v. Planters' Bank (1851) 13 How. 183, 187, 14 L. Ed. 105.

A New York corporation may bring suit in a federal court on the notes of an Illinois corporation, although the treasurer of the latter corporation, to whose order the notes were made payable, and by whom they were, before delivery, indorsed to the New York corporation, which loaned the money for which they were given, may be a citizen of Illinois. Blair v. City of Chicago (1906) 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801, reversing decree Govin v. City of Chicago (C. C. 1904) 132 Fed. 848.

Where a national bank executed a nonnegotiable note to another national

bank, both being citizens of Nebraska, which note was assigned to a citizen of another state, an action by him thereon against the maker and other defendants, the most of whom were also citizens of Nebraska, cannot be maintained in the federal courts on the ground of diversity of citizenship. George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40, affirmed Wyman v. Same (1906) 26 S. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, Frenzer v. Same (1906) 26 S. Ct. 498, 201 U. S. 244, 50 L. Ed. 742, and Poppleton v. Same (1906) 26 S. Ct. 498, 201 U. S. 245, 50 L. Ed. 743.

The indorsement of a writing obligatory is regarded as a new contract, and the indorsee, being a citizen of another state, may sue his immediate indorser in the federal court irrespective of the citizenship of the maker and payee. Codwise v. Gleason (C. C. 1807) Fed. Cas. No. 2,938; Campbell v. Jordan (C. C. 1847) Fed. Cas. No. 2,362; Gaylord v. Johnson (C. C. 1850) Fed. Cas. No. 5,285; Dennison v. Larned (C. C. 1855) Fed. Cas. No. 3,798.

The federal court held to have no jurisdiction of an action by an assignee of a note not made payable at a bank, where, under the state law in such case, the maker is entitled to assert, against any indorsee, any equity available against the payee. Gregg v. Weston (C. C. 1877) Fed. Cas. No. 5,800.

372. —— **Subsequent holders.** — A promissory note, payable "to the order of ——," which was made and delivered for a valuable consideration, is, in legal effect, payable to bearer; and one who buys it from a lawful owner and holder, and afterwards fills the blank by writing his own name therein as payee, is a "subsequent holder." Steel v. Rathbun (C. C. 1890) 42 Fed. 390.

373. **Obligations payable to bearer.**— County or municipal bonds, issued with the space for the name of the payee left blank, are, in legal effect, instruments payable to bearer and a transferee, having the requisite citizenship, to whom they were transferred in the same condition by delivery, may sue thereon in the federal court, though the original holder could not. Keene Five-Cent Sav. Bank v. Lyon County of State of Iowa (C. C. 1898) 90 Fed. 523 (judgment affirmed Lyon County, Iowa, v. Keene Five-Cent Sav. Bank [1900] 100 Fed. 337, 40 C. C. A. 391); Lyon County, Iowa, v. Keene Five-Cent Sav. Bank (1900) 100 Fed. 337, 40 C. C. A. 391; Reynolds v. Lyon County, Iowa (C. C. 1899) 97 Fed. 155.

A county warrant made payable "to A. B., or bearer," is legally equivalent to one made simply "to bearer." Thompson v. Searcy County (1893) 57 Fed. 1030, 6 C. C. A. 674 (judgment affirmed [1895] 66 Fed. 92, 13 C. C. A. 349).

A promissory note, payable "to the order of ——," which was made and delivered for a valuable consideration, is, in legal effect, payable to bearer. Steel v. Rathbun (C. C. 1890) 42 Fed. 390.

A bill of exchange drawn by a corporation in favor of itself, and by it indorsed in blank, is payable to bearer, within the meaning of the statute restricting the jurisdiction of circuit courts in actions on negotiable instruments. Bank of British North America v. Barling (C. C. 1891) 46 Fed. 357, judgment affirmed Barling v. Bank of British North America (1892) 50 Fed. 260, 1 C. C. A. 510.

The holder of a municipal bond, payable to a person named or order, and indorsed in blank by the payee, can only maintain an action thereon in a federal court where the payee might have done so. Thomson v. Town of Elton (C. C. 1900) 100 Fed. 145.

Interest coupons, though payable to bearer, cannot be sued on in the federal court unless the bonds to which they were attached were suable in such court. Clarke v. Janesville (D. C. 1856) Fed. Cas. No. 2,854.

374. **Corporation's obligation to bearer transferable by delivery.**—This provision does not prevent a suit by the assignee of a chose in action payable to bearer, where the instrument was made by a corporation. White v. Vermont & M. R. Co. (1858) 62 U. S. (21 How.) 575, 16 L. Ed. 221; City of New Orleans v. Quinlan (1899) 19 Sup. Ct. 329, 330, 173 U. S. 191, 43 L. Ed. 664 (affirming Quinlan v. City of New Orleans [C. C. 1897] 92 Fed. 695); Board of Com'rs of Lake County, Colo., v. Dudley (1899) 19 Sup. Ct. 398, 400, 173 U. S. 243, 43 L. Ed. 684; Barling v. Bank of British North America (1892) 50 Fed. 260, 1 C. C. A. 510 (affirming judgment Bank of British North America v. Barling [C. C. 1891] 46 Fed. 357); Bradly v. Marine & R. Phosphate Min. & Mfg. Co. (C. C. 1879) Fed. Cas. No. 1,789; Newgass v. City of New Orleans (C. C. 1888) 33 Fed. 196; State Nat. Bank of Denison v. Eureka Springs Water Co. (C. C. 1909) 174 Fed. 827.

A town, under the laws of the state of New York, being a corporation in respect to the making of contracts, the right to sue, and the liability to be sued, negotiable instruments made by it are within the exception of the statute. Andes v. Ely (1895) 15 Sup. Ct. 954, 959, 158 U. S. 312, 39 L. Ed. 996.

A municipal corporation is a corporation within this provision. Loeb v. Trustees of Columbia Tp. (1900) 21 Sup. Ct. 174, 176, 179 U. S. 472, 45 L. Ed. 280.

A civil township, made a body politic and corporate by the state statutes and authorized to issue negotiable bonds, is a corporation within the meaning of the federal judiciary act. Loeb v. Trustees of Columbia Tp., Hamilton County, Ohio (C. C. 1899) 91 Fed. 37, reversed

(1900) 21 S. Ct. 174, 179 U. S. 472, 45 L. Ed. 280.

375. What are choses in action.—A claim, founded on contract, to recover a sum of money out of a fund in the hands of a railroad company, is a "chose in action." Mexican Nat. R. Co. v. Davidson (1895) 15 Sup. Ct. 563, 157 U. S. 201, 39 L. Ed. 672, questions certified and answered in the negative Davidson v. Mexican Nat. R. Co. (C. C. 1893) 58 Fed. 653.

The phrase "chose in action" does not include rights of action founded on some wrongful act, or neglect of duty, causing the damage, but is limited to suits founded on contracts containing within themselves some promise or duty to be performed. Conn v. Chicago, B. & Q. R. Co. (C. C. 1891) 48 Fed. 177, 178.

The term "chose in action" includes actions for damages growing out of rights of action founded on contracts containing within themselves some promise or duty to be performed. Goldman v. Furness, Withy & Co. (D. C. 1900) 101 Fed. 467, 468.

376. Accounting.—Complainant B. B., a citizen of West Virginia, entered a partnership with defendant and G., both residents of New York, for the exploitation of gas land and the construction and operation of a carbon plant; G. agreeing to drive the gas well on the land of complainant B. B., defendant to construct and operate the plant, the proceeds to be divided, one-third to complainant B. B., one-half to defendant, and one-sixth to G. G. thereafter assigned his interest to complainant J. B., a citizen of West Virginia, whereupon complainants sued defendant in the federal court for dissolution of the partnership and for an accounting. Held, the term "chose in action" was sufficiently broad to cover the right of complainant J. B., whether by his purchase he became a partner, or whether his right of action was limited to compensation for drilling a well out of profits earned by defendant; and hence, since G. could not have maintained an action against defendant in the federal court for such relief, such court had no jurisdiction of the joint action by G.'s assignee and his co-complainant. Brown v. Beacom (1909) 174 Fed. 812, 98 C. C. A. 520.

An assignee of a right to an account of the proceeds of sales of mortgaged property cannot maintain a suit in the circuit court of the United States, in a case where his assignors were not competent, on the ground of citizenship, to sue the defendants. Wilkinson v. Wilkinson (C. C. 1856) Fed. Cas. No. 17,677.

A purchaser at an execution sale of the interest of one partner in the partnership assets, if such purchaser be a nonresident of the state, may maintain a bill in equity against the remaining partner for a division of such assets and an accounting, though the partner whose interest is so purchased could not himself have filed such bill for want of the requisite citizenship. McNichol v. Phelps (C. C. 1882) 16 Fed. 8.

377. Breach of duty of carriage.—In an action against two railroad companies, the complaint alleged the delivery of goods to one which it accepted as a common carrier, and agreed and undertook to carry and safely deliver to the second; that it failed to take proper care of such goods, whereby they became damaged and injured in transit; that it delivered the same to the second company, which accepted them as a common carrier, and agreed and undertook to carry them and safely deliver them to a third company, but, in violation of its agreement and duty, diverted and unreasonably delayed the shipment; and that the goods were finally sold by both defendants without notice to plaintiff. Held, that the action was one for breach of duty as a carrier, arising by operation of law or by express contract, and in either case was in tort, and not to recover on a chose in action, and might, therefore, be brought in a federal court by an assignee without reference to the citizenship of his assignor. Muller v. Chicago, I. & L. R. Co. (C. C. 1906) 149 Fed. 939.

378. County or municipal warrants, bonds, and coupons.—County bonds and coupons, being made by a corporation, come within the exception to the general rule that an assignee cannot sue on a chose in action in the federal courts unless the citizenship of the original owner was such as would have enabled him to maintain the suit. Board of Com'rs of Kearney County v. McMaster (1895) 68 Fed. 177, 15 C. C. A. 353; Board of Com'rs of Kearny County v. Irvine (1903) 126 Fed. 689, 61 C. C. A. 607 (modifying decree Coffin v. Board of Com'rs of Kearney County [C. C. 1902] 114 Fed. 518, and writ of certiorari denied [1904] 24 Sup. Ct. 851, 192 U. S. 607, 48 L. Ed. 585); Cloud v. City of Sumas (C. C. 1892) 52 Fed. 177; McLean v. Valley County, Neb. (C. C. 1896) 74 Fed. 389, judgment affirmed Valley County v. McLean (1897) 79 Fed. 728, 25 C. C. A. 174.

The holder may sue without reference to the citizenship of any prior holder and unaffected by the circumstance that the municipality may be entitled to make a defense based upon equities between the original parties. Independent School Dist. of Ackley v. Hall (1885) 5 Sup. Ct. 371, 113 U. S. 135, 28 L. Ed. 954.

A citizen of California can recover upon bonds held in his own right, although acquired by assignment from citizens of New Jersey, who could not sue in the courts of the United States; but he is compelled to rely on the title of

his assignors to avoid the matter pleaded in bar to the action. New Providence Tp. v. Halsey (1886) 6 Sup. Ct. 765, 766, 117 U. S. 336, 29 L. Ed. 904.

A suit in equity against certain municipalities by an alien assignee of warrants issued by the police board of such municipalities prior to the repeal of an act which gave the board power to issue warrants for police expenses, and to apportion the expenses against the municipalities to be paid by taxes raised by them, for the application thereto, as assets of the board, of amounts due to it, on apportionments made and taxes levied and collected, is a suit to establish a claim on the warrants, and to enforce payment by a decree over against the municipalities, dispensing with judgment against the board by reason of the dissolution, and hence a suit to recover the contents of choses in action, of which the United States court had no jurisdiction, in the absence of an averment in the bill that it could have been maintained by the assignors. City of New Orleans v. Benjamin (1894) 153 U. S. 411, 14 Sup. Ct. 905, 38 L. Ed. 764.

A municipal corporation is a corporation within this provision. Loeb v. Trustees of Columbia Tp. (1900) 21 Sup. Ct. 174, 176, 179 U. S. 472, 45 L. Ed. 280.

As to negotiable municipal obligations under former law, see, also, Adams v. Republic County Com'rs (C. C. 1885) 23 Fed. 211; Town of Thompson v. Perrine (1883) 106 U. S. 589, 1 Sup. Ct. 564, 568, 27 L. Ed. 298; Chickaming Tp. v. Carpenter (1883) 106 U. S. 663, 1 Sup. Ct. 620, 27 L. Ed. 307; Cooper v. Thompson (D. C. 1876) Fed. Cas. No. 3,202; Perrine v. Thompson (C. C. 1879) Fed. Cas. No. 10,997; Ackley School Dist. v. Hall (1885) 113 U. S. 135, 5 Sup. Ct. 371, 28 L. Ed. 954; New Providence Tp. v. Halsey (1886) 117 U. S. 336, 6 Sup. Ct. 764, 29 L. Ed. 904; Inhabitants of New Providence Tp. v. Halsey (1886) 117 U. S. 336, 6 Sup. Ct. 764, 29 L. Ed. 904; Halsey v. New Providence Tp. (C. C. 1880) 3 Fed. 364; Porter v. City of Janesville, Id. 617; Farr v. Town of Lyons (C. C. 1882) 13 Fed. 377; Blacklock v. Small (1887) 127 U. S. 96, 8 Sup. Ct. 1096, 32 L. Ed. 70; Jerome v. Rio Grande County Com'rs (C. C. 1883) 18 Fed. 873; Pettit v. Hope (C. C. 1880) 2 Fed. 623.

The federal court has jurisdiction on the ground of diverse citizenship of a suit by the assignee of the payees of police warrants if such payees might at the time suit was commenced have themselves prosecuted suit therein on that ground had there been no assignment or transfer. Emsheimer v. New Orleans (1902) 22 Sup. Ct. 770, 774, 186 U. S. 33, 46 L. Ed. 1042.

A county warrant made payable "to A. B., or bearer," is legally equivalent to one made payable simply "to bearer," and the assignee thereof may maintain an action thereon in a federal court, without reference to the citizenship of A. B., if the other requisite jurisdictional facts appear. Thompson v. Searcy County (1893) 57 Fed. 1030, 6 C. C. A. 674, judgment affirmed (1895) 66 Fed. 92, 13 C. C. A. 349.

A federal court may have jurisdiction of causes of action on coupons made by a municipal corporation and payable to bearer, though the original holders could not have maintained action on them. Independent School Dist. of Sioux City v. Rew (1901) 111 Fed. 1, 49 C. C. A. 198, 55 L. R. A. 364.

The rule applied that city notes payable to bearer are excepted from Judiciary Act Aug. 13, 1888, substantially re-enacted herein, whether they were first negotiated to a citizen of a state other than that of maker or not. Citizens' Sav. Bank v. City of Newburyport (1909) 169 Fed. 766, 95 C. C. A. 232, writ of certiorari denied City of Newburyport v. Citizens' Sav. Bank (1909) 30 Sup. Ct. 399, 215 U. S. 598, 54 L. Ed. 342.

A holder of county railway aid bonds may sue the county in a federal court, where the covenant is to pay the holder, although the bonds were originally issued to a railroad company in the same state with the county. McCoy v. Washington County (C. C. 1862) Fed. Cas. No. 8,731. CONTRA, see Clarke v. Janesville (D. C. 1856) Fed. Cas. No. 2,854.

The court has no jurisdiction of an action by an assignee on a county warrant payable to the order of a person named therein, and passing only by indorsement, in the absence of averment that the assignor was qualified to sue in this court, but has jurisdiction of an action by the holder on one payable to bearer, such being a negotiable security made by a corporation. Rollins v. Chaffee County (C. C. 1888) 34 Fed. 91.

Drain orders drawn by a county drain commissioner upon the county treasurer are so far negotiable that action may be brought upon them by the holder, in the federal court, though the court would have no jurisdiction of an action brought by the assignor of the holder. Aylesworth v. Gratiot County (C. C. 1889) 43 Fed. 350, judgment affirmed Gratiot County v. Aylesworth (1895) 15 Sup. Ct. 1039, 159 U. S. 250, 40 L. Ed. 146.

Defendant city, having voted bonds for the erection of waterworks, contracted for the same with F. & Co. Plaintiffs furnished the pipes for the works, and an agreement was made between plaintiffs, defendant, and the contractors by which plaintiffs were to be paid for the material furnished soon after the works were completed. Upon the completion of the works the contractors drew an order on the city in favor of plaintiffs for the amount due, which order was duly accepted by de-

fendant. Held, that the order and acceptance constituted a direct agreement between plaintiffs and defendant, and were not an assignment of the contractors' claim. Ripley v. City of Superior (C. C. 1890) 41 Fed. 113, judgment affirmed City of Superior v. Ripley (1890) 11 Sup. Ct. 288, 138 U. S. 93, 34 L. Ed. 914.

The holder of a municipal bond, payable to a person named or order, and indorsed in blank by the payee, can only maintain an action thereon in a federal court where the payee might have done so. Thomson v. Town of Elton (C. C. 1900) 100 Fed. 145.

See, also, 373, ante, this subdivision.

379. **Contracts.**—A suit to compel the specific performance of a contract was a suit to recover the contents of a chose in action. Corbin v. Black Hawk County (1881) 105 U. S. 659, 26 L. Ed. 1136.

A suit to compel the specific performance of a contract or to enforce its stipulations, is a suit to recover the contents of a chose in action and so is not maintainable in the federal courts by the assignee, if it could not have been prosecuted by the assignor. Corbin v. Black Hawk County (1881) 105 U. S. 659, 663, 26 L. Ed. 1136.

A suit to enforce a contract is a suit to recover the contents of a chose in action. Shoecraft v. Trustees of Internal Imp. Fund (1888) 8 Sup. Ct. 686, 689, 124 U. S. 730, 31 L. Ed. 574.

A suit by the assignee of an oral contract to recover a sum of money due thereon is one "to recover the contents of a chose in action," and a federal court is without jurisdiction of such suit unless it could have been maintained by the assignor. Utah-Nevada Co. v. De Lamar (1904) 133 Fed. 113, 66 C. C. A. 179, writ of certiorari denied De Lamar v. Utah-Nevada Co. (1905) 26 Sup. Ct. 746, 199 U. S. 605, 50 L. Ed. 330.

An action to recover damages for a refusal to accept and pay for merchandise purchased under an oral contract, is a suit to recover the contents of a chose in action, and the circuit court has no jurisdiction of such suit in favor of an assignee, unless it might have been prosecuted in such court if no assignment had been made. Simons v. Ypsilanti Paper Co. (C. C. 1888) 33 Fed. 193.

A mortgagee, holding by assignment a contract between corporations of the same state, cannot sue in a federal court for specific performance, though itself a corporation of another state. Boston Safety & Deposit Co. v. City of Plattsmouth (C. C. 1896) 76 Fed. 881.

A suit to rescind a contract for the building of a steamship made between defendant and complainant's promoters held not one brought by complainant as assignee in which the jurisdiction of the court was dependent on the right of its assignor to sue. Commonwealth S. S. Co. v. American Shipbuilding Co. (D. C. 1912) 197 Fed. 780.

380. **Conveyances.**—A citizen of one state having title to lands in another is not precluded from suing for those lands in the federal courts by the fact that he derives his title from a citizen of the state in which the lands are located. McDonald v. Smalley (1828) 1 Pet. 620, 624, 7 L. Ed. 287.

The provision of section 11 of the judiciary Act of 1789, substantially re-enacted herein, in relation to suits by assignees, is inapplicable to a conveyance of land between citizens of different states. Briggs v. French (C. C. 1835) Fed. Cas. No. 1,871.

A sale and conveyance under a decree of foreclosure of a waterworks plant, together with the rights of all the parties in the franchise and contract under which it was constructed, does not operate merely as an assignment of the contract. In such case the conveyance vests the purchaser with rights in real property, to the full enjoyment of which the enforcement of the contract is a necessary incident. Portage City Water Co. v. City of Portage (C. C. 1900) 102 Fed. 769.

380½. **Damages for trespass to lands.**—The provision does not deprive federal courts of jurisdiction of an action by an assignee to recover damages for a trespass in entering upon lands and cutting down trees. Ambler v. Eppinger (1890) 137 U. S. 480, 11 Sup. Ct. 173, 34 L. Ed. 765.

381. **Failure to protest drafts or notes.**—A suit against a bank to recover for neglecting to protest drafts forwarded by a correspondent bank, brought by an assignee of the right of action, is not a suit to recover the contents of a chose in action in favor of an assignee. Barney v. Globe Bank (C. C. 1862) Fed. Cas. No. 1,031.

An action to recover damages for failing properly to present and protest a note by an assignee thereof is an action to recover on a chose in action. Anderson v. Manufacturers' Bank (N. Y. 1862) 14 Abb. Prac. 436.

382. **Illegal execution of notes.**—An action on relation of the assignee of a note on the official bond of a township trustee for illegally executing the note is not an action by the assignee of a negotiable instrument so as to fall within the rule prohibiting the maintenance of an action by the assignee of a chose in action unless his assignor maintained the same. Indiana v. Glover (1895) 15 Sup. Ct. 186, 189, 155 U. S. 513, 39 L. Ed. 243.

383. **Insurance policies.**—Pending an action in a New York court against a corporation of that state by a citizen of New Jersey, upon a policy of insurance on the life of her husband, the plaintiff assigned the policy to a citizen of New York in trust for her benefit and

was afterward nonsuited. Held, that the federal court would entertain jurisdiction, since it could have taken jurisdiction without the assignment. Manhattan Life Ins. Co. v. Broughton (1883) 3 Sup. Ct. 99, 109 U. S. 121, 27 L. Ed. 878.

An action to recover on an insurance policy, and to reform the same, is an action "to recover the contents of a chose in action," and, where both plaintiff's assignor and defendant are aliens, and no federal question is involved, the federal court will decline jurisdiction. Laird v. Indemnity Mut. Marine Assur. Co. (C. C. 1890) 44 Fed. 712.

Plaintiff and other insurance companies paid losses on buildings destroyed by fire alleged to have been negligently caused by defendant railroad company. One was a foreign corporation, which paid losses on three buildings; one being more than the jurisdictional amount, and the others less. Others paid losses on the same buildings and others, each less than that amount, but aggregating more as to each building. All of the claims were united by assignments in plaintiff, a corporation of another state, which brought suit thereon in a federal court, joining in separate counts the claims relating to each building. Held that, as to the three counts containing the claims of the foreign company on which it might have brought suit in that court by reason of its large claim, the court had jurisdiction, but that it did not have jurisdiction of the other counts, none of the claims in which could have been sued therein by the assignor. Hartford Fire Ins. Co. v. Erie R. Co. (C. C. 1909) 172 Fed. 899.

384. **Judgments.**—The assignee of a judgment founded on a contract cannot maintain a suit thereon in a United States court unless such suit might be prosecuted there, had no assignment been made. Walker v. Powers (1881) 104 U. S. 245, 26 L. Ed. 729.

The federal courts have no jurisdiction of a suit by the assignee of a judgment to subject thereto property of the judgment debtor standing in the name of a third person, when the assignor is a citizen of the same state as the defendant. Mississippi Mills v. Cohn (1893) 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052, affirming (C. C. 1889) 39 Fed. 865.

The fact that the original ground of suit in a state court between citizens of different states was a negotiable chose in action will not prevent the federal court taking jurisdiction of a bill in equity in favor of the assignee of the judgment, who is a citizen of the same state with plaintiff. Dexter v. Smith (C. C. 1821) Fed. Cas. No. 3,866.

An action by a resident of one state against a corporation of another state, to vacate, because of failure of consideration, a satisfaction of judgments of courts of the state in which the corporation was organized, which plaintiff had obtained by assignment from a resident of such state, is founded on the implied obligation of the corporation to make the judgments good if the consideration for the satisfaction failed, and not on the judgments. Hay v. Alexandria & W. R. Co. (C. C. 1884) 20 Fed. 15.

A national bank located in Pennsylvania recovered a judgment in the Supreme Court of New York against a New York corporation and issued an execution thereon, which was returned unsatisfied. The bank then assigned the judgment, with all its rights, to plaintiff, a citizen of New York who brought suit thereon in a federal court in Pennsylvania against a citizen of that state to enforce his statutory liability under the laws of New York as a stockholder of the judgment defendant. Held, that such suit was one to recover the contents of the judgment, which was a chose in action, and, since it could not have been maintained by the bank in such court could not be by plaintiff as its assignee. Sullivan v. Ayer (C. C. 1909) 174 Fed. 199.

A federal court is not deprived of jurisdiction of a suit by an assignee of four state court judgments to set aside satisfactions executed by himself because the assignors of two of the judgments could not have sued in that court. Hay v. Alexandria & W. R. Co. (C. C. 1884) 20 Fed. 15.

385. **Liabilities created by state statute.**—An action on a bill of exchange payable to bearer, brought by the transferee thereof against stockholders of the corporation which drew it, to enforce their individual liability imposed by Civ. Code Cal. § 322, is not founded on the assignment of the bill, but on the liability created by that section, and can be brought in the district court in a proper case, without regard to the judiciary act. Barling v. Bank of British North America (1892) 50 Fed. 260, 1 C. C. A. 510, affirming Bank of British North America v. Barling (C. C. 1891) 46 Fed. 357.

386. **Mortgages.**—Where a mortgagor and mortgagee resided in the same state, and the mortgagee assigned the mortgage to a citizen of another state, it was held that the assignee could not file his bill for foreclosure in the circuit court of the United States. Sheldon v. Sill (1850) 8 How. 441, 12 L. Ed. 1147; Hill v. Winne (D. C. 1859) Fed. Cas. No. 6,503.

The relief sought by way of foreclosure of certain trust deeds stamps the suit as one to recover the contents of a chose in action, although the bill also prays for a cancellation of a release of the trust deeds to the grantor, as in fraud of the rights of the complainant, who held the deeds and the notes secured thereby as collateral security for a loan to the trustee. Kolze v. Hoad-

ley (1906) 26 Sup. Ct. 220, 221, 200 U. S. 76, 50 L. Ed. 377.

The right of a citizen of another state to foreclose a mortgage in a federal court is unaffected by an assignment by the mortgagee for the benefit of creditors. Edwards v. Hill (1894) 59 Fed. 723, 8 C. C. A. 233.

A trustee in a mortgage executed by a water company, claiming the right by virtue of the provisions of such mortgage to collect rentals due the company, cannot maintain an action against a city to recover an amount alleged to be due the company as rentals in a federal court, where the company and city are corporations of the same state; his sole right to maintain such an action being as assignee of the contract between the city and company. City of Eau Claire v. Payson (1901) 107 Fed. 552, 46 C. C. A. 466, rehearing denied (1901) 109 Fed. 676, 48 C. C. A. 608.

Suit by Arizona corporation, an assignee of the right of action, against residents of California held a suit to redeem under an equitable mortgage, and not a suit on a chose in action, of which the District Court would not have had jurisdiction if the assignor could not have sued. Power & Irrigation Co. of Clear Lake v. Stephens (1915) 226 Fed. 642.

A suit to have a deed adjudged a mortgage, and for relief based thereon, is not one based on a chose in action, which could not be brought in the federal court, if plaintiff's predecessor in interest, the grantor, could not bring it there. Power & Irrigation Co. of Clear Lake v. Adamson (1915) 226 Fed. 645.

The section is inapplicable to the assignment of a mortgage, and an assignee thereof may file a bill of foreclosure in the federal court without regard to the citizenship of his assignor. Dundas v. Bowler (C. C. 1843) Fed. Cas. No. 4,140; Seckel v. Backhaus (C. C. 1877) Fed. Cas. No. 12,599. CONTRA, see Hill v. Winne (D. C. 1859) Fed. Cas. No. 6,503.

An action to foreclose a mortgage, where the note is void because of a fraudulent alteration, and the mortgage has been assigned, is not within the jurisdiction of the federal court, where the assignor and the mortgagor were citizens of the same state at the time the mortgage was given, though the assignee and the mortgagor were citizens of different states at the time the suit was brought. Mersman v. Werges (C. C. 1880) 3 Fed. 378, decree reversed (1884) 5 S. Ct. 65, 112 U. S. 139, 28 L. Ed. 641.

The federal court has jurisdiction in a real action for the possession of land, brought by an assignee of a note and mortgage. Whiting v. Wellington (C. C. 1882) 10 Fed. 810.

A mortgage given by a water company covering rentals accruing to it under a contract with a city is no more than an assignment of a chose in action as to such rentals, and the mortgagee cannot maintain an action against the city to enforce payment of the same in a federal court, where the mortgagor and the city are both corporations of the same state; nor can one claiming the right to enforce the contract by subrogation to the rights of the mortgagee. American Waterworks & Guarantee Co. v. Home Water Co. (C. C. 1902) 115 Fed. 171, appeal dismissed American Water Works & Guaranty Co. v. Little Rock (1904) 24 S. Ct. 855, 194 U. S. 639, 48 L. Ed. 1162.

A suit to foreclose trust deeds securing notes, with relief incidental thereto, is one to collect the money due on the notes. Hoadley v. Day (C. C. 1904) 128 Fed. 302.

A suit to have an instrument in form a deed declared a mortgage in accordance with the contract of the parties, and to redeem therefrom, held a suit to recover upon a chose in action, which could not be maintained in a federal court by an assignee of the grantor, where for want of diversity of citizenship the assignor could not have maintained it in such court. Power & Irrigation Co. of Clear Lake v. Capay Ditch Co. (D. C. 1914) 213 Fed. 399.

As to right to foreclose because of negotiable character of note under former law, see, also, Tredway v. Sanger (1883) 2 Sup. Ct. 691, 107 U. S. 323, 27 L. Ed. 582; Mersman v. Werges (1884) 5 Sup. Ct. 65, 67, 112 U. S. 139, 28 L. Ed. 641.

387. Open accounts.—The federal court has no jurisdiction of a suit on an open account, brought by an assignee thereof, who is a citizen of another state, when the assignor, at the time of making the assignment, was a citizen of the same state with defendant. Chase v. Sheldon Roller Mills Co. (C. C. 1893) 56 Fed. 625.

388. Pledges.—Under Act March 3, 1887, as corrected by Act Aug. 13, 1888, and substantially re-enacted by this section, a pledgee of stock cannot, on account of the diverse citizenship existing between himself and the corporation, sue the corporation in the federal court for the appointment of a receiver where his pledgor is a resident of the state of which the corporation is a citizen. Gorman-Wright Co. v. Wright (1904) 134 Fed. 363, 67 C. C. A. 345.

389. Possessory actions.—The statute does not apply to a suit by such assignee, to recover possession of the thing in specie, or damages for its wrongful detention, but only to actions brought to recover the contents or enforce the contract contained in the thing assigned. Deshler v. Dodge (1853) 57 U. S. (16 How.) 622, 14 L. Ed. 1084.

The federal court for the district of Ohio, has jurisdiction of an action of replevin for a quantity of bank bills,

brought against a citizen of Ohio by a citizen of New York, to whom they have been assigned by a citizen of Ohio. Deshler v. Dodge (1853) 57 U. S. (16 How.) 622, 14 L. Ed. 1084.

An action of replevin by the assignee of a promissory note, secured by a chattel mortgage, to recover possession of the mortgaged property from a stranger to the contract, for the purpose of ultimately subjecting it to the mortgage, is not a suit to recover the contents of a chose in action, so as to make the jurisdiction of a federal court dependent on whether it would have had jurisdiction if no assignment or transfer had been made. Buckingham v. Dake (1901) 112 Fed. 258, 50 C. C. A. 492.

A county subscribed for stock in a railroad company, to be paid by an issue of county bonds, under an act which prescribed that the bonds, when executed, "shall be deposited with the trustee, to be held in escrow, and to be delivered to the said railroad company when it shall have become entitled to the same" by compliance with the prescribed conditions upon which the subscription was made. Held, where the bonds were withheld by the trustee, upon compliance with the conditions, that the right of the railroad company was one "to recover the contents of a chose in action," and therefore, where the railroad company and the trustee are citizens of the same state, an assignee of the company cannot sue to recover the bonds in a federal court. Jackson & Sharp Co. v. Pearson (C. C. 1892) 60 Fed. 113.

390. Quieting title.—A suit to quiet title to land and for the cancellation of tax deeds under which defendants claim, where complainant sues as assignee of a mortgage and of a certificate of purchase in foreclosure proceedings thereunder which admittedly has not ripened into the legal title, is a suit to recover the contents of such instruments as choses in action, and cannot be maintained in a federal court, unless a suit might have been prosecuted thereon in such court if no assignment had been made. Farr v. Hobe-Peters Land Co. (1910) 188 Fed. 10, 110 C. C. A. 160, reversing decree Hobe-Peters Land Co. v. Farr (C. C. 1908) 170 Fed. 644.

Bill in nature of mortgagor's bill to quiet title held not based upon a chose in action within this section, so as to exclude the District Court from taking jurisdiction if assignor of plaintiff could not sue therein. Power & Irrigation Co. of Clear Lake v. Capay Ditch Co. (1915) 226 Fed. 634.

391. Recovery of payments.—Under a state statute complaint in action to recover payments under contract held one on a "chose in action" within this section. Power & Irrigation Co. of Clear Lake v. Bank of Woodland (1915) 226 Fed. 698.

A claim against a railroad company for overcharges in freight is not a "chose in action," within the provision of the act, and an assignee of such claims may sue a nonresident company thereon, without regard to the citizenship of his assignors. Conn v. Chicago, B. & O. R. Co. (C. C. 1891) 48 Fed. 177.

Where plaintiff's assignor, a citizen of the same state as defendants, sued on the assigned claim to recover money paid on a contract for the sale of stock which defendant sought to rescind without restoring the amount received, the claim was a "chose in action" within this section, and jurisdiction did not appear, though plaintiff was a nonresident. Power & Irrigation Co. of Clear Lake v. Bank of Woodland (D. C. 1914) 213 Fed. 109.

392. Suits to restrain ultra vires acts of corporations.—R. S. § 629, substantially re-enacted herein held not to apply to a bill by a nonresident stockholder of a corporation, who acquired his stock by assignment from a resident of the state where the corporation was domiciled, to restrain the latter's directors and trustees from using the corporate assets for an alleged ultra vires business, affecting complainant's interest only in common with all other stockholders. Consumers' Gas Trust Co. v. Quinby (1905) 137 Fed. 882, 70 C. C. A. 220, writ of certiorari denied (1905) 25 S. Ct. 803, 198 U. S. 585, 49 L. Ed. 1174.

393. Suits to set aside fraudulent conveyances.—See 264, 265, 366 et seq., ante, this subdivision.

394. Transfer of corporate stock.—A proceeding in equity to compel the transfer upon the books of a corporation of corporate stock which the complainant had purchased from a third person is not a suit "to recover the contents of any promissory note or other chose in action in favor of any assignee," of which jurisdiction is excluded from the federal courts. Jewett v. Bradford Sav. Bank & Trust Co. (C. C. 1891) 45 Fed. 801.

395. Trusts.—A suit to enforce rights in the corpus of a trust estate of persons claiming under the assignee of a part of the beneficiary's interest in the trust, by which the income was to be paid to the beneficiary until he reached a certain age, when the fund was to become his absolutely, is not within this section, governing suits to recover on a chose in action by an assignee or subsequent holder. Brown v. Fletcher (1915) 35 S. Ct. 154, 235 U. S. 589, 59 L. Ed. 374; Brown v. Fletcher (1915) 35 S. Ct. 750, 237 U. S. 583, 59 L. Ed. 1128, reversing decree (1913) 206 F. 461, 124 C. C. A. 367.

A bill held not one by an assignee to recover the contents of a chose in action, but one to enforce a trust ex maleficio. Prest-O-Lite Co. v. Avery Pom-

able Lighting Co. (C. C. 1908) 164 Fed. 60.

396. Who are assignees.—The indorsee or holder of a note, payable to a certain person "or bearer," may sue thereon in the federal court, if a citizen of another state, regardless of the citizenship of the payee named. Bullard v. Bell (C. C. 1817) Fed. Cas. No. 2,-121; Wood v. Dummer (C. C. 1824) Fed. Cas. No. 17,944; Halsted v. Lyon (C. C. 1840) Fed. Cas. No. 5,968; Sackett v. Davis (C. C. 1842) Fed. Cas. No. 12,203; Towne v. Smith (C. C. 1846) Fed. Cas. No. 14,115; Varner v. West (C. C. 1873) Fed. Cas. No. 16,-885; Codman v. Vermont & C. R. Co. (C. C. 1879) Fed. Cas. No. 2,936.

A general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued therein. Sere v. Pitot (1810) 6 Cranch, 332, 334, 3 L. Ed. 240.

In a suit on a note held that objection to jurisdiction on the ground that the note was given to plaintiff and another, and the latter was a citizen of the state wherein the suit was brought, and suit is interdicted by the prohibition of the Judiciary Act, could not be sustained. McMicken v. Webb (1837) 11 Pet. 25, 38, 9 L. Ed. 618.

The owner of coupon bonds payable to the bearer is not an assignee within the meaning of the statute defining the jurisdiction of the federal courts; hence the right to sue in those courts does not depend upon the former owner. Thompson v. Perrine (1882) 1 Sup. Ct. 564, 568, 106 U. S. 589, 27 L. Ed. 298.

A corporation which constructed a railroad in consideration of receiving from the railroad company certain lands to which it was entitled by a grant from the state and a contract with the trustees of the state internal improvement fund is an assignee of a chose in action within the meaning of the statute, and cannot maintain in the federal court a suit to compel specific performance unless its assignee could. Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co. (1894) 14 Sup. Ct. 483, 152 U. S. 71, 38 L. Ed. 358.

A purchaser of warrants at a judicial sale under authority of an order of the probate court was an assignee, within the meaning of Act March 3, 1875. Glass v. Police Jury of Parish of Concordia (1900) 20 Sup. Ct. 346, 347, 176 U. S. 207, 44 L. Ed. 436.

A New York corporation may bring suit in a federal court on the notes of an Illinois corporation, although the treasurer of the latter corporation, to whose order the notes were made payable, and by whom they were, before delivery, indorsed to the New York corporation, which loaned the money for which they were given, may be a citizen of Illinois. Blair v. Chicago (1906) 26 Sup. Ct. 427, 432, 201 U. S. 400, 50 L. Ed. 801, reversing decree Govin v. City of Chicago (C. C. 1904) 132 Fed. 848.

The Illinois statute giving a plaintiff in attachment the right to bring an action on a forthcoming bond taken by the sheriff, "the same as if such bond had been assigned to him," does not render him, in fact or constructively, an assignee, within the meaning of the federal judiciary act. Smith v. Packard (1900) 98 Fed. 793, 39 C. C. A. 294.

An executor or administrator is not an "assignee," within the meaning of the section. Mayer v. Foulkrod (C. C. 1823) Fed. Cas. No. 9,341.

The assignee of a bail bond is not an assignee of a chose in action within the act. Bobyshall v. Oppenheimer (C. C. 1824) Fed. Cas. No. 1,592.

A receiver appointed on a voluntary dissolution of a bank (in Michigan) stands in the relation of the assignee of an insolvent debtor. Bradford v. Jenks (C. C. 1840) Fed. Cas. No. 1,769.

Action was begun in the federal court in North Carolina, by a citizen of New York against a citizen of North Carolina, on a note made to the cashier of a national bank, which was also a citizen of the latter state. The note had been indorsed to the plaintiff, and after indorsement the bank became insolvent, and a receiver was appointed. Plaintiff contended that suit could have been brought on the note by the receiver had no assignment been made, and that the court therefore had jurisdiction. Held, that the receiver would himself have been an assignee of the note, although the assignment would have been effected by operation of law, and that, as the bank could not have brought suit on the note, the court had no jurisdiction. U. S. Nat. Bank v. McNair (C. C. 1893) 56 Fed. 323.

A nonresident assignee of a share in the estate of an intestate, who sues the administrators and their sureties to enforce obligations incurred by an alleged failure to properly discharge their duties, is not an assignee of a chose in action, so as to be precluded from maintaining the suit in a federal court by the fact that his assignor could not have maintained it therein. Bertha Zinc & Mineral Co. v. Vaughan (C. C. 1898) 88 Fed. 566.

Where the receiver of a railroad corporation completed the road, and thereby became entitled to a town subscription, the receiver's successor was not an assignee. Paige v. Town of Rochester (C. C. 1905) 137 Fed. 663.

397. Intermediate assignees.—The limitation does not extend to intermediate assignees, and it is sufficient to sustain jurisdiction where it is shown that the original holder of the chose in action, as well as plaintiff and his immediate assignor, might have prosecuted the suit in that court. Farr v. Hobe-Peters Land Co. (1910) 188 Fed.

10, 110 C. C. A. 160 (reversing decree Hobe-Peters Land Co. v. Farr [C. C. 1908] 170 Fed. 644); Milledollar v. Bell (C. C. 1852) Fed. Cas. No. 9,549; Portage City Water Co. v. City of Portage (C. C. 1900) 102 Fed. 769; Emsheimer v. City of New Orleans (C. C. 1900) 116 Fed. 893.

An alien assignee of a judgment obtained by a nonresident can maintain a suit thereon in the federal court, though his immediate assignor was a citizen of the same state with defendant. Wilson v. Fisher (C. C. 1830) Fed. Cas. No. 17,803.

As against remote indorsers, except in the case of a foreign bill of exchange, plaintiff must show that the intermediate indorsers could have sustained an action in the federal court. Campbell v. Jordan (C. C. 1847) Fed. Cas. No. 2,362.

398. What constitutes assignment.—A deed of trust, in the nature of a mortgage, set out in full a contract between the mortgagor and certain parties for the conveyance of several parcels of land to him, and then conveyed to the mortgagee all the right, title, and interest which he (the mortgagor) had, or might thereafter acquire "in and to" the lands embraced in the contract. Held, that the conveyance was in legal effect an assignment of the contract. Shoecraft v. Trustees of Internal Imp. Fund (1888) 8 Sup. Ct. 686, 689, 124 U. S. 730, 31 L. Ed. 574.

The jurisdiction of a court of the United States, on the ground of diverse citizenship, of a suit by a foreign corporation against residents of the state, is not defeated on the theory that plaintiff is suing as the assignee of a domestic corporation, where the bill, although emphasizing the existence of certain contracts between defendants and its assignor, and alleging that it became substituted for such assignor as a party thereto, contains allegations which show that the parties, having the old contracts before them, entered into new agreements determined by reference to the terms of the old contracts, but none the less personal and immediate. American Colortype Co. v. Continental Colortype Co. (1903) 23 Sup. Ct. 265, 188 U. S. 104, 47 L. Ed. 404.

Where a city ordinance under which a water franchise was granted, provided that hydrant rentals should be paid to plaintiff, a nonresident corporation as trustee, the fact that the original ordinance granting the franchise was not to the water company, but to M. and his assigns, who assigned the same to the water company, and that both M. and the company were citizens of the same state, did not preclude the trustee from bringing an action to recover such rents in the federal court. City of Seymour v. Farmers' Loan & Trust Co. (1904) 128 Fed. 907, 63 C. C. A. 633.

Defendant city, having voted bonds for the erection of waterworks, contracted for the same with F. & Co. Plaintiffs furnished the pipes for the works, and an agreement was made between plaintiffs, defendant, and the contractors by which plaintiffs were to be paid for the material furnished soon after the works were completed. Upon the completion of the works, the contractors drew an order on the city in favor of plaintiffs for the amount due, which order was duly accepted by defendant. Held, that the order and acceptance constituted a direct agreement between plaintiffs and defendant, and were not an assignment of the contractors' claim. Ripley v. City of Superior (C. C. 1890) 41 Fed. 113, judgment affirmed City of Superior v. Ripley (1890) 11 S. Ct. 288, 138 U. S. 93, 34 L. Ed. 914.

Where contractor assigned amount due and the other party to the contract consented to the assignment and agreed to pay the assignee, held that, in determining jurisdiction of United States court of action by assignee, contractor's citizenship was immaterial. J. I. Case Threshing Mach. Co. v. Road Improvement Dist. No. 3 of Pulaski County, Ark. (D. C. 1914) 210 Fed. 366.

399. Cause of action arising after assignment.—A suit to declare and enforce a lien on certain interests in distributive shares of the property of a decedent in the hands of an ancillary administrator is not within this section, because plaintiff's right is derived from an heir whose citizenship is the same as that of such administrator, where plaintiff, who sues as administratrix, and who is a citizen of a different state from the defendant administrator, is suing primarily on the obligation of such heir to her intestate, to secure which a lien was given upon such heir's distributive share. Ingersoll v. Coram (1908) 29 Sup. Ct. 92, 98, 211 U. S. 335, 53 L. Ed. 208, reversing decree Coram v. Ingersoll (1906) 148 Fed. 169, 78 C. C. A. 303.

An action by a lessor against one to whom the lessee has transferred the lease, for the recovery of rent, is not one in which the plaintiff sues in the right of an assignee but is brought in his own right as an original party to the contract and on a cause of action which never existed in favor of the lessee and the citizenship of the latter cannot affect the jurisdiction of a federal court in the case. Adams v. Shirk (1901) 105 Fed. 659, 44 C. C. A. 653, denying rehearing (1900) 104 Fed. 54, 43 C. C. A. 407.

A city in Wisconsin granted a waterworks franchise to citizens of another state, and contracted with the grantees for the rental of fire hydrants. The grantees at once assigned their rights under the ordinance and contract to a Wisconsin corporation, which constructed waterworks and furnished *the hy-*

drants required by the contract. The company also made a trust deed to a citizen of another state to secure bonds by which it pledged the rentals to become due from the city for the payment of interest on the bonds. Held, that the fact that the contract was originally made between the city and a citizen of another state did not give a federal court jurisdiction of a suit by the trustee in the mortgage against the city to collect rentals due the water company arising out of such contract, the cause of action being one which never existed in favor of the original grantees, but which accrued in the first instance in favor of the company, in whose right alone the action was maintainable. City of Eau Claire v. Payson (1901) 109 Fed. 676, 48 C. C. A. 608, denying rehearing (1901) 107 Fed. 552, 46 C. C. A. 466.

A nonresident assignee of a share in the estate of an intestate, who sues the administrators and their sureties to enforce obligations incurred by an alleged failure to properly discharge their duties, is not an assignee of a chose in action, so as to be precluded from maintaining the suit in a federal court by the fact that his assignor could not have maintained it therein. Bertha Zinc & Mineral Co. v. Vaughan (C. C. 1898) 88 Fed. 566.

An assignee in insolvency of a Maine corporation, who is given by the statutes of that state a right of action against its stockholders to recover for stock issued without bona fide payment of full value therefor, which right of action did not exist in the corporation, may maintain such an action in a federal court of another jurisdiction. Dunn v. Howe (C. C. 1899) 96 Fed. 160.

Where plaintiff alleged a cause of action for damages for a conspiracy charged to have been committed by defendants against plaintiff after he became the owner of a contract for the sale of real estate by assignment, the citizenship of plaintiff's assignor of the contract was immaterial to the jurisdiction of the federal court, the cause of action alleged never having existed in his favor. Noyes v. Crawford (C. C. 1904) 133 Fed. 796.

Where, under the terms of a town vote granting aid to a railroad company, no cause of action ever accrued to the railroad corporation, but did accrue to its receiver or the assignee of his successor who furnished funds to complete the road under an assignment of the subscription, the fact that the corporation could not have maintained an action in the federal courts to recover such subscription because it was of the same citizenship as the town did not deprive such assignee of the right to sue in the federal courts. Paige v. Town of Rochester (C. C. 1905) 137 Fed. 663.

400. Subrogation. — A creditor who has become subrogated to a right of his debtor may sue on such right in the federal court, if he and the defendant are citizens of different states, though the debtor and the defendant are citizens of the same state, and the debtor has assigned his right to the creditor, since such assignment does not create the creditor's right of action, but merely aids it. City of New Orleans v. Gaines (1891) 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102.

401. Validity of assignment.—In order to give jurisdiction to the federal court of an action of an assignee of a bond under seal made equally negotiable with a promissory note under the local law, it must appear that the title, being made capable of passing by delivery, did so pass from the first taker after the act went into operation. White v. Vermont & M. R. Co. (C. C. 1858) Fed. Cas. No. 17,559.

Where a party who is entitled to sue in the federal courts transfers his cause of action to another who has the same right, the fact that the transfer was made for an inadequate consideration will not invalidate it, so long as the legal title is transferred. Stanley v. Board of Sup'rs of Albany County (C. C. 1883) 15 Fed. 483.

The question whether a cause of action was assignable so as to entitle the assignee to maintain a suit thereon in a federal court is to be determined by the law of the state where the transactions took place. Commonwealth S. S. Co. v. American Shipbuilding Co. (D. C. 1912) 197 Fed. 780.

402. Nonassignable causes of action.—An assignee of a nonassignable cause of action cannot maintain a suit thereon before a federal court where his assignor could not have done so. Northern Ins. Co. v. St. Louis & S. Ry. Co. (C. C. 1883) 15 Fed. 840.

403. Reassignment.—Where the original owner of a chose in action, who might have sued thereon in a federal court, assigned the same, he is entitled to sue in such court on again becoming the owner by a reassignment from his assignee, without regard to the citizenship of the latter. Moore Bros. Glass Co. v. Drevet Mfg. Co. (C. C. 1907) 154 Fed. 737.

404. Time when jurisdictional grounds must exist.—Jurisdiction is to be determined according to the status at the time the suit is brought; and an assignee of a note may sue on the same in the federal courts if the payee or first holder is then a resident of a different state from defendant, although he was a resident of the same state when the assignment was made. Jones v. Shapera (1893) 57 Fed. 457, 6 C. C. A. 423; Brainard v. Williams (C. C. 1846) Fed. Cas. No. 1804; Thaxter v. Hatch (C. C. 1853) Fed. Cas. No. 13,866; Chamberlain v. Eckert (C. C. 1869) Fed. Cas. No. 2,577. CONTRA, see Rogers v. Linn (C. C. 1840) Fed. Cas. No. 12,015;

White v. Leahy (C. C. 1874) Fed. Cas. No. 17,551; Noyes v. Crawford (C. C. 1904) 133 Fed. 796.

The obligee in a bond secured by a mortgage assigned the bond in trust for his children. Plaintiffs, the cestuis que trustent, a number of years afterwards brought suit in the federal circuit court against the obligor, alleging payment of the bond by him to the trustee in Confederate currency, and prayed that the bond, which had been surrendered to him, be redelivered to them, and that the pretended payments thereon, and the satisfaction of the mortgage which had been entered, be declared void. Plaintiffs were residents of Georgia, and the obligor of South Carolina, but the obligee, at the time of the assignment, and when suit was brought, was a resident of South Carolina. Held, that the court had no jurisdiction. Blacklock v. Small (1888) 8 Sup. Ct. 1096, 1098, 127 U. S. 96, 32 L. Ed. 70.

G., a citizen of Wisconsin, brought suit in the United States court for the Western district of Wisconsin against a citizen of Minnesota and a citizen of Ohio, to set aside a tax deed upon his land, situated in Wisconsin, as a cloud on his title, and, after the case was ready for trial and set down for hearing, transferred his entire interest in the land to a citizen of Minnesota. Held that, although the transferee could not originally have brought the suit, the jurisdiction of the court, having once attached, was not devested by the transfer in such a manner that the assignee could not, by a supplemental bill, or an original bill in the nature of a supplemental bill, continue the jurisdiction of the court, and retain and preserve the benefit of the former proceedings in the suit of G. against the same defendants. Glover v. Shepperd (C. C. 1884) 21 Fed. 481.

405. Joinder of causes of action.—The joinder of causes of action on bonds payable to the order of an individual, of which the federal courts cannot take jurisdiction, with causes of action on coupons made by a municipal corporation and payable to bearer, of which a federal court may take cognizance, does not deprive such a court of jurisdiction. Independent School Dist. of Sioux City v. Rew (1901) 111 Fed. 1, 49 C. C. A. 198, 58 L. R. A. 364.

406. Joinder of assignees.—Where an assignee of a chose in action is entitled to sue thereon alone in the federal courts, he and his assignees may sue there together as if no assignment had been made. Paige v. Town of Rochester (C. C. 1905) 137 Fed. 663.

407. Pleadings and record.—The bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if no assignment had been made. Turner v. Bank of North America (1799) 4 U. S. (4 Dall.) 8, 1 L. Ed. 718; Montalet v. Murray (1807) 8 U. S. (4 Cranch) 46, 2 L. Ed. 545; Bradley v. Rhines (1869) 75 U. S. (8 Wall.) 393, 396, 19 L. Ed. 467; Morgan v. Gay (1873) 19 Wall. 81, 82, 22 L. Ed. 100; King Iron Bridge & Manufacturing Co. v. Otoe County (1887) 7 S. Ct. 552, 120 U. S. 225, 30 L. Ed. 623 (reversing judgment [C. C. 1886] 27 Fed. 800); Brock v. Northwestern Fuel Co. (1889) 130 U. S. 341, 9 Sup. Ct. 552, 32 L. Ed. 905; North American Transportation & Trading Co. v. Morrison (1900) 20 S. Ct. 869, 872, 178 U. S. 262, 44 L. Ed. 1061 (reversing judgment Morrison v. North American Transportation & Trading Co. [C. C. 1898] 85 Fed. 802); Kolze v. Hoadley (1906) 26 Sup. Ct. 220, 222, 200 U. S. 76, 50 L. Ed. 371; Smith v. Fifield (1899) 91 Fed. 561, 33 C. C. A. 681; Ban v. Columbia So. R. Co. (1902) 117 Fed. 21, 25, 54 C. C. A. 407; Fry v. Rousseau (C. C. 1842) Fed. Cas. No. 5,141; Fletcher v. Turner (C. C. 1853) Fed. Cas. No. 4,867; Raisin Fertilizer Co. v. Snell (C. C. 1884) 21 Fed. 353; Stanton v. Shipley (C. C. 1886) 27 Fed. 498, 499; Rollins v. Chaffee Co. (C. C. 1888) 34 Fed. 91; Republic Iron Min. Co. v. Jones (C. C. 1889) 37 Fed. 721, 2 L. R. A. 746; Hudson v. Bishop (C. C. 1889) 38 Fed. 680; United States Nat. Bank v. McNair (C. C. 1893) 56 Fed. 323, 325.

A pleading averring that plaintiff's assignor was a corporation, with its principal office in Florida, and that defendant resided in Alabama, insufficiently shows the citizenship of the assignor and of defendant, and hence is insufficient to show jurisdiction in the federal court on the ground of diverse citizenship. J. J. McCaskill Co. v. Dickson (1908) 159 Fed. 704, 86 C. C. A. 572.

Where the right of a plaintiff to maintain an action in a federal court on an assigned claim, which depended on the citizenship of his assignor, was not questioned in the trial court, it is sufficient to sustain the jurisdiction that it appears in the record that the assignor had a domicile and resided in a state other than that of which the defendant was a citizen. First Nat. Bank of Canyon, Tex., v. Crowley (1910) 183 Fed. 578, 105 C. C. A. 450.

An allegation, in a bill of complaint brought by an assignee of claims against a Louisiana corporation, that "each of said persons in whose favor said claims accrued * * * are now, and were on the 9th day of February, 1891, citizens, respectively, of states other than the state of Louisiana, and competent, as such citizens, to maintain suit in this honorable court against the defendants, * * * if no assignment or transfer had been made," is insufficient to confer jurisdiction on the circuit court, but the state or states of which the assignors were citizens should be specifically designated. Ben-

jamin v. City of New Orleans (1896) 74 Fed. 417, 20 C. C. A. 591.

Where the assignee of a mechanic's lien seeks to enforce and foreclose such liens in a federal court, it must affirmatively and clearly appear from the bill filed that the court had jurisdiction as to all of the original lien claimants, and where no averment as to the citizenship of some of such claimants is made in an amended bill it will be presumed that they are citizens of the state where the suit is brought, and the bill will be dismissed for want of jurisdiction. Hampton v. Truckee Canal Co. (C. C. 1883) 19 Fed. 1.

In a suit by an assignee of a chose in action "to recover the contents" thereof, it is not enough for plaintiff to allege in his complaint that his assignor was a citizen of a different state from defendant when he acquired such chose in action, but he must allege the existence of such diverse citizenship of the assignor and defendant at the time of bringing the suit. Benjamin v. City of New Orleans (C. C. 1896) 71 Fed. 758.

If it does not appear upon the record that a suit might have been maintained in the courts of the United States between the original parties to a promissory note, no suit can be maintained upon it in those courts by any subsequent holder. Montalet v. Murray (1807) 4 Cranch, 46, 47, 2 L. Ed. 545; Parker v. Ormsby (1891) 11 Sup. Ct. 912, 141 U. S. 81, 35 L. Ed. 654; Bison State Bank v. Billington (1913) 209 Fed. 610, 126 C. C. A. 432; U. S. Nat. Bank v. McNair (C. C. 1893) 56 Fed. 323.

Where an action is brought by an assignee of county warrants, only one of which was payable to order and that one not indorsed by the payee, and the citizenship of the payee was not averred and did not appear on the record, the court must be deemed to have been without jurisdiction. King Iron Bridge & Manuf'g Co. v. County of Otoe (1887) 7 Sup. Ct. 552, 553, 120 U. S. 225, 30 L. Ed. 623.

In action by indorsee of note, complaint held to show, by allegation as to payee's incorporation, that payee could have sued in the federal court because of diversity of citizenship. Piedmont Carolina Ry. Co. v. Shaw (1915) 223 Fed. 973, 138 C. C. A. 227.

In a suit as assignee of a note by a citizen of one state against a citizen of another, an averment that the payees had become citizens of the same state as the plaintiff was held sufficient to sustain the jurisdiction of the court. Kirkman v. Hamilton (1832) 6 Pet. 20, 25, 8 L. Ed. 305.

Where suit is brought on a note in a federal court by an indorsee against the maker, not only the parties to the suit, but also the payee, must be stated on the record to be such as to give the court jurisdiction. Turner v. Bank of North America (1799) 4 Dall. 8, 11, 1 L. Ed. 718.

In a suit in the federal court, as assignee of a note, by a citizen of one state against a citizen of another, an averment that the payees had become citizens of the same state as the plaintiff was sufficient to sustain the jurisdiction of the court. Kirkman v. Hamilton (1832) 31 U. S. (6 Pet.) 20, 8 L. Ed. 305.

Where a citizen of one state, as indorsee of inland bills drawn or accepted by a citizen of another, the plaintiff claiming through the indorsement of the payee, or of the payee and subsequent indorsers, sues the drawer or acceptor, in the federal court, the citizenship of such payee, or of such payee and subsequent indorsers, must be alleged to be different from that of the defendant. It is not enough to allege that the plaintiff is a citizen of one state and the defendant of another. Morgan v. Gay (1873) 86 U. S. (19 Wall.) 81, 22 L. Ed. 100.

Where complainants, citizens of Pennsylvania, filed a bill in the federal courts of New York against citizens of New York as trustees of a testamentary trust to recover an assigned beneficiary's interest, and did not allege that complainants' assignors were citizens of any other state than New York, federal jurisdiction on the ground of diversity of citizenship did not appear. Brown v. Fletcher (1913) 206 Fed. 461, 124 C. C. A. 367, modifying decree (D. C. 1912) 203 Fed. 70.

408. Objections to jurisdiction.—An objection to the jurisdiction of a federal court on the ground that the action is based on a contract assigned to plaintiff, and it does not appear that it could have been maintained in that court by the assignor, is one which cannot be waived, and may be raised at any time, or considered by the court on its own motion, and it need not, therefore, be presented by an assignment of error in the appellate court. Utah-Nevada Co. v. De Lamar (1904) 133 Fed. 113, 66 C. C. A. 179, writ of certiorari denied De Lamar v. Utah-Nevada Co. (1905) 26 Sup. Ct. 746, 199 U. S. 605, 50 L. Ed. 330.

Objection to the jurisdiction of a federal court in a suit on the ground that a collusive transfer of the property which is the subject of the suit was made for the purpose of conferring such jurisdiction cannot be taken for the first time in a bill of review after final decree has been entered and the term has ended. Acord v. Western Pocahontas Corporation (1909) 174 Fed. 1019, 98 C. C. A. 625, writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346, and affirming decree (C. C. 1907) 156 Fed. 989.

An objection that a transfer of a note was made to confer jurisdiction on a federal court should be presented by a

plea in abatement. Gause v. Clarksville (C. C. 1880) 1 Fed. 353.

Under Act March 3, 1875, no court could assume jurisdiction of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon, if no assignment had been made, even in cases where no plea had been interposed to the jurisdiction, nor objection taken to the jurisdiction, either upon the trial or argument. Stanley v. Board of Sup'rs of Albany County (C. C. 1880) 5 Fed. 254, 255.

So much of Act Aug. 13, 1888, § 1, substantially re-enacted herein, conferring jurisdiction on federal courts, prohibits suits by assignees, which could not have been maintained by their assignors in the federal courts, is jurisdictional, and cannot be waived. Pepper v. Rogers (C. C. 1904) 128 Fed. 987.

IX. NATURE AND EXTENT OF JURISDICTION IN GENERAL

See notes under Const. art. 3, § 2, cl. 1, as to relation between state and federal courts, and extent of judicial power generally.

As to binding force of distinction between law and equity see notes under Const. art. 3, § 2, cl. 1.

409. Scope and purpose of act in general.—The judiciary act of 1887-88 (Act March 3, 1887, c. 373, 24 Stat. 552; Act Aug. 13, 1888, c. 866, 25 Stat. 433) was intended to contract the jurisdiction of the federal courts. Hanrick v. Hanrick (1894) 14 Sup. Ct. 835, 837, 153 U. S. 192, 38 L. Ed. 685; Joy v. City of St. Louis (C. C. 1903) 122 Fed. 524 (order affirmed [1906] 26 Sup. Ct. 478, 201 U. S. 332, 50 L. Ed. 776); Gustafson v. Chicago, R. I. & P. Ry. Co. (C. C. 1904) 128 Fed. 85; St. Louis, I. M. & S. Ry. Co. v. Davis (C. C. 1904) 132 Fed. 629.

The scope and intent of this chapter and chapters 3 and 4 must be ascertained by construing them as an entirety, and they treat of parties and subject-matter within the jurisdiction of district courts, and also of places where suits shall be instituted. Smith v. Farbenfabriken of Elberfeld Co. (1913) 203 Fed. 476, 121 C. C. A. 598.

This section and section 28, post, § 1010 et seq., codify and adopt the terms of Act 1887 as amended and corrected by Act 1888. Western Union Tel. Co. v. Southeast & St. L. Ry. Co. (1913) 208 Fed. 266, 125 C. C. A. 466.

The law conferring jurisdiction on the federal courts is not to be strictly construed; for the jurisdiction is presumably a beneficial one because tending to promote confidence and commercial intercourse between citizens of the several states by furnishing them a comparatively impartial tribunal. Goldsmith v. Holmes (C. C. 1888) 36 Fed. 484, 487, 1 L. R. A. 816, affirmed (1893) 13 Sup. Ct. 288, 147 U. S. 150, 37 L. Ed. 118.

This subdivision, as incorporated in the Revised Statutes, was not repealed by Act March 3, 1887, § 4. Stephens v. Bernays (C. C. 1890) 44 Fed. 642, 643.

In original proceedings in mandamus to compel a railroad to furnish transfer services to a shipper, judgment for plaintiff was affirmed in the Supreme Court of the United States, and plaintiff filed in the Supreme Court of the state a claim for damages. Held, that the United States Judiciary Act of Aug. 13, 1888, c. 866, 25 Stat. 433, would not deprive the state Supreme Court of all power to allow in this proceeding damages or expenses incurred in the proceeding in error. Larabee Flour Mills Co. v. Missouri Pac. Ry. Co. (1911) 116 Pac. 901, 85 Kan. 214.

410. Nature and extent of federal jurisdiction.—The United States District Court is a court of limited jurisdiction. Henry v. Carson (1884) 96 Ind. 412.

The courts of the United States, though of limited jurisdiction, by intendment of law, are regarded as courts of law of general jurisdiction. U. S. v. Sommers (1909) 171 Fed. 57, 96 C. C. A. 299; Toledo, St. L. & W. R. Co. v. Perenchio (1913) 205 Fed. 472, 123 C. C. A. 540; Kentucky Coal Lands Co. v. Mineral Development Co. (C. C. 1911) 191 Fed. 899; Reed v. Vaughan (1851) 15 Mo. 137, 55 Am. Dec. 133.

The jurisdiction of a federal court is not prima facie general, but special. Maxfield v. Levy (C. C. 1797) Fed. Cas. No. 9,321, 2 Dall. 381, 4 Dall. 330, 332, 1 L. Ed. 854.

The United States district courts are not inferior courts in the technical sense of those words. Reed v. Vaughn (1847) 10 Mo. 447; In re Booth (1854) 3 Wis. 157.

The courts of the United States are courts of limited, but not inferior, jurisdiction, and can exercise no jurisdiction or powers not given by acts of congress, either expressly or by necessary implication. Kempe v. Kennedy (1809) 5 Cranch, 173, 3 L. Ed. 70; U. S. v. Alberty (C. C. 1844) Fed. Cas. No. 14,426; Same v. Ta-wan-ga-ca (C. C. 1836) Fed. Cas. No. 16,435.

Federal courts have no jurisdiction, except that conferred by the federal Constitution or federal statutes. Rice v. Minnesota & N. W. Railroad Co. (1861) 1 Black 358, 374, 17 L. Ed. 147; Devine v. Unaka Nat. Bank (1911) 125 Tenn. 98, 140 S. W. 747, 39 L. R. A. (N. S.) 586.

Comity cannot confer jurisdiction, and its exercise cannot impart validity to orders and decrees which are in themselves null and void. In re Macon Sash, Door & Lumber Co. (D. C. 1901) 112 Fed. 323, judgment reversed Carling v. Seymour Lumber Co. (1902) 113 Fed. 483, 51 C. C. A. 1.

Where a federal court has no jurisdiction of a case it has no power to make any order in it, except to dismiss

it for want of jurisdiction. Fisk v. Union Pac. R. Co. (C. C. 1869) Fed. Cas. No. 4,827.

411. Courts of District of Columbia.—The jurisdiction of the courts of the District of Columbia in an action brought against a railroad company which was incorporated in a state, and whose line extended through that state and into the district, does not depend on this section. Baltimore & O. R. Co. v. Harris (1870) 12 Wall. 65, 86, 20 L. Ed. 354.

412. Power of equity court over admiralty proceedings.—The district court, sitting in equity, has power to restrain the enforcement of a decree made by the same court sitting in admiralty. Dutcher v. Woodhull (D. C. 1874) Fed. Cas. No. 4,204.

413. Jurisdiction, how obtained.—Under the law of Oregon as settled by decision, an attachment is merely auxiliary to the main action, and the issuance and levy of an attachment does not give the court jurisdiction to render a judgment in the action without a valid service upon, or appearance by, the defendant. Johnson v. North Star Lumber Co. (1913) 206 Fed. 624, 125 C. C. A. 118, affirming decree North Star Lumber Co. v. Johnson (D. C. 1912) 196 Fed. 56.

Jurisdiction of an inhabitant of the district cannot be acquired by an attachment of his property. Sadlier v. Fallen (C. C. 1856) Fed. Cas. No. 12,-210.

The federal courts enforce the rule that the court cannot adjudicate directly on rights of a person not actually or constructively before it. Hyams v. Old Dominion Co. (D. C. 1913) 204 Fed. 681, decree modified (1913) 209 Fed. 808, 126 C. C. A. 532.

414. Jurisdiction by consent.—Where a federal court would not otherwise have jurisdiction, it cannot acquire it by the consent of the parties. Cutler v. Rae (1849) 7 How. 729, 731, 12 L. Ed. 890; Pittsburgh, C. & St. L. R. Co. v. Ramsey (1874) 22 Wall. 322, 327, 22 L. Ed. 823; Byers v. McAuley (1893) 13 Sup. Ct. 906, 910, 149 U. S. 608, 37 L. Ed. 867; Minnesota v. Northern Securities Co. (1904) 24 Sup. Ct. 598, 601, 194 U. S. 48, 48 L. Ed. 870 (reversing decree [C. C. 1903] 123 Fed. 692); First Nat. Bank v. Prager (1899) 91 Fed. 689, 34 C. C. A. 51; Bobyshall v. Oppenheimer (C. C. 1824) Fed. Cas. No. 1,592; Ketchum v. Farmers' Loan & Trust Co. (C. C. 1845) Fed. Cas. No. 7,736; McKim v. Kelsey (C. C. 1851) Fed. Cas. No. 8,861; State v. Tolleston Club of Chicago (C. C. 1892) 53 Fed. 18; Anderson v. Bassman (C. C. 1905) 140 Fed. 10; Iowa Lillooet Gold Min. Co. v. Bliss (C. C. 1906) 144 Fed. 446; Peper Automobile Co. v. American Motor Car Sales Co. (C. C. 1910) 180 Fed. 245; Columbia Digger Co. v. Rector (D. C. 1914) 215 Fed. 618.

An information for quo warranto to try title to an office cannot be maintained except at the instance of the government, and the consent of the parties will not give jurisdiction. Wallace v. Anderson (1820) 5 Wheat. 291, 5 L. Ed. 91.

The parties may admit existence of facts which show jurisdiction, and the courts may act judicially on such admission. Pittsburgh, C. & St. L. R. Co. v. Ramsey (1874) 22 Wall. 322, 327, 22 L. Ed. 823.

While parties cannot confer jurisdiction on a federal court by consent, still where the jurisdictional facts are properly alleged, and thus properly appear on the record, and the parties proceed to trial on pleadings which go to the merits, and, particularly, when the jurisdictional facts are not subsequently put in issue by the defendant nor seriously denied, the case ordinarily will not be dismissed for want of jurisdiction, where the proofs do not create a legal certainty that it is not within the jurisdiction. William H. Perry Co. v. Klosters Aktie Bolag (1907) 152 Fed. 967, 82 C. C. A. 321.

Concession, contrary to the facts, that parties were engaged in interstate commerce, as alleged in the complaint, held not to give jurisdiction on that ground. Delaware, L. & W. R. Co. v. Yurkonis (1915) 220 Fed. 429, 137 C. C. A. 23, affirming judgment Yurkonis v. Delaware, L. & W. R. Co. (D. C. 1914) 213 Fed. 537, appeal dismissed Delaware, L. & W. R. Co. v. Yurkonis (1915) 35 Sup. Ct. 902, 238 U. S. 439, 59 L. Ed. 1397.

A federal court has no jurisdiction of a personal action where neither complainant nor defendant is a citizen or resident of the district unless the parties consent to the court exercising jurisdiction. Hultberg v. Anderson (C. C. 1909) 170 Fed. 657.

See, also, 108, 349, 365, 408, of this subdivision.

415. Suits collusively brought.—In a suit by a gas company against a city to restrain the enforcement of an ordinance forfeiting its property and franchises, where it appeared that two of the three directors refused to institute proceedings in the local courts because of the excited condition of the public mind, in order that the third, who was a nonresident, might be driven to a proceeding in his own name in the federal courts, held a case of collusive jurisdiction. City of Detroit v. Dean (1882) 106 U. S. 537, 1 Sup. Ct. 560, 27 L. Ed. 300.

The county of S., Cal., desiring to enjoin a certain nuisance maintained by a California corporation, but being unable to sue in the United States court, agreed to furnish the attorneys for the

plaintiff and bear all the expenses of the present suit. The plaintiff was interested in the result of the suit as well as the county. Held, that this was a suit collusively made, and the United States court had no jurisdiction. Cashman v. Amador & S. Canal Co. (1885) 118 U. S. 58, 6 Sup. Ct. 926, 30 L. Ed. 72.

A suit by nonresident taxpayers on behalf of themselves and all other taxpayers, to restrain a municipal public utilities commission from proceeding to acquire by purchase or otherwise a waterworks system, on the ground that it was an unconstitutional body and its expenditures illegal, should not be dismissed on the theory that complainants were collusively made parties in order to create a case justifiable in the federal courts, because they were solicited to bring the suit, and were indemnified by the existing waterworks company against liability for costs or counsel fees. Wheeler v. Denver (1913) 33 Sup. Ct. 842, 229 U. S. 342, 57 L. Ed. 1219.

A corporation, being a citizen of the same state as defendants, and therefore incapable of suing in the federal courts to restrain defendants from inducing its employés to strike, brought a suit for such relief in the state courts, pending which complainants, who were nonresident stockholders, made a demand on the officers of the corporation to bring suit in the federal courts, knowing that the corporation could not do so, and on the corporation's refusal, themselves filed a bill for such relief in the federal court. Held, that such acts did not constitute a compliance with equity rule 94, relating to stockholders' bills, and requiring that such suit shall not be collusive, and that the court had no jurisdiction. Kemmerer v. Haggerty (C. C. 1905) 139 Fed. 693.

416. Sham or fictitious transfers.—See 264, 265, 367¾, above.

417. Motive of suit.—The motive with which a creditor invokes the jurisdiction of a federal court is immaterial if he has a justifiable demand and the requisite diversity of citizenship exists. Blair v. City of Chicago (1906) 26 Sup. Ct. 427, 201 U. S. 400, 50 L. Ed. 801, reversing decree Govin v. City of Chicago (C. C. 1904) 132 Fed. 848.

418. Jurisdiction of subject-matter or of the person.—The jurisdiction of the federal courts is restricted to the territorial limits within which they are placed. Toland v. Sprague (1838) 12 Pet. 300, 328, 9 L. Ed. 1093; U. S. v. Alberty (C. C. 1844) Fed. Cas. No. 14,426.

The district court in one state has no jurisdiction in personam against a citizen of another state, not served with process in the former state. Wilson v. Graham (C. C. 1821) Fed. Cas. No. 17,804; Cox v. Maddux (1880) 72 Ind. 206.

The jurisdiction of a district court is coextensive with the district, notwithstanding any multiplication of places at which courts are to be held, or subdivisions of the district. Rosecrans v. U. S. (1897) 17 Sup. Ct. 302, 304, 165 U. S. 257, 41 L. Ed. 708.

The jurisdiction of the person of a party gives a court of equity plenary power in cases of contract, fraud, or trust to compel him to act in relation to property in his control beyond its territorial jurisdiction. Wilhite v. Skelton (1906) 149 Fed. 67, 78 C. C. A. 635 (reversing judgment [Ind. T. 1904] 82 S. W. 932); Groom v. Mortimer Land Co. (1912) 192 Fed. 849, 113 C. C. A. 173, writ of error denied (1912) 32 Sup. Ct. 835, 225 U. S. 700, 56 L. Ed. 1264.

The jurisdiction of a district court is coextensive with the territorial area of the district, and, unless limitations are found in congressional acts, the right to draw a grand jury from the district as a whole seems to be unquestionable. Clement v. U. S. (1906) 149 Fed. 305, 308, 79 C. C. A. 243, certiorari denied (1907) 27 Sup. Ct. 795, 206 U. S. 562, 51 L. Ed. 1189.

The federal courts cannot send their process into another district, except where specially authorized by law. Ex parte Graham (C. C. 1818) Fed. Cas. No. 5,657.

The fact that the subject-matter of a suit is situated in a foreign country will not deprive a court of equity of the United States of jurisdiction to grant relief against fraud with reference to such subject-matter by defendants, who are within the court's jurisdiction. Vacuum Oil Co. v. Eagle Oil Co. of New York (C. C. 1907) 154 Fed. 867, decree affirmed Eagle Oil Co. of New York v. Vacuum Oil Co. (1908) 162 Fed. 671, 89 C. C. A. 463, writ of certiorari denied (1909) 29 Sup. Ct. 696, 214 U. S. 515, 53 L. Ed. 1063.

419. —— Common carriers.—In the absence of express authority by act of congress, a federal court has no jurisdiction to compel the operation of a railroad outside of the state in which the court sits. People v. Colorado Cent. R. Co. (C. C. 1890) 42 Fed. 638.

420. —— Enforcement of liens.—In foreclosing a mortgage on a bridge connecting a state of the Union with a foreign country, a federal court of equity in such state has jurisdiction to foreclose the entire lien, including that covering the franchises and property lying in such foreign country. International Bridge & Tramway Co. v. Holland Trust Co. (1897) 81 Fed. 422, 26 C. C. A. 469.

Jurisdiction to enforce a mortgage on lands purchased by the United States merely to secure a debt depends upon

the locality of the land. Elliot v. Van Voorst (C. C. 1860) Fed. Cas. No. 4,390.

In the case of a mortgage on a railroad running through several states, a federal court of one state may decree foreclosure and direct a sale of the entire road. Randolph v. Wilmington & R. R. Co. (C. C. 1876) Fed. Cas. No. 11,563.

A federal court is without jurisdiction to decree the foreclosure of a lien upon and to order a sale of land which is situated in another state. Jones v. Byrne (C. C. 1906) 149 Fed. 457, decree reversed Byrne v. Jones (1908) 159 Fed. 321, 90 C. C. A. 101.

While a court may not fix the lien of its decree upon lands in another jurisdiction and then order a sale of such lands by its master in satisfaction of that lien, it may enforce a contract lien, as the execution of a trust, where the parties are before it, and it can enforce the confirmation of the title by appropriate conveyance. Clark v. Iowa Fruit Co. (C. C. 1911) 185 Fed. 604.

421. —— **Enforcement of state laws or judgments.**—Where a party may not have the benefit of final process upon the decree of a state court against an adverse party because of the latter's residence in a different state, the United States district court has jurisdiction of a bill in equity brought to enforce such decree. Shields v. Thomas (1855) 18 How. 253, 15 L. Ed. 368.

A federal court in Kentucky cannot enforce rights given by a statute of Indiana with respect to the use of so much of a bridge across the Ohio river as is situated within the state of Indiana. Evansville & H. Traction Co. v. Henderson Bridge Co. (C. C. 1904) 134 Fed. 973, judgment affirmed (1905) 141 Fed. 51, 72 C. C. A. 539.

422. —— **Estates of decedents.**—A federal court may, at suit of a creditor, who is a citizen of one state, subject to the payment of his demand the property, both real and personal, of a deceased debtor, who was a citizen of another state, as such a proceeding is not in rem, but inter partes, and within its jurisdiction. Brockett v. Richardson (1884) 61 Miss. 706.

423. —— **Foreign vessels.**—A public armed vessel of a foreign state, at peace with the United States, is exempt from the jurisdiction of its local tribunals while enjoying in a friendly manner the hospitality of its waters. The Exchange v. McFaddon (1812) 7 Cranch, 116, 3 L. Ed. 287; Walley v. The Liberty (1838) 12 La. 98, 32 Am. Dec. 114.

424. —— **Indian country.**—See, also, post, §§ 10502, 10503, and notes thereunder.

Process from a district court of Idaho cannot be served upon a defendant on an Indian reservation in that territory. Harkness v. Hyde (1878) 98 U. S. 476, 25 L. Ed. 237.

425. —— **Injunctions.**—A bill to abate a nuisance was brought in the United States district court for the district of Iowa. The nuisance consisted of a bridge across the Mississippi, from Iowa to Illinois, the dividing line of the states being the middle thread of the river. Held, that the court had no jurisdiction to abate the nuisance on the Illinois side. Mississippi & M. R. Co. v. Ward (1862) 2 Black, 485, 17 L. Ed. 311.

A court of equity having jurisdiction of the parties may enjoin a continuing injury to real property within its jurisdiction by flooding caused by the improper construction of works maintained by defendant for diverting the water of a river into a canal, although such works are across the boundary within the republic of Mexico. The Salton Sea Cases (1909) 172 Fed. 792, 97 C. C. A. 214, writ of certiorari denied California Development Co. v. New Liverpool Salt Co. (1909) 30 Sup. Ct. 405, 215 U. S. 603, 54 L. Ed. 345.

A federal court of equity in Kentucky held to have jurisdiction to enjoin a railroad company from interfering with a telegraph company in the operation of its line over the railroad company's right of way in other states, as well as in Kentucky. Louisville & N. R. Co. v. Western Union Telegraph Co. (1913) 207 Fed. 1, 124 C. C. A. 573, affirming order Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1913) 201 Fed. 946.

Whether a court can enjoin a nuisance consisting of odors generated by a factory situated outside the territorial jurisdiction, and carried by the air to a residence within the jurisdiction, where the parties are properly before the court, quære. Keyser v. Coe (C. C. 1871) Fed. Cas. No. 7,750.

A federal court in Florida had jurisdiction to enjoin an express company from transporting liquor illegally sold in Georgia in competition with complainant's legal sales of liquor in Georgia in interstate commerce shipped from complainant's place of business in Florida. Long v. Southern Express Co. (D. C. 1912) 201 Fed. 441, decree reversed Southern Express Co. v. Long (1913) 202 Fed. 462, 120 C. C. A. 568.

426. —— **Receivership proceedings.**—A federal court of equity will not entertain jurisdiction of a suit to wind up a corporation or appoint a general receiver therefor, where neither the domicile nor property of the corporation are within the state or district and the residence of the stockholders is immaterial. Kirwin v. Boston & O. Mining Co. (C. C. 1908) 171 Fed. 900.

427. —— **Specific performance.** — While a federal court of equity may compel a conveyance of lands in another state by a decree in personam

against a party who holds the title, it has no jurisdiction to itself transfer the title to such lands by a sale and conveyance made through its master or commissioner. Guarantee Trust & Safe-Deposit Co. v. Delta & Pine-Land Co. (1900) 104 Fed. 5, 43 C. C. A. 396, writ of certiorari denied (1901) 21 Sup. Ct. 919, 180 U. S. 636, 45 L. Ed. 710.

In a suit in equity in the federal courts for specific performance of telegraph right of way contracts with certain consolidated railroad companies, the necessary parties being subject to the court's jurisdiction, it was immaterial that a portion of the property affected was beyond the court's territorial jurisdiction. Western Union Telegraph Co. v. Pittsburg, C., C. & St. L. Ry. Co. (C. C. 1905) 137 Fed. 435.

428. —— Trusts.—Equity has power to affect the title to real estate beyond its jurisdiction by a sale and conveyance thereof by its master in suits to execute trusts to undo frauds and enforce contracts whenever it has jurisdiction of the persons interested in the real estate. Byrne v. Jones (1908) 159 Fed. 321, 90 C. C. A. 101, reversing decree Jones v. Byrne (C. C. 1906) 149 Fed. 457.

In a case of asserted fraud or constructive trusts created by operation of law, jurisdiction does not depend upon the location of lands affected by the decree. Briggs v. French (C. C. 1833) Fed. Cas. No. 1,870.

429. Retention and scope of jurisdiction once acquired.—A court which has acquired rightful jurisdiction of the parties and subject-matter will retain it for all purposes within the general scope of the equities to be enforced. Ober v. Gallagher (1876) 93 U. S. 199, 23 L. Ed. 829; Ward v. Todd (1880) 103 U. S. 327, 26 L. Ed. 339; Michigan Railroad Tax Cases (23 cases) (C. C. 1905) 138 Fed. 223, affirmed Michigan Cent. R. Co. v. Powers (1906) 26 Sup. Ct. 459, 201 U. S. 245, 50 L. Ed. 744.

The jurisdiction of the federal courts depends upon the state of things at the time the action was brought, and after its jurisdiction is vested it cannot be ousted. Jones v. Shapera (1893) 57 Fed. 457, 462, 6 C. C. A. 423; Tug River Coal & Salt Co. v. Brigel (1898) 86 Fed. 818, 30 C. C. A. 415 (affirming decree Brigel v. Tug River Coal & Salt Co. [C. C. 1896] 73 Fed. 13); Greenwood v. Rector (C. C. 1855) Fed. Cas. No. 5,792.

A federal court, having obtained jurisdiction by reason of the federal questions set up by the bill, may decide all the questions in the case, even though it decides the federal questions adversely to the party raising them, or omits to decide them, but decides the case on local questions only. Siler v. Louisville & N. R. Co. (1909) 29 Sup. Ct. 451, 213 U. S. 175, 53 L. Ed. 753; Same v. Illinois Cent. R. Co. (1909) 29 Sup. Ct. 458, 213 U. S. 199, 53 L. Ed. 760.

On application to enjoin enforcement of state statute as unconstitutional under Act June 18, 1910, § 17, post, § 1243, all questions local as well as federal may be determined. Louisville & N. R. Co. v. Garrett (1913) 34 Sup. Ct. 48, 231 U. S. 298, 58 L. Ed. 229, affirming order Same v. Siler (C. C. 1911) 186 Fed. 176.

The federal court has jurisdiction of all questions arising in the course of the levy and collection of a tax directed by it to be made by a municipality to enforce its judgment. Brooks v. Memphis (C. C. 1876) Fed. Cas. No. 1,954.

Where a decree for the payment of two creditors was rendered in a state court against an insolvent deputy sheriff and his sureties, to which the sheriff and his sureties were parties, and nonresident representatives of one creditor sued in the federal court and established the debt against the sheriff's surety, the federal court might entertain his petition, pending the cause, against a solvent surety of the deputy for reimbursement, notwithstanding both petitioner and respondent were residents of the same state. Howards v. Selden (C. C. 1880) 5 Fed. 465, 473.

Where federal jurisdiction attaches at law, it attaches for some purpose in equity, and vice versa. Whelan v. Enterprise Transp. Co. (C. C. 1908) 164 Fed. 95.

A federal court by entertaining jurisdiction of a suit against an administrator, cannot draw to itself power to determine all claims against the estate. American Baptist Home Mission Society v. Stewart (C. C. 1911) 192 Fed. 976.

Where federal jurisdiction has been properly invoked in a suit involving a federal question, the court will retain the case and administer complete relief on other grounds, though the state courts may afford an adequate remedy. Portland Ry., Light & Power Co. v. City of Portland (D. C. 1914) 210 Fed. 667.

After jurisdiction on the ground of diverse citizenship attached to a wife's suit for an accounting and for a division of community property, the court was bound to consider all issues properly presented and thereafter render a judgment and decree. Johnson v. Johnson (D. C. 1915) 225 Fed. 413.

Retention of jurisdiction by courts of equity and of admiralty, see notes under § 1536, post.

430. Ancillary and incidental jurisdiction.—The federal court cannot take jurisdiction of a bill in equity between citizens of the same state, which does not disclose a cause of action of federal cognizance, on the ground that it is ancillary to a previous litigation, where the parties and the subject-matter are not the same. Christmas v. Russell (1871) 14 Wall. 69, 20 L. Ed. 762.

Diversity of citizenship between the

parties is not necessary to the jurisdiction of the court of the United States in an ancillary action to enforce the payment of a judgment of that court out of a fund which by such judgment was made liable for its payment. City of New Orleans v. Fisher (1901) 21 Sup. Ct. 347, 180 U. S. 185, 45 L. Ed. 485, modifying decree (1899) 91 Fed. 574, 34 C. C. A. 15.

While property is held in the possession of a federal court, and thereby withdrawn from the jurisdiction of state courts, such federal court has jurisdiction to entertain a suit in relation to such property, without regard to the citizenship of parties. Compton v. Jesup (1895) 68 Fed. 263, 15 C. C. A. 397, certified and determined (1897) 17 Sup. Ct. 795, 167 U. S. 1, 42 L. Ed. 55.

Where a railroad foreclosure suit is pending in a United States court in one district, as ancillary to a similar suit in another, the former court should not remit to the court of primary jurisdiction an incidental motion relating to transactions which took place within its own district, and to other related litigations arising there, and of which it had already taken jurisdiction. Jones v. Central Trust Co. (1896) 73 Fed. 568, 19 C. C. A. 569.

A bill in a federal court between citizens of the same state, and of which the court has jurisdiction only by reason of its ancillary character, cannot be retained after the suit on which it is dependent has been dismissed. Cabaniss v. Reco Min. Co. (1902) 116 Fed. 318, 54 C. C. A. 190.

A dependent suit cannot be maintained to adjudicate the claims of those who were not parties to, or in privity with the original suit, except in the case of those who claim an interest in the property in the custody of the court, and with this exception the claims of those who are not parties to the original suit, which accrued before its commencement, may be adjudicated in the original suit only to the jurisdiction of which diversity of citizenship or a federal question, is indispensable. Campbell v. Golden Cycle Min. Co. (1905) 141 Fed. 610, 73 C. C. A. 260.

In order that the federal court may have jurisdiction of a dependent suit, a dependent cause of action is indispensable, although after jurisdiction is acquired by means of such a cause, the court may determine in a proper case the entire controversy between the parties relating to its subject-matter. Id.

An ancillary suit defined, and the jurisdiction of the same by a federal court held dependent on its jurisdiction of the prior suit. Ferguson v. Omaha & S. W. R. Co. (C. C. A. 1915) 227 Fed. 513.

While a bill to obtain the benefit of a depending suit by a party who acquired the plaintiff's title by transfer from them pendente lite may be technically and to some extent an original bill, it is essentially supplementary. Such bill is not, in a proper sense, the commencement of an original suit, but is rather the mere continuation of the former suit. Miller v. Rogers (C. C. 1886) 29 Fed. 401.

Where an action has been removed from the state court to the federal court on the ground of local prejudice, a bill for reformation on the equity side of the court is properly filed in the federal court, as it is auxiliary to the first action, even though the parties may not be entitled to bring an action in the first instance in the federal court on the ground of diverse citizenship. Rosenbaum v. Council Bluffs Ins. Co. (C. C. 1889) 37 Fed. 724, 3 L. R. A. 189.

A federal court has no jurisdiction, on an intervening petition, to render a general judgment which it would have no jurisdiction to render in an independent suit. Clyde v. Richmond & D. R. Co. (C. C. 1894) 65 Fed. 336.

The dependence of an ancillary upon an original suit for purposes of jurisdiction does not throw both suits into hotchpot, and dispense with the ordinary rules of pleading and practice as to parties proper and necessary to each cause of action. Parties to the original bill are not thereby made parties to the dependent bill, nor have they any more right to intervene in the dependent cause than if the court had independent jurisdiction thereof. And the dependent cause is proceeded in without regard to the pleading or course of the principal suit. Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C. 1897) 82 Fed. 642.

A railroad company leased its line to another company, the rental to be paid directly to its stockholders in the nature of dividends. In a subsequent litigation in a federal court a receiver was appointed, who took possession and operated the leased line, but paid no rental. The lessor intervened and became a party, and by a compromise settlement it was agreed that the lessor should receive the net earnings under the receivership, and that the reorganized company should pay it a further sum and take a renewal lease. Such agreement was ratified by the court, and the lessor company distributed a portion of the fund as a dividend to its stockholders, and used a portion for other purposes. The dividend was accepted by the stockholders, a majority of whom at a meeting ratified the company's action. Five years afterwards certain of the stockholders filed a bill of intervention in a suit against the company and the reorganized lessee company, alleging that the entire fund received under the settlement was for rental, and was the property of the stockholders, and not of the corporation, which merely took it in trust; and the bill prayed that the company be required to distribute the remainder of such fund to them. Held, that the intervention

should be dismissed as to the lessor company, as the interveners were represented in the original litigation by the company without objection and their rights as against all other parties to the suit fully determined, and the questions sought to be raised, having arisen out of dealings between the company and its stockholders after the litigation was closed, so far as such company was concerned, were not properly within the ancillary jurisdiction of the court. Central R. & Banking Co. of Georgia v. Farmers' Loan & Trust Co. (C. C. 1901) 112 Fed. 81, decree affirmed (1902) 114 Fed. 263, 52 C. C. A. 149, affirming decree (C. C. 1901) 116 Fed. 700, which is affirmed Same v. Farmers' Loan & Trust Co., of New York (1903) 125 Fed. 1001, 60 C. C. A. 400.

431. —— **Actions on bonds.**—Under the practice of the Louisiana courts and the federal court for that district, the proceeding by rule to show cause, in an attachment against a surety upon a forthcoming bond given to obtain a release of property attached, is merely incidental to the original suit; and jurisdiction, having once attached, will not cease because the parties to the rule are citizens of the same state. Reilly v. Golding (1869) 10 Wall. 56, 19 L. Ed. 858.

On the expiration of a stay bond the lands of the surety were sold to satisfy the judgment, as allowed by the Nebraska statute, but, in view of a threatened appeal by the surety, the judgment creditor was required, as a prerequisite to obtaining the money, to give a bond conditioned for repayment thereof "in case the order confirming the sale is reversed by the supreme court of the United States." No appeal, however, was taken, but the purchaser of the land brought ejectment to recover it of the stay bondsman. and the supreme court of the United States held that the Nebraska statute did not apply, and the sale was void. Thereupon the court ordered the judgment creditor to repay the money into court, and assigned the redelivery bond to the purchaser of the land. The order was not complied with, and thereafter the purchaser filed a petition on the bond in the same court. Held, that this proceeding was merely auxiliary to the former suit, and the federal court had jurisdiction, irrespective of the citizenship of the parties or the amount in controversy. Lamb v. Ewing (1893) 54 Fed. 269, 4 C. C. A. 320.

A federal court held to have ancillary jurisdiction of an action on a bond which it had required to be given in a pending suit, regardless of the residence of the parties. Mississippi Valley Fuel Co. v. Watson Coal Co. (1912) 202 Fed. 122, 120 C. C. A. 276.

Suit on a bond on appeal in suit in federal court is not an original suit, and jurisdiction of the original suit gives jurisdiction. American Surety Co. of New York v. Shultz (1915) 223 Fed. 280, 138 C. C. A. 522.

An action on an attachment bond executed in a suit pending in a federal court is ancillary to the action in which the bond was given, and may be maintained in the same court, without regard to the citizenship of the parties or the amount involved. Files v. Davis (C. C. 1902) 118 Fed. 465.

432. —— **Adjudication of claims upon property in the custody of the court.**—A bill in equity dependent upon a former action of which the federal court had jurisdiction may be maintained in a national court, in the absence of diversity of citizenship and of a federal question to enforce or obtain an adjudication of liens upon or claims to property in the custody of the court in the original suit. Brun v. Mann (1906) 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; Loy v. Alston (1909) 172 Fed. 90, 96 C. C. A. 578.

A court of equity, which has undertaken to administer the estate of an insolvent corporation, and has taken possession of all its property through a receiver, may, in its discretion, reserve to itself the determination of all claims of or against the receiver, and the jurisdiction of a federal court in such a case to entertain a suit by its own receiver for the enforcement of a claim is not dependent on the citizenship of the parties, or the amount in controversy. Bowman v. Harris (C. C. 1899) 95 Fed. 917.

433. —— **Bill of revivor.**—A bill of revivor is a mere continuation of the original suit, and, where the jurisdiction of a federal court has attached because of the different citizenship of plaintiff and defendant, it cannot be devested by the death of the nonresident defendant, although his executor, against whom the suit is revived, is a citizen of the same state as plaintiff. Hone v. Dillon (C. C. 1886) 29 Fed. 465.

434. —— **Collection of assets by receiver.**—A federal court which has appointed a receiver for an insolvent building and loan association in a suit to wind up its affairs, has jurisdiction of a suit brought by him to collect from a borrowing stockholder and to foreclose a mortgage securing the loan, regardless of the citizenship or residence of the defendants, or the fact that the mortgaged property is situated in another district. Gunby v. Armstrong (1904) 133 Fed. 417, 66 C. C. A. 627; Bottom v. National Ry. Building & Loan Ass'n (C. C. 1901) 123 Fed. 744; Cooper v. Newton (C. C. 1908) 160 Fed. 190.

The federal court has jurisdiction in a general creditors' suit properly pending therein, for the collection and distribution of the assets of an insolvent corporation, to hear and determine an

ancillary suit instituted in the same cause by its receiver, in accordance with its order, against debtors of such corporation, so far as in said suit the receiver claims the right to recover from any one debtor a sum not exceeding the jurisdictional amount. White v. Ewing (1895) 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67.

The fact that the federal court has possession of all the assets of an insolvent corporation, for the purpose of winding up its affairs, in a suit pending in such court, gives it jurisdiction to entertain a petition, ancillary to such suit, against a debtor of the corporation, to ascertain and enforce payment of his debt, without regard to the citizenship of the parties or the amount in controversy. Peck v. Elliott (1897) 79 Fed. 10, 24 C. C. A. 425, 38 L. R. A. 616, reversing decree Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co. (C. C. 1896) 72 Fed. 957.

Where a federal court, by its receiver, has possession of all the property of a railroad company for the purpose of administering it as the property of an insolvent corporation in a suit brought by general creditors, such possession draws to that court, as auxiliary, all suits and proceedings with respect to the property, and it has jurisdiction of proceedings to foreclose a mortgage, without regard to the citizenship of the parties, whether such proceedings are by cross bill, or intervening petition in the pending suit, or by an original bill. Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. (1899) 95 Fed. 497, 36 C. C. A. 155, certiorari denied (1900) 20 Sup. Ct. 383, 176 U. S. 219, 44 L. Ed. 442, modifying decree Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C. 1898) 86 Fed. 929.

Under a state law which makes stockholders in banks and trust companies "individually responsible, equally and ratably, and not one for the other, for all contracts and liabilities of such corporation to the extent of the amount of their stock at par value in addition to the amount of such stock," the amount to be recovered on account of the liability of the stockholders of such a corporation being sought to be administered in equity in a suit brought in behalf of all creditors against all stockholders who are within the jurisdiction, and where the amounts due from the corporation to complainants are of the requisite jurisdictional amount, and the amounts due from some of the defendants exceed such sum, and the requisite diversity of citizenship exists, such suit may be brought in a federal court, and such court, having acquired jurisdiction generally to administer the trust, may, as ancillary to such jurisdiction, decree against a stockholder, either under an ancillary bill or in the original case. Robertson v. Conway (1911) 188 Fed. 579, 110 C. C. A. 377.

Where a federal court has acquired jurisdiction of a cause, a supplementary proceeding may be maintained therein without regard to the citizenship of the parties, and therefore, pending a suit in equity brought by assignees in bankruptcy to set aside a conveyance alleged to have been made by the bankrupt in fraud of creditors, a creditor to whom the assignees have, under order of court, conveyed the bankrupt's title, may file a bill in the cause in the nature of a supplemental bill, although a citizen of the same state as defendants. Miller v. Rogers (C. C. 1886) 29 Fed. 401.

A suit in equity, brought by the receiver of an insolvent corporation, appointed by a federal court, against the subscribers to the stock of the corporation, to collect the balances due on their subscriptions, is within the jurisdiction of such federal court in equity, as an ancillary suit, without regard to the citizenship of the parties, or the adequacy of the remedy at law. Bausman v. Denny (C. C. 1896) 73 Fed. 69.

When a federal court has obtained jurisdiction over a corporation by the filing of a creditors' bill and the appointment of a receiver, a suit by the receiver for the collection of assets is cognizable in such court, regardless of citizenship or the amount in controversy. Alexander v. Southern Home Building & Loan Ass'n (C. C. 1903) 120 Fed. 963.

Where a federal court has appointed a receiver for an insolvent corporation, a suit brought by such receiver for the collection of an assessment made by the court on stockholders of the corporation to pay its debts is ancillary to the main suit, and is cognizable by a federal court, regardless of the citizenship of the parties or the amount in controversy. Brown v. Allebach (C. C. 1907) 156 Fed. 697.

Independently of diverse citizenship, amount involved, or federal question, a federal court has jurisdiction of a proceeding by its receiver to collect a claim; the proceeding being ancillary. J. Elwood Lee Co. v. Grace Hospital (D. C. 1913) 206 Fed. 994.

435. —— **Conservation of property in hands of receiver.**—Where the property is within the jurisdiction of the federal court, and has been taken into its custody by the appointment of a receiver, its jurisdiction to protect it from interference by such state officer is independent of the amount involved, the citizenship of the parties, or of the existence of any new ground of equitable jurisdiction. Ex parte Tyler (1893) 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; Id. (1893) 149 U. S. 191, 13 Sup. Ct. 793, 37 L. Ed. 689.

A federal court which has possession of property by receivers, and is engaged in administering the trusts pertaining to it, must take jurisdiction of any claim by any one whose interests would

be injuriously affected by the action of the court in dealing with the property and administering the trust. Blake v. Pine Mountain Iron & Coal Co. (1896) 76 Fed. 624, 22 C. C. A. 430.

Where a federal court, by its receiver, has possession of all the property of a railroad company for the purpose of administering it as the property of an insolvent corporation in a suit brought by general creditors, such possession draws to that court, as auxiliary, all suits and proceedings with respect to the property, and it has jurisdiction of proceedings to foreclose a mortgage, without regard to the citizenship of the parties, whether such proceedings are by cross bill, or intervening petition in the pending suit, or by an original bill. Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. (1899) 95 Fed. 497, 36 C. C. A. 155, certiorari denied (1900) 20 Sup. Ct. 383, 176 U. S. 219, 44 L. Ed. 442, modifying decree Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C. 1898) 86 Fed. 929.

The will of a testator was probated in Chicago as his place of domicile and a general executor appointed. Decedent owned property in New York City of the value of perhaps $3,000,000, including a valuable residence and art collection, but the executor took no steps for ancillary administration there for three years, and in the meantime the property there was in possession of the widow, who asserted an adverse claim to a large part of it. The art collection was given no care, and taxes amounting to $200,000, were unpaid, and a mortgage on a part of the real estate was being foreclosed for nonpayment of interest. When the executor applied for appointment as ancillary administrator, his application was contested by the widow, who procured an injunction in Chicago restraining him from proceeding therewith. The estate was largely indebted, and a foreign creditor whose claim for a large amount had been allowed filed a bill in equity in the federal court in New York on behalf of itself and all other creditors, praying the appointment of a receiver, that the court administer the property there, and for general relief. Held that, while the court was without jurisdiction to grant all the relief prayed for, it had and properly exercised jurisdiction to take charge of and preserve the property by its receiver. Underground Electric Rys. of London v. Owsley (1909) 176 Fed. 26, 99 C. C. A. 500, affirming order (C. C. 1909) 169 Fed. 671.

Where a federal court of equity, in a suit for the partition of lands, has appointed a receiver for such lands, he may, by leave of the court, file a bill in equity to protect his possession, and to require the defendants, as authorized by a state statute, to set up for adjudication an adverse claim made by them, alleged to constitute a cloud on the complainant's title, which will seriously interfere with any partition that may be ordered by the court; and such bill, being ancillary to the original suit, is within the jurisdiction of the court, regardless of the citizenship of the parties. Connor v. Alligator Lumber Co. (C. C. 1899) 98 Fed. 155.

A federal court which has appointed ancillary receivers for the property of a corporation within its jurisdiction has jurisdiction of a suit by such receivers in their own name to protect the business carried on by them from injury by unfair competition, also carried on within the state, without regard to the citizenship of the parties. Brookfield v. Hecker (C. C. 1902) 118 Fed. 942.

Where a federal court had acquired jurisdiction of the assets of a street railway company operating the same through a receiver for the benefit of creditors, it had ancillary jurisdiction of a petition by the receiver to restrain a competing street railway company from maintaining gates across a certain highway, the effect of which would be to practically destroy the value of the property in the hands of the receiver. Hampton Roads Ry. & Electric Co. v. Newport News & O. P. Ry. & Electric Co. (C. C. 1904) 131 Fed. 534.

A federal court, which was administering the estate of an insolvent corporation, including standing timber, held to have ancillary jurisdiction of a suit by its receivers to enjoin the cutting of timber by others, regardless of the citizenship of the parties. Knox & Lewis v. Alwood (D. C. 1915) 228 Fed. 753.

See, also, 253, ante, this subdivision.

436. —— **Cross-bills.**—Where a cross-bill is filed to enforce a judgment in a United States court, and which could not be filed in any other court, the proceeding is only ancillary to the original suit; and, in such case, the jurisdiction of the court is not ousted by the fact that the plaintiff and defendant corporations are both of the same state. Milwaukee & M. R. Co. v. Chamberlain (1867) 6 Wall. 748, 18 L. Ed. 859.

When the federal court obtains jurisdiction of a suit to foreclose a mortgage involving more than the jurisdictional amount by reason of diverse citizenship, it has jurisdiction to determine the priority of all liens upon the premises set up by cross-bill, regardless of the amounts claimed; and, as the jurisdiction of the circuit court of appeals is not limited to any amount, it may entertain an appeal from a decree of the circuit court on such a cross-bill, refusing to recognize a lien for less than the jurisdictional amount. Courtney v. Insurance Co. of North America (1892) 49 Fed. 309, 1 C. C. A. 249.

A bill in equity was filed in a federal court to set aside deeds to certain lands, both the grantor and grantees in such deeds being made defendants. Such

grantees filed a cross-bill against the grantor codefendant to recover purchase money paid him for the land, and for the cancellation of notes given for deferred payments in case the conveyances should be held invalid. Subsequently a decree was entered by consent of such grantees, to which their codefendant did not object, granting to complainant the relief prayed for, but retaining the case for determination of the matters arising on the cross-bill. Issue was joined thereon, and after a hearing a decree was entered in favor of the complainants therein. Held, that the cross-bill was ancillary to the original suit, growing directly out of the matters involved therein, and was within the jurisdiction of the court, without regard to the citizenship of the parties thereto, and that the entry of the decree on the original bill did not deprive the court of jurisdiction to retain and try the issues on the cross-bill. Craig v. Dorr (1906) 145 Fed. 307, 76 C. C. A. 559.

Where a court of the United States has jurisdiction of a suit to foreclose a chattel mortgage, it may entertain a cross bill in such suit, filed by a party who intervenes and claims to be the owner of a part of the property, although such party, because his citizenship is the same as that of defendant, could not have originated the suit. Osborne & Co. v. Barge (C. C. 1887) 30 Fed. 805.

When a federal court has jurisdiction of a suit on the facts alleged in the bill, both as to the subject-matter and the parties, it may take jurisdiction of all ancillary or cross-bills without regard to the citizenship of the adversary parties to the dependent bills. First Nat. Bank v. Salem Capital Flour Mills Co. (C. C. 1887) 31 Fed. 580; Everett v. Independent School Dist. of Rock Rapids (C. C. 1900) 102 Fed. 529.

A federal court, in a suit in equity between citizens of different states, based on a judgment at law in favor of the complainant and against one of the defendants, is not ousted of its jurisdiction to proceed and determine issues joined therein between co-defendants by the fact that such judgment is discharged after the commencement of the suit, although it would not have had jurisdiction of an original suit, between such co-defendants, because they are citizens of the same state. Ritchie v. Burke (C. C. 1901) 109 Fed. 16.

In a suit in a federal court of equity to establish and protect rights in the waters of a stream against other separate appropriators of water from the same stream, all of whom are citizens of different states from complainant, the court may entertain cross-bills by any or all of the several defendants setting up priority of right as against complainant or their codefendants, since they relate to the subject of the original suit, which is the water of the stream, and, being ancillary to the original suit, the court has jurisdiction to determine the issues raised thereby without regard to the citizenship of the parties thereto. Ames Realty Co. v. Big Indian Min. Co. (C. C. 1906) 146 Fed. 166; Miller & Lux v. Rickey (C. C. 1906) 146 Fed. 574, decree affirmed Rickey Land & Cattle Co. v. Miller & Lux (1906) 152 Fed. 11, 81 C. C. A. 207, and order affirmed Same v. Wood (1907) 152 Fed. 22, 81 C. C. A. 218, decrees affirmed Same v. Miller & Lux (1910) 31 Sup. Ct. 11, 218 U. S. 258, 54 L. Ed. 1032.

A resident of the District of Columbia, although not a citizen of a state within the constitutional provision giving the federal courts cognizance of suits between citizens of different states, may maintain a cross-bill in a suit in such a court for relief which is ancillary to that sought in the original suit; the citizenship of the parties in such case being immaterial. Ulman v. Iaeger's Adm'r (C. C. 1907) 155 Fed. 1011.

The Federal Mining Company, a Delaware corporation, the Bunker Hill, and the January Company, both Oregon corporations, each owned a mining claim, and all three claims conflicted. The Federal Company sued the Bunker Hill Company in the United States court to quiet title and for an accounting for ores taken from the overlaps, and the January Company had a similar suit against the Bunker Hill Company in the state court. The Bunker Hill Company moved to make the January Company a party in the suit in the United States court, which was resisted on the ground that because of the ownership of the entire January stock by the Federal Company it could not be a defendant but must be a plaintiff, which would destroy the jurisdiction of the court by having an Oregon citizen on both sides of the case. Held, that the controversy between the Bunker Hill Company and the January Company could be litigated between them on cross-bill as ancillary to the main case, though they were citizens of the same state. Federal Mining & Smelting Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (C. C. 1909) 187 Fed. 474.

Where the jurisdiction of a federal court has been properly invoked, it continues for the purpose of determining rights in property which is the subject of litigation under a cross-bill between codefendants, although the original bill is dismissed and there is no diversity of citizenship between the defendants. United States v. Mackey (D. C. 1913) 214 Fed. 137, appeal of certain parties dismissed Gladys Belle Oil Co. v. Same (C. C. A. 1914) 216 Fed. 129, decree reversed United States v. Same (C. C. A. 1914) 216 Fed. 126.

437. —— **Distribution of assets.**—Jurisdiction of a bill which seeks to reach

and distribute to the persons found entitled thereto the proceeds of a sale of lands to the United States cannot be entertained by a federal court on the theory that the cause is ancillary to an action at law to recover the lands from the United States, as occupied without right, in which the rival claimants had united in procuring final judgment in favor of two of their number, leaving their respective interests to be settled by arbitration. Stillman v. Combe (1905) 25 Sup. Ct. 480, 197 U. S. 436, 49 L. Ed. 822.

In a suit in a federal court to dissolve a partnership and distribute its assets, where the court had jurisdiction, and has taken possession of the property and sold the same, through a receiver, and brought in the creditors by order, the fact that one of such creditors was a citizen of the same state as the complainant does not affect its jurisdiction. Bloomingdale v. Watson (1904) 128 Fed. 268, 62 C. C. A. 600.

Suit by a trustee of a mortgage of a railroad company for a receiver and distribution among creditors generally, brought after foreclosure suit, held an independent and not an ancillary suit, and the court in such suit cannot restrain prosecution of prior actions in state courts. Central Trust Co. v. Chicago, R. I. & P. R. Co. (1915) 224 Fed. 706, 140 C. C. A. 246.

A decree in proceedings to foreclose a railroad mortgage in the federal court in Tennessee provided that the fund arising from the sale should be applied to such claims "as are decreed by the court to be prior in lien or equity to the lien of said mortgage." A decree in ancillary proceedings in the federal court in Georgia ratified the foreclosure decree, but reserved the right to "determine what amount of the purchase price of the property sold shall be paid into this court," for payment of costs and "such other claims filed in this cause in this court as may be allowed and adjudged prior in lien to the mortgage," and in a subsequent decree of the Georgia court, confirming the sale, it was provided that the question of distribution of the funds and priority of liens was reserved for future action "by this court." Held, that the court in Georgia would assume jurisdiction to determine the priority of claims, filed therein on judgments recovered in Georgia, over the lien of the mortgage. Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co. (C. C. 1895) 69 Fed. 658.

Where a federal court has taken possession of the property of an insolvent corporation for distribution among creditors, it may, in its discretion, remove to itself suits pending against the corporation in the state courts, and affecting the property, by virtue of its jurisdiction to administer the same and as incidental thereto, without regard to whether or not it would have had jurisdiction of the suit. Rice v. Durham Water Co. (C. C. 1899) 91 Fed. 433.

A federal court has jurisdiction to determine the right to the proceeds of a judgment rendered therein which has been paid into court, as between different claimants who appear and assert their claims, regardless of their citizenship. Myers v. Luzerne County (C. C. 1903) 124 Fed. 436.

See, also, 252, ante, this subdivision.

438. —— **Enforcement of judgments, decrees, or orders.**—The court has jurisdiction of all proceedings consequent upon the judgment or decree to obtain satisfaction, for the suit is not terminated until satisfaction. Brun v. Mann (1906) 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; Loy v. Alston (1909) 172 Fed. 90, 96 C. C. A. 578; Campbell v. Hadley (D. C. 1859) Fed. Cas. No. 2,358.

A proceeding in mandamus in a federal court to enforce payment of a judgment rendered therein is ancillary to the original action and within the jurisdiction of the court, regardless of the citizenship of the parties. Labette County Com'rs v. U. S. (1884) 112 U. S. 217, 5 Sup. Ct. 108, 28 L. Ed. 698; Tucker v. Hubbert (1912) 196 Fed. 849, 117 C. C. A. 365.

A suit on a recognizance of bail, or an action of debt on a judgment is an original suit; a scire facias upon a judgment is to some purposes only a continuation of the former suit. Davis v. Packard (1833) 7 Pet. 276, 285, 8 L. Ed. 684.

An act (July 15, 1862) repealed all circuit court powers given to certain district courts of the United States. A subsequent statute (March 3, 1863) enacted "that in all cases wherein the district court has rendered final judgments or decrees prior to the passage of the act, said district court shall have power to issue writs of execution, or other final process, or to use such other powers and proceedings as may be in accordance with law, to enforce the judgments and decrees aforesaid," anything in said act of July 15, 1862, to the contrary, notwithstanding. Held, that the district court acquired only such powers as might be necessary to insure the execution of any final process that it might issue; that is to say, such powers as might be necessary to regulate and control its officers in the execution of their ministerial duties. Held, also, that the words "judgments and decrees," within the meaning of this act, were such judgments and decrees as disposed of the whole case, so that nothing remained to be done but to issue "final process." Bronson v. La Crosse & M. R. Co. (1863) 68 U. S. (1 Wall.) 405, 17 L. Ed. 616.

In absence of special statutory enactments by the state where the jurisdiction is exercised, the United States court has no power to authorize a marshal to levy taxes for the purpose of

satisfying a judgment, as the only ordinary method of satisfaction is by execution. Barkley v. Levee Com'rs (1876) 93 U. S. 258, 23 L. Ed. 893.

Ancillary relief in a federal court by way of an injunction in aid of a decree in a suit over the validity of state taxation, in which jurisdiction as to the state and its officers had been acquired as the result of the voluntary action of the state in submitting its rights to judicial determination, is not forbidden by Const. U. S. Amend. 11, as a suit against the state. Gunter v. Atlantic Coast Line R. Co. (1906) 26 Sup. Ct. 252, 200 U. S. 273, 50 L. Ed. 477.

A bill filed to carry out a decree, in a former suit, establishing a partnership, by which new parties are brought in and new matter charged as a basis of relief, is not a supplemental or ancillary bill, of which jurisdiction can be entertained without regard to the citizenship of the parties. Anglo-Florida Phosphate Co. v. McKibben (1894) 65 Fed. 529, 13 C. C. A. 36.

That the roadbed of a railroad company has been sold under a decree of foreclosure in a federal court gives that court no jurisdiction over a subsequent suit to restrain the enforcement of a judgment of ejectment procured in a state court by an alleged owner of part of the roadbed, who was not a party to the foreclosure suit. Central Trust Co. v. Grantham (1897) 83 Fed. 540, 27 C. C. A. 570.

A federal court has jurisdiction, as ancillary to an action therein in which a judgment was rendered against the city of New Orleans, to award a writ of mandamus against the board of liquidation of the city debt to compel such board to pay or fund the judgment as required by the state statutes. Such jurisdiction is not affected by the fact that the board was not a party to the principal suit, since it is a department of the municipal government created by statute, and charged with the sole duty of liquidating the indebtedness of the city. Board of Liquidation of City of New Orleans v. U. S. (1901) 108 Fed. 689, 47 C. C. A. 587.

A suit in equity in a federal court to enforce payment of a tax in order to obtain satisfaction to that extent of a judgment rendered by such court, although original in form, is ancillary to the original action and within the jurisdiction of the court irrespective of the amount in controversy. Preston v. Calloway (1910) 183 Fed. 19, 105 C. C. A. 311, writ of certiorari denied Same v. Sturgis Mill. Co. (1911) 31 Sup. Ct. 714, 220 U. S. 610, 55 L. Ed. 608.

A suit to enforce payment of a special assessment made by a city under a mandamus awarded by a federal court held ancillary, and within the jurisdiction of the court, without regard to the amount involved. Cushman v. Warren-Scharf Asphalt Paving Co. (1915) 220 Fed. 857, 135 C. C. A. 289, certiorari denied (1915) 35 Sup. Ct. 603, 238 U. S. 621, 59 L. Ed. 1493.

A creditors' bill, filed to obtain satisfaction of a judgment at law rendered in the same court, is not an original action, irrespective of parties. Babcock v. Millard (C. C. 1862) Fed. Cas. No. 699.

The federal court has no jurisdiction to entertain a creditors' bill based on a decree in admiralty recovered in the district court, all the parties to the bill being citizens of the same state, on the ground that the bill is ancillary to the decree in the district court. Winter v. Swinburne (C. C. 1881) 8 Fed. 49.

Actions in aid of an execution at law are ancillary to the original suit, and are, in effect, a continuance of the suit at law to obtain the fruit of the judgment, or to remove obstacles to its enforcement. Claflin v. McDermott (C. C. 1882) 12 Fed. 375.

Where a judgment has been obtained against a city in a federal court by a nonresident, such court has jurisdiction of a bill to restrain an assessment and collection of a tax by the city on such judgment. De Vignier v. City of New Orleans (C. C. 1883) 16 Fed. 11.

A suit in a federal court to obtain a construction and enforcement of a decree of the same court is ancillary to the former suit, and the court has jurisdiction regardless of the citizenship of the parties. Jenks v. Brewster (C. C. 1899) 96 Fed. 625.

When the marshal has sold stock in a private corporation under an execution issued on a valid judgment rendered by a federal court against the owner, and the officers of the corporation refuse to issue a certificate for such stock to the purchaser, or to transfer the same to his name on the books, the court has authority to compel such action by a writ of mandamus, which in such case is a process in execution necessary to make the sale effective, and the proceeding therefor ancillary to the original suit. Hair v. Burnell (C. C. 1900) 106 Fed. 280.

A federal court rendering a judgment has ancillary jurisdiction of a creditor's bill by the judgment creditor to set aside fraudulent conveyances by the judgment debtor without regard to the citizenship of the parties. Hobbs Mfg. Co. v. Gooding (C. C. 1908) 164 Fed. 91.

An action, by the owner of a judgment recovered against a corporation for infringement of a patent, to charge directors of such corporation with payment of the judgment on the ground that they were joint trespassers with the corporation, is not within the jurisdiction of the federal court as ancillary to the former suit. H. C. Cook Co. v. Beecher (C. C. 1909) 172 Fed. 166, judgment affirmed (1910) 30 Sup. Ct. 601, 217 U. S. 497, 54 L. Ed. 855.

439. —— Enforcement of liens and mortgages.—Where a suit is pending in

a federal court for the appointment of a receiver and the foreclosure of a railroad mortgage, the court will take jurisdiction without regard to the citizenship of the parties, of another bill filed by lien claimants, since their right to enforce their liens in the state court will be cut off when the federal court takes possession of the property; and their suit may be regarded as in substance an ancillary bill. Central Trust Co. v. Bridges (1893) 57 Fed. 753, 6 C. C. A. 539, reversing decree (C. C. 1891) 48 Fed. 243, decree modified Central Trust Co. v. Condon (1895) 67 Fed. 84, 14 C. C. A. 314.

A personal judgment for a deficiency may be entered on foreclosure, in a federal court, of a vendor's lien expressly reserved in the deed. White v. Ewing (1895) 69 Fed. 451, 16 C. C. A. 296, modifying decree (1895) 66 Fed. 2, 13 C. C. A. 276.

The possession by the court, in which a foreclosure suit is pending, of the fund applicable to the payment of the bonds secured by the mortgage under foreclosure, is sufficient to authorize it to entertain the petition of the claimants, asserting a mortgage lien upon such bonds. Central Trust Co. v. Carter (1896) 78 Fed. 225, 24 C. C. A. 73.

Where a mortgage was given to secure a prior indebtedness from the mortgagor to the mortgagee, who were citizens of different states, the jurisdiction of a federal court of a suit to foreclose the mortgage is not affected by the fact that it also secured other indebtedness owing by the mortgagor to a third person, who was a citizen of the same state, which had been assigned to the mortgagee. Camp v. Peacock, Hunt & West Co. (1904) 129 Fed. 1005, 64 C. C. A. 490, affirming decree Peacock, Hunt & West Co. v. Thaggard (C. C. 1904) 128 Fed. 1005.

A suit in equity in a federal court to enforce an attachment lien obtained in a former action in the same court, and to subject the attached property or its proceeds to the satisfaction of the judgment recovered therein, is not an original suit, but is ancillary and supplementary to the former action, and may be maintained as an incident to the jurisdiction already vested, without regard to the citizenship of the parties; and it is immaterial, so far as the ancillary character of the suit is concerned, that the proceeds of the attached property are not in the actual custody of the federal court; the effect of the removal having been to bring the property potentially within the jurisdiction and custody of that court. Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. (1904) 133 Fed. 267, 68 C. C. A. 19.

A suit was brought in the United States court for Ohio for the foreclosure of a mortgage on defendant's railroad, which extends through Ohio and West Virginia. After the appointment of a receiver in that suit, complainant filed a bill termed an "ancillary bill," in the United States court for West Virginia, reciting the proceedings in the first suit, and exhibiting a copy of the bill therein, and praying the court to take "ancillary jurisdiction" and furnish such relief as might be necessary to accomplish the purposes of the first suit, "and for such other and further relief as the nature of the case may require," etc. Held, that the bill should be dismissed. If the aid of the court in West Virginia is desired in enforcing the mortgage, it must be invoked by an independent suit. Mercantile Trust Co. v. Kanawha & O. Ry. Co. (C. C. 1889) 39 Fed. 337.

A bill to enforce various liens on part of a railroad as against the lien of a general mortgage, which is about to be foreclosed in the same court by a suit ancillary to another suit in a different district and state, is an original bill within the meaning of that term as used in equity pleading, yet the suit, in its essence, is supplementary to the ancillary foreclosure suit, which it seeks to oppose; and hence the court's jurisdiction is unaffected by the fact that, when the parties are arranged according to their interests in the suit, some who are residents of the same state will be found on opposite sides of the controversy. McBee v. Marietta & N. G. Ry. Co. (C. C. 1891) 48 Fed. 243, decree reversed Same v. Central Trust Co. (1893) 57 Fed. 753, 6 C. C. A. 539.

A federal court having jurisdiction and possession, through its receiver, of all the property of a railroad company, thereby acquires jurisdiction of a subsequent suit to foreclose a mortgage on the same property, irrespective of the citizenship of the parties thereto, and may enter therein a binding decree of foreclosure and sale. Carey v. Houston & T. C. Ry. Co. (C. C. 1892) 52 Fed. 671 (following Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co. [1890] 11 Sup. Ct. 61, 137 U. S. 171, 34 L. Ed. 625); Park v. New York, L. E. & W. R. Co. (C. C. 1895) 70 Fed. 641; Fish v. Ogdensburgh & L. C. R. Co. (C. C. 1897) 79 Fed. 131; Metropolitan Trust Co. of New York v. Columbus, S. & H. R. Co. (C. C. 1899) 93 Fed. 689.

The duty of a court in which proceedings are pending, ancillary to proceedings in another district, for the foreclosure of a mortgage, is only to consider and dispose of rights and liens peculiar to its jurisdiction, and to the property particularly within its charge. Clyde v. Richmond & D. R. Co. (C. C. 1894) 65 Fed. 336.

When a United States court has jurisdiction, generally, of a controversy, by reason of the parties being citizens of different states, it can entertain a suit for the foreclosure of a mortgage on land within the district for which

it sits, and, in such suit, can entertain and determine such pertinent questions as are necessary to give the complainant perfect and full relief, including the question of the superiority of an alleged prior mortgage held by a defendant, although neither complainant nor all the defendants are residents of the district. Kuhn v. Morrison (C. C. 1894) 75 Fed. 81, remanding cause (1896) 78 Fed. 16, 23 C. C. A. 619.

A federal court in which a mortgage foreclosure is pending has jurisdiction to determine and enforce the rights of a holder of a tax deed to the land, who had obtained a decree by default against complainants in a suit in a state court brought after the suit to foreclose was begun, and with notice of its pendency. Cohen v. Solomon (C. C. 1895) 66 Fed. 411.

A federal court has ancillary jurisdiction of a mortgage foreclosure suit, irrespective of the citizenship of the parties, where all the property affected is already in its possession through its receiver in another suit. Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C. 1897) 82 Fed. 642.

A receiver appointed in a creditors' suit against an insolvent railroad company is not a proper party to an ancillary suit against the same company to foreclose a mortgage on the property in his hands. Id.

Complainant filed a bill in equity in a federal court, alleging that through an attachment in an action at law in said court against an alien the court had acquired jurisdiction of a fund in the hands of trustees, but that, by reason of the death of the defendant, leaving no representatives in this country, it had become impossible to proceed further in such action, and praying the aid of the court in the enforcement of his lien as against the trustees, who were made defendants. No federal question was involved, and the parties were all citizens of the same state. Held, that the only ground of federal jurisdiction was the ancillary nature of the suit, and that, on its being determined therein that a judgment of a state court adjudging that the attachment was ineffectual to give a lien upon the fund was binding upon the complainant, the court was without jurisdiction further to entertain the suit. Montgomery v. McDermott (C. C. 1900) 99 Fed. 502.

A suit to restrain private persons from selling the stock of a railroad company is not ancillary to one to foreclose a mortgage on property of such company, to which the stockholders are not parties. Raphael v. Trask (C. C. 1902) 118 Fed. 777, affirmed (1904) 24 Sup. Ct. 647, 194 U. S. 272, 48 L. Ed. 973.

Where an attorney who has recovered a judgment in favor of his client in a federal court in Iowa and entered notice of a lien on such judgment on the docket in conformity to the state statute brings a suit in equity in such court against the parties to the judgment to enforce his lien, such suit is ancillary to the original suit and within the jurisdiction of the court without regard to the amount involved or the citizenship of the parties. Brown v. Morgan (C. C. 1908) 163 Fed. 395.

That receivers appointed by a federal court for a street railroad system have been operating a leased line does not give such court jurisdiction of a suit to foreclose a mortgage on such line after the receivers have elected to surrender the lease and have offered to return the property to the lessor. Guaranty Trust Co. of New York v. Second Ave. R. Co. (C. C. 1908) 165 Fed. 487.

440. —— **Enforcement of process.**—If necessary to prevent the abuse of its own process a federal court will entertain a bill by a stranger to the suit in which the process issued, without regard to diversity of citizenship. Such a bill is regarded as merely incidental and ancillary to the suit already pending. Krippendorf v. Hyde (1884) 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.

441. —— **Intervention.**—The federal court, having jurisdiction of an action, and the custody or control of the fund or property in controversy, may entertain a petition of intervention, and try the issues thereon, without regard to the citizenship of the parties in the main action, or to the amount in controversy under the petition. People's Sav. Inst. of Erie County, Pa., v. Miles (1896) 76 Fed. 252, 22 C. C. A. 152.

A bill in equity filed in the federal court against the parties to an action at law, which has proceeded to judgment in said court, to enjoin the enforcement of such judgment, and for permission to the complainant to intervene in said action and set up a defense, is ancillary to the original action, so far as the question of jurisdiction is concerned, and may be maintained without regard to diversity of citizenship. McDonald v. Seligman (C. C. 1897) 81 Fed. 753.

Where suit for the foreclosure of a railroad mortgage was instituted in the federal court, and such court had appointed a receiver, and the railroad had been sold under such proceedings, the court had jurisdiction of an intervention by a creditor having obtained a judgment in a state court to determine priority of such judgment, as a lien on the property of the railroad. State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. 1902) 115 Fed. 367.

442. —— **Modification, construction, or vacation of judgments or decrees.**—Where a bill in equity is necessary to have a construction of the orders, decrees, and acts made or done by a federal court, the bill is properly filed in such federal court as distinguished from any state court, and it may be enter-

tained in such federal court, even though parties who are interested in having the construction made would not, from want of proper citizenship, be entitled to proceed, by original bill of any kind, in a court of the United States. Minnesota Co. v. St. Paul Co. (1864) 2 Wall. 609, 17 L. Ed. 886.

In such a case, the question will not be whether the bill filed is supplemental or original in the technical sense of equity pleading, but whether it is to be considered as supplemental or entirely new and original in that sense which the supreme court has sanctioned with reference to the line that divides jurisdiction of the federal courts from that of the state courts. Id.

Where the United States court had jurisdiction, on the ground of diverse citizenship, of a suit to foreclose a mortgage on a railroad, it has jurisdiction of a suit by the railroad corporation to have the decree in such suit set aside on the ground of the unfaithful conduct of its officers in conducting such suit, without regard to the citizenship of the parties to the suit, to set aside the decree. Pacific Railroad v. Missouri Pac. Ry. Co. (1884) 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498.

A bill by the stockholders of a corporation, filed to impeach the decree of foreclosure and sale on the ground of collusion and fraud and want of jurisdiction in the court to make it, is an ancillary suit, and a mere continuation of the main suit, so far as the jurisdiction of the federal court is concerned. Carey v. Houston & T. C. Ry. Co. (1896) 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638.

A bill in equity dependent upon a former action of which the federal court had jurisdiction may be maintained to restrain, avoid, or explain the judgment or decree therein. Brun v. Mann (1906) 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; Loy v. Alston (1909) 172 Fed. 90, 96 C. C. A. 578.

A federal court has jurisdiction of a suit to set aside its former decree for being fraudulently obtained, although by reason of present citizenship a purely original bill between the parties could not be maintained, as such a suit is but a continuation of the former controversy. Foster v. Mansfield, C. & L. M. R. Co. (C. C. 1888) 36 Fed. 627, decree affirmed (1892) 13 Sup. Ct. 28, 146 U. S. 88, 36 L. Ed. 899.

In a suit pending in the United States court a compromise was effected, in pursuance of which defendant paid plaintiff a certain sum, and a final decree was entered by stipulation dismissing plaintiff's bill. Defendant subsequently executed a trust deed of all his property for the use and benefit of his heirs, and thereafter died; after which plaintiff filed a bill in the same court against the trustees to have the stipulation and decree of dismissal set aside for fraud. Held that, it being alleged in the bill that all the parties to the suit were citizens of the state, the court had no jurisdiction, as defendants not having been parties to the former suit, and not being the personal representatives of the former defendant, and the property which was the subject of the former contest not being any longer subject to the order of the court, the bill was an original one, not dependent upon or ancillary to the original suit, and a state court of equity could give full relief. Ralston v. Sharon (C. C. 1892) 51 Fed. 702.

A federal court has jurisdiction of a suit the purpose of which is to modify and correct one of its own decrees, without regard to the citizenship of the parties, and as incidental to such relief to grant an injunction to restrain a party from acting upon the decree as originally entered. Thompson v. Schenectady Ry. Co. (C. C. 1903) 124 Fed. 274.

A suit in equity commenced in a federal court, the purpose of which is to set aside a judgment of dismissal entered by the same court in an action at law, is ancillary to such action and within the jurisdiction of the court without regard to the citizenship of the parties, and where the defendants named in the bill were parties to the original action, or are in privity with such parties, service may be made upon them, although they reside beyond the limits of the district. O'Connor v. O'Connor (C. C. 1906) 146 Fed. 994.

Where an action is brought in a federal court on an arbitrator's award, a suit by the defendant therein to set aside the award for fraud is ancillary, but such fact does not give the court jurisdiction to bring in another party who is a citizen of the same state as the complainant to impeach an award in its favor made at the same arbitration, but which is separate and distinct from that between the other parties. Hecht v. Youghiogheny & Lehigh Coal Co. (C. C. 1908) 162 Fed. 812.

443. —— **Proceedings against receivers.**—Where a receiver of a corporation was appointed by a federal court, an action against the receiver for injuries to an employé was maintainable in such court, though no federal question was involved and there was no diversity of citizenship. Betts v. Bisher (1914) 213 Fed. 581, 130 C. C. A. 161.

Pleadings considered, and held to fairly warrant the deduction that, as alleged in the petition, defendant, who was sued as receiver, was appointed by the trial court and to therefore sustain its jurisdiction regardless of the citizenship of the parties. Cobb v. Sertic (1914) 218 Fed. 320, 134 C. C. A. 116.

An action may be maintained in a federal court against a receiver appointed by that court based upon his alleged negligent performance of his duties as

such receiver regardless of the citizenship of the parties. Id.

Regardless of citizenship, federal court held to have jurisdiction of action for negligence against receivers appointed by it. St. Bernard v. Shane (1915) 220 Fed. 852, 135 C. C. A. 399, reversing order (D. C. 1913) 201 Fed. 453.

A federal court of equity, in an ancillary case, has jurisdiction to control a railroad receiver against whom complaint is made by an intervening petition filed against the receiver in the ancillary receivership litigation. Chattanooga Terminal Ry Co. v. Felton (C. C. 1895) 69 Fed. 273.

When a federal court, by the appointment of a receiver, has assumed exclusive control of the operation and management of a railroad, a proceeding to require the receiver by mandamus to comply with a state statute requiring the weighing of cars loaded with lumber is subordinate and ancillary to the suit in which the receiver was appointed, and, as such, within the jurisdiction of the federal court, and removable thereto if commenced in a state court. State of Washington v. Northern Pac. R. Co. (C. C. 1896) 75 Fed. 333.

An action against a receiver appointed by a federal court, growing out of the transactions of the receiver or his employés, being ancillary to the suit in which the receiver was appointed, is within the jurisdiction of that court, regardless of the citizenship of the parties, the nature of the controversy, or the amount involved. Carpenter v. Northern Pac. R. Co. (C. C. 1896) 75 Fed. 850.

A suit by or against a receiver of a federal court in the course of the winding up of a corporation is ancillary to the main suit, and is cognizable in the same court, regardless of the amount in controversy. Lanning v. Osborne (C. C. 1897) 79 Fed. 657.

A suit brought against a receiver of a federal court to determine his right to assets claimed by him as such receiver is ancillary to the suit in which he was appointed. Shinney v. North American Savings, Loan & Building Co. (C. C. 1899) 97 Fed. 9.

A federal court has jurisdiction of a proceeding by the parties interested in a corporation for which it has appointed a receiver to enjoin him, on obtaining his discharge, from making use of the knowledge of the corporation's business acquired by him in his office of receiver, by engaging in competition with it, or the successor to its business, though all the parties to the proceeding are citizens of the state; but under such conditions it cannot inquire into any contractual obligations of his not to enter into such competition. Lavis v. Consumers' Brewing Co. (C. C. 1901) 106 Fed. 435.

444. —— **Proceedings in aid of jurisdiction.**—Jurisdiction of a bill to reach and distribute the proceeds of a sale of lands to the United States cannot be entertained by a federal court on the theory that it is ancillary to an action at law to recover the lands from the United States as occupied without right, in which the claimants had procured final judgment in favor of two of their number, leaving their respective interests to arbitration. Stillman v. Combe (1905) 25 Sup. Ct. 480, 197 U. S. 436, 49 L. Ed. 822.

In a dependent or ancillary suit in a federal court, a party may be brought in by compulsory process, though his citizenship is such that it would defeat the jurisdiction if it depended on diverse citizenship. Compton v. Jesup (1895) 68 Fed. 263, 15 C. C. A. 397, certified and determined (1897) 17 Sup. Ct. 795, 167 U. S. 1, 42 L. Ed. 55.

A federal court has jurisdiction of a suit in equity between citizens of the same state to reach equitable assets of a nonresident debtor, against whom the complainant has an action in attachment pending in the same court, only when the complainant has by his attachment acquired a lien on property of the defendant which will render the suit in equity ancillary to the action at law. Montgomery v. McDermott (1900) 103 Eed. 801, 43 C. C. A. 348, affirming decree (C. C. 1900) 99 Fed. 502.

A bill in equity dependent upon a former action of which the federal court had jurisdiction may be maintained to aid, enjoin, or regulate the original suit. Brun v. Mann (1906) 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154; Loy v. Alston (1909) 172 Fed. 90, 96 C. C. A. 578.

Where the United States court had jurisdiction of a suit by plaintiffs against the R. & M. Co., in which a claim owing to the latter by defendant was attached, and would have had jurisdiction of such a suit by plaintiffs against defendant, the fact that the R. & M. Co. could not have sued the defendant in the United States Circuit Court, because both were aliens, did not deprive such court of the power to attach the debt owing from defendant to the R. & M. Co.; the R. & M. Co. being entitled to sue defendant in the state court. Helvetia Swiss Fire Ins. Co. v. Brandenstein (1909) 168 Fed. 1020, 92 C. C. A. 614, writ of error dismissed (1909) 30 Sup. Ct. 405, 215 U. S. 588, 54 L. Ed. 339, and writ of certiorari denied (1910) 30 Sup. Ct. 575, 216 U. S. 621, 54 L. Ed. 641, and affirming judgment Brandenstein v. Helvetia Swiss Fire Ins. Co. (C. C. 1908) 159 Fed. 589.

Where a receiver, appointed by a federal court, by reason of the character of his appointment, or because of local policy or the rights of local creditors, is not permitted to sue in a juris-

diction other than the one in which he was appointed, a bill may be filed in another federal court for the appointment of an ancillary receiver, and, the ultimate object of such proceeding being to aid the purpose of the original suit, it is in that sense ancillary, and jurisdiction thereof does not depend on diversity of citizenship of the parties. Bluefields S. S. Co. v. Steele (1911) 184 Fed. 584, 106 C. C. A. 564.

Where a bill by a legatee, a citizen of California, against an executor, a resident of Massachusetts, sought to reach real estate fraudulently mortgaged by the executor to a trustee residing in Illinois, to secure a note owned by a resident of Illinois, the trustee, made a party, was bound by any decree respecting his representative defense, and the trial court could, by ancillary bill, bring in the holder of the note if that should be deemed necessary, without affecting the diversity of citizenship. Fraser v. Cole (C. C. A. 1914) 214 Fed. 556.

The fact that an original action for a mandamus will lie in the courts of the state against a municipal corporation or its officers to compel the payment of bonds issued by the corporation or the levy of a tax for their payment does not deprive the holder of such bonds of the right to maintain an action to recover judgment thereon in a federal court, where the requisite diversity of citizenship exists; a judgment being a necessary preliminary to the issuance of a writ of mandamus by such court, which only grants it in aid of an existing jurisdiction, and not as an original remedy. Shepard v. Tulare Irr. Dist. (C. C. 1899) 94 Fed. 1, affirmed Tulare Irr. Dist. v. Shepard (1902) 22 Sup. Ct. 531, 185 U. S. 1, 46 L. Ed. 773.

The law, as recognized in the federal court is that, when a federal court at the domicile of a corporation appoints a receiver, or makes a decree winding up the corporation and disposing of its assets, or a decree of foreclosure, or any other decree looking to a disposition of its property, having proper jurisdiction in equity therefor, the courts in other districts will ordinarily exercise ancillary jurisdiction, and assist in carrying out the purpose of the court at the place of domicile. Conklin v. U. S. Shipbuilding Co. (C. C. 1903) 123 Fed. 913.

A federal court has, irrespective of the citizenship of the parties, power to entertain a bill for discovery, in aid of the defenses to a suit for the infringement of a patent, as ancillary to such suit, etc. Kendall v. Winsor (1860) 6 R. I. 453.

445. —— **Protection and administration of trust property.**—B. and others filed intervening petitions, in suits pending in the United States court for the winding up of certain railroad properties, claiming a fund in the hands of the C. Trust Co. Held that, notwithstanding B. and his associates and the C. Trust Co. were citizens of the same state, as the making of the order sought for was properly incident to granting full relief in the pending suits, and as the C. Trust Co. was a mere depositary of the fund, having no valid claim against it, the court had jurisdiction to direct payment of the fund to B. and his associates. Central Trust Co. of New York v. Benedict (1897) 78 Fed. 198, 24 C. C. A. 56.

Where a federal court has acquired jurisdiction of the cause and of all necessary parties in a suit to administer a trust, it may protect such jurisdiction by preventing interference with the trust property through attachments subsequently procured from a state court, whether it has at the time taken actual possession by its receiver or not, and it has ancillary jurisdiction of proceedings for that purpose against those attempting such interference, without regard to their citizenship. Memphis Sav. Bank v. Houchens (1902) 115 Fed. 96, 52 C. C. A. 176.

446. —— **Restraint of proceedings.**—A bill in equity to enjoin a judgment at law is not an original bill; and therefore it is not necessary, in a court of limited jurisdiction, to make citizens of the same state with the plaintiff parties defendant. Simms v. Guthrie (1815) 9 Cranch, 19, 3 L. Ed. 642; Freeman v. Howe (1860) 24 How. 450, 460, 16 L. Ed. 749; Williams v. Byrne (C. C. 1846) Fed. Cas. No. 17,718.

A federal court will not set aside a judgment of a state court for a mere irregularity, when the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, a bill of review, or an appeal. Gaines v. Fuentes (1875) 92 U. S. 10, 23 L. Ed. 524; Barrow v. Hunton (1878) 99 U. S. 80, 25 L. Ed. 407; Smith v. Schwed (C. C. 1881) 9 Fed. 483.

The creditors of a certain debtor, by process out of the federal court, attached property in the hands of the complainant, who claimed title to it in his own right. The goods were returned to him upon his giving a delivery bond to the marshal conditioned upon his producing the goods at a day named, or paying their value. Complainant, having disposed of the goods and paid their value to the marshal, brought a bill for an injunction to prevent the money so paid in, which he claimed as his own, from being distributed to the creditors in the original suit. Held that, being unable to maintain replevin against the marshal in the state court by reason of the goods being in the custody of the law in the federal court, the complainant had no adequate legal remedy, and was entitled to his injunction without

regard to his citizenship. Krippendorf v. Hyde (1883) 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145.

A bill in a federal court to restrain the enforcement of a judgment by such court in ejectment between the same parties, on account of an equitable defense that could not be pleaded in ejectment, need not allege the citizenship of the parties, since no other court than the one which rendered the judgment could stay process in it on the grounds set forth. Johnson v. Christian (1887) 125 U. S. 642, 8 Sup. Ct. 1135, 31 L. Ed. 820.

A bill to enjoin the prosecution of a creditors' suit pending in the same court is ancillary to such suit, and jurisdiction does not depend on the diverse citizenship of the parties. Bradshaw v. Miners' Bank of Joplin (1897) 81 Fed. 902, 26 C. C. A. 673.

A suit to stay an action on the law side of the court for recovery of lands, and to reform a deed thereto, is an ancillary suit, and the court has jurisdiction without regard to the amount in controversy. Hill v. Kuhlman (1898) 87 Fed. 498, 31 C. C. A. 87.

Where separate actions at law by insured against insurers on policies to which the same defense is interposed, and under which the liability, if any, is proportional, are removed to the federal court, with the exception of one in which the amount involved is not enough to give it jurisdiction, prosecution of this action, as well as of the others, may be enjoined by a bill in the federal court to have the liabilities of insurers determined and adjusted by such court as a court of equity under such bill. Virginia-Carolina Chemical Co. v. Home Ins. Co. of New York (1902) 113 Fed. 1, 51 C. C. A. 21.

Several insurance companies separately issued policies on the same property of V., providing for proportional liability only for any loss, and V. brought separate actions at law thereon against them in a state court. The state court refused a motion to transfer the cases to the federal court; but in all of them, except one, in which there was involved less than the amount necessary to give the federal court jurisdiction, complete records were seasonably filed in the federal court, which refused motions to remand. Held, that a bill in the federal court to enjoin further prosecution of the actions at law there or elsewhere, and to have the liability of the insurers determined and adjusted in equity under such bill, was ancillary to the actions at law, so as to be maintained without regard to the citizenship of the parties. Id.

Where a court of the United States, in a suit for the foreclosure of a mortgage, has actually seized the property through its marshal, for the purpose of selling the same under the provisions of the mortgage, such court has jurisdiction of a suit by a third person, claiming ownership of the property, to enjoin its sale, as ancillary to the original suit, and regardless of the citizenship of the parties. Davis v. Martin (1902) 113 Fed. 6, 51 C. C. A. 27.

A suit in equity to stay proceedings at law pending in a federal court may be maintained in such court without regard to the citizenship or alienage of the parties. St. Luke's Hospital v. Barclay (C. C. 1855) Fed. Cas. No. 12,241.

In a suit in the federal court brought by aliens, for the construction of a will, an injunction was issued to restrain the executor from distributing the estate. Parkes v. Aldridge (C. C. 1879) Fed. Cas. No. 10,755.

A bill filed on the equity side of the United States court to enjoin the suit at law is ancillary, and dependent on the original suit, and, consequently, can be maintained without reference to the citizenship or residence of the parties. Cortes Co. v. Thannhauser (C. C. 1881) 9 Fed. 226.

A suit to restrain a decree entered in another equity suit in the same court may be sustained in a federal court, although all parties are citizens of the same state, as it is not an original suit, but purely ancillary and supplementary to the previous one; especially where the United States marshal is a party defendant. The court has inherent jurisdiction over its own process, to prevent abuse. Broadis v. Broadis (C. C. 1898) 86 Fed. 951.

A bill filed in a federal court to enjoin the further prosecution of an action at law pending therein is ancillary to the law action, and the court has jurisdiction without regard to the citizenship of the parties. Widaman v. Hubbard (C. C. 1898) 88 Fed. 806.

Where several insurers were liable, if at all, proportionately to the amount the insurance of each bore to the amount of the loss, and suits against some of them had been removed to the federal court, and the same defenses had been interposed on behalf of all, a bill in the federal court to restrain the suits at law and to adjust the liability of the various insurers was an ancillary, and not an original, bill; and hence the jurisdiction of the federal court did not depend on the citizenship of the parties or the amount involved. Rochester German Ins. Co. v. Schmidt (C. C. 1904) 126 Fed. 998.

Where an action at law was pending in the federal court, such court had ancillary jurisdiction before judgment to entertain a bill to restrain the further prosecution of such action on equitable grounds not available as a defense to the action at law, without regard to the citizenship of the parties. Leigh v. Kewanee Mfg. Co. (C. C. 1904) 127 Fed. 990.

A suit in equity in a federal court to enjoin the further prosecution of ac-

tions pending in said court, of which it has jurisdiction by reason of diversity of citizenship of the parties, and to enable the complainant to make his defense to such actions, is ancillary thereto and within the jurisdiction of the court, without regard to the citizenship of parties joined as defendants. South Penn Oil Co. v. Calf Creek Oil & Gas Co. (C. C. 1905) 140 Fed. 507.

The United States court has jurisdiction of a suit to enjoin the assignment of a judgment rendered therein, without regard to the citizenship of the parties to the injunction suit, whether the parties thereto were or were not parties to the original suit. The injunction suit is not an original, but an auxiliary, suit. Thompson v. McReynolds (D. C. 1887) 29 Fed. 657.

In an ancillary suit to restrain the further prosecution of an action at law in the state court, alleged to have been removed to the federal court, the amount in controversy is not a jurisdictional element. Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688.

447. —— Restraint of unfair competition in patent and trade-mark cases.—A federal court which has appointed ancillary receivers for the property of a corporation within its jurisdiction has jurisdiction of a suit by such receivers in their own name to protect the business carried on by them from injury by unfair competition, also carried on within the state, without regard to the citizenship of the parties. Brookfield v. Hecker (C. C. 1902) 118 Fed. 942.

A complaint in a federal court cannot join with a cause of action for infringement of a patent one for unfair competition in trade, although both relate to the same subject-matter, where there is no allegation of diverse citizenship to give jurisdiction of the second cause. C. L. King & Co. v. Inlander (C. C. 1902) 133 Fed. 416.

A bill to restrain the infringement of a patent, which thus presents a federal question, does not draw within the jurisdiction of the federal court a further issue as to unfair competition growing out of the same acts of defendant. Cushman v. Atlantis Fountain Pen Co. (C. C. 1908) 164 Fed. 94.

Where there is no diversity of citizenship in an action in the federal court for infringement of trade-mark and unfair competition, jurisdiction can only be sustained in case there is a cause of action for infringement of a valid trade-mark. Thaddeus Davids Co. v. Davids (C. C. 1908) 165 Fed. 792, decree reversed (1910) 178 Fed. 801, 102 C. C. A. 249.

In a suit for infringement of a patent, of which a federal court has jurisdiction because of the subject-matter, it has also jurisdiction to grant relief against unfair competition by imitating in the infringing article the distinctive form and appearance of complainant's patented article. T. B. Woods Sons Co. v. Valley Iron Works (C. C. 1909) 166 Fed. 770.

Where a trade-name had not been registered federal jurisdiction of a suit for unfair competition was not conferred by such act, but existed only under the rules governing ordinary suits at law or in equity. A. B. Andrews Co. v. Puncture Proof Footwear Co. (C. C. 1909) 168 Fed. 762.

Where the acts of defendant alleged in a bill constituted an infringement of complainant's patent and also unfair competition in trade, the cause of action for the infringement gives a federal court jurisdiction of the suit and to grant any relief to which complainant may be entitled on either ground. Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co. (C. C. 1910) 182 Fed. 832.

If acts constituting infringement of a trade-mark and other acts constituting unfair competition in trade are independent, though relating to the same article, each set of acts is a separate cause of action, of the former of which a federal court has jurisdiction, but not of the latter, both parties being residents of the same state; but, where the wrongful acts are not distinct, unfair competition as well as infringement of the trade-mark may be enjoined in the same suit. Ross v. H. S. Geer Co. (C. C. 1911) 188 Fed. 731.

A federal court, in a suit to enjoin infringement of a trade-mark, cannot enjoin future acts amounting to unfair competition only. Id.

Where a trade-mark is invalid or not infringed, and the parties are citizens of the same state, the federal court has no jurisdiction of a suit to prevent unlawful competition. Bernstein v. Danwitz (C. C. 1911) 190 Fed. 604.

The fact that a federal court has jurisdiction of a suit between citizens of different states for infringement of a patent, because charged to have been committed within the district, where defendant has a regular and established place of business, although neither party is a citizen or resident of the district, does not give it incidental or ancillary jurisdiction of a separable cause of action for unfair competition. Woerheide v. H. W. Johns-Manville Co. (D. C. 1912) 199 Fed. 535.

448. Rights enforceable in general.—There being no common-law action for a wrongful and malicious attachment enforceable under the Porto Rican procedure, a court of that district would have no jurisdiction to entertain the suit. Fernandez Y Perez v. Perez Y Fernandez (1906) 26 Sup. Ct. 561, 566, 202 U. S. 80, 50 L. Ed. 942.

The rights of action founded on contracts which contain within themselves some promise or duty to be performed are within this section, which does not include merely naked rights of action founded on some wrongful act, neglect

of duty, to which the law attaches damages. Buckingham v. Dake (1901) 112 Fed. 258, 50 C. C. A. 492.

A federal court in equity has jurisdiction to disregard or enjoin enforcement of an unconscionable judgment of the state or national court for new causes, such as fraud, accident, or mistake, which led the court into rendition of a wrong judgment, or prevented the judgment defendant from availing himself of a meritorious defense. National Surety Co. v. State Bank of Humbolt (1903) 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394; Horton v. Stegmyer (1910) 175 Fed. 756, 99 C. C. A. 332, 20 Ann. Cas. 1134.

449. Necessity of showing jurisdictional facts.—The facts on which jurisdiction rests must, in some form, appear in the record of all suits prosecuted before the federal court. To this rule there are no exceptions. Kempe v. Kennedy (1809) 5 Cranch, 173, 3 L. Ed. 70; Sullivan v. Fulton Steamboat Co. (1821) 6 Wheat. 450, 451, 5 L. Ed. 302; McCormick v. Sullivant (1825) 10 Wheat. 192, 6 L. Ed. 300; Scott v. Sanford (1856) 19 How. 393, 402, 15 L. Ed. 691; In re Smith (1876) 94 U. S. 455, 456, 24 L. Ed. 165; Central Grain & Stock Exch. of Hammond v. Board of Trade of City of Chicago (1903) 125 Fed. 463, 60 C. C. A. 299; Turner v. Jackson Lumber Co. (1908) 159 Fed. 923, 87 C. C. A. 103; Atchison, T. & S. F. Ry. Co. v. Phillips (1910) 176 Fed. 663, 100 C. C. A. 215; Newcomb v. Burbank (1910) 181 Fed. 334, 104 C. C. A. 164; Farmers' Oil & Guano Co. v. Duckworth Co. (1914) 217 Fed. 362, 133 C. C. A. 278; Anderson v. Jackson (C. C. 1828) Fed. Cas. No. 357; Kelly v. Harding (C. C. 1867) Fed. Cas. No. 7,670; Norton v. Brewster (C. C. 1884) 23 Fed. 840; Simon v. House (C. C. 1891) 46 Fed. 317, 318; Wells v. Russellville Anthracite Coal Min. Co. (D. C. 1913) 206 Fed. 528; Columbia Digger Co. v. Rector (D. C. 1914) 215 Fed. 618; Duncan v. U. S. (1883) 18 Ct. Cl. 230; Henry v. Carson (1884) 96 Ind. 412; Chemung Canal Bank v. Judson (1853) 8 N. Y. (4 Seld.) 254.

Jurisdiction must appear on the face of the bill or declaration by direct and positive averment. Yeandle v. Pennsylvania R. Co. (1909) 169 Fed. 938, 95 C. C. A. 282; California-Atlantic S. S. Co. v. Central Door & Lumber Co. (1913) 206 Fed. 5, 124 C. C. A. 139; Barker v. Eastman (1913) 206 Fed. 865, 124 C. C. A. 525 (affirming decree [C. C. 1911] 192 Fed. 659); U. S. v. Alberty (C. C. 1844) Fed. Cas. No. 14,426; Jones v. Adams Express Co. (C. C. 1904) 129 Fed. 618.

The district courts are not inferior courts of limited jurisdiction in the sense that renders it necessary to show their jurisdiction on the face of their records. Reed v. Vaughn (1847) 10 Mo. 447; Ex parte Hill (1869) 5 Nev. 154; Chemung Canal Bank v. Judson (1853) 8 N. Y. (4 Seld.) 254; Thompson v. Lyle (Pa. 1842) 3 Watts & S. 166.

The inferior courts of the United States are courts of limited jurisdiction, but they are not inferior courts in the technical sense of the term, and their judgments, taken alone, may not be disregarded, and, where the jurisdiction is not alleged in the proceedings, their judgments and decrees are erroneous, and may, on a writ of error or appeal, be reversed, but until reversed they are conclusive. McCormick v. Sullivant (1825) 10 Wheat. 192, 199, 6 L. Ed. 300.

While the jurisdiction of the national courts is limited, they are not inferior courts, and their judgments possess every attribute of finality and estoppel, and the absence of all appearance of jurisdictional facts is immaterial. In re First Nat. Bank (1907) 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355.

Jurisdictional allegations in the complaint in federal courts are not made as a basis for proof at the trial, but to found jurisdiction thereon. Per Amidon, District Judge. Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633, writ of certiorari denied (1909) 29 Sup. Ct. 698, 214 U. S. 517, 53 L. Ed. 1064.

In a federal court, an order of injunction is not void because the necessary jurisdictional facts do not appear on the face of the pleadings, and a person imprisoned for contempt in violating the same is not entitled to release on habeas corpus. In re Eaton (C. C. 1892) 51 Fed. 804.

In a bill filed in a federal court by a stockholder to enforce rights which may properly be asserted by the corporation, allegations which do no more than to show a formal demand on the board of directors to bring the suit, and a formal refusal, with a further general allegation that the suit is not a collusive one to confer jurisdiction, are not a sufficient compliance with equity rule 94. Elkins v. City of Chicago (C. C. 1902) 119 Fed. 957.

The dismissal of a bill to quiet title to a mining claim does not carry with it a cross-bill filed by defendant seeking to have the title to the same claim quieted in him and which alleges facts not alleged in the original bill; nor is it necessary to the retaining of the suit for trial on the cross-bill, where it is in a federal court, that the cross-bill should contain the jurisdictional allegations as to the citizenship of the parties, which was shown by the original bill. Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. (C. C. 1905) 139 Fed. 838.

A bill brought in the federal District Court by a minority stockholder to redress wrongs claimed to have been inflicted upon his corporation is demurrable if it fails to state that the suit is not a collusive one to confer on a federal court jurisdiction of a cause of

which it would not otherwise have cognizance, as required by equity rule 94 (29 Sup. Ct. xxxvii). Smith v. Chase & Baker Piano Mfg. Co. (D. C. 1912) 197 Fed. 466.

450. Sufficiency of showing of jurisdiction.—The decision of the Supreme Court in Covington Drawbridge Co. v. Shepherd (1857) 20 How. 227, 15 L. Ed. 896, as to what averment in the declaration is sufficient to give the federal courts jurisdiction, is reaffirmed. Covington Drawbridge Co. v. Shepherd (1858) 21 How. 112, 123, 16 L. Ed. 38.

It is not sufficient that jurisdiction may be inferred argumentatively from the averments. Wolfe v. Hartford Life & Annuity Ins. Co. (1893) 13 Sup. Ct. 602, 603, 148 U. S. 389, 37 L. Ed. 493.

It is sufficient to support the jurisdiction of a federal court that the facts requisite to confer it appear in any part of the record, or are the necessary consequences of the facts stated in the pleadings or the findings of the court. Myers v. Hettinger (1899) 94 Fed. 370, 37 C. C. A. 369, affirming judgment Hettinger v. Meyers (C. C. 1897) 81 Fed. 805.

The jurisdiction of a national court may not be denied where the facts requisite to confer it appear directly or by just inference from any part of the record. Howe v. Howe & Owen Ball Bearing Co. (1907) 154 Fed. 820, 83 C. C. A. 536; Adams Express Co. v. Adams (1908) 159 Fed. 62, 86 C. C. A. 252.

A proper allegation of jurisdictional facts in federal courts creates a prima facie case in favor of jurisdiction. Per Amidon, District Judge. Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633, writ of certiorari denied (1909) 29 Sup. Ct. 698, 214 U. S. 517, 53 L. Ed. 1064.

Where the jurisdiction of a federal court is not challenged by pleading, it sufficiently appears, if it is shown in any part of the record, including the proofs. Mahoning Valley Ry. Co. v. O'Hara (1912) 196 Fed. 945, 116 C. C. A. 495.

The plaintiff's title, "The Third National Bank of Baltimore," was not in itself an averment either that the plaintiff was a banking association established in the district of Maryland or under the law of the United States providing for national banking associations; and the fact that R. S. § 5243, post, § 9835, imposes a fine upon any corporation, not organized under the national banking act, which shall use the word "national" as part of its name, does not necessarily imply that it was lawfully established under such act. Third Nat. Bank v. Teal (C. C. 1881) 5 Fed. 503, 504.

451. Joinder of causes within and without jurisdiction of court.—Jurisdiction of federal courts cannot be enlarged by uniting in a single suit causes of action for which the court is without jurisdiction with one of which it has jurisdiction. Geneva Furniture Mfg. Co. v. S. Karpen & Bros. (1915) 35 Sup. Ct. 788, 238 U. S. 254, 59 L. Ed. 1295.

The federal court's jurisdiction cannot be extended by uniting in the same complaint a cause of action of which it has no jurisdiction with one of which it has. National Casket Co. v. New York & Brooklyn Casket Co. (C. C. 1911) 185 Fed. 533.

Equity rule 26 (198 Fed. xxv; 115 C. C. A. xxv) does not authorize joinder of causes not within the federal jurisdiction with a cause within such jurisdiction. Vose v. Roebuck Weather Strip & Wire Screen Co. (D. C. 1914) 210 Fed. 687.

Where a suit is brought originally in a federal district court on both federal and nonfederal grounds, the court may not rightfully retain that part of the suit based on the nonfederal ground, unless that ground is merely incidental to the federal ground. Tullar & Tullar v. Illinois Cent. R. Co. (D. C. 1914) 213 Fed. 280.

The jurisdiction of a federal court being a limited one, it cannot be extended by uniting a cause of action of which it has no jurisdiction with one within its jurisdiction. Electric Boat Co. v. Lake Torpedo Boat Co. (D. C. 1914) 215 Fed. 377.

452. Effect of insufficient showing.—Where the jurisdiction of the federal courts is not alleged in the proceedings, their judgments and decrees are erroneous and may be reversed; but until reversed they are conclusive, McCormick v. Sullivant (1825) 10 Wheat. 192, 199, 6 L. Ed. 300; Scott v. Sandford (1856) 19 How. 393, 402, 15 L. Ed. 691.

While a United States court cannot acquire jurisdiction of a suit unless its jurisdiction is apparent on the face of the bill or declaration, its jurisdiction may be defeated by a subsequent development of facts which did not appear at the outset. Barker v. Eastman (1913) 206 Fed. 865, 124 C. C. A. 525, affirming decree (C. C. 1911) 192 Fed. 659.

When the jurisdictional facts do not appear on the record, the proceedings are void, and may be so treated by other courts. Duncan v. U. S. (1883) 18 Ct. Cl. 230.

453. Amendment and cure of defects.—Where a federal court has jurisdiction over the parties and cause of action, it cannot be affected by any amendment of the pleadings changing the cause of action. Green v. Custard (1859) 23 How. 484, 485, 16 L. Ed. 471.

An admission made on the trial of an action in the federal court of "the liability of defendant in this case and everything as alleged except the measure of damages" does not cure the omission of the declaration to allege

facts giving the court jurisdiction. Grand Trunk Western Ry. Co. v. Reddick (1908) 160 Fed. 898, 88 C. C. A. 80.

The power of a federal court of equity to allow the amendment of a bill by changing the parties to give the court jurisdiction, and the propriety of exercising such power if it exists, should only be determined on a formal application and due notice and hearing. Riggs v. Brown (C. C. 1909) 172 Fed. 637.

The court has power to permit amendment making necessary jurisdictional averment after verdict or entry of judgment or after remand by appellate court. McEldowney v. Card (C. C. 1911) 193 Fed. 475.

See, also, 111, 133, 341–344, 364, of this subdivision, and §§ 1251c, 1591, post, and notes.

454. Determination of question of jurisdiction.—It belongs to the federal courts to determine the question of their own jurisdiction. Freeman v. Howe (1860) 24 How. 450, 459, 16 L. Ed. 749.

A consideration of the averments of an answer in determining whether the federal court has jurisdiction of a suit commenced therein is necessitated by Jurisdictional Act March 3, 1875, § 5, post, § 1019, which requires the circuit court to dismiss the cause whenever "at any time after such suit has been brought" it shall appear that its jurisdiction has been improperly invoked. Excelsior Wooden Pipe Co. v. Pacific Bridge Co. (1902) 22 Sup. Ct. 681, 185 U. S. 282, 46 L. Ed. 910, 99 O. G. 2102, reversing decree (1901) 109 Fed. 497, 48 C. C. A. 349.

A judgment of a United States court that it has jurisdiction over a criminal prosecution against an Indian charged with committing murder of another Indian on an Indian reservation is reviewable by writ of error, but cannot be attacked collaterally as absolutely void. Toy Toy v. Hopkins (1909) 29 Sup. Ct. 416, 417, 212 U. S. 542, 53 L. Ed. 644.

Affidavits filed in connection with a plea to the jurisdiction, whether actually offered to be read in evidence or not, should be considered by a federal court in deciding the question raised by a plea to the jurisdiction, setting up the objection that the defendant was a foreign corporation not doing business in the state, and that the person attempted to be served with process was not its agent at that time. Mechanical Appliance Co. v. Castleman (1910) 30 Sup. Ct. 125, 215 U. S. 437, 54 L. Ed. 272.

Where the fact is clear on the face of the pleadings that an improper party has been joined or an assumed cause of action injected into the case to defeat the jurisdiction of the federal court over the real controversy, the court may find the attempted fraud on its jurisdiction from the record alone and prevent its perpetration. Boatmen's Bank of St. Louis v. Fritzlen (1905) 135 Fed. 650, 68 C. C. A. 288, writ of certiorari denied Fritzlen v. Boatmen's Bank of St. Louis, Mo. (1905) 25 Sup. Ct. 803, 198 U. S. 586, 49 L. Ed. 1174, and reversing judgment Weldon v. Fritzlen (C. C. 1904) 128 Fed. 608.

Under Judiciary Act 1875, § 5, post, § 1019, where a defendant after verdict and judgment for the first time raises the question of jurisdiction, on the ground that there was no evidence to support the jurisdictional allegations of plaintiff's pleading, which were put in issue by a general denial, it is competent for the court to set aside the judgment for the purpose of inquiring into the question, either with or without a jury, as it may see fit; and, unless it shall appear from the evidence adduced or from the record that it is without jurisdiction, it may re-enter the judgment on the verdict. Toledo Traction Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28.

Although an unverified bill by a stockholder in a federal court against the corporation and another corporation of the same state alleged facts which gave the court jurisdiction on the ground of diversity of citizenship, where such allegations were promptly denied by the first corporation, which denied that complainant was a bona fide stockholder, and alleged that the suit was brought collusively in the interest of its codefendant to enable the latter to litigate matters between the two corporations in the federal court, which allegations found support in the averment in the bill of facts not germane to the cause of action stated, the joinder of unnecessary parties, and the filing of a cross-bill by the other corporation against the first defendant, a jurisdictional issue was presented, which the court was required to determine before granting an injunction on the cross-bill restraining further proceedings in a pending suit in a state court. National Hollow Brake Beam Co. v. Chicago Ry. Equipment Co. (1909) 168 Fed. 666, 94 C. C. A. 152.

The rule that federal courts must take notice of want of jurisdiction whenever it appears does not apply when it depends, not on a single uncontroverted fact, but on a finding of an issue of fact as to the fraudulent joinder of defendants to prevent a removal, which is determinable only after a hearing on the facts. Donovan v. Wells, Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250.

A federal court in determining the question of jurisdiction is not limited to the return of the marshal and declaration, but may look to the entire record. Wylie Permanent Camping Co. v. Lynch (1912) 195 Fed. 386, 115 C. C. A. 288, writ of certiorari denied

(1912) 32 Sup. Ct. 839, 225 U. S. 707, 56 L. Ed. 1266.

A court must, as an incident to its general power to administer justice, have authority to consider its own right to hear a cause; but its assumption of authority to proceed in a cause does not confer jurisdiction, where it does not exist. Brougham v. Oceanic Steam Navigation Co. (1913) 205 Fed. 857, 126 C. C. A. 321.

A motion to strike or demurrer to a plea to the jurisdiction in a federal court is irregular. Alkire Grocery Co. v. Richesin (C. C. 1899) 91 Fed. 79.

Pleas to the jurisdiction in a federal court should be set down for hearing like a demurrer unless complainant desires to have the facts pleaded in issue, when he should reply. Id.

It is the better practice to determine the question of the jurisdiction of a federal court arising upon a denial of plaintiff's allegation of citizenship on an issue taken by plea, with opportunity to both parties to adduce evidence in the regular way, rather than on motion and ex parte affidavits. Gaddie v. Mann (C. C. 1906) 147 Fed. 955, decree reversed Mann v. Gaddie (1907) 158 Fed. 42, 88 C. C. A. 1.

The question of laches in filing a suit in the District Court of the United States is immaterial, in determining the question whether the court has jurisdiction. McCauley v. McCauley (D. C. 1913) 202 Fed. 280.

Where a bill prays for an injunction and damages, the question of the court's jurisdiction must be determined by examining the allegations of the bill with reference to equitable relief, as if no demand were made for damages. Bureau of National Literature v. Sells (D. C. 1914) 211 Fed. 379.

455. —— **Necessity of evidence to establish jurisdictional allegations.**—It is not error to refuse to sustain a plea to the jurisdiction where the correctness of such refusal depends on the alleged existence of certain facts which are not admitted. Wright v. U. S. (1895) 15 Sup. Ct. 819, 821, 158 U. S. 232, 39 L. Ed. 963.

Where a jurisdictional allegation in a bill filed in a federal court is put in issue by the answer, it must be proved, or the court must decline jurisdiction. Yeandle v. Pennsylvania R. Co. (1909) 169 Fed. 938, 95 C. C. A. 282; Klenk v. Bryne (C. C. 1906) 143 Fed. 1008; Plaut v. Gorham Mfg. Co. (D. C. 1909) 174 Fed. 852.

Where the facts alleged in a plea questioning the jurisdiction of the District Court of the United States are admitted, no evidence in support thereof is necessary to enable the court to determine the question of jurisdiction. McCauley v. McCauley (D. C. 1913) 202 Fed. 280.

456. —— **Presumption as to jurisdiction.**—It will be presumed that a cause is without the jurisdiction of a federal District Court, unless the contrary affirmatively appears from the record. In re Smith (1876). 94 U. S. 455, 456, 24 L. Ed. 165; Robertson v. Cease (1878) 97 U. S. 646, 24 L. Ed. 1057; Grace v. American Cent. Ins. Co. (1883) 3 Sup. Ct. 207, 210, 109 U. S. 278, 27 L. Ed. 932; Yeandle v. Pennsylvania R. Co. (1909) 169 Fed. 938, 95 C. C. A. 282; Newcomb v. Burbank (1910) 181 Fed. 334, 104 C. C. A. 164; California-Atlantic S. S. Co. v. Central Door & Lumber Co. (1913) 206 Fed. 5, 124 C. C. A. 139; U. S. v. Southern Pac. R. Co. (C. C. 1892) 49 Fed. 297; Same v. Central Pac. R. Co., Id. 304; Lonergan v. Illinois Cent. R. Co. (C. C. 1893) 55 Fed. 550, 551; Shade v. Northern Pac. Ry. Co. (D. C. 1913) 206 Fed. 353.

It was the purpose of Congress by the judiciary act of 1887, corrected by act of 1888, 25 Stat. 433, to contract the jurisdiction of the national courts, and all doubtful questions should be resolved against jurisdiction. Joy v. City of St. Louis (C. C. 1903) 122 Fed. 524 (order affirmed [1906] 26 Sup. Ct. 478, 201 U. S. 332, 50 L. Ed. 776); St. Louis, I. M. & S. Ry. Co. v. Davis (C. C. 1904) 132 Fed. 629.

Where the declaration contained special counts upon promissory notes, and also common money notes, although the jurisdiction of the federal was not apparent upon the special counts, yet the money counts sustained by evidence might have been sufficient to uphold it, it will be presumed that such evidence was given; the record being silent, and no objection having been made to jurisdiction during the progress of the trial. Bank of U. S. v. Moss (1848) 6 How. 31, 36, 12 L. Ed. 331.

Where the court of the United States, having jurisdiction over the parties and the subject-matter in a foreclosure suit, orders a seizure and sale, and the mortgaged premises are sold accordingly, the presumption will be, in favor of a purchaser at the sale, that the facts which were necessary to be proved in order to confer jurisdiction were proved; and no other court can inquire into those facts. Erwin v. Lowry (1849) 7 How. 172, 12 L. Ed. 655.

Complainant invoking jurisdiction of federal court of a suit against nonresident aliens has the burden of proving the jurisdictional fact that the property to be affected is within the jurisdiction, where averments in this respect are traversed. Chase v. Wetzlar (1912) 32 Sup. Ct. 659, 225 U. S. 79, 56 L. Ed. 990.

The jurisdiction of a federal court of a suit to administer the assets of a defunct corporation could not be raised in a collateral proceeding for partition of the surplus assets of such corporation. City of New Orleans v. Howard (1908) 160 Fed. 393, 87 C. C. A. 345.

The prima facie case of jurisdiction

by proper allegation of jurisdictional facts in an action in a federal court continues until it is overcome by convincing evidence. Per Amidon, District Judge. Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633, writ of certiorari denied (1909) 29 Sup. Ct. 698, 214 U. S. 517, 53 L. Ed. 1064.

Where a bill properly alleges the requisite facts to give a federal court jurisdiction, the burden rests on the defendant to both allege and prove facts relied on to defeat the jurisdiction. Wiemer v. Louisville Water Co. (C. C. 1903) 130 Fed. 244; Gaddie v. Mann (C. C. 1906) 147 Fed. 955, decree reversed Mann v. Gaddie (1907) 158 Fed. 42, 88 C. C. A. 1.

Where federal courts sitting in code states wherein an objection to the jurisdiction of the court over the subject-matter may be put in on the general issue follows such practice, no presumption of jurisdiction attends their judgments or decrees, but facts showing jurisdiction must appear of record. Paper Automobile Co. v. American Motor Car Sales Co. (C. C. 1910) 180 Fed. 245.

It will be presumed in favor of a judgment of a federal court, it being a court of superior jurisdiction proceeding according to the course of the common law, that it had jurisdiction of the parties, unless the contrary appears on the face of the records. Arnold v. Nye (1871) 23 Mich. 286.

The jurisdiction of the federal court is conclusively presumed, unless the contrary affirmatively appears on the face of the record. Turrell v. Warren (1878) 25 Minn. 9.

Since a federal court is a court of general jurisdiction, its only limitation being as to parties entitled to litigate therein, a state court will not presume that the United States court was without jurisdiction of an action pending there. Griswold v. Sedgwick (N. Y. 1828) 1 Wend. 126.

The federal courts, though of limited jurisdiction, are not inferior courts, and the same presumptions as to the validity of judgments when collaterally assailed will be indulged as on a similar attack on a judgment of a court of general jurisdiction. Ruckman v. Cowell (1848) 1 N. Y. (1 Comst.) 505.

457. Objections to jurisdiction.—A federal court is without jurisdiction of an action at law where the answer contains a general denial, which under the state practice puts in issue the jurisdictional allegations of the complaint, and there is no proof to sustain such allegations. Yocum v. Parker (1904) 130 Fed. 770, 66 C. C. A. 80, reversing judgment (C. C. 1903) 130 Fed. 722, which is affirmed on rehearing (1904) 134 Fed. 205, 67 C. C. A. 227.

The fact that one defendant might have pleaded to the jurisdiction is not available to the other defendant, where the former is not served with process. Craig v. Cummings (C. C. 1811) Fed. Cas. No. 3,331.

A conveyance made to enable a party to maintain suit in a federal court cannot be questioned by one not claiming under either party. Briggs v. French (C. C. 1835) Fed. Cas. No. 1,871.

A plea to the jurisdiction of a federal court in a suit in equity is not objectionable because it alleges more than one ground of objection to the jurisdiction. Cooper v. Preston (C. C. 1900) 105 Fed. 403.

The defense that the court has no jurisdiction of the alleged cause of action must point out or definitely state the defect so as to be apparent to the court, and must be sufficient to form the basis of a judgment apart from the portions of the record relied upon. Lewicki v. John C. Wiardi & Co. (D. C. 1914) 213 Fed. 647.

Defendant's motion in the District Court for leave to plead to the jurisdiction, without prejudice to defendant's right to plead to the merits and assert any counterclaim, held to be denied. American Sheet & Tin Plate Co. v. Winzeler (D. C. 1915) 227 Fed. 321.

See, also, 108, 345–349, 365, 408, of this subdivision.

458. —— Manner of raising objection.—See, also, notes under § 1019, post.

Where the want of jurisdiction in a federal court is apparent on the face of the petition, it may be taken advantage of by demurrer. Southern Pac. Co. v. Denton (1892) 13 S. Ct. 44, 146 U. S. 202, 36 L. Ed. 942.

The question of jurisdiction may be raised by motion to dismiss, want of jurisdiction being shown by the bill. Steigleder v. McQuesten (1905) 25 Sup. Ct. 616, 198 U. S. 141, 49 L. Ed. 986; Municipal Inv. Co. v. Gardiner (C. C. 1894) 62 Fed. 954.

The supreme court of the United States will of its own motion deny its jurisdiction, and that of the court from which the record comes, unless the jurisdiction affirmatively appears, although neither party make the point in the argument. King Iron Bridge & Manufacturing Co. v. Otoe County (1887) 120 U. S. 225, 7 Sup. Ct. 552, 30 L. Ed. 623.

Where a bill to enjoin taxation against a corporation showed diverse citizenship and that the amount in controversy exceeded $2,000, the failure of the plaintiff to comply with the ninety-fourth equity rule so as to show a right to maintain the suit did not go to the jurisdiction of the court, although it might be raised as a defense by demurrer. Illinois Cent. R. Co. v. Adams (1901) 21 Sup. Ct. 251, 253, 180 U. S. 28, 45 L. Ed. 410.

A federal court should not dismiss on its own motion, for want of jurisdiction, a suit against the dairy and food commissioner of a state, on the ground that such suit is one against the state, but such question should be raised by de-

murrer or other pleading. Scully v. Bird (1908) 28 Sup. Ct. 597, 209 U. S. 481, 52 L. Ed. 899.

An objection to the jurisdiction of a federal court, where dependent on a question of fact, may be taken by answer, and the question of fact submitted to the jury, but such issue is an independent one, and should not be submitted with the other issues in the case to be determined by a general verdict. Kirven v. Virginia-Carolina Chemical Co. (1906) 145 Fed. 288, 76 C. C. A. 172, 7 Ann. Cas. 219.

The jurisdiction of a federal court of another case cannot be first raised on appeal. City of New Orleans v. Howard (1908) 160 Fed. 393, 87 C. C. A. 345.

Neither the general denial under state codes nor the general issue at common law is a proper method of challenging the jurisdiction of federal courts. Per Amidon, District Judge. Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633, writ of certiorari denied (1909) 29 Sup. Ct. 698, 214 U. S. 517, 53 L. Ed. 1064.

All matters which go to challenge the jurisdiction of the court, or the capacity of the plaintiff to sue, should be presented by plea in abatement, in advance of hearing on the merits, unless the want of jurisdiction is put in issue by some pleading. Gause v. City of Clarksville (C. C. 1880) 1 Fed. 353.

The federal courts always decline jurisdiction on their own motion whenever it appears that they have no jurisdiction of the subject-matter in controversy. U. S. v. Wickersham (C. C. 1882) 10 Fed. 505, 511.

A plea to the jurisdiction must be supported by a special affidavit. Wittemore v. Malcomson (C. C. 1886) 28 Fed. 605.

The question of jurisdiction of a federal court may be raised by demurrer. Hagstoz v. Mutual Life Ins. Co. of New York (C. C. 1910) 179 Fed. 569.

Challenge to the court's jurisdiction over the person of the defendant cannot be made by answer to the merits or coupled with such answer, but must be by motion to quash the return and set aside the service. Peper Automobile Co. v. American Motor Car Sales Co. (C. C. 1910) 180 Fed. 245.

Where a question of jurisdiction is purely one of law, it may be raised either by motion or plea in abatement. Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co. (C. C. 1910) 181 Fed. 974.

The overruling of an objection to jurisdiction by a federal court, raised by a special appearance for the purpose, does not render the question res judicata, but the objection may be renewed by answer. Tate v. Brinser (D. C. 1915) 226 Fed. 878.

The District Court, separately from the trial on the merits, may determine questions relative to its jurisdiction, whether raised by objections to the complaint, plea in abatement, or by motion pending trial. American Sheet & Tin Plate Co. v. Winzeler (D. C. 1915) 227 Fed. 321.

See, also, 108, 345–349, 365, 408, of this subdivision.

459. —— Time of objection.—Where a suit is brought by B. in the United States against F. in his individual name as president of a national bank, and it appears upon an inspection of the whole record that the suit was treated by both parties as the suit of the bank, and not of B. in his individual capacity, F. will not be allowed on final hearing, in order to defeat the jurisdiction, to assert for the first time that B., and not the bank, was the complainant in the cause. Fortier v. New Orleans Nat. Bank (1884) 5 Sup. Ct. 234, 112 U. S. 439, 28 L. Ed. 764.

Defendant may at any time before trial object to the jurisdiction on motion, or by a plea, or on the general issue with notice to the adverse party. Bobyshall v. Oppenheimer (C. C. 1824) Fed. Cas. No. 1,592.

The want of jurisdiction may be shown at the trial. Dennistoun v. Draper (C. C. 1866) Fed. Cas. No. 3,804; Murray v. Patrie, Id. 9,967; Kain v. Texas Pac. R. Co. (C. C. 1875) Fed. Cas. No. 7,596.

The question of want of jurisdiction is always open for determination, even though there may be in the case prior rulings of the same or another judge sustaining the jurisdiction. Sheldon v. Wabash R. Co. (C. C. 1900) 105 Fed. 785.

The defense that a United States District Court has no jurisdiction over the alleged cause of action can be raised at any time. Daily v. Doe (D. C. 1880) 3 Fed. 903; Lewicki v. John C. Wiardi & Co. (D. C. 1914) 213 Fed. 647.

See, also, 108, 345–349, 365, 408, of this subdivision.

460. —— Waiver of objections. — Want of jurisdiction of a federal court of the subject-matter cannot be waived by the parties. Garrett v. Louisville & N. R. Co. (1912) 197 Fed. 715, 117 C. C. A. 109; Peper Automobile Co. v. American Motor Car Sales Co. (C. C. 1910) 180 Fed. 245.

An appearance in a civil action in federal courts waives all objections to jurisdiction because of defects in process. Pollard v. Dwight (1808) 4 Cranch, 421, 2 L. Ed. 666.

Objection to the court's jurisdiction of a corporation held not waived by appearing and pleading in abatement by attorney. Commercial & Railroad Bank of Vicksburg v. Slocomb (1840) 14 Pet. 60, 65, 10 L. Ed. 354.

The parties cannot by consent waive the objection that the case is one of which the court has no jurisdiction. Scott v. Sandford (1856) 19 How. 393, 402, 15 L. Ed. 691.

Defendant does not preclude himself

from raising the question of jurisdiction by interposing a plea of former adjudication, and waiting until it is decided against him. The court is bound, even of its own motion, to determine questions of jurisdiction whenever and however they may be presented. Morris v. Gilmer (1889) 9 Sup. Ct. 289, 292, 129 U. S. 315, 32 L. Ed. 690.

It is a general rule in the federal courts that an objection once taken to the jurisdiction is not waived by defendant's subsequently answering and taking part in the trial. Foster Milburn Co. v. Chinn (1913) 202 Fed. 175, 122 C. C. A. 577, affirming judgment Chinn v. Foster-Milburn Co. (D. C. 1912) 195 Fed. 158.

A plea of the general issue waives proof of jurisdiction of the person if served within the state. Blachly v. Davis (C. C. 1839) Fed. Cas. No. 1,456.

To go to trial on the merits does not have the effect of waiving the jurisdiction of the court. Carriere & Son v. U. S. (C. C. 1908) 163 Fed. 1009.

See, also, 108, 345–349, 365, 408, of this subdivision.

CITED WITHOUT DEFINITE APPLICATION

Sere v. Pitol (1810) 6 Cranch, 332, 3 L. Ed. 240; McIntire v. Wood (1813) 7 Cranch, 504, 505, 506, 3 L. Ed. 420; McNutt v. Bland (1844) 2 How. 9, 14, 11 L. Ed. 159; Phillips v. Preston (1847) 5 How. 278, 290, 12 L. Ed. 152; Barney v. Baltimore (1867) 6 Wall. 280, 289, 18 L. Ed. 825; Gaines v. Fuentes (1875) 92 U. S. 10, 18, 23 L. Ed. 524; Ober v. Gallagher (1876) 93 U. S. 199, 23 L. Ed. 829; U. S. v. Ames (1878) 99 U. S. 35, 25 L. Ed. 295; The City of Panama v. Phelps (1879) 101 U. S. 453, 456, 25 L. Ed. 1061; New Orleans, M. & T. R. Co. v. Mississippi (1880) 102 U. S. 135, 136, 26 L. Ed. 96; Williams v. Nottawa Twp. (1881) 104 U. S. 209, 210, 26 L. Ed. 719; Louisiana v. Jumel (1883) 2 Sup. Ct. 128, 170, 171, 107 U. S. 711, 27 L. Ed. 448; New York Guaranty & Indemnity Co. v. Memphis Water Co. (1883) 2 Sup. Ct. 279, 284, 107 U. S. 205, 27 L. Ed. 484; Civil Rights Cases (1883) 3 Sup. Ct. 18, 22, 109 U. S. 3, 27 L. Ed. 835; Robb v. Connolly (1884) 4 Sup. Ct. 544, 550, 111 U. S. 624, 28 L. Ed. 542; Carter v. Greenhow (1885) 5 Sup. Ct. 928, 930, 114 U. S. 317, 29 L. Ed. 202; Bowman v. Chicago & N. W. Ry. Co. (1885) 6 Sup. Ct. 192, 193, 115 U. S. 611, 29 L. Ed. 502; Coffey v. U. S. (1886) 6 Sup. Ct. 432, 435, 116 U. S. 427, 29 L. Ed. 681; Rosenbaum v. Bauer (1887) 7 Sup. Ct. 633, 636, 120 U. S. 450, 30 L. Ed. 743; In re Louisville Underwriters (1890) 10 Sup. Ct. 587, 588, 134 U. S. 488, 33 L. Ed. 991; McGahey v. Virginia (1890) 10 Sup. Ct. 972, 978, 135 U. S. 662, 34 L. Ed. 304; Petri v. Commercial Nat. Bank (1892) 12 Sup. Ct. 325, 326, 142 U. S. 644, 35 L. Ed. 1144; Fleitas v. Richardson (1893) 13 Sup. Ct. 495, 147 U. S. 550, 37 L. Ed. 276; Mississippi Mills v. Cohn (1893) 14 Sup. Ct. 75, 150 U. S. 202, 37 L. Ed. 1052; U. S. v. American Bell Telephone Co. (1895) 16 Sup. Ct. 69, 70, 159 U. S. 548, 40 L. Ed. 255; Carey v. Houston & T. C. R. Co. (1896) 16 Sup. Ct. 537, 541, 161 U. S. 115, 40 L. Ed. 638; Rosecrans v. U. S. (1897) 17 Sup. Ct. 302, 304, 165 U. S. 257, 41 L. Ed. 708; Hunt v. U. S. (1897) 17 Sup. Ct. 609, 610, 166 U. S. 424, 41 L. Ed. 1063; Barrett v. U. S. (1898) 18 Sup. Ct. 327, 331, 169 U. S. 218, 42 L. Ed. 723; City of New Orleans v. Quinlan (1899) 19 Sup. Ct. 329, 330, 173 U. S. 191, 43 L. Ed. 664; North American Transportation Trading Co. v. Morrison (1900) 20 Sup. Ct. 869, 872, 178 U. S. 262, 44 L. Ed. 1061; Turner v. Richardson (1901) 21 Sup. Ct. 295, 296, 180 U. S. 87, 45 L. Ed. 438; Waite v. Santa Cruz (1902) 22 Sup. Ct. 327, 335, 184 U. S. 302, 46 L. Ed. 552; Emsheimer v. New Orleans (1902) 22 Sup. Ct. 770, 774, 186 U. S. 33, 46 L. Ed. 1042; Northern Pac. R. Co. v. Soderberg (1903) 23 Sup. Ct. 365, 366, 188 U. S. 526, 47 L. Ed. 575; U. S. v. Dewey (1903) 23 Sup. Ct. 415, 424, 188 U. S. 254, 47 L. Ed. 463; Helwig v. U. S. (1903) 23 Sup. Ct. 427, 428, 188 U. S. 605, 47 L. Ed. 614; Giles v. Harris (1903) 23 Sup. Ct. 639, 643, 189 U. S. 475, 47 L. Ed. 909 (dissenting opinion); Kinney v. Columbia Savings & Loan Asso. (1903) 24 Sup. Ct. 30, 31, 191 U. S. 78, 48 L. Ed. 103; Continental National Bank of Memphis v. Buford (1903) 24 Sup. Ct. 54, 55, 191 U. S. 119, 48 L. Ed. 119; Spencer v. Duplan Silk Co. (1903) 24 Sup. Ct. 174, 175, 191 U. S. 526, 48 L. Ed. 287; Stevenson v. Fain (1904) 25 Sup. Ct. 6, 7, 195 U. S. 165, 49 L. Ed. 142; Sweeney v. Carter Oil Co. (1905) 26 Sup. Ct. 55, 57, 199 U. S. 252, 50 L. Ed. 178; Petri v. F. E. Creelman Lumber Co. (1905) 26 Sup. Ct. 133, 136, 199 U. S. 487, 50 L. Ed. 281; Kolze v. Hoadley (1906) 26 Sup. Ct. 220, 221, 200 U. S. 76, 50 L. Ed. 377; Wyman v. Wallace (1906) 26 Sup. Ct. 495, 496, 201 U. S. 230, 50 L. Ed. 738; Fernandez y Perez v. Perez y Fernandez (1906) 26 Sup. Ct. 561, 565, 202 U. S. 80, 50 L. Ed. 942; Devine v. Los Angeles (1906) 26 Sup. Ct. 652, 659, 202 U. S. 313, 50 L. Ed. 1046; Bush v. Elliott (1906) 26 Sup. Ct. 668, 671, 202 U. S. 477, 50 L. Ed. 1114; Wishkah Boom Co. v. U. S. (1906) 26 Sup. Ct. 765, 202 U. S. 613, 15 L. Ed. 1171; Green v. Chicago, B. & Q. R. Co. (1907) 27 Sup. Ct. 595, 596, 205 U. S. 530, 51 L. Ed. 916; Minneapolis v. Reum (1893) 56 Fed. 576, 577, 6 C. C. A. 31; Fuller v. Aylesworth (1896) 75 Fed. 694, 698, 21 C. C. A. 505; Blake v. Pine Mountain Iron & Coal Co. (1896) 76 Fed. 624, 636, 22 C. C. A. 430; Elkhart Nat. Bank v. Northwestern Guaranty Loan Co. (1898) 87 Fed.

253, 30 C. C. A. 632; U. S. v. Kelly (1899) 97 Fed. 460, 38 C. C. A. 275; Utah-Nevada Co. v. De Lamar (1904) 133 Fed. 113, 66 C. C. A. 179 (certiorari denied [1905] 26 Sup. Ct. 746, 199 U. S. 605, 50 L. Ed. 330); German Savings & Loan Soc. v. Tull (1905) 136 Fed. 1, 11, 69 C. C. A. 1 (certiorari denied [1906] 26 Sup. Ct. 757, 200 U. S. 621, 50 L. Ed. 624); U. S. v. Fidelity & Deposit Co. of Maryland (1907) 155 Fed. 117, 83 C. C. A. 577; Same v. Rothstein (1911) 187 Fed. 268, 109 C. C. A. 521; McClellan v. Carland (1911) 187 Fed. 915, 110 C. C. A. 49; Garrett v. Louisville & N. R. Co. (1912) 197 Fed. 715, 117 C. C. A. 109; American Union Telegraph Co. v. Bell Telephone Co. (C. C. 1880) 1 Fed. 698, 699; Stanley v. Board of Sup'rs of Albany County (C. C. 1880) 5 Fed. 254, 255; Lyons v. Lyons Nat. Bank (C. C. 1881) 8 Fed. 369, 375; Watson v. Brooks (C. C. 1882) 13 Fed. 540, 543; Muntz v. Raft of Timber (C. C. 1883) 15 Fed. 555, 556; Dundee Mortgage & Trust Inv. Co. v. School Dist. No. 1 (C. C. 1884) 21 Fed. 151, 153; Davis v. Kansas City, S. & M. R. Co. (C. C. 1887) 32 Fed. 863; U. S. v. Shaw (C. C. 1889) 39 Fed. 433, 435, 3 L. R. A. 232; Same v. Lynde (C. C. 1890) 44 Fed. 215; Same v. Banister (C. C. 1895) 70 Fed. 44, 45; Same v. Belknap (C. C. 1896) 73 Fed. 19; Zimmerman v. Carpenter (C. C. 1898) 84 Fed. 747, 748; Price & Hart v. T. J. Ellis & Co. (C. C. 1904) 129 Fed. 482; Wells v. Clark (C. C. 1905) 136 Fed. 462, 464 (modified [1906] 27 Sup. Ct. 43, 203 U. S. 164, 51 L. Ed. 138); Jones v. Gould (C. C. 1905) 141 Fed. 698, affirmed (1906) 149 Fed. 153, 80 C. C. A. 1; E. A. Holmes & Co. v. U. S. Fire Ins. Co. (C. C. 1906) 142 Fed. 863, 865; Smith Oyster Co. v. Darbee & Immel Oyster & Land Co. (C. C. 1906) 149 Fed. 555, 557; Chicago, R. I. & P. R. Co. v. Swanger (C. C. 1908) 157 Fed. 783 (affirmed [1910] 30 Sup. Ct. 633, 218 U. S. 135, 54 L. Ed. 970; and [1910] 30 Sup. Ct. 639, 218 U. S. 159, 54 L. Ed. 978); People's U. S. Bank v. Goodwin (C. C. 1908) 162 Fed. 937; U. S. v. Parker (C. C. 1908) 166 Fed. 137; Harding v. Standard Oil Co. (C. C. 1909) 170 Fed. 651; Shawnee Nat. Bank v. Missouri, K. & T. Ry. Co. (C. C. 1909) 175 Fed. 458; Gulbenkian v. U. S. (C. C. 1909) 175 Fed. 860 (affirmed [1911] 186 Fed. 133, 108 C. C. A. 245); In re The Eureka No. 32 (D. C. 1901) 108 Fed. 672; Puget Sound Sheet Metal Works v. Great Northern Ry. Co. (D. C. 1912) 195 Fed. 350; Woerheide v. H. W. Johns-Manville Co. (D. C. 1912) 199 Fed. 535; Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1912) 201 Fed. 932; Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. (D. C. 1913) 202 Fed. 293; The Fred E. Sander (D. C. 1913) 208 Fed. 724.

(2) Of crimes and offenses.

Second. Of all crimes and offenses cognizable under the authority of the United States.

R. S. § 563, pars. 1, 2, § 629, pars. 19, 20. Act March 3, 1875, c. 137, § 1, 18 Stat. 470. Act March 3, 1887, c. 373, § 1, 24 Stat. 552. Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433. Act March 3, 1911, c. 231, § 24, par. 2, 36 Stat. 1091.

Notes of Decisions

See as to "Determination of jurisdiction" notes under subdivision 1, as to "Nature and extent of jurisdiction in general."

See, also, §§ 1233 and 10165 et seq., and notes thereunder.

1. Nature and scope of jurisdiction in general.
2. Former statute as prospective.
3. Jurisdiction concurrent with other tribunals.
4. Common-law offenses.
5. Offenses punishable under state laws.
6. Trial of indictments found in state courts.
7. Offenses against the law of nations.
8. Offenses committed in foreign countries or on foreign vessels.
9. Offenses on Indian reservations.
10. Offense by accessory.
11. Offenses by foreign consuls.
12. Personal violence to public minister.
13. Perjury and false swearing.
14. Conspiracy.
15. Passing counterfeit bank notes.
16. Violation of law as to hours of labor.
17. Revolt and mutiny on vessel.
18. Plundering property from stranded vessel.
19. Offenses within the admiralty and maritime and territorial jurisdiction of the United States.

1. Nature and scope of jurisdiction in general.—The federal courts have no criminal jurisdiction, except what is given by statute. U. S. v. Worrall (1798) 2 Dall. 384, 1 L. Ed. 426; Same v. Hudson (1812) 7 Cranch, 32, 3 L. Ed. 259; Same v. Coolidge (1816) 1 Wheat. 415, 4 L. Ed. 124; Same v. Smith (C. C. 1792) Fed. Cas. No. 16,323; Same v. Hare (C. C. 1818) Fed. Cas. No. 15,304; Same v. Terrel (C. C. 1840) Fed. Cas. No. 16,452; Same v. Lancaster (C. C. 1841) Fed. Cas. No. 15,556; Same v. New Bedford Bridge (C. C. 1847) Fed. Cas. No. 15,867; Same v. Ramsay (C. C. 1847) Fed. Cas. No. 16,115; Same v. Wilson (C. C. 1856) Fed. Cas. No. 16,731; Same v. Barney (C. C. 1866) Fed. Cas. No. 14,524; Same v. Hutchinson (D. C. 1848) Fed. Cas. No. 15,432; Same v. Wilson (D. C. 1874) Fed. Cas. No. 16,732; Same v. Swett (D. C. 1879) Fed. Cas. No. 16,427; In re Booth (1854)

3 Wis. 157. CONTRA, U. S. v. Coolidge (C. C. 1813) Fed. Cas. No. 14,857.

The federal courts have no common-law jurisdiction to try and punish crimes, but only such jurisdiction as is expressly authorized by the constitution or by congress. U. S. v. New Bedford Bridge (C. C. 1847) Fed. Cas. No. 15,867; Same v. Ramsay (C. C. 1847) Fed. Cas. No. 16,115; Same v. Wilson (C. C. 1856) Fed. Cas. No. 16,-731; Id. (D. C. 1874) Fed. Cas. No. 16,732; Same v. Hare (C. C. 1818) Fed. Cas. No. 15,304; Same v. Lancaster (C. C. 1841) Fed. Cas. No. 15,556; Same v. Barney (C. C. 1866) Fed. Cas. No. 14,524; Same v. Scott (D. C. 1865) Fed. Cas. No. 16,241; Same v. Swett (D. C. 1879) Fed. Cas. No. 16,427.

Where a district court had exclusive and final jurisdiction of an offense by the laws of the United States, neither the regularity of its proceedings nor the validity of its sentence can be called in question in any other court, either of a state or the United States by habeas corpus or any other process. Ableman v. Booth (1858) 21 How. 506, 521, 16 L. Ed. 169.

Federal District Court which has jurisdiction under this subdivision of all crimes cognizable under authority of the United States, acts within its jurisdiction whether it finds a man guilty or not, and whether its decision is right or wrong. Lamar v. United States (1916) 36 S. Ct. 255.

Jurisdiction of federal District Court over a prosecution under Cr. Code, § 32. post, § 10196, for falsely pretending, with intent to defraud, to be a federal officer, is not defeated because the indictment may not charge a crime. Id.

The United States circuit court has jurisdiction of indictments, under R. S. §§ 5515, 5522, for interfering with and resisting the supervisors of election and deputy marshals of the United States in the performance of their duties at an election of representatives to congress. Ex parte Siebold (1879) 100 U. S. 371, 25 L. Ed. 717.

There are no crimes cognizable in the federal courts outside of maritime or international law or treaties except such as are created and defined by acts of Congress. Morris v. U. S. (1908) 161 Fed. 672, 88 C. C. A. 532.

The circuit court had no jurisdiction to punish as a crime the obstruction of navigable tide waters by the erection of a bridge, without an express grant of authority by congress. U. S. v. New Bedford Bridge (C. C. 1847) Fed. Cas. No. 15,867.

Extent of the criminal jurisdiction of the United States stated by Field, C. J. U. S. v. Smiley (C. C. 1864) Fed. Cas. No. 16,317.

The federal courts have jurisdiction of all criminal cases arising under the federal laws. U. S. v. Smith (C. C. 1792) Fed. Cas. No. 16,323; Same v. Reese (C. C. 1866) Id. 16,138.

Except offenses committed on the high seas, or in places in the states which are under the exclusive jurisdiction of the United States, there are no felonies against the United States, cognizable by courts of the United States, except those which are expressly made such by act of congress. U. S. v. Shepherd (C. C. 1875) Fed. Cas. No. 16,274.

This provision does not confer jurisdiction on the district courts of any crime not otherwise defined by some statute of the United States, and a crime is cognizable unnder the authority of the United States when it is triable in its courts by virtue of its laws. U. S. v. Lewis (D. C. 1888) 36 Fed. 449.

Assuming that, under 26 Stat. 45, the jurisdiction of the district court for the district of Washington extends to all crimes committed within the district, the fact that the grand jury is sworn to inquire into offenses committed within that division only in which the court is sitting does not avoid an indictment for an offense committed within that division. U. S. v. Wan Lee (D. C. 1890) 44 Fed. 707.

The district court of the northern district of Iowa may name the time and place of trial of criminal whether at regular or special term or at the usual places for holding court or otherwise, subject only to the right of defendant to a speedy trial within the district in which the offense was committed. U. S. v. Kessel (D. C. 1894) 63 Fed. 433, 434.

2. Former statute as prospective.—Judiciary Act 1789, § 12, which gave to the circuit courts concurrent jurisdiction of all crimes and offenses cognizable in the district courts, was prospective, and embraced all offenses the jurisdiction of which was vested in the district courts by subsequent statutes. U. S. v. Holliday (1865) 70 U. S. (3 Wall.) 407, 18 L. Ed. 182.

3. Jurisdiction concurrent with other tribunals.—This enactment contemplates that the jurisdiction so exclusively conferred may be made a concurrent jurisdiction with other tribunals whenever the laws of the United States shall so direct, and a district court has jurisdiction to indict and try a person charged with having forged an obligation of the United States with intent to defraud, which is made an offense under R. S. § 5414 (section 10318 of this compilation), although accused was at the time an officer of the army, and the alleged offense was committed at a military post, and with intent to defraud an enlisted soldier, where accused has since been discharged from the army without any action against him having been taken by the military authorities. Neall v. U. S. (1902) 118 Fed. 699, 704, 56 C. C. A. 31.

Congress did not, by the crimes acts of 1825 and 1835 (4 Stat. 115, 775), give to the civil courts any jurisdiction

over the crime of murder, when committed on board a United States ship of war, and triable before a court-martial under the navy regulations. U. S. v. Mackenzie (D. C. 1843) Fed. Cas. No. 18,313.

4. Common-law offenses.—See note, ante.

There are no common-law offenses against the United States. U. S. v. Eaton (1892) 12 Sup. Ct. 764, 767, 144 U. S. 677, 36 L. Ed. 591; U. S. v. Barnaby (C. C. 1892) 51 Fed. 20, 22; U. S. v. Gibson (D. C. 1891) 47 Fed. 833; (1893) 20 Op. Atty. Gen. 590.

There are no common-law offenses under the laws of the United States, and the courts of the United States exercise no common-law jurisdiction except where conferred by an act of congress. U. S. v. Dietrich (C. C. 1904) 126 Fed. 676; Barclay v. U. S. (1902) 69 Pac. 798, 11 Okl. 503.

The United States circuit courts did not have common-law jurisdiction in criminal cases. Jurisdiction of crimes against the state was not among their implied powers, though they might fine for contempt, imprison for contumacy, enforce the observance of their orders, etc. U. S. v. Hudson (1812) 7 Cranch, 32, 3 L. Ed. 259.

Whether the courts of the United States have jurisdiction of offenses at common law against the United States, quære. U. S. v. Coolidge (1816) 1 Wheat. 415, 416, 4 L. Ed. 124.

The courts of the United States have no jurisdiction over offenses not made punishable by the Constitution, laws, or treaties of the United States, but they may resort to the common law for the definition of terms by which offenses are designated. Pettibone v. U. S. (1893) 13 Sup. Ct. 542, 545, 148 U. S. 197, 37 L. Ed. 419.

The courts of the United States do not resort to the common law as a source of criminal jurisdiction, but can only take cognizance of such crimes and offenses as are expressly designated by the laws of congress, and of which they are by such laws given jurisdiction. Peters v. U. S. (1899) 94 Fed. 127, 36 C. C. A. 105.

The fact that the punishment for a common-law crime has been changed by statute does not affect the jurisdiction to punish it at common law. U. S. v. Hammond (C. C. 1801) Fed. Cas. No. 15,293.

Conspiracy as known at common law is not cognizable as such in the federal courts. U. S. v. Martin (C. C. 1870) Fed. Cas. No. 15,728.

There are no common-law offenses against the United States, and the offenses cognizable in the federal courts are only such as the federal statutes define, provide a punishment for, and confer jurisdiction to try; but when congress adopts or creates a common-law offense the courts may properly look to the common law for the true meaning and definition thereof, in the absence of a clear definition in the act creating it. In re Greene (C. C. 1892) 52 Fed. 104.

The judicial power over offenses can be exercised only over offenses which are made punishable by the constitution, laws, or treaties of the United States, but resort to the common law may be had when necessary for the definition of the terms by which offenses are designated. In re Kelly (C. C. 1895) 71 Fed. 545, 547.

Federal courts have no jurisdiction of common-law offenses. U. S. v. Shelton (C. C. 1900) 100 Fed. 831.

The federal courts have no jurisdiction of offenses at common law, though the general government be the party immediately aggrieved. U. S. v. Hutchinson (D. C. 1848) Fed. Cas. No. 15,432.

The United States courts have no common-law jurisdiction in criminal matters, and can only take such jurisdiction as is given them by statute; and the fact that, though the larceny was committed within the limits of a state, the stolen property was not discovered in defendant's possession until the vessel was upon Lake Michigan, will not aid their jurisdiction. U. S. v. Rogers (D. C. 1891) 46 Fed. 1.

An indictment for offering an internal revenue officer a bribe to set fire to a distillery situated within the limits of a state is not cognizable by the federal courts, since there are no common-law offenses against the United States; and R. S. § 5451, post, § 10203, which makes it a crime to offer to bribe an officer of the United States with intent to influence him to do or omit to do any act in violation of his lawful duty, applies only to acts within the official functions of the officer. U. S. v. Gibson (D. C. 1891) 47 Fed. 833.

The fact that an internal revenue officer has the right, by virtue of his office, to enter the distillery at any time, does not bring the offense within the cognizance of the federal courts. Id.

The use as money of an instrument which does not possess the requisite similitude to some national obligation or security to perpetrate a common-law cheat is not an offense against the United States, but is solely within state authority. U. S. v. Barrett (D. C. 1901) 111 Fed. 369.

When Congress in a statute refers to or adopts a common-law offense without further definition, the common-law definition must obtain. U. S. v. Cardish (D. C. 1906) 143 Fed. 640.

There are no common-law offenses against the United States, and the courts of the United States have only such jurisdiction as Congress has conferred on them to try and punish such acts as it shall have previously declared to be crimes and fixed the penalty therefor. U. S. v. Martin (D. C. 1910) 176 Fed. 110.

Under Act Feb. 27, 1801, there may

be common-law offenses against the United States committed in the District of Columbia. Harrison v. Moyer (D. C. 1915) 224 Fed. 224.

While it is the general rule that there are no common-law offenses against the United States, such rule does not apply to the District of Columbia; and, the common law being in force in the District of Columbia when R. S. § 5440, post, § 10201, was enacted, which makes it an indictable offense to conspire to commit any offense against or to defraud the United States in any manner and for any purpose, any common-law offense not repealed, superseded, or plainly inconsistent with existing legislation or necessarily obsolete is an offense against the United States within the meaning of that section. Tyner v. U. S. (1904) 23 App. D. C. 324.

5. Offenses punishable under state laws.—The offense of extorting money under a threat to accuse a person of a criminal violation of a federal internal revenue law, though made a crime by R. S. § 5484, post, § 10315, is excepted from the exclusive jurisdiction conferred on the federal courts by R. S. § 629, and R. S. § 711, post, § 1233, of "all crimes and offenses cognizable under the authority of the United States," by the provision of section 5328, post, § 10500, that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." Sexton v. People of State of California (1903) 23 S. Ct. 543, 189 U. S. 319, 47 L. Ed. 833, affirming judgment People v. Sexton (1901) 64 P. 107, 132 Cal. 37.

An indictment for robbery on land will not lie in the federal courts. U. S. v. Terrel (C. C. 1840) Fed. Cas. No. 16,452.

The federal courts had no jurisdiction of the crime of larceny under Act 1790, § 16, committed in a place where the jurisdiction of the United States is concurrent with that of a state. U. S. v. Tierney (C. C. 1864) Fed. Cas. No. 16,517.

In matters committed to the sole jurisdiction of the United States, statutes of the state have no application, and a criminal prosecution for violation of a state statute cannot be based upon acts done in such matters, but the determination of the rightfulness of such acts depends wholly upon the laws of the United States, and belongs to their courts. Accordingly held, that the statute of Iowa (Code, § 3871) providing for the punishment of one who maliciously threatens to accuse a person of a crime in order to compel him to do an act has no application to a United States pension examiner, charged with the duty of investigating fraudulent pension claims. In re Waite (D. C. 1897) 81 Fed. 359, order affirmed Campbell v. Waite (1898) 88 Fed. 102, 31 C. C. A. 403.

The fact that an act constitutes an offense under the statutes of a state, cognizable only in the state courts, does not deprive a federal court of jurisdiction to entertain a prosecution based on the same act, where it also constitutes an offense against the laws of the United States. U. S. v. Lackey (D. C. 1900) 99 Fed. 952.

A federal court may entertain a prosecution for violation of Act March 2, 1867, § 1, post, § 10442, denouncing peonage, though prosecution of the same acts under the name of kidnapping and false imprisonment might be held in the state courts. U. S. v. McClellan (D. C. 1904) 127 Fed. 971, 979.

The crime of destroying the ballot box used and the ballot cast at an election for Congressman and presidential electors can be punished by the state as well as the United States. Mason v. State (1892) 55 Ark. 529, 18 S. W. 827.

6. Trial of indictments found in state courts.—Congress has no power to confer on the United States courts jurisdiction to try indictments found in the state courts, as the constitution of the United States confers no such power. People v. Murray (1864) 5 Parker, Cr. R. 577.

7. Offenses against the law of nations.—The federal judiciary, in the absence of legislation by Congress, has jurisdiction of an offense against the law of nations, and may proceed to punish the offender according to the forms of the common law. Henfield's Case (C. C. 1793) Fed. Cas. No. 6,360.

8. Offenses committed in foreign countries or on foreign vessels.—The United States courts have no jurisdiction over robbery or piracy committed by an alien on board a foreign vessel on the high seas, whether within or without a marine league of our coasts. U. S. v. Kessler (C. C. 1829) Fed. Cas. No. 15,528.

The federal courts have no jurisdiction of offenses upon or against the property of another committed on board of an American vessel lying within a land-locked harbor within the jurisdiction of a foreign sovereign. U. S. v. Morel (C. C. 1834) Fed. Cas. No. 15,807; Same v. Jackson (C. C. 1843) Fed. Cas. No. 15,457.

The fact that a person stealing goods in a foreign port brings them upon the high seas in an American vessel will not give jurisdiction of the offense to the federal courts. U. S. v. Morel (C. C. 1834) Fed. Cas. No. 15,807.

The joint resolution by congress of April 20, 1898, after declaring that "the people of the island of Cuba are, and of right ought to be, free and independent," further states "that the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island, except for the pacification

thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people." After the Treaty of Paris, a military governor of the island was appointed by the secretary of war, and the military governor afterwards provided for a civil government, with the various departments and courts. The act of June 6, 1900, amending R. S. § 5270, post, § 10110, provides for honoring requisitions from the chief executive officer in "control" of a "foreign country or territory" under the "control" of the United States. Held, that Cuba, under the military governor, was a foreign country, so that one committing a crime on a vessel registered at a Cuban port was not subject to trial therefor in the courts of the United States. U. S. v. Assia (C. C. 1902) 118 Fed. 915.

No federal court has jurisdiction to try persons, whether or not claiming to be American citizens, for crimes committed in foreign countries. (1893) 20 Op. Atty. Gen. 590.

9. Offenses on Indian reservations.—See, also, notes under §§ 10445 and 10502, post.

The federal circuit courts had no jurisdiction over an indictment against a white man for the murder of a white man within an Indian Reservation in a state. U. S. v. McBratney (1881) 104 U. S. 621, 623, 26 L. Ed. 869.

The offense of assault with intent to commit rape, committed by an Indian upon an Indian woman, both residing upon an Indian reservation, is not cognizable as a crime by any statute of the United States, and United States courts have no jurisdiction of such offense. U. S. v. King (D. C. 1897) 81 Fed. 625.

10. Offense by accessory.—See, also, § 10506, and notes thereunder.

An indictment as accessory before the fact of murder will not lie in the federal courts. U. S. v. Ramsay (C. C. 1847) Fed. Cas. No. 16,115.

11. Offenses by foreign consuls.—Under section 11, Judiciary Act, giving the circuit court jurisdiction of all crimes and offenses cognizable under the authority of the United States, such courts had jurisdiction to try an indictment against a foreign consul for offenses committed in this country. U. S. v. Ravara (C. C. 1793) Fed. Cas. No. 16,122.

A foreign consul, notwithstanding his official character, is indictable in this country and triable in the federal court for the common-law offense of sending anonymous and threatening letters with intent to extort money. U. S. v. Ravara (C. C. 1794) Fed. Cas. No. 16,122a, 2 Dall. 299, note.

12. Personal violence to public minister.—The circuit courts had jurisdiction of the offense of offering violence to the person of a public minister. U. S. v. Ortega (1826) 11 Wheat. 467, 469, 6 L. Ed. 521.

13. Perjury and false swearing.—See also, §§ 10248 and 10295, and notes thereunder.

Federal courts have exclusive jurisdiction of perjury in deposition in a contested election of a member of Congress. Thomas v. Loney (1890) 10 Sup. Ct. 584, 585, 134 U. S. 372, 33 L. Ed. 949, affirming (C. C. 1889) 38 Fed. 101.

Section 10295, post, defining the crime of perjury, is not confined in its operation to places within the exclusive jurisdiction of the United States, but is of universal application within the territorial limits thereof; and the crime is punishable in the district court of the district in which it is committed. Caha v. United States (1894) 14 Sup. Ct. 513, 152 U. S. 211, 38 L. Ed. 415.

A District Court of the United States has jurisdiction of a prosecution under R. S. § 5395, post, § 10248, for false swearing in a naturalization proceeding, notwithstanding the fact that such proceeding was in a state court. Holmgren v. United States (1907) 156 Fed. 439, 84 C. C. A. 301, judgment affirmed (1910) 30 S. Ct. 588, 217 U. S. 509, 54 L. Ed. 861, 19 Ann. Cas. 778.

Act July 14, 1870, c. 254, 16 Stat. 254, entitled "An act to amend the naturalization laws and to punish crimes against the same," etc., provides (section 1) that "in all cases where any oath or affidavit is made or taken under or by virtue of the law relating to the naturalization of aliens or in any proceedings under such laws" any person who knowingly swears falsely shall be punished, etc. Section 4 made the provisions of the act applicable to all naturalization proceedings before any court, and provided that "the courts of the United States shall have jurisdiction of all offenses under the provisions of this act in or before whatsoever court or tribunal the same shall have been committed." When incorporated into the Revised Statutes of 1875, section 1 of this act became section 5395 (this compilation, § 10248), being placed in the chapter entitled "Crimes against Justice," while the other sections were distributed elsewhere. Section 4 became section 5429 (this compilation, § 10249), and, with the portion of this section above quoted omitted, was made applicable only to sections immediately preceding, thus excluding section 5395. Held that, notwithstanding the changes on revision, section 5395 still conferred on the federal courts jurisdiction of a perjury committed in naturalization proceedings in a state court, in the procedure prescribed by Congres. U. S. v. Severino (C. C. 1903) 125 Fed. 949.

Const. U. S. art. 3, § 1, vests the judicial power of the United States in

the courts thereof. By R. S. § 711, cl. 1, post, § 1233, such courts had jurisdiction exclusive of the state courts of all crimes and offenses cognizable under the authority of the United States. R. S. § 629, cl. 20, embodied herein, gave the Circuit Courts of the United States exclusive cognizance of all such crimes except where otherwise provided by law, and R. S. § 5392, post, § 10295, defining and punishing perjury, does not save the jurisdiction of the state courts. Held, that perjury committed by false swearing before a United States commissioner was not subject to the jurisdiction of a state court under Ky. St. § 1174 (Russell's St. § 3708), defining and punishing perjury. Commonwealth v. Kitchen (1911) 133 S. W. 586, 141 Ky. 655.

Willful false swearing by a person giving testimony in a naturalization proceeding before a state court is an offense against the laws of the United States punishable in the federal courts and not in the state courts. People v. Sweetman (N. Y. 1857) 3 Park. Cr. R. 358.

14. Conspiracy.—See note, ante, as to "Common-law offense."

Where an indictment charged that defendants conspired to injure, oppress, threaten, and intimidate B., a citizen of the United States, in the free exercise of his privilege of contracting and being contracted with, his right of personal security and personal liberty, and the overt act charged was the seizing of B., the placing of handcuffs on him, and compelling him, by force and against his will, to enter into a pretended contract to work for a long period of time for the defendant, the indictment did not state an offense within the jurisdiction of the federal courts, under R. S. § 5508, post, § 10183, prohibiting conspiracy to injure or intimidate citizens in the exercise of civil rights; the citizen's right to personal liberty and security being within the primary jurisdiction of the state. U. S. v. Eberhart (C. C. 1899) 127 Fed. 254.

Federal courts have no jurisdiction to punish a conspiracy to oppress and intimidate a citizen of the United States to prevent him from exercising the right to establish a miners' union in a state, in the furtherance of which defendants were alleged to have assaulted such citizen, with intent to murder him by shooting at him with a pistol; such offense being entirely within the jurisdiction of the state courts. U. S. v. Moore (C. C. 1904) 129 Fed. 630.

It is not necessary to the conviction of persons charged with a conspiracy that they should have resided within the jurisdiction of the court trying the indictment at the time the conspiracy was formed, if the conspiracy was entered into, and had its headquarters, in that jurisdiction. U. S. v. Howell (D. C. 1892) 56 Fed. 21.

15. Passing counterfeit bank notes.—A state court has no jurisdiction over the offense of passing counterfeit national bank notes with knowledge of their counterfeit character. Therefore, where one has been convicted of that offense by a state court and sentenced to imprisonment, he will be discharged on motion in habeas corpus proceedings taken in the district court. Ex parte Houghton (D. C. 1881) 7 Fed. 657; Id. (D. C. 1881) 8 Fed. 897.

16. Violation of law as to hours of labor.—In a prosecution of government contractors for "unlawfully, intentionally, and knowingly requiring or permitting a laborer or mechanic, employed on public work," to wit, a dam across the Ohio river, to work more than eight hours on a single calendar day, contrary to the provisions of Act Aug. 1, 1892, post, § 8919, "relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia," the offense is not the working overtime by the laborer or mechanic, but is on the part of the contractor in requiring and permitting such overtime work to be done; and hence, where the work is directed, required, or permitted from the Ohio side of the river, the federal court for the Southern District of Ohio has jurisdiction over the offense, notwithstanding some or all of the work may have been performed south of the line which divides the states of Ohio and Kentucky. U. S. v. Sheridan-Kirk Contract Co. (D. C. 1906) 149 Fed. 809.

17. Revolt and mutiny on vessel.—See notes under §§ 10465 and 10466, post.

18. Plundering property from stranded vessel.—See notes under § 10470, post.

19. Offenses within the admiralty and maritime and territorial jurisdiction of the United States.—See § 10445 et seq. and notes thereunder.

Cited without definite application, U. S. v. Hall (1878) 98 U. S. 343, 345, 25 L. Ed. 180; Tennessee v. Davis (1879) 100 U. S. 257, 274, 277, 25 L. Ed. 648; In re Mills (1890) 10 Sup. Ct. 762, 135 U. S. 263, 34 L. Ed. 107; Ex parte Wilson (1891) 11 Sup. Ct. 870, 872, 140 U. S. 575, 35 L. Ed. 513; New York v. Eno (1894) 15 Sup. Ct. 30, 31, 155 U. S. 89, 39 L. Ed. 80; Rosecrans v. U. S. (1897) 17 Sup. Ct. 302, 304, 165 U. S. 257, 41 L. Ed. 708; Hunt v. U. S. (1897) 17 Sup. Ct. 609, 610, 166 U. S. 424, 41 L. Ed. 1063; Barrett v. U. S. (1898) 18 Sup. Ct. 327, 331, 169 U. S. 218, 42 L. Ed. 723; Dwyer v. U. S. (1909) 170 Fed. 160, 95 C. C. A. 416; U. S. v. Borger (C. C. 1881) 7 Fed. 193, 194; U. S. v. Baum (C. C. 1896) 74 Fed. 43, 45.

(3) Of admiralty causes, seizures, and prizes.

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it; of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.

R. S. § 563, pars. 8, 9, § 629, par. 6. Act March 3, 1911, c. 231, § 24, par. 3, 36 Stat. 1091.

Notes of Decisions

1. Constitutionality of former statute.
2. Former law limiting or extending jurisdiction.
3. Territorial courts.
4. Nature, grounds, and scope of jurisdiction in general.
5. Waters over which jurisdiction extends.
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12. Foreign attachment.
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15. Insurance.
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17. Demurrage.
18. Salvage.
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21. Claims for wages.
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23. Torts in general.
24. Collisions.
25. Personal injuries.
26. Wrongful death.
27. Limitation of liability of shipowners.
28. Seizures, forfeitures, and penalties in general.
29. Seizures on land.
30. Detention of cargo belonging to government.
31. Prize.
32. Objections or exceptions and waiver thereof.

See, also, § 1233, post, and notes thereunder.

See, also, Const. art. 3, § 2, cl. 1, and notes thereunder as to "cases of admiralty and maritime jurisdiction."

1. Constitutionality of former statute.—Under the clause of the constitution extending to federal courts jurisdiction in admiralty, congress had power to enact Act Feb. 26, 1845 (5 Stat. 726), extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same. The Genesee Chief v. Fitzhugh (1851) 53 U. S. (12 How.) 443, 13 L. Ed. 1058; Fretz v. Bull (1851) 53 U. S. (12 How.) 466, 13 L. Ed. 1068.

The provision of the ninth section of the Judiciary Act which vests in the district courts of the United States exclusive cognizance of civil causes of admiralty and maritime jurisdiction is constitutional. The Moses Taylor (1866) 4 Wall. 411, 430, 18 L. Ed. 397.

Act Sept. 24, 1789, § 9, providing that the district courts shall have exclusive original cognizance in all cases of admiralty and maritime jurisdiction, but saving to litigants in all cases the right of a common-law remedy where such remedy exists, is not in conflict with Const. U. S. art. 3, § 2, extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." Home Ins. Co. v. Northwestern Packet Co. (1867) 32 Iowa, 223, 7 Am. Rep. 183.

2. Former law limiting or extending jurisdiction.—Act 1845, c. 19, extending the admiralty and maritime jurisdiction of the district courts of the United States to certain cases upon the lakes and navigable waters connecting them, was not a regulation of commerce. The Genesee Chief v. Fitzhugh (1851) 53 U. S. (12 How.) 443, 13 L. Ed. 1058; Fretz v. Bull (1851) 53 U. S. (12 How.) 466, 13 L. Ed. 1068.

Act Feb. 26, 1845 (5 Stat. 726), extending the admiralty jurisdiction to certain cases on the lakes or navigable waters connecting the same, does not give admiralty jurisdiction of a libel for the loss of goods shipped from one port to another port in the same state, even though the ultimate destination of the vessel is a port in another state. Allen v. Newberry (1858) 62 U. S. (21 How.) 244, 16 L. Ed. 110; Maguire v. Card (1858) 62 U. S. (21 How.) 248, 16 L. Ed. 118.

Under Act Feb. 26, 1845 (5 Stat. 726), it was held that admiralty jurisdiction of the federal courts does not extend to a contract for supplies furnished a vessel engaged in trade between two river ports in the same state. Maguire v. Card (1858) 21 How. 248, 249, 16 L. Ed. 118.

Under Act 1845, c. 20 (5 Stat. 726), the admiralty jurisdiction of the federal courts upon the lakes does not extend to a suit upon a contract of shipment of goods between ports and places in the same state, although the vessel is a general ship, with an assorted cargo, engaged in a general carrying business between ports of different states. Allen v. Newberry (1858) 62 U. S. (21 How.) 244, 16 L. Ed. 110.

The extension of admiralty jurisdiction to the lakes (Act Feb. 26, 1845) did not take away the concurrent remedy which existed at common law. The

Globe (C. C. 1852) Fed. Cas. No. 5,-483.

The act of 1794 (1 Stat. 381) limited the jurisdiction of the district court to a marine league from the coasts or shores, and therefore the district court had no jurisdiction of a libel filed for the restoration of a French vessel captured by an English vessel at a place more than a marine league from the shore, but less than a marine league from certain shoals covered with water, such shoals not being part of the coast or shore. Soult v. L'Africaine (D. C. 1804) Fed. Cas. No. 13,179.

Contracts for materials furnished at the home port, in building steamboats and other vessels, are not within Act Feb. 26, 1845, extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connected therewith. Ludington v. The Nucleus (D. C. 1850) Fed. Cas. No. 8,598.

Act Feb. 26, 1845 (5 Stat. p. 726), extending the jurisdiction in admiralty to certain cases upon the Great Lakes and navigable waters connecting the same, having been passed on the erroneous assumption that admiralty jurisdiction was limited to tidewaters, is wholly inoperative, and neither enlarged nor restricted the jurisdiction in admiralty as it existed under the constitution and the judiciary act of 1789. Franconet v. The F. W. Backus (D. C. 1852) Fed. Cas. No. 5,048; The Flora (D. C. 1853) Fed. Cas. No. 4,878; Parmlee v. The Charles Mears (D. C. 1856) Id. 10,766; Scott v. The Young America (D. C. 1856) Id. 12,549; Wolverton v. Lacey (D. C. 1856) Id. 17,-932; The Revenue Cutter No. 1 (D. C. 1860) Fed. Cas. No. 11,713; Western Transp. Co. v. The Great Western (D. C. 1862) Id. 17,443; Gillett v. Pierce (D. C. 1875) Id. 5,437.

3. **Territorial courts.**—See, also, notes under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

Under 10 Stat. 172, the district courts of Washington Territory had jurisdiction in admiralty cases. The City of Panama (1879) 101 U. S. 453, 25 L. Ed. 1061; The City of Panama (1877) 1 Wash. T. 518.

4. **Nature, grounds, and scope of jurisdiction in general.**—The district courts possess all the powers of courts of admiralty, both instance and prize. The Betsey (1794) 3 Dall. 6, 16, 1 L. Ed. 485.

The original jurisdiction in admiralty exercised by the district courts is exclusive not only of other federal courts, but of the state courts also. The Hine v. Trevor (1866) 4 Wall. 555, 18 L. Ed. 451.

The jurisdiction of the district courts so far as it extends to civil causes of admiralty and maritime jurisdiction is coextensive with the constitutional gift of judicial power on the subject. New England M. Ins. Co. v. Dunham (1870) 11 Wall. 1, 23, 20 L. Ed. 90.

The district courts are invested with the entire admiralty power of the constitution as courts of original jurisdiction, and such power is exclusive of the state courts as well as other federal courts. American S. B. Co. v. Chace (1872) 16 Wall. 522, 529, 21 L. Ed. 369.

By this section Congress conferred upon the district court the exclusive original cognizance of all admiralty and maritime causes, and the nature and extent of this jurisdiction must be determined by the laws of Congress, the decisions of this court, and by the usages prevailing in the courts of the states at the time the federal constitution was adopted. In re Easton (1877) 95 U. S. 68, 70, 24 L. Ed. 373.

Causes within the admiralty jurisdiction are within the jurisdiction of the district courts by virtue of the delegation of authority "in all civil causes of admiralty and maritime jurisdiction." De Lovio v. Boit (C. C. 1815) Fed. Cas. No. 3,776.

The proceedings on bonds for value or stipulations in admiralty are incident to the principal cause, and the circuit court had no jurisdiction except on appeal from the final decree. The Hollen (C. C. 1818) Fed. Cas. No. 6,608.

The jurisdiction of the district court embraces all cases of a maritime nature, whether they be particularly of admiralty cognizance or not. Such jurisdiction and the law regulating its exercise are to be sought for in the general maritime laws of nations, and are not confined to that of England or any other particular maritime nation. The Seneca (C. C. 1829) Fed. Cas. No. 12,670; Davis v. The Seneca (D. C. 1828) Id. 3,-650; Kynoch v. The S. C. Ives (D. C. 1856) Fed. Cas. No. 7,958.

In the nature of the case, where the jurisdiction of the district court has attached, it is exclusive. Black v. Southern Pac. R. Co. (C. C. 1889) 39 Fed. 565.

The district courts of the United States, as courts of admiralty, exercise as large a jurisdiction and are governed by the same principles of maritime law as the courts of the maritime nations of continental Europe. The S. C. Ives (D. C. 1856) Fed. Cas. No. 7,-958.

The circuit courts of the United States had no original jurisdiction in admiralty. Jansen v. Vrow Christina Magdalena (D. C. 1794) Fed. Cas. No. 7,216.

The district court in admiralty may order the restoration of property, the right to the possession of which is in the marshal of the adjoining district. The Joseph Gorham (D. C. 1843) Fed. Cas. No. 7,537.

Const. art. 3, § 2, declaring that the judicial power of the United States shall extend to all cases of admiralty

and maritime jurisdiction, and Judiciary Act 1789, conferring on United States district courts cognizance of civil causes in admiralty and maritime jurisdiction, vest in such district courts exclusive original cognizance in all cases involving admiralty and maritime jurisdiction. Bird v. The Josephine (1868) 39 N. Y. 19.

The test of admiralty jurisdiction, under the act of 1789, is the nature of the claim on which the suit is founded, and not the form of remedy resorted to. When the claim is maritime, it comes within that jurisdiction exclusively, excepting only the right of suitors to pursue common-law remedies, or what is equivalent thereto, in other courts. The Petrel v. Dumont (1876) 28 Ohio St. 602, 22 Am. Rep. 397.

The jurisdiction of the district court of the United States, under the ninth section of the judiciary act of 1789, embraces all cases of a maritime nature, whether they be particularly of admiralty cognizance or not, and such jurisdiction and the law regulating its exercise are to be sought for in the general maritime laws of nations, and are not confined to that of England or any other particular maritime nation. Davis v. The Seneca (1829) 3 Clark, 521, 6 Pa. Law J. 213.

5. Waters over which jurisdiction extends.—See notes ante and post.

See, also, notes under Const. art. 3, § 2, cl. 1 as to "Cases of admiralty and maritime jurisdiction."

The admiralty and maritime jurisdiction granted to the district courts is not limited to tidewaters but extends to all public navigable lakes and rivers where commerce is carried on between different states or with a foreign nation. The Genesee Chief v. Fitzhugh (1851) 12 How. 443, 457, 13 L. Ed. 1058.

The admiralty jurisdiction of the district courts of the United States extends over fresh-water rivers navigable from the sea, by virtue of the act of 1789, and not by the act of 1845, which extends their jurisdiction upon the lakes and navigable waters connecting with the same. Jackson v. The Magnolia (1857) 61 U. S. (20 How.) 296, 5 L. Ed. 909.

The grant of admiralty powers to the District Court of the United States is coextensive with the grant in the Constitution as to the character of the waters over which it extends. Admiralty jurisdiction, as conferred by the constitution and the judiciary act of 1789, is not limited to tidewater, but covers the entire navigable waters of the United States. Though such jurisdiction on the lakes and waters connecting the same is governed by Act Feb. 3, 1845, the jurisdiction of admiralty on the other interior waters of the United States is based on Act Sept. 24, 1789. The Hine v. Trevor (1866) 71 U. S. (4 Wall.) 555, 18 L. Ed. 451.

The part of the sea below low-water mark, and not within the body of any country, is the "high seas" within Act 1789, § 9. The Abby (C. C. 1818) Fed. Cas. No. 14.

A state law which, for a cause of action clearly maritime, either of contract or tort, arising on or committed by a ship engaged in commerce on any public navigable water of the United States, gives a remedy at common law in a state court by attachment in rem against the vessel specifically as debtor or offender, is in conflict with section 9 of the judiciary act of 1789, giving exclusive jurisdiction in admiralty and maritime causes to the admiralty courts; and this is so even though the state law provides that the attachment of the ship be "in a pending suit." Stewart v. Potomac Ferry Co. (C. C. 1882) 12 Fed. 296.

The jurisdiction of the district courts extends to a marine league from the coasts or shores extending to low-water mark. Shoals covered with water are not a part of the coast or shore. Soult v. L'Africaine (D. C. 1804) Fed. Cas. No. 13,179.

Under Act Feb. 26, 1857, § 1, making Lake Superior the common boundary between the states of Minnesota, Wisconsin, and Michigan, and section 2, giving Minnesota concurrent jurisdiction over all waters that form a common boundary between itself and another state, the federal district court of Minnesota has admiralty jurisdiction over the open waters of such lake. Inman v. The Lindrup (D. C. 1894) 62 Fed. 851.

Maritime jurisdiction over the nontidal navigable inland waters of this country, where they are susceptible of use for interstate traffic, has been exercised by the federal courts since Judiciary Act Sept. 24, 1789, c. 20, 1 Stat. 73. Ryman Steamboat Line Co. v. Commonwealth (1907) 101 S. W. 403, 30 Ky. Law Rep. 1276, 10 L. R. A. (N. S.) 1187.

In the absence of a treaty with Great Britain authorizing it, the process of the district courts of the United States sitting in admiralty cannot be executed in Canadian waters. Tyler v. People (1860) 8 Mich. 320.

6. Consent conferring jurisdiction.—Consent will not confer on a district court sitting in admiralty a jurisdiction not given by statute, especially where the rights of third parties are affected. Winchester v. U. S. (1878) 14 Ct. Cl. 13.

7. Loss of jurisdiction.—See, also, notes under § 1536, post.

In a proceeding in rem, a valid seizure and actual control of the res by the marshal gives jurisdiction, and an improper removal of it from his custody, as by an order of court improvidently made, does not destroy the jurisdiction. Hence, where, on a libel in rem in the admiralty for repairs, a vessel had been seized,

and, on hearing, the libel was dismissed, but on the same day an appeal to the circuit court was moved and allowed, a motion made on the next day by the claimants, and improvidently granted, to restore the vessel to them, does not devest the circuit court of its jurisdiction to hear the appeal, if within due time the appeal is perfected by giving bonds in the way prescribed by statute. The Rio Grande (1874) 90 U. S. (23 Wall.) 458, 23 L. Ed. 158.

Jurisdiction once acquired by possession of the res is not lost by its subsequent removal beyond the territorial jurisdiction of the court without consent of libelant. Otis v. The Rio Grande (C. C. 1872) Fed. Cas. No. 10,613.

A clerical error in docketing an admiralty cause on a civil docket will not deprive the court of jurisdiction. Hatch v. The Boston (D. C. 1880) 3 Fed. 807.

8. Effect of adoption of state laws.—The jurisdiction of the district courts in admiralty and maritime cases is not ousted by the adoption of state laws by act of congress. Such act only gives concurrent jurisdiction to the state courts, and limits the recovery in the United States courts to the sum to which the party is entitled by the state law so adopted. Hobart v. Drogan (1836) 35 U. S. (10 Pet.) 108, 119, 9 L. Ed. 363.

9. Saving of common-law remedy.—See notes ante and post.

See, also, notes under § 1233, post, and notes under Const. art. 3, § 2, cl. 1, as to "Cases of Admiralty and Maritime Jurisdiction."

The provision saving common-law remedies does not include proceedings in rem. The Moses Taylor (1866) 4 Wall. 411, 431, 18 L. Ed. 397; The J. R. Langdon (1908) 163 Fed. 472, 475, 90 C. C. A. 18.

The meaning of this clause is that in cases of concurrent jurisdiction in admiralty and at common law the jurisdiction of the latter is not taken away. Waring v. Clarke (1847) 5 How. 441, 460, 12 L. Ed. 226.

This section does not change the remedy at common law. The clause referring to the common-law remedy has no application to seizures under the revenue law or navigation law, but, if the thing seized is acquitted, the owner may prosecute the wrongdoer either in admiralty or at common law. New Jersey Steam Nav. Co. v. Merchants' Bank (1848) 6 How. 344, 385, 390, 12 L. Ed. 465.

Attachment in state court not defeated by seizure of vessel under process of federal court of admiralty upon a libel for seaman's wages. Taylor v. Carryl (1857) 20 How. 583, 594, 15 L. Ed. 1028.

The clause of section 9 of the judiciary act of 1789 which saves to suitors "the right of a common-law remedy where the common law is competent to give it" does not apply to proceedings in rem, as used in the admiralty courts, and a state law conferring jurisdiction of such proceedings upon the state courts is void. The Moses Taylor (1866) 71 U. S. (4 Wall.) 411, 18 L. Ed. 397; The Hine v. Trevor (1866) 71 U. S. (4 Wall.) 555, 18 L. Ed. 451.

State statutes conferring on state courts the remedy for maritime torts and marine contracts by proceedings strictly in rem are not within the saving of the right of a common-law remedy, but this rule does not prevent the seizure and sale by the state courts of the interest of any owner or part owner in the vessel by attachment or general execution in a personal action to recover a debt for which he is personally liable, nor does it prevent any action which the common law gives for obtaining a judgment in personam against one liable in a marine contract or tort. The above-stated rule applied to a statute of Iowa giving a lien against any vessel found in the waters of the state for injury to person or property by said boat, and authorizing the seizure and sale of the boat without any process against the wrongdoer, whether owner or master, and saving to plaintiff all his common-law rights, but making no provision to protect the owner of the vessel. The Hine v. Trevor (1866) 71 U. S. (4 Wall.) 555, 18 L. Ed. 451.

The saving to suitors in all cases of the right of a common-law remedy, where the common law is competent to give it, does not authorize a proceeding in rem to enforce a maritime lien in a common-law court, state or federal. The Belfast (1868) 7 Wall. 624, 643, 19 L. Ed. 266.

A suit for mariner's wages in personam is maintainable at common law, and is within the exception of section 9 of the Judiciary Act of 1789. An objection to the jurisdiction of a state court, in a suit for mariner's wages in personam, that the process of sequestration or attachment has been used to bring the vessel on which the services were rendered under the dominion of the court, for the purpose of subjecting it to such judgment as might be rendered in the cause, is not maintainable, as such a process is not a proceeding in rem, as known in admiralty. Leon v. Galceran (1870) 78 U. S. (11 Wall.) 185, 20 L. Ed. 74.

There is a remedy at common law for damages by collision at sea, and this section confers admiralty jurisdiction on the courts of the United States, but saves to suitors in all cases the right of a common-law remedy where the common law is competent to give it. Therefore the United States courts as courts of admiralty do not have exclusive jurisdiction of suits in personam

growing out of collisions between vessels while navigating the Ohio river. Schoonmaker v. Gilmore (1880) 102 U. S. 118, 119, 26 L. Ed. 95.

The jurisdiction of state courts of a suit in case for damages caused by fires from a burning scow is clearly preserved by the provision, "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." Chappell v. Bradshaw (1888) 9 Sup. Ct. 40, 41, 128 U. S. 132, 32 L. Ed. 369.

A bill to enforce a lien for towage by foreclosure of the lien on a raft of lumber in the complainant's possession where the suit is brought against individual defendants, seeking a decree against them, and, in default of the payment thereof, a sale of the property to satisfy it, is not a proceeding in rem within the exclusive admiralty jurisdiction of the federal courts, but is a suit in personam to enforce a common-law remedy, which may be brought in a state court by virtue of R. S. § 563, saving the suitor's right of a common-law remedy in all cases where the common law is competent to give it. Knapp, Stout & Co. Company v. McCaffrey (1900) 20 Sup. Ct. 824, 826, 44 L. Ed. 921, decree affirmed (1899) 52 N. E. 898, 178 Ill. 107, 69 Am. St. Rep. 290.

The constitutional grant (article 3, § 2) of admiralty jurisdiction to the federal courts, as construed by this section of the judiciary act, leaves open the common-law jurisdiction of the state courts over torts committed at sea. Old Dominion S. S. Co. v. Gilmore (1907) 28 Sup. Ct. 133, 134, 207 U. S. 398, 52 L. Ed. 264.

A suit in personam against shipowners for work and materials in repairing vessel in which an attachment was for the purpose only of satisfying personal judgment is not within exclusive admiralty jurisdiction of the federal courts, under the clause saving to suitors the common-law remedies. Rounds v. Cloverport Foundry & Mach. Co. (1915) 35 S. Ct. 596, 237 U. S. 303, 59 L. Ed. 966, affirming judgment (1914) 167 S. W. 384, 159 Ky. 414.

Vessel property, like other personal property of shipowners, may be subjected in a personal suit against the owners, but only the interest of the owners may be sold and maritime lienholders cannot be compelled to submit their claims in such suit; its only effect being to delay the enforcement of their liens while the vessels are in the custody of the court. The J. R. Langdon (1908) 163 Fed. 472, 90 C. C. A. 18, affirming judgment (D. C. 1906) 145 Fed. 64.

Common-law courts of Massachusetts have no power to adjust maritime liens on a fund attached under the state law. The Caroline (C. C. 1819) Fed. Cas. No. 2,419.

A proceeding in the state court to enforce a shipwright's lien under an act relative to the enforcement of liens on chattels by the sale thereof is not "a common-law remedy," within R. S. § 563, giving the federal district court exclusive jurisdiction of civil causes in admiralty, saving to suitors the right of a common-law remedy if any they have. Terrell v. The B. F. Woolsey (C. C. 1880) 4 Fed. 552.

The saving of the right of a common-law remedy does not provide that admiralty causes may be tried in common-law courts in every case in which the subject of admiralty jurisdiction can be reached by common-law process and the issues of fact and law tried under the common-law practice, and the common law is not competent to afford a remedy against a vessel engaged in commerce on the navigable waters as between suitors having maritime claims against such vessel. Stewart v. Potomac Ferry Co. (C. C. 1882) 12 Fed. 296, 301.

Pendency of a libel in admiralty against a vessel is no bar to an attachment suit at law against the owners for the same cause of action. Wolf v. Cook (C. C. 1889) 40 Fed. 432.

An action will not lie at common law for salvage on the high seas. Brevoor v. The Fair American (D. C. 1800) Fed. Cas. No. 1,847.

A suit to enforce a maritime contract is within the exclusive jurisdiction of admiralty, saving to suitors the right of a common-law remedy where the common law is competent to give it. A statutory remedy in the nature of a bill in equity to foreclose a mortgage for the enforcement of a common-law lien founded on a maritime contract is not within the reservation limiting the admiralty jurisdiction, and a state court has no jurisdiction. The B. F. Woolsey (D. C. 1880) 3 Fed. 457, 462.

The proceeding authorized by the New York act of May 8, 1869 (Laws 1869, c. 738), giving mechanics and others the right to foreclose their lien on and sell the chattel affected thereby, is not a "common-law remedy," within 1 Stat. 77, § 9, conferring exclusive jurisdiction on admiralty courts to enforce maritime contract, but saving to suitors the right of a common-law remedy where the common law is competent to give it. The reservation of the act of congress relates to well-known forms of actions and remedies, distinguished alike from those presented in rem in courts of admiralty and those that are peculiar to courts of equity. Id.

In all maritime cases, it is wholly within the discretion of congress whether it will provide for a trial by jury. In re Long Island North Shore Passenger & Freight Transp. Co. (D. C. 1881) 5 Fed. 599, 624.

The saving of the right of a common-law remedy forbids any interference by

the district court with suits in the state courts when the whole subject-matter and all the rights of both parties can be adjudicated and preserved in the ordinary course of a common-law suit. The Rosa (D. C. 1892) 53 Fed. 132, 134.

The mere fact that a constable without process has seized a boat under Act S. C. Jan. 2, 1895, declaring that any boat transporting liquor at night shall be liable to seizure and confiscation, presents no conflict of jurisdiction on the owner libeling it, and therefore no reason why the federal court should remit him to the state court for his remedy. Jervey v. The Carolina (D. C. 1895) 66 Fed. 1013.

The saving of a common-law remedy is applicable in all cases where the action in the state court is in form a common-law action against the person without any of the ingredients of a proceeding in rem to enforce a maritime lien. The Lotta (D. C. 1907) 150 Fed. 219, 220.

The clause in this subsection and section 1233, subsec. 3, post, saving to suitors from the exclusive jurisdiction of admiralty the right of a common-law remedy when the common law is competent to give it, gives to a suitor having a right of action growing out of a maritime contract the right to go into a common-law forum, if one is found competent to work out the rights involved in his contract, but not to find a new remedy. Schuede v. Zenith S. S. Co. (D. C. 1914) 216 Fed. 566.

The clause saving to suitors a common-law remedy, though not embracing proceedings in rem, does not include proceedings in personam where the vessel is attached or sequestrated. Berton v. Tietjen & Lang Dry Dock Co. (D. C. 1915) 219 Fed. 763.

That salvage cases are of common-law jurisdiction is questioned in this country only as to state courts; hence the district courts have not exclusive jurisdiction as to the Court of Claims. Bryan v. U. S. (1870) 6 Ct. Cl. 128.

An ordinary suit, conducted according to the course of the common law, cannot be prosecuted against a steamboat directly as such, nor against the master or owners thereof in that capacity. Turner v. Wallace (1851) 11 Ark. (6 Eng.) 662.

The state courts have jurisdiction of actions to recover from the owners the value of goods sold and delivered at the request of the master, although for the use of a vessel engaged in navigating the high seas. This is a common-law remedy. Crawford v. Roberts (1875) 50 Cal. 235.

Under that clause in the acts of 1789 and 1845 reserving to suitors the right to pursue their common-law remedy, an action in attachment for injuries to a dredge may be maintained. The act of congress did not contemplate a distinction between a common-law and a statutory remedy, but merely meant to give concurrent jurisdiction to the common-law courts in cases where they had power to enforce such rights as the admiralty courts could enforce, whether the right or remedy was conferred by the common law or by statute. Walter v. Kierstead (1884) 74 Ga. 18.

Under the clause "saving to suitors the right of a common-law remedy where the common law is competent to give it," a "limitation of liability" pleaded in an action against the individual owners of a vessel for injuries sustained in a collision was not available, being applicable only when a remedy in admiralty is sought. Duffy v. Gleason (1900) 58 N. E. 729, 26 Ind. App. 180.

R. S. § 563, creating admiralty jurisdiction in collision cases, "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it," does not take away the jurisdiction of state courts in collision cases. Id.

1 Rev. St. Ky. c. 7, § 16, giving the state jurisdiction in case of collision between two boats, in a personal action, simply modifies the common-law remedy, and is within a reservation of Act Sept. 24, 1789 (1 Brightly's Dig. U. S. 230), known as the "Judiciary Act," which provides that the district courts of the United States shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, etc., saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it. Stewart v. Harry (1868) 66 Ky. (3 Bush) 438.

Under federal Judiciary Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 76, giving the federal District Courts admiralty and maritime jurisdiction, but "saving to suitors a common-law remedy, where the common law is competent to give it," the quoted clause is intended to save the right of action in those courts which follow the common law as distinguished from admiralty proceedings; the words "common-law remedy" not necessarily implying remedy obtainable in a common-law court, or being equivalent to "means employed to enforce a right or redress an injury," and they are not limited to such causes of action as existed at common law at the passage of such act. Johnson v. Westerfield's Adm'r (1911) 135 S. W. 425, 143 Ky. 10.

The courts of a state have jurisdiction to enforce by a proceeding in rem liens given by its laws for labor and materials furnished in constructing or repairing domestic vessels, notwithstanding R. S. § 563, subd. 8, embodied herein, and R. S. § 711, subd. 3, post, § 1233, giving the United States district courts exclusive jurisdiction of "all civil causes of admiralty and maritime jurisdiction, saving to suitors the right of a common-law remedy in all cases where the common law is competent to

give it." Atlantic Works v. The Glide (1893) 157 Mass. 525, 33 N. E. 163, 34 Am. St. Rep. 305.

A common-law action for services in fitting out a vessel and as master and for commissions on her earnings and for certain out-lays and expenses is founded on the right to have a common-law liability enforced by common-law proceedings of which a person cannot lawfully be deprived, and the fact that an action in rem against the vessel had been brought in a United States court, and that an appeal by plaintiff was pending from the judgment therein, was not a bar to such action. People v. Judge of Wayne Circuit Court (1873) 27 Mich. 406, 15 Am. Rep. 195.

State courts have jurisdiction at common law over actions on contracts for the employment by a vessel owner of a captain or master for his vessel. Jones v. Graham & Morton Transp. Co. (1883) 16 N. W. 893, 51 Mich. 539.

Under the saving clause of Judiciary Act, the right to proceed in state courts by suit in personam to redress wrongs committed at sea is saved, though the injured person had the concurrent right to proceed in rem in a federal court of admiralty. Lindstrom v. Mutual S. S. Co. (Minn. 1916) 156 N. W. 669.

The existence of a remedy in admiralty against the vessel, for breach of a contract of affreightment, does not prevent a state court from entertaining a common-law action against the owners. Parisot v. Helm (1876) 52 Miss. 617.

The fact that the rights of the parties to an action are to be determined by the principles of maritime law does not exclude the jurisdiction of the state courts where the action is a personal one, based on contracts enforceable under the common law, which is in force in the state; the common-law remedies of suitors in civil causes of admiralty and maritime jurisdiction having been saved to them by the provisions of the judiciary act of 1789 (R. S. § 563). Conrad v. De Montcourt (1897) 39 S. W. 805, 138 Mo. 311.

The judiciary act of 1789 (section 9), defining the jurisdiction of district courts of the United States, does not deprive state tribunals of the right to enforce by attachment a lien given by a state law, and based on supplies furnished to the vessel on which such lien is claimed. Bird v. The Josephine (N. Y. 1876) 50 Barb. 501; In re The Circassian, Id. 490.

The state courts of common law have jurisdiction in causes of action arising within admiralty jurisdiction, where a remedy exists at common law, although the cause of action is not recognized by the common law, but is given entirely by the state statutes. Dougan v. Champlain Transp. Co. (N. Y. 1872) 6 Lans. 430.

Under that clause in the acts of 1789 and 1845 saving to suitors the right of a common-law remedy where the common law is competent to give it, the state court has jurisdiction of an action against a carrier for the death of a passenger drowned in Lake Champlain, a state statute providing for the survival of the cause of action and the bringing thereof in the state courts. The remedy existed at common law, though the cause of action for death did not. Id.

The jurisdiction of actions to enforce common-law remedies for breaches of maritime contracts or for maritime torts saved to the state courts by the judiciary act of 1789 (1 Stat. 76, § 9) is not limited, restricted, or qualified by the act of 1851 "to limit the liability of shipowners," etc. (9 Stat. 635), unless appropriate proceedings are taken under said statute by a party interested to avail himself of the benefit thereof. Baird v. Daly (1874) 57 N. Y. 236, 15 Am. Rep. 488.

Though the federal constitution extends the judiciary power of the federal court to "all cases of admiralty and maritime jurisdiction," and the judiciary act of September 24, 1789, invests the district courts with "exclusive cognizance of all civil causes of admiralty and maritime jurisdiction," this exclusive original cognizance is to be understood to be exclusive as between the district and circuit courts of the United States. This jurisdiction may be concurrent with that of courts of common law in cases in which a common-law remedy may be adequate and proper, since the judiciary act of 1789 "saves to suitors in all cases the right of common-law remedy where the common law is competent to give it," and therefore a libel in rem may be maintained in the state courts under the water craft act for supplies furnished to a vessel navigating the waters of the state. Thompson v. The Julius D. Morton (1853) 2 Ohio St. 26, 59 Am. Dec. 658.

A proceeding against a steamboat under the water-craft law of February 26, 1840, for the breach of a maritime contract, is not a common-law remedy, within the meaning of the judiciary act of 1789, vesting admiralty and maritime jurisdiction in the United States courts, but saving to suitors the right to pursue their common-law remedy. Such proceeding is in the nature and has the effect of a proceeding in rem in admiralty. The General Buell v. Long (1869) 18 Ohio St. 521; Dumont v. The Petrel No. 2 (1870) 1 Cin. R. 27; The Petrel v. Dumont (1876) 28 Ohio St. 602, 22 Am. Rep. 397.

The right of a plaintiff, under Judiciary Act Sept. 24, 1789, § 9 (1 Stat. 76), to select the forum in an action in admiralty, cannot prevent defendant from setting up in the state court the defense of nonliability, in that the loss arose from danger of navigation. Sevier v. Mitchell (Or. 1914) 142 P. 780.

Where a state court acquires common-law jurisdiction of a case in which

a vessel is seized by foreign attachment before it is libeled in admiralty for seamen's wages, the lien of the attachment creditors is superior to that of the seamen. Carryl v. Taylor (Pa. 1854) 2 Am. Law Reg. 333.

Common-law courts and admiralty have concurrent jurisdiction of a cause of action growing out of an agreement by defendants, in consideration of the delivery to them of the cargo of a certain wrecked vessel by plaintiffs, who were the salvors, to pay them such proportion of the expenses incurred as should be apportioned upon such cargo. Albany City Ins. Co. v. Whitney (1871) 70 Pa. St. (20 P. F. Smith) 248.

Common-law courts and admiralty have concurrent jurisdiction on charter party, bill of lading, shipping articles, and policy of marine insurance. Id.

That clause in Act 1789, c. 20, § 9, saving to suitors a common-law remedy where the common law is competent to give it, is intended to save the remedy or right of action in those courts which proceed according to the course of the common law, as distinguished from admiralty proceedings; and therefore an action on the case may be maintained in the state courts for the death of one killed in a collision on Narragansett Bay, under R. I. c. 176, §§ 16, 21, giving such action to the next of kin of persons killed by steamboat carriers. Chase v. American S. S. Co. (1870) 9 R. I. 419, 11 Am. Rep. 274.

The state courts have jurisdiction of an action against a resident steamboat company for breach of a contract of carriage which was to be performed on the high seas, and without the state. Ransberry v. North American Transportation & Trading Co. (1900) 61 Pac. 154, 22 Wash. 476; Gill v. North American Transportation & Trading Co. (1905) 79 Pac. 778, 37 Wash. 694, affirmed North American Transportation & Trading Co. v. Gill (1906) 27 Sup. Ct. 778, 203 U. S. 579, 51 L. Ed. 326.

Under R. S. § 563, providing that the federal district courts shall have exclusive jurisdiction in admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," it was held, that the federal courts did not have exclusive jurisdiction of a suit to partition a vessel between several owners, but that such suit was maintainable in the state courts. Reynolds v. Nielson (1903) 93 N. W. 455, 116 Wis. 483, 96 Am. St. Rep. 1000.

Under Const. U. S. art. 3, § 2, providing that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, and R. S. § 563, subd. 8, embodied herein, giving to the federal courts exclusive jurisdiction in admiralty and maritime matters, but expressly saving "to suitors in all cases the right of a common-law remedy where the common law is competent to give it," it was held in an action against a carrier for damage to goods in shipment to plaintiff, and for the loss of some of them, wherein the answer alleged that the goods were shipped by water, and that the damage was caused by reason of the dangers of navigation, by the grounding of the vessel, and it becoming necessary to lighter the same, which had been assumed by plaintiff by a bill of lading exempting the carrier from liability for loss from perils of navigation and by a general average bond, that the pleadings did not show a case within the exclusive jurisdiction of the federal courts. John Meunier Gun Co. v. Lehigh Valley Transp. Co. (1904) 101 N. W. 386, 123 Wis. 143.

The seizure of a vessel under the general attachment law (St. Wis. 1898, § 2738) does not invade the jurisdiction of the federal admiralty courts, because the vessel itself is not proceeded against; it being simply the reaching of property rights in the property by attachment in a personal action against the owner as a common-law remedy preserved by the express terms of the admiralty law itself (R. S. § 563, subd. 8), embodied herein. Phillips v. Eggert (1907) 113 N. W. 686, 133 Wis. 318, 126 Am. St. Rep. 963.

10. Leave to sue receiver.—Under Judicial Code, §§ 24, 66, 267, held that court, granting leave to sue receiver, had no power, and, if it had a discretion, would not, limit the suit to one in admiralty. Berwind-White Coal Mining Co. v. Eastern S. S. Corp. (D. C. 1916) 228 Fed. 726.

11. Suits between foreigners and against foreign vessels.—See note, post, as to "Collisions."

See, also, notes under § 7629, post, and Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

The federal district courts have cognizance of torts committed on the high seas, when the parties or the vessel are found within their jurisdiction, without reference to the nationality of either. The Noddleburn (C. C. 1887) 30 Fed. 142, affirming (D. C. 1886) 28 Fed. 855.

Ordinarily the district court will not interfere in disputes between the master and seamen of a foreign vessel, when they are bound by the articles to submit all disputes to a home tribunal. Aertsen v. The Aurora (D. C. 1800) Fed. Cas. No. 95.

The protest of a foreign consul will not prevent the district court from taking jurisdiction of a libel in rem by foreign seamen against a foreign vessel to recover wages. Orr v. The Achsah (D. C. 1849) Fed. Cas. No. 10,586.

The district court may take cognizance of a suit by foreign seamen against a foreign vessel. Armstrong v.

The Rydesdale (D. C. 1862) Fed. Cas. No. 547.

The court will investigate the conduct of a master of a British vessel in procuring the intervention of a British consul in a foreign port, by which a seaman was imprisoned. Patch v. Marshall (C. C. 1853) Fed. Cas. No. 10,793.

The district court in admiralty will take jurisdiction of a suit for wages between foreigners, if the voyage is ended, and there is no contract binding the parties to another jurisdiction, and no reason why justice cannot be done here. The Pawashick (D. C. 1872) Fed. Cas. No. 10,851.

A libel for wages by a foreign seaman, whom the master has charged with desertion, held should be dismissed where the master offered to take the seaman home, and give him a certificate of forgiveness for past offenses. Willendson v. Forsoket (D. C. 1801) Fed. Cas. No. 17,682.

The thirteenth article of the treaty between Sweden and the United States, of July 4, 1827 (8 Stat. 346, 352), provides "that each country shall have the right to appoint consuls, vice consuls, etc., in the commercial ports and places of the other country," and that such consuls, etc., "shall have the right, as such to sit as judges and arbiters in such differences as may arise between the captain and crews of the vessel belonging to the nation whose interests are committed to their charge, without the interference of the local authorities." Held, that the district court was not thereby debarred from exercising its authority in a case within the terms of such treaty, where there was no consul, or other officer of Sweden, within the territorial jurisdiction of the court. The Amalia (D. C. 1880) 3 Fed. 652.

Where the charter of a British vessel was executed in Liverpool between British subjects, but the vessel was attached within the district and all the facts necessary to determine the rights under the charter party were sufficiently proved without taking testimony under a foreign commission, justice would be promoted by the district court taking jurisdiction and disposing of the case. Boult v. The Naval Reserve (D. C. 1881) 5 Fed. 209, 212.

When the master of a British vessel knowingly allows a rope to remain in an insecure condition, and a seaman, in the proper discharge of his duty falls to the deck therefrom, and is hurt in consequence of such neglect, the seaman may maintain a suit against such vessel in the district court for damages. The Noddleburn (D. C. 1886) 28 Fed. 855.

Libelant, a seaman on a British vessel, under articles for the entire voyage, left the vessel on its arrival in a United States port, and, after his absence had been noted on the log book for several days, he was marked as a deserter. On that day he returned, but was told to go about his own business. Held that, as the court would administer relief by comity in accordance with British law, which forbids a master to discharge a seaman in such port without the consent of the consul, which was refused, and as the master was willing to receive libelant back, saying that he had never discharged him, and the latter was anxious to secure passage home, an order would be entered securing that result, and the libel for wages be dismissed. Wilson v. The John Ritson (D. C. 1888) 35 Fed. 663.

United States statutes conferring admiralty jurisdiction do not apply to claims of bad treatment suffered by an American serving as a seaman on a Norwegian vessel. Williams v. The Welhaven (D. C. 1892) 55 Fed. 80.

An action for services of a seaman, based on his contract, broken by assault on him by the master of his vessel, a British ship, within the police limits of the United States, may be entertained by the federal court within whose jurisdiction the assault was made. The Kentigern (D. C. 1900) 99 Fed. 443.

A United States court of admiralty has jurisdiction of a suit by a seaman against a foreign vessel to recover wages, and the exercise of such jurisdiction is discretionary. Where the libelant is an American citizen, signed in an American port, although on board the vessel, and claims to have been wrongfully discharged, jurisdiction will be entertained. The August Belmont (D. C. 1907) 153 Fed. 639.

An action brought by an alien sailor for personal injuries on board a ship owned by a foreign corporation while at a wharf within the state is not, under R. S. § 563, subd. 8, embodied herein, a matter of admiralty jurisdiction exclusively. Faras v. Lower California Development Co. (Cal. App. 1739) 151 Pac. 35.

12. Foreign attachment.—A district court proceeding in admiralty has jurisdiction by foreign attachment in a suit against a vessel owner to recover a balance due on an average adjustment. National Board of Marine Underwriters v. Melchers (D. C. 1891) 45 Fed. 643.

13. Maritime contracts and services in general.—See, also, notes under § 1233, post, and under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

The district court in admiralty has no jurisdiction of a libel in personam against the builder of a vessel, after its delivery, for breach of the written contract under which it was built. Cunningham v. Hall (C. C. 1858) Fed. Cas. No. 3,481, reversing (D. C. 1858) Fed. Cas. No. 3,482.

The provisions of Act Sept. 24, 1789, which give to the district courts original cognizance of all civil causes of admiralty and maritime jurisdiction, comprehended all maritime contracts, and those which relate to the navigation, business, or commerce of the sea,

and the building, repairing, or supplying of vessels. Davis v. A New Brig (D. C. 1834) Fed. Cas. No. 3,643.

Maritime contracts in the sense used in admiralty practice belong to the exclusive and original jurisdiction of the district courts of the United States; and therefore those provisions in the statutes of this state which authorize actions in rem against vessels by name in such cases are not sustainable. Mitchell v. The Magnolia (1869) 45 Mo. 67; Peish v. Same (1869) Id. 69.

A debt contracted in building a vessel at the East Newark shipyard for which a lien is given by Nixon's Dig. 576, is not a maritime contract within Judiciary Acts 1789, 1845, and Const. U. S. art. 3, § 2, providing that the district courts of the United States shall have jurisdiction over all cases of admiralty and maritime contracts. Elliot v. Edwards (1869) 34 N. J. Law (5 Vroom) 96.

14. Supplies and repairs, and services performed for vessel.—See note ante, and note post as to "Enforcement of liens."

A libel in the District Court for Louisiana against a steamboat at New Orleans to recover for work done and materials found in repairs, in view of the state law giving a lien therefor, was a case of admiralty jurisdiction, tested by whether the Mississippi ebbed and flowed at New Orleans, and being satisfied by a regular rise and fall of the water, and by whether the service was a maritime service to be performed substantially on the sea or tidewater. Peyroux v. Howard (1833) 7 Pet. 324, 341, 8 L. Ed. 700.

Contracts for building vessels or for work done or materials furnished in their construction are not maritime, and hence a state statute relating to such contracts, giving liens to the contractors and providing for their enforcement in the state courts, is not invalid, as in derogation of the admiralty jurisdiction conferred on the District Courts by the Constitution and the judiciary act of 1789. The Winnebago (1905) 141 Fed. 945, 73 C. C. A. 295, writ of certiorari denied (1906) Iroquois Transp. Co. v. A. Harvey's Sons Mfg. Co., 26 S. Ct. 752, 200 U. S. 616, 50 L. Ed. 621.

The district courts of the United States have jurisdiction of a libel in personam against the owner of a domestic steamboat for supplies furnished to the boat and services performed for her. Jutte v. Davis (D. C. 1890) 47 Fed. 592.

Contracts for repairs or supplies to be furnished to a vessel in her home port are not maritime contracts; and the act of 1857 making vessels navigating the rivers within or bordering on this state liable for such debts in a proceeding in rem is not in conflict with section 9 of the judiciary act of 1789, conferring admiralty jurisdiction on the United States courts. Williamson v. Hogan (1868) 46 Ill. 504.

The furnishing of materials for the equipment and outfit of a boat at its home port is not a maritime contract, within the exclusive and original jurisdiction of the district courts, under the admiralty laws. Mitchell v. The Magnolia (1869) 45 Mo. 67; Peish v. Same (1869) Id. 69.

Contracts for repairs or supplies furnished to a boat or vessel at her home port are maritime contracts, and therefore come within the admiralty jurisdiction of the district courts. The Petrel v. Dumont (1876) 28 Ohio St. 602.

15. Insurance.—See, also, notes under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

Maritime contracts within the jurisdiction of the district courts have reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they are made. A contract of maritime insurance is a maritime contract within the admiralty and maritime jurisdiction, though not within the exclusive jurisdiction of the United States courts. New England M. Ins. Co. v. Dunham (1870) 11 Wall. 1, 23, 20 L. Ed. 90.

The district courts of the United States, as courts of admiralty, have jurisdiction over policies of marine insurance. Hale v. Washington Ins. Co. (C. C. 1842) Fed. Cas. No. 5,916.

16. Charter parties and contracts of affreightment or transportation.—See notes ante.

See, also, notes under section 1233, post, and under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

The district court has jurisdiction of a libel against a steamboat company for the loss of specie carried in its boat by an expressman and lost by the burning of the boat on Long Island Sound. New Jersey Steam Nav. Co. v. Merchants' Bank (1848) 6 How. 344, 385, 12 L. Ed. 465.

Admiralty jurisdiction extends to charter party and affreightment. These are admiralty contracts within the meaning and construction of the constitution and act of congress, and cognizable in admiralty courts by process in rem or in personam. Morewood v. Enequist (1859) 23 How. 491, 493, 16 L. Ed. 516.

Contracts of affreightment are maritime contracts over which the courts of admiralty have jurisdiction, and consequently liens arising therefrom may be enforced in the district court. The Eddy (1866) 5 Wall. 481, 18 L. Ed. 486.

Admiralty jurisdiction in a suit in personam is not dependent on a right to proceed in rem, but upon the subject-matter of the suit, and a suit against the United States, brought under the provisions of Act March 3, 1887, c. 359,

24 Stat. 505, and based upon a maritime contract of affreightment, is within the admiralty jurisdiction of the District Court. U. S. Shipping Co. v. U. S. (C. C. 1906) 146 Fed. 914.

A charter party for the transportation of lumber entirely by boat from the port of shipment to that of destination is a maritime contract, and therefore the United States district court has jurisdiction of an action in personam in admiralty for its breach. Dunbar v. Weston (D. C. 1899) 93 Fed. 472.

17. Demurrage.—A libel by the owner of three vessels constituting "one ship" against the cargo for demurrage for unreasonable detention at the port of discharge is within the admiralty jurisdiction of the district court. Brown v. Certain Tons of Coal (D. C. 1888) 34 Fed. 913.

18. Salvage.—See note, ante, as to "Saving of common-law remedy."

See, also, notes under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

The district court has jurisdiction of a libel for salvage on the sea or on tidewaters by virtue of its admiralty and maritime jurisdiction. Hobart v. Drogan (1836) 10 Pet. 108, 120, 9 L. Ed. 363.

Though jurisdiction over cases of salvage is vested in the district court, Congress may, as it has done by act March 3, 1887, post, § 1136(1), give jurisdiction to the court of claims in cases in which one will be entitled to redress in a court of admiralty as well as in a court of law or equity. U. S. v. Morgan (1900) 99 Fed. 570, 573, 39 C. C. A. 653, appeal dismissed (1901) 22 Sup. Ct. 931, 46 L. Ed. 1263.

The district court in admiralty has jurisdiction of a libel in rem as well as in personam for salvage services, though performed under a contract for a fixed compensation not contingent upon success. The A. D. Patchin (C. C. 1849) Fed. Cas. No. 87; Gager v. The A. D. Patchin (D. C. 1849) Id. 5,170; The Louisa Jane (D. C. 1873) Id. 8,532; The Williams (C. C. 1873) Id. 17,710. But see The Whitaker (D. C. 1854) Fed. Cas. No. 17,524; Id. (D. C. 1855) Fed. Cas. No. 17,525; The Marquette (D. C. 1872) Id. 9,101.

The district court in admiralty has jurisdiction in a case of salvage rendered by an American tug to a British vessel in Canadian waters. The Sailor's Bride (C. C. 1859) Fed. Cas. No. 12,-220.

The district court has jurisdiction over a case of salvage on the Ohio river. In re Seven Coal Barges (C. C. 1870) Fed. Cas. No. 12,677.

The jurisdiction of the federal district court in cases of salvage is not confined to American property or to cases occurring in American waters. Western Transp. Co. v. The Great Western (D. C. 1862) Fed. Cas. No. 17,443.

19. Pilotage.—See, also, notes under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

The district court has jurisdiction of a libel against the consignee of a vessel for pilotage, though the consignee is made liable therefor by a state statute of the port where the services were performed. McDonald v. Prioleau (D. C. 1891) 44 Fed. 769.

20. Claim for towing on Hudson river.—A United States district court has jurisdiction of a libel filed against a canal boat to enforce a claim for towing it up the Hudson river. Nor does R. S. § 4251, post, § 7996, providing that a canal boat shall not be libeled in a federal court for the wages of any person employed on board or in navigating it, affect the case. Ryan v. Hook (N. Y. 1884) 34 Hun, 185.

21. Claims for wages.—See, also, notes, ante, as to "Suits between foreigners and against foreign vessels" and as to "Saving of common-law remedy."

The district court has no jurisdiction as a court of admiralty and maritime jurisdiction of a suit for wages earned on a voyage in a steam vessel from Shippingport in Kentucky on the river Missouri and back again to the port of departure. The Thomas Jefferson (1825) 10 Wheat. 428, 430, 6 L. Ed. 358.

A seaman serving on a small vessel navigating the interior waters of the state should seek his remedy for wages in the local courts of the state if the owner is known to him and responsible. The Bolivar (D. C. 1847) Fed. Cas. No. 1,609.

The district court has no jurisdiction in rem for seamen's wages for services exclusively within the state. Brooks v. The Peytona (D. C. 1858) Fed. Cas. No. 1,959.

A court of admiralty may decree seamen's wages, although earned on a steamer of less than five tons, engaged in carrying freight and passengers upon navigable waters. The Pioneer (D. C. 1884) 21 Fed. 426.

The crew of a steamboat plying between the ports of adjoining states upon navigable tide waters have a right to proceed for wages due them by libel in the district court of the United States. Abbott v. Baltimore & R. Steam-Packet Co. (1850) 1 Md. Ch. 542.

22. Enforcement of liens.—See, also, note, ante, as to "Saving of common-law remedy."

See, also, notes under section 1233, post, and under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

Lien for duties held not enforceable by a libel in admiralty, see, U. S. v.

Three Hundred Fifty Chests of Tea (1827) 12 Wheat. 486, 497, 6 L. Ed. 702.

Jurisdiction was vested in the district courts by section 9 of the judiciary act of 1789 to enforce maritime liens by a suit in rem in all cases where such liens arise whether the liability is for the breach of a maritime contract or to recover damages for marine tort. Pendergast v. The Kalorama (1869) 10 Wall. 204, 215, 19 L. Ed. 941.

Where claims on the proceeds in the registry of a vessel sold are not maritime liens, the district court cannot distribute those proceeds in payment of the claims if the owners of the vessel oppose such distribution. The Lottawanna (1873) 87 U. S. (20 Wall.) 201, 22 L. Ed. 259.

A lien under a state statute for repairs or supplies furnished in the home port is a right of property in the vessel and a maritime lien enforceable by process in rem exclusively in the district courts. The Glide (1897) 17 Sup. Ct. 930, 931, 167 U. S. 606, 42 L. Ed. 296.

A state may provide for liens in favor of material men for necessaries furnished to a vessel in her home port or in a port of the state to which she belongs, though the contract to furnish the same is a maritime contract and such liens can be enforced by proceedings in rem in the district courts of the United States. Perry v. Haines (1903) 24 Sup. Ct. 8, 9, 191 U. S. 17, 48 L. Ed. 73.

A valid maritime lien created by a state statute for supplies furnished to a domestic vessel may be enforced by court of admiralty of any district which obtains possession of the vessel. The Vigilant (1907) 151 Fed. 747, 81 C. C. A. 371.

Proceedings against vessels in rem to enforce maritime liens are vested exclusively in the District Courts. A Circuit Court could sell vessels free from such liens, if the lienors voluntarily submitted themselves to the Circuit Court's jurisdiction. Hudson v. New York & Albany Transp. Co. (1910) 180 Fed. 973, 104 C. C. A. 129.

If holders of maritime liens against vessels come into the Circuit Court having possession of the res, and ask for adjudication upon their liens, they should be held to have assented to the jurisdiction of the Circuit Court for all purposes, including a substitution of the proceeds of sale for the res whenever in the sound discretion of the court, such substitution is necessary to preserve the property from deterioration or secure a better price for it. Id.

Steamship company held to have maritime lien for freight and charges advanced to connecting carriers, and action therefor was within the jurisdiction of the District Court. New York & Cuba Mail S. S. Co. v. Maldonado & Co. (1915) 225 Fed. 353, 140 C. C. A. 377.

Jurisdiction to enforce maritime liens and liens under the state law for supplies, etc., belongs exclusively to the District Court in admiralty, under R. S. § 563, and R. S. § 711, post, § 1233. Hudson v. New York & A. Transp. Co. (C. C. 1909) 175 Fed. 519.

The district courts of the United States have a general admiralty jurisdiction in rem in suits brought by material men against foreign ships, and in cases of domestic ships where the local law gives a lien. Wick v. The Samuel Strong (D. C. 1855) Fed. Cas. No. 17,607.

Furnishing an air pump to a water craft (a "chuncker") used for pumping water out of dry docks is a maritime service, and the lien given therefor by the local law may be enforced in the district court in admiralty. Winslow v. A Floating Steam Pump (D. C. 1879) Fed. Cas. No. 17,880.

This court has jurisdiction to enforce a simple common-law possessory lien, independent of the question whether the lienor's rights were enlarged or altered by the New York statute giving lienors the right to enforce their liens by a sale of the property. The power of a court of admiralty to order the sale of a vessel does not depend upon the right the libelant may have to sell her, or cause her to be sold, to enforce his demand; but it is a power inherent in the court, to be exercised in the interest of commerce. The cause being maritime in its nature, the court has jurisdiction of the parties and the subject-matter. It is immaterial that the vessel is a domestic vessel. The B. F. Woolsey (D. C. 1881) 7 Fed. 108.

When it is attempted in the district court to give effect to liens created by state laws, they are enforced subject to all the qualifications and limitations imposed by those laws. The Kingston (D. C. 1885) 23 Fed. 200.

The district courts of the United States have no jurisdiction to enforce liens arising under state laws, except when they are founded upon a contract maritime in its character. Id.

United States district courts having jurisdiction of a contract, as a maritime one, can, under admiralty rule 12, enforce liens given for its security by state laws. Haritwen v. The Louis Olsen (D. C. 1892) 52 Fed. 652, decree reversed Olsen v. Haritwen (1893) 57 Fed. 845, 6 C. C. A. 608, following The Lottawanna (1874) 21 Wall. 558, 22 L. Ed. 654.

R. S. § 563, cl. 8, embodied herein, which confers upon the district courts of the United States jurisdiction "of all civil causes of admiralty and maritime jurisdiction," gives such courts jurisdiction of a suit to enforce a maritime lien created by a state statute for pilotage fees, or for a penalty imposed by such statute, for the failure to take a

pilot as therein required. The Lida Fowler (D. C. 1902) 113 Fed. 605.

The courts of a state have jurisdiction to enforce, by a proceeding in rem, liens given by its laws for labor and materials furnished in constructing or repairing domestic vessels, notwithstanding R. S. § 563, subd. 8, embodied herein, and R. S. § 711, subd. 3, post, § 1233, giving the United States district courts exclusive jurisdiction of "all civil causes of admiralty and maritime jurisdiction, saving to suitors the right of a common-law remedy in all cases where the common law is competent to give it." Such liens are not maritime, though growing out of a maritime contract. Atlantic Works v. The Glide (1893) 159 Mass. 60, 34 N. E. 258, affirming (1893) 33 N. E. 163.

A contract for repairs of a vessel, made at her home port, is maritime in its nature, and under Const. U. S. art. 3, § 2, extending the judicial power to all cases of maritime jurisdiction, and R. S. § 563, par. 8, embodied herein, giving district courts of the United States jurisdiction of civil causes of maritime jurisdiction, enforcement of a maritime lien given by a state statute cannot be instituted in a state court. Hankins v. Cox & Sons Co. (1899) 44 A. 206, 63 N. J. Law, 512.

Hill's Code Or. § 3690, so far as it authorizes a proceeding in rem in the state courts to enforce a lien for necessary supplies furnished a vessel in her home port, is invalid, as it contravenes Const. U. S. art. 3, § 2, and R. S. § 563, and R. S. § 711, post. § 1233, which give exclusive jurisdiction of such proceedings to the district courts of the United States. Portland Butchering Co. v. The Willapa (1893) 25 Or. 71, 34 Pac. 689.

Maritime contracts in the sense used in admiralty practice, and marine torts in cases where a maritime lien arises, belong to the exclusive and original jurisdiction of the district courts of the United States; and therefore those provisions in the statutes of this state which authorize actions in rem against vessels by name in such cases are not sustainable. Mitchell v. The Magnolia (1869) 45 Mo. 67; Peish v. Same (1869) Id. 69.

23. Torts in general.—See note, ante, as to "Suits between foreigners and against foreign vessels."

See, also, notes under § 1233, post, and Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

The provision conferring jurisdiction of civil causes of admiralty and maritime jurisdiction remains in force as applied to the navigable waters of the Hudson and all other navigable waters of the Atlantic coast which empty into the sea or into the bays and gulfs that form a part of the sea, and jurisdiction is not taken away by the fact that a tort was committed within the body of a county. Commercial Transp. Co. v. Fitzhugh (1861) 1 Black, 574, 579, 17 L. Ed. 107.

A suit brought on a petition setting forth that defendant was the owner of a vessel named, that the vessel was so negligently managed by him that it damaged plaintiff's warehouse on the land near the bank of the river on which the vessel was plying, and praying that a writ of attachment against defendant be issued to the sheriff, commanding him to attach the vessel, and summoning defendant to appear, and for a decree subjecting the vessel to a lien for such damages, is an action in personam, and not a proceeding in rem, nor can the lien sought to be enforced be deemed a maritime lien; and hence the cause is not a proceeding in rem against a vessel, cognizable by United States district courts sitting as courts of admiralty. Johnson v. Chicago & P. Elevator Co. (1886) 119 U. S. 388, 7 Sup. Ct. 254, 30 L. Ed. 447.

Where the collector of customs seized a foreign-built yacht, purchased abroad by a citizen of the United States, on the ground that it was liable to duty as an imported article, a libel by the owner on the theory that it was not subject to duty because not an imported article, so that the seizure was wrongful, presents a question of a marine tort cognizable in admiralty by any district court of the United States within whose territorial jurisdiction the yacht may be found. That jurisdiction would not fail on the ground that the owner's remedy was under the customs administrative act of 1890 (26 Stat. 131), since, under sections 14 and 15 thereof, the decision of the collector, of the board of general appraisers, and of the circuit court on appeal therefrom, is limited to determining "the rate and amount" of duties chargeable, and does not extend to the question whether or not an article is imported merchandise, within the meaning of the tariff laws. Ex parte Fassett (1892) 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087.

Where goods that had been sold to be paid for on delivery were shipped in the name of the vendors, a shipping receipt given to them, and a bill of lading subsequently given to the vendee, who then absconded, upon the refusal of the master to give the vendors a bill of lading, they could recover against the vessel the value of the goods without a demand; and, as the vessel was in navigable waters, the tort was maritime in its character, for which an action could be brought in the district court. The Ferreri (C. C. 1882) 14 Fed. 589, affirming decree (D. C. 1881) 9 Fed. 468.

The federal district courts have cognizance of torts committed on the high seas, when the parties or the vessel are found within their jurisdiction,

without reference to the nationality of either. The Noddleburn (C. C. 1887) 30 Fed. 142.

A marine tort is one that occurs on any public navigable water of the United States, whether caused by a wrongful act or omission; and the proper district court, as a court of admiralty, has jurisdiction of a suit to recover damages therefor. Holmes v. O. & C. Ry. Co. (D. C. 1880) 5 Fed. 75.

A boat or vessel plying between two ports in the same state, upon any navigable water of the United States, but engaged exclusively in the domestic commerce of the state, is within the admiralty jurisdiction of the United States; and when a steam ferry boat, contrary to the provision of R. S. § 4466, post, § 8230, carries passengers on an excursion, largely in excess of the number allowed by her permit, and fails to carry the required number of life preservers, she is guilty of a marine tort, and a district court has jurisdiction of a libel in personam against her owners and master to recover the penalty prescribed by R. S. § 4500, post, § 8276. U. S. v. Burlington & H. County Ferry Co. (D. C. 1884) 21 Fed. 331.

The United States district court has jurisdiction of an action against a municipal corporation for damages to a schooner caused by the negligent care and management of a draw on a bridge owned by the corporation. Etheridge v. City of Philadelphia (D. C. 1885) 26 Fed. 43.

The district courts have jurisdiction of torts committed on the high seas, without reference to the nationality of the vessel or the parties thereto. Bernhard v. Creene (D. C. 1874) Fed. Cas. No. 1,349; The Noddleburn (D. C. 1886) 28 Fed. 855.

An illegal seizure of a vessel while lying at the dock is a maritime tort, giving a district court jurisdiction in admiralty of a libel to recover her. Jervey v. The Carolina (D. C. 1895) 66 Fed. 1013.

The federal District Courts, given cognizance of all civil cases of admiralty and maritime jurisdiction, have civil jurisdiction over all wrongs committed on waters over which Congress may, by virtue of the admiralty clause of the Constitution, authorize the exercise of criminal jurisdiction. Imbrovek v. Hamburg-American Steam Packet Co. (D. C. 1911) 190 Fed. 229, judgment affirmed (C. C. A. 1912) Atlantic Transport Co. of West Virginia v. Imbrovek (1912) 193 Fed. 1019, 113 C. C. A. 398.

Marine torts, in cases where a maritime lien arises, belong to the exclusive and original jurisdiction of the district courts of the United States; and therefore those provisions in the statutes of this state which authorize actions in rem against vessels by name in such cases are not sustainable. Mitchell v. The Magnolia (1869) 45 Mo. 67; Peish v. Same, Id. 69.

24. Collisions.—See note, ante, as to "Saving of common-law remedy," and note, post, as to "Wrongful death."

See, also, notes under section 1233, post, and under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

The United States district court for the Northern district of Illinois has jurisdiction in admiralty of a suit in rem against a steam canal boat, to recover damages caused by a collision between her and another canal boat, while the two boats were navigating the Illinois and Lake Michigan Canal, although the libelant's boat was bound from one place in Illinois to another place in Illinois. In re Petition of Boyer (1883) 109 U. S. 629, 3 Sup. Ct. 434, 27 L. Ed. 1056.

A stipulation given for the release of a vessel upon the original libel to recover damages done to a vessel with which she collided, although it purports to be "for the benefit of whom it may concern," does not bind the sureties to respond to claims set up by intervening petitions filed subsequently to the release; and hence the court should not entertain jurisdiction of such intervening petitions. Admiralty rule 34, relating to intervening petitions, applies only to those cases in which the vessel is still in custody, or in which she has been sold and the proceeds paid into court. The Oregon (1895) 15 Sup. Ct. 804, 812, 158 U. S. 186, 39 L. Ed. 943.

Admiralty jurisdiction of a federal District Court extends to a cause of action against a stevedore company arising out of an injury to one of its employés, caused by its failure to secure the hatch covers on a vessel in navigable waters, whereby the employé was injured. Atlantic Transport Co. of West Virginia v. Imbrovek (1914) 34 S. Ct. 733, 234 U. S. 52, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, affirming decree (1912) 193 Fed. 1019, 113 C. C. A. 398; Same v. State of Maryland (1914) 34 S. Ct. 736, 234 U. S. 63, 58 L. Ed. 1213, affirming decree (1912) 193 Fed. 1019, 113 C. C. A. 408.

The court of the district in which the offending vessel is arrested has jurisdiction of a libel for collision which occurred within the territorial limits of another district. Town v. Western Metropolis (D. C. 1865) Fed. Cas. No. 14,114.

The district court in admiralty has jurisdiction of a libel for collision in the North Sea between vessels of different nations. The Jupiter (D. C. 1867) Fed. Cas. No. 7,585.

It is not essential to the jurisdiction of the court on a libel for collision that the marshal should continuously retain the vessel in his custody. The E. W. Gorgas (D. C. 1879) Fed. Cas. No. 4,585. See, also, The Rio Grande (1874) 90 U. S. (23 Wall.) 463, 23 L. Ed. 158.

Where the liability of the owners of a steamboat arose out of a collision on water which was a navigable highway of commerce, the district court had jurisdiction of it in admiralty, and the rule of limitation of the liability of the owners of the steamboat with respect to such a tort was a rule of admiralty procedure prescribed by congress, and the fact that the vessel was customarily employed solely in Maryland waters, and not in foreign or interstate commerce, was immaterial. The Tolchester (D. C. 1890) 42 Fed. 180.

25. **Personal injuries.**—See, also, notes under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

A libel for injuries to a passenger in a steamboat proceeding from Sacramento to San Francisco is within the admiralty jurisdiction. The New World v. King (1853) 16 How. 469, 472, 14 L. Ed. 1019.

A libel for personal injuries, which alleges that libelant was injured while engaged in an extrahazardous employment on the premises of his employer in the state of Washington, that he received from the Industrial Insurance Commission of the state a specified sum as a gratuitous payment out of a fund provided by the state, and to which defendant had never contributed, and that the amount received was not accepted as payment for any of the injuries sustained, shows that libelant after the injuries obtained relief under the Workmen's Compensation Act (Laws Wash. 1911, c. 74), which abolishes civil actions for damages by workmen for personal injuries, and he cannot proceed in admiralty for compensation for the injuries. The Fred E. Sander (D. C. 1914) 212 Fed. 545.

Where a stevedore assisting in loading lumber from a dock onto the boat was injured while working on the dock by being struck by a sling load of lumber being transferred to the boat by its hoisting appliances, the wrong did not create a maritime tort with a remedy in admiralty. The Bee (D. C. 1914) 216 Fed. 709.

A suit by machinist working on defendant's dry dock under the New Jersey Workmen's Compensation Act held not within the exclusive jurisdiction of the federal courts, as a case involving admiralty or maritime jurisdiction within Const. art. 3, § 2, and Judicial Code, § 24, and hence was not removable for that reason or as arising under the laws of the United States. Berton v. Tietjen & Lang Dry Dock Co. (D. C. 1915) 219 Fed. 763.

An injury sustained by an employé on navigable waters of the United States is within the jurisdiction of the federal courts of admiralty under Const. U. S. art. 3, § 2, and Act Sept. 24, 1789. Lindstrom v. Mutual S. S. Co. (Minn. 1916) 156 N. W. 669.

Under Const. U. S. art. 3, § 2, and R. S. § 563, the Judiciary Act of 1789, before the Workmen's Compensation Act, a seaman injured on Puget Sound in intrastate commerce could sue in admiralty in a federal court or at common law in a state court. State v. Daggett (Wash. 1915) 151 P. 648.

26. **Wrongful death.**—See note, ante, as to "saving of common-law remedy."

See, also, notes under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

A writ of prohibition will not issue to restrain a district court from proceeding in a libel case for damages for drowning persons in a collision. In re Gordon (1881) 104 U. S. 515, 516, 26 L. Ed. 814; In re Detroit River Ferry Co. (1881) 104 U. S. 519, 520, 26 L. Ed. 815.

The district court for the Northern district of Illinois has jurisdiction of a suit in rem against a steam canal boat for damages caused by a collision between her and another canal boat while the boats were navigating the Illinois and Lake Michigan canal at a point about four miles from its Chicago end and within the body of Cook county. Ex parte Boyer (1884) 3 Sup. Ct. 434, 109 U. S. 629, 27 L. Ed. 1056.

A marine tort is one that occurs on any public navigable water of the United States, whether caused by wrongful act or omission, and the proper district court, as a court of admiralty, has jurisdiction of a suit to recover damages therefor; and the right to recover damages for death, given by Oregon Civil Code, § 367, may be enforced in the federal courts. Holmes v. Oregon & C. R. Co. (D. C. 1880) 5 Fed. 75, 77.

The district court in admiralty has jurisdiction of a libel for damages for the death of libelant's husband in a collision caused by the negligence of the vessel libeled. The Towanda (C. C. 1877) Fed. Cas. No. 14,109.

Where a death was caused by a collision, in 1877, near the Cross Rip lightship, in Nantucket Sound, the offending vessel being enrolled in Philadelphia, and a libel in rem was filed in the district court for the Eastern district of Pennsylvania in 1882, by the widow and daughter of the man so killed, their cause of action does not depend upon the statute laws of either Massachusetts or Pennsylvania, and the limitation of one year in the statutes of those states does not operate as a bar. The Harrisburg (C. C. 1883) 15 Fed. 610, decree reversed (1886) 7 S. Ct. 140, 119 U. S. 199, 30 L. Ed. 358.

When a passenger on the railway ferry boat, plying across the Wallamet river between East Portland and Portland, was drowned by reason of the negligence of the owner of the boat or its servants, a marine tort was committed, for which a suit may be maintained in the district court by the administrator of the deceased to recover the damages given therefor by section

367 of the Oregon Civil Code. Holmes v. Oregon & C. Ry. Co. (D. C. 1880) 5 Fed. 75.

Gen. St. Minn. p. 825, § 2, providing that, "when death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action had he lived," etc., does not confer upon the United States district court jurisdiction of a libel in rem, filed by the administratrix of an injured person to enforce a marine tort, as in case of death from such a tort the action does not survive in admiralty. Oleson v. The Ida Campbell (D. C. 1888) 34 Fed. 432.

Under Comp. St. Or. §§ 371, 3690, giving a right of action to an administrator for the death of his intestate, and giving a lien on a vessel navigating the waters of the state, for any injury caused thereby, a suit in admiralty may be maintained in the United States district court for such death. The Oregon (D. C. 1891) 45 Fed. 62, decree reversed (1895) 15 S. Ct. 804, 158 U. S. 186, 39 L. Ed. 943.

An action to recover damages for death caused by a collision on navigable waters is for a tort which by its nature and locality is maritime, and as such is within the ancient jurisdiction of the United States district court, and equally so whether the right of action is given by state or by federal legislation. The City of Norwalk (D. C. 1893) 55 Fed. 98, decree modified (1894) 61 Fed. 364, 9 C. C. A. 521.

The steamer Bertha engaged to tow the schooner Dora B. to Lituya Bay, but owing to rough weather passed that port and steered for Yakutat. Before reaching Yakutat, and while off the coast of Alaska, the hawser parted. Instead of returning to the tow and rendering further assistance, the Bertha kept on her course, abandoning the Dora B., which was carried on the coast and wrecked, and the deceased lost his life. Held that it is immaterial that the parting of the hawser happened over three miles off shore and out of the jurisdiction of the court; it appearing that the disaster which caused the decedent's death happened upon the shore within the three-mile limit and within the jurisdiction of the court. Williams v. Alaska Commercial Co. (1903) 2 Alaska, 43.

A suit in admiralty cannot be maintained in a court of the United States, either under the general maritime law or any act of Congress, to recover damages for the death of a person caused by negligence on the high seas. Id.

27. Limitation of liability of shipowners.—See note, ante, as to "Collisions," and see, also, § 8022 et seq., and notes thereunder, and notes under §§ 1233, 1536, post, and under Const. art. 3, § 2, cl. 1, as to "Cases of Admiralty and Maritime Jurisdiction."

The United States district courts, sitting in admiralty, have jurisdiction of cases arising under the Act of March 3, 1851, limiting the liability of owners of vessels, for loss or damage to cargo. Norwich Co. v. Wright (1871) 80 U. S. (13 Wall.) 104, 20 L. Ed. 585.

Jurisdiction is not affected by the fact that there has been a decree in a proceeding in rem for libelant's entire damage to his cargo sunk by a collision, since the district court still had jurisdiction, after the decision on appeal, to entertain a petition for limitation of liability, and to order a new appraisement of the steamer to ascertain her value when lying sunk. Place v. Norwich & N. Y. Transp. Co. (1886) 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134.

The district court of the United States cannot take jurisdiction in admiralty of a petition for limitation of liability under the Revised Statutes of the United States, where it would not have had cognizance in admiralty, originally, of the cause of action involved. Ex parte Phenix Ins. Co. (1886) 7 S. Ct. 25, 118 U. S. 610, 30 L. Ed. 274, denying writ of prohibition In re Goodrich Transp. Co. (D. C. 1886) 26 Fed. 713.

The court in proceedings to limit liability does not lose jurisdiction by allowing the steamship, after giving a stipulation for her value, to go into another district in the ordinary course of her business, since the proceeding to limit liability is an equitable action, and not one against the vessel and her freight. In re Morrison (1892) 147 U. S. 14, 13 Sup. Ct. 246, 37 L. Ed. 60.

Where shipowners have invoked the jurisdiction of a court of admiralty by a petition to limit their liability, under R. S. §§ 4283, 4284, post, §§ 8021, 8022, and, having thereby secured the stay of proceedings by libelants, surrender but one of two vessels held by the court to be liable, the court, having full equitable powers to adjust the rights of all parties interested, is not bound to dismiss the proceedings for that reason, but may by its own process, or its own order, seize the other vessel, and make distribution of the entire fund which it was the duty of the petitioners to tender by their petition; and such is the proper, and only equitable, course, where by reason of the proceedings suits by libelants have been delayed for a number of years, during which the shipowners have become insolvent. Oregon R. R. & Nav. Co. v. Balfour (1898) 90 Fed. 295, 33 C. C. A. 57.

Where a British ship has been proceeded against in a federal district court for a collision happening on the high seas, and the parties affected have appeared, such district court has jurisdiction to decree the owners of such ship to be entitled to the benefit of a rule of the general maritime law permitting them to abandon their vessel and freight, and thereupon to be exempted from further responsibility.

Churchill v. The British America (D. C. 1878) Fed. Cas. No. 2,715.

Proceedings to limit the liability of shipowners must originate in the district court. The Mary Lord (C. C. 1887) 31 Fed. 416.

The circuit courts have no jurisdiction by bill in equity, or otherwise, to enforce proceedings for limiting the liability of shipowners under the provisions of R. S. §§ 4282, 4284, 4285, post, §§ 8020, 8022, 8023. The statute embodied in these sections created a new right, and by implication prescribed that it should be enforced in the district courts, and the remedy is confined to the jurisdiction provided by the statute which gave the right. Elwell v. Geibei (C. C. 1887) 33 Fed. 71.

Jurisdiction of proceedings for limiting the liability of shipowners is in the district courts. Id.

It is not necessary to jurisdiction that the court should have possession of the vessel or her proceeds, or of a fund representing the proceeds, over which the court had already obtained control through the exercise of its ordinary jurisdiction. The City of Norwich (D. C. 1873) Fed. Cas. No. 2,762. And see The Mendota (D. C. 1882) 14 Fed. 358.

Act March 3, 1851, to limit the liability of shipowners, confers no power on the court to discharge the vessel from all liens upon her, on the filing of a stipulation by the owners in the full value of the vessel and freight, for the benefit of all parties having claims upon her. But this may be done under the general admiralty powers of the court. The City of Norwich (D. C. 1866) Fed. Cas. No. 11,202.

The American schooner J. M. L. and her cargo were totally lost in a collision at sea with the British steamer A. On a libel in personam in district court an interlocutory decree had adjudged the owners of each vessel to pay one-half the damages, and pending a reference thereon the owners of the schooner filed a petition to limit their liabilities in respect to half the cargo lost. Held that, as the amount to be paid by the owners of the steamer for the loss of the schooner equitably represented so much of the schooner, and as that fund would be in this court, the court had jurisdiction of the proceeding, and was the most appropriate court to determine whether the fund derived from the steamship for the loss of the schooner should be paid over to the trustee to be appointed in the limited liability proceeding, or retained by the owners of the schooner, or secured to the owners of the lost cargo by provisions in the final decree in the former suit to the extent of their claim, or to the extent necessary to save the steamer from liability for lost cargo beyond the terms of the interlocutory decree. In re Leonard (D. C. 1882) 14 Fed. 53.

The act of congress limiting the liability of shipowners in certain cases is not referable to that clause in the constitution giving power to regulate interstate commerce, but is a rule of admiralty procedure enacted under the clause granting admiralty jurisdiction, and therefore the district court has jurisdiction of a proceeding to limit the liability of the owners of a ship for a maritime tort, customarily employed within the navigable waters of a state. The Tolchester (D. C. 1890) 42 Fed. 180.

Where a district court had in its control the only fund to which claimants for damages by a collision had a right to resort for payment of their claims under the limiting liability act, being the only court competent to administer the admiralty rule for the limitation of the liability of the owners of the vessel, it has the authority and jurisdiction to issue an order restraining the further prosecution of suits by claimants in the state courts. Id.

Where actions have been brought against the owners of a boat for the death of persons by wrongful act (Code Civ. Proc. Cal. § 377) occurring on the high sea within the state jurisdiction, the United States district court has jurisdiction in admiralty to stay such actions, determine the liabilities of such owners under the limited liability act (R. S. § 4282 et seq., post, § 8020 et seq.) and enforce the rights of the parties. In re Humboldt Lumber Manufacturers' Ass'n (D. C. 1894) 60 Fed. 428, judgment affirmed, Humboldt Lumber Manufacturers' Ass'n v. Christopherson (1896) 73 Fed. 239, 19 C. C. A. 481, 46 L. R. A. 264.

28. Seizures, forfeitures, and penalties in general.—See, also, note, ante, as to "Torts in general."

See, also, notes under § 1233 and under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

The district court of the district in which the seizure was made, and not that in which the offense was committed, has jurisdiction of proceedings in rem for an alleged forfeiture. U. S. v. The Betsey (1808) 8 U. S. (4 Cranch) 443, 2 L. Ed. 673; Keene v. U. S. (1809) 9 U. S. (5 Cranch) 304, 3 L. Ed. 108; The Ann (1815) 13 U. S. (9 Cranch) 289, 3 L. Ed. 734; The Merino (1824) 22 U. S. (9 Wheat.) 391, 6 L. Ed. 118; The Octavia (C. C. 1813) Fed. Cas. No. 10,422.

Under the ninth section of the judiciary act of 1789, the district court had jurisdiction of a seizure of a vessel of more than 10 tons burden made on navigable waters for violation of Act Feb. 28, 1806, entitled "An act to suspend the commercial intercourse between the United States and certain parts of the island of St. Domingo." U. S. v. The Betsey (1808) 8 U. S. (4 Cranch) 443, 2 L. Ed. 673.

Under the judiciary act of 1789, the admiralty jurisdiction of the district

courts, in cases of seizure for forfeitures, does not attach until after a seizure made, and there must be a subsisting seizure when the libel is filed. If the seizure be abandoned, and the property restored, before any proceedings are had, the jurisdiction is devested, and cannot be reinstated except by a new seizure. The Ann (1815) 13 U. S. (9 Cranch) 289, 3 L. Ed. 734.

In revenue cases, the court has jurisdiction, though the property seized may never have come into the possession of its officers. The Ann (1815) 13 U. S. (9 Cranch) 289, 3 L. Ed. 734; The Bolina (C. C. 1812) Fed. Cas. No. 1,608.

In cases of seizures made under the revenue laws, on waters navigable from the sea by vessels of 10 or more tons burden, the district court sits as a court of admiralty. The Sarah (1823) 21 U. S. (8 Wheat.) 391, 5 L. Ed. 644.

As originally enacted, section 9 of the Judiciary Act of 1789, c. 20, marked out the general jurisdiction of the district courts and of the several district courts in relation to each other in cases of seizures on waters of the United States, and, if made within the waters of one district, the jurisdiction attaches to the court of that district, but, where seizure is made on the high seas, the jurisdiction is conferred on no particular district court, and it may be exercised by the court of any district into which the property is carried, and there proceeded against. The Merino (1824) 9 Wheat. 391, 401, 6 L. Ed. 118.

This provision, as originally enacted by Judiciary Act of 1789, c. 20, includes all seizures for forfeitures made under laws of impost, navigation, and trade on waters navigable from the sea by vessels of ten tons burden and upwards as cause of admiralty and maritime jurisdiction triable by the court, and not by jury. The Margaret (1824) 9 Wheat. 421, 427, 6 L. Ed. 125.

The clause in the Judiciary Act of 1789, § 9, which includes within the admiralty jurisdiction all seizures made on waters navigable from the sea by vessels of 10 or more tons burden was limited to the cases there stated. The Thomas Jefferson (1825) 10 Wheat. 428, 429, 6 L. Ed. 358.

Under R. S. § 563, and R. S. § 734, post, § 1027, defining the admiralty jurisdiction of the district courts, and the act of May 17, 1884, establishing the district of Alaska, the district court of Alaska has jurisdiction to declare a forfeiture of vessels guilty of taking fur seal, in violation of R. S. § 1956, post, § 8850, in any of the navigable waters acquired from Russia by the treaty of March 30, 1867, over which the United States may lawfully exercise dominion. Ex parte Cooper (1892) 12 Sup. Ct. 453, 459, 143 U. S. 472, 36 L. Ed. 232.

An information in rem on the admiralty side of the district court for forfeiture under the impost laws is proper. Clark v. U. S. (C. C. 1811) Fed. Cas. No. 2,837.

Where, in case of a seizure for violation of the nonimport law, the vessel and part of her cargo were seized in the Delaware river, and part of the cargo after it had been landed, the district court in admiralty has jurisdiction. Id.

After a vessel has been seized and libeled for forfeiture, the court does not lose jurisdiction to condemn by losing possession of her. U. S. v. The Little Charles (C. C. 1818) Fed. Cas. No. 15,612.

The district courts, as courts of admiralty, have jurisdiction of the question who are entitled to the proceeds of a seizure as informers or otherwise. Robinson v. Hook (C. C. 1826) Fed. Cas. No. 11,956.

The want of a seizure prior to the commencement of proceedings in a cause of seizure under the laws of impost, navigation, and trade, under Act 1789, § 9, is fatal to the jurisdiction, though the objection be first taken upon appeal. The Fideliter (C. C. 1870) Fed. Cas. No. 4,755.

Seizure of the res, before filing of the libel, is essential to jurisdiction under a libel for a penalty or forfeiture. The May (C. C. 1874) Fed. Cas. No. 9,330, affirming (D. C. 1873) Fed. Cas. No. 9,329.

The district court has exclusive jurisdiction, under Judiciary Act 1789, § 9, of a libel for forfeiture against a vessel for carrying away timber reserved for naval purposes which has been cut from public lands, in violation of Act March 2, 1831. U. S. v. The Helena (D. C. 1850) Fed. Cas. No. 15,341.

Correspondence between the collector, secretary of the treasury, and district attorney, and directions to the latter to file a libel, while the vessel is lying within the collector's district, do not constitute a seizure by him which will support a libel. The Silver Spring (D. C. 1854) Fed. Cas. No. 12,858.

The restriction in the judiciary act of 1789, confining jurisdiction to waters navigable from the sea by vessels of 10 tons burden or more, applies exclusively to seizures under the laws of impost, navigation, or trade in matters of revenue only. Western Transp. Co. v. The Great Western (D. C. 1862) Fed. Cas. No. 17,443.

Under 1 Stat. 77, § 9, giving exclusive original cognizance of all admiralty causes to the federal courts, the district court has exclusive jurisdiction of a libel in rem based on Acts July 4, 1864, giving a penalty for a neglect to post up in a steamer a synopsis of the laws relating to the carriage of passengers. The Lewellen (D. C. 1868) Fed. Cas. No. 8,307.

The admiralty jurisdiction of the district court in revenue cases extends only to seizures for forfeitures under duty

laws, as conferred by Act 1789, § 9. U. S. v. Five Hundred Boxes of Pipes (D. C. 1870) Fed. Cas. No. 15,116.

A libel in rem may be maintained in the district court in admiralty for the penalty imposed by R. S. § 4469, post, § 8239, for overcrowding a passenger vessel. The Arctic (D. C. 1881) 11 Fed. 177.

It is not to be supposed that the general rule and test of jurisdiction of the district courts in cases of penalties and seizures as prescribed by R. S. § 563, was intended to be changed and a peculiar and impracticable test substituted by R. S. § 4499, post, § 8275, for the recovery of the penalty thereby imposed. The Idaho (D. C. 1886) 29 Fed. 187, 191.

29. Seizures on land.—The court in cases of seizures on land proceeds, not as a court of admiralty, but as a court of common-law jurisdiction on a trial by jury. The Sarah (1823) 8 Wheat. 391, 394, 5 L. Ed. 644; U. S. v. George Spraul & Co. (1911) 185 Fed. 405, 107 C. C. A. 569.

A libel charging a seizure to have been made on waters navigable by vessels of ten tons burden and upwards, when in fact it was made on land, will not support a verdict and judgment thereon, but the libel must be amended or dismissed. The Sarah (1823) 8 Wheat. 391, 394, 5 L. Ed. 644.

Where a seizure under the Confiscation Acts was made on land, the claimants were entitled to a jury trial, though the suit was in form a libel of information. Morris' Cotton (1869) 8 Wall. 507, 511, 19 L. Ed. 481.

Previous seizure under an order of the president under the Abandoned and Captured Property Act of July 17, 1862 (12 Stat. 820), was essential to give jurisdiction to adjudge forfeiture and decree condemnation. U. S. v. Winchester (1878) 99 U. S. 372, 376, 25 L. Ed. 479.

A district court of the United States is without authority to condemn property captured on land by the navy during the rebellion as prize; and a decree to that effect will not defeat the right of the owner to recover the proceeds of the captured property by a suit under the abandoned or captured property act, though the fund, once paid into the treasury, has been distributed pursuant to the decree. Cook v. U. S. (1873) 9 Ct. Cl. 288.

A district court of the United States has no jurisdiction, as a court of admiralty, over property, seized as prize, on land, by the crew of a private-armed vessel; and a decree of condemnation by such court is no bar to an action of trespass by the owner of the property against the captors, who had no authority to seize it. Slocum v. Wheeler (1816) 1 Conn. 429.

30. Detention of cargo belonging to government.—The district courts of the United States have not jurisdiction to detain a cargo belonging to the government, and, where such a cargo has been libeled under a bottomry bond, it must be discharged from the custody of the marshal. Goodwin v. U. S. (1870) 6 Ct. Cl. 146.

31. Prize.—See note, ante, as to "Seizures on land."

See, also, notes under Const. art. 3, § 2, cl. 1, as to "Cases of admiralty and maritime jurisdiction."

A district court has jurisdiction of questions of prize by virtue of its general admiralty and maritime jurisdiction. The Amiable Nancy (1818) 16 U. S. (3 Wheat.) 546, 557, 4 L. Ed. 456; Jennings v. Carson (D. C. 1792) Fed. Cas. No. 7,281; The Amy Warwick (D. C. 1862) Fed. Cas. Nos. 341, 342.

As the jurisdiction of the district courts extends to all civil causes of admiralty and maritime jurisdiction, such courts possess all the powers of a court of admiralty, whether considered as an instance or prize court, and may award restitution of property claimed as a prize of war by a foreign captor. Glass v. The Betsey (1794) 3 U. S. (3 Dall.) 6, 1 L. Ed. 485; Novion v. Hallett (N. Y. 1819) 16 Johns. 327.

District courts possess all the powers of courts of admiralty, both instance and prize, and may award restitution of property claimed as prize of war by a foreign captor. Glass v. The Betsy (1794) 3 U. S. (3 Dall.) 6, 1 L. Ed. 485.

District courts as courts of admiralty had power to carry into effect the decrees of the former court of appeals in prize cases. Penhallow v. Doane (1795) 3 Dall. 54, 80, 1 L. Ed. 507.

A prize court when a proper case is made for its interposition will proceed to adjudicate and condemn captured property, or award restitution, although it is not actually in the control of the court. Jecker v. Montgomery (1851) 13 How. 498, 515, 14 L. Ed. 240.

The District Court of the United States, sitting as a prize court, may hear and determine all questions respecting claims arising after the capture of a vessel of the United States guilty of a maritime tort. The Siren v. U. S. (1868) 7 Wall. 152, 161, 19 L. Ed. 129.

The jurisdiction of a prize court is strictly in rem, and usually confined to the adjudication of the question of prize or no prize; and the relative rights of rival claimants will not be settled further than may be necessary to the determination of the main question. A decree, therefore, ordering restitution to the claimant, will not estop a third person from showing, as against attaching creditors of the claimant, that he himself is the rightful owner, and that claimant held the vessel in trust for him. Cushing v. Laird (1883) 2

Sup. Ct. 196, 107 U. S. 69, 27 L. Ed. 391.

Where the United States brings into a prize court a vessel that was captured by the co-operation of the army and navy, and as to which there can be no distribution of prize money, it is a submission to the jurisdiction of the court, and a decree for damages may be rendered against it. U. S. v. The Nuestra Senora De Regla (1883) 108 U. S. 92, 2 Sup. Ct. 287, 27 L. Ed. 662.

Where the subject of litigation depends upon the question of prize or no prize, it is completely and exclusively within the cognizance of the district court. U. S. v. Bright (C. C. 1809) Fed. Cas. No. 14,647.

A court of prize will take cognizance, not only of all questions of prize, but of every incident thereto, until a final adjustment of all claims arising from the capture. It will therefore entertain a supplemental suit for the distribution of prize proceeds. The St. Lawrence (C. C. 1814) Fed. Cas. No. 12,233.

Vessels used merely as transports for troops and neither armed nor commanded by government officers do not bring within the prize jurisdiction a capture by military forces. U. S. v. Two Hundred and Sixty-Nine and One-Half Bales of Cotton (C. C. 1868) Fed. Cas. No. 16.583.

The jurisdiction of the district court does not extend to the case of a capture on the high seas, by a privateer lawfully commissioned, of the property of an enemy to the sovereign issuing the commission. The case is not altered though the capture should have been originally made by a prescribed privateer. Castello v. Bouteille (D. C. 1794) Fed. Cas. No. 2,504.

The federal district courts will not assume jurisdiction of prize matters of foreign nations occurring upon the high seas flagrante bello. Hernandez v. Aury (D. C. 1818) Fed. Cas. No. 6,413.

The confiscations provided for by Act July 3, 1861, § 6, and Act Aug. 6, 1861, can be carried into effect by the prize courts of the United States, as respects property captured at sea. The Sarah Starr (D. C. 1861) Fed. Cas. No. 12,352.

Where the captured vessel was destroyed because unfit to be sent in for adjudication, but the cargo was sent in, held, that the court had jurisdiction. The Zaralla (D. C. 1862) Fed. Cas. No. 18,203.

Where the captured vessel is appraised by a naval survey, and appropriated to the United States, she may be proceeded against in a prize court, where her papers and crew, together with the appraisal, are sent in. The Advocate (D. C. 1862) Fed. Cas. No. 94.

The district courts have prize jurisdiction in case of property, recently water-borne, captured on a wharf by man-of-war's men in boats. Six Hundred and Eighty Pieces of Merchandise (D. C. 1863) Fed. Cas. No. 12,915.

No court of the United States is empowered to decree final distribution in prize except the court which first acquires jurisdiction over the res, or its representative proceeds. Winchester v. U. S. (1878) 14 Ct. Cl. 13.

Proceedings against a prize ship are to be had in the district court of the United States. (1798) 1 Op. Atty. Gen. 85.

When the courts have acquired jurisdiction of cases of maritime capture the political department of the government should postpone the consideration of questions concerning reclamation and indemnification until the judiciary has finally performed its functions in those cases. (1864) 11 Op. Atty. Gen. 117.

Prize courts are, in a sense, governed by the law of nations relating to war, and in all countries must have some, if not the same rules concerning the manner of presenting claims. (1899) 22 Op. Atty. Gen. 327.

No action at common law lies for an illegal capture on the high seas as prize of war; and no irregularity or misconduct of the captor in the disposition of the prize will confer jurisdiction as to the original taking, or be in itself a ground of action at common law. Novion v. Hallett (N. Y. 1819) 16 Johns. 327; Hallett v. Lamothe (1819) 7 N. C. 279.

A prize court proceeds in rem, and cannot exercise jurisdiction unless it have possession of the subject. Wheelwright v. Depeyster (N. Y. 1806) 1 Johns. 471, 3 Am. Dec. 345.

32. Objections or exceptions and waiver thereof.—A plea to the merits in a case of seizure waives any exception to the jurisdiction. The Abby (C. C. 1818) Fed. Cas. No. 14.

A stipulation filed to obtain the release of a vessel is not a waiver of the question as to its original liability to seizure in admiralty. The Fidelity (C. C. 1879) Fed. Cas. No. 4,758, affirming (D. C. 1878) Fed. Cas. No. 4,757.

A plea to the jurisdiction can only be interposed by defendant himself in propria persona, and on oath. Teasdale v. The Rambler (D. C. 1794) Fed. Cas. No. 13,815.

Want of jurisdiction appearing on the face of the libel should be taken advantage of by demurrer, not by plea. Knight v. The Attila (D. C. 1838) Fed. Cas. No. 7,881.

Exception to the jurisdiction of the court, in a civil action brought by a private suitor against an armed ship of a friendly power, is properly taken by suggestion filed in the name of the United States by the United States attorney. The Pizarro v. Matthias (D. C. 1852) Fed. Cas. No. 11,199.

At any stage of a proceeding in admiralty until final hearing, the question of jurisdiction is open. Ward v.

Thompson (D. C. 1856) Fed. Cas. No. 17,162.

A court of admiralty will ordinarily refuse to decide a jurisdictional question upon a mere motion. Lands v. A Cargo of 227 Tons of Coal (D. C. 1880) 4 Fed. 478.

The question of jurisdiction may be raised on motion to dismiss the libel before the cause is reached on the calendar, although not raised by exceptions before answer. Wenberg v. A Cargo of Mineral Phosphate (D. C. 1883) 15 Fed. 285.

On a libel for wages, after claimant has pleaded to the merits, and testimony has been taken on the issues made by the pleadings, it is too late to object to the jurisdiction of the court, on the ground that the wages were earned by a foreign seaman on board a foreign vessel. The Bruckley Castle (D. C. 1888) 36 Fed. 923.

An objection to the jurisdiction of a court of admiralty over a cause should be made by plea, or, where the want of jurisdiction is palpable, by demurrer. The August Belmont (D. C. 1907) 153 Fed. 639.

The right to object to the assumption of jurisdiction by a court of admiralty of the United States in a suit by a foreign subject against a vessel of his own country is waived by a general appearance and the filing of an answer by the claimant. The Ucayali (D. C. 1908) 159 Fed. 800.

Cited without definite application, Providence & N. Y. S. S. Co. v. Hill Mfg. Co. (1884) 3 Sup. Ct. 617, 619, 109 U. S. 578, 27 L. Ed. 1038 (dissenting opinion); In re Louisville Underwriters (1890) 10 Sup. Ct. 587, 588, 134 U. S. 588, 33 L. Ed. 991; U. S. v. Dewey (1903) 23 Sup. Ct. 415, 424, 188 U. S. 254, 47 L. Ed. 463; Four hundred and Forty-Three Cans of Frozen Egg Product v. U. S. (1912) 33 Sup. Ct. 50, 226 U. S. 172, 57 L. Ed. 174; U. S. v. Banister Realty Co. (C. C. 1907) 155 Fed. 583; The L. B. X. (D. C. 1898) 88 Fed. 290, 292; The Ira M. Hedges (D. C. 1908) 163 Fed. 587, reversed (1910) 31 Sup. Ct. 17, 218 U. S. 264, 54 L. Ed. 1039, 20 Ann. Cas. 1235.

(4) Of suits under any law relating to the slave trade.

Fourth. Of all suits arising under any law relating to the slave trade.

R. S. § 629, par. 7. Act March 3, 1911, c. 231, § 24, par. 4, 36 Stat. 1092.

Notes of Decisions

Jurisdiction of federal court.—The District Court has jurisdiction to determine who are the actual captors under a state law enacted in pursuance of the Slave Trade Act 1807, c. 77, and directing the proceeds of the sale of the negroes to be paid one moiety for the use of the commanding officer of the capturing vessel. The Josefa Segunda (1825) 10 Wheat. 312, 322, 6 L. Ed. 329.

The federal court has no power to issue a writ of certiorari to a United States commissioner to review proceedings before him under the fugitive slave act of September 18, 1850. Ex parte Van Orden (C. C. 1854) Fed. Cas. No. 16,870.

Cited without definite application, U. S. v. Mooney (1885) 6 Sup. Ct. 304, 116 U. S. 104, 29 L. Ed. 550.

(5) Of cases under internal revenue, customs, and tonnage laws.

Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals.

R. S. § 563, par. 5, § 629, par. 4. Act March 3, 1911, c. 231, § 24, par. 5, 36 Stat. 1092.

Notes of Decisions

Scope and application of provision.—A law providing for the payment by the clerk of the district court into the treasury of surplus moneys received as fees is not a revenue law within the provision of this section. U. S. v. Hill (1887) 8 Sup. Ct. 308, 310, 123 U. S. 681, 31 L. Ed. 275.

The application of this provision has not been modified as to removed causes by the removal of Acts of 1887 and 1888. Crawford v. Hubbell (C. C. 1898) 89 Fed. 1.

Repeal of former statute.—R. S. § 629, cl. 4, embodied herein, was not repealed by the act of March 3, 1875 (18 Stat. 470), or by the act of March 3, 1887 (24 Stat. 552), defining the jurisdiction of the circuit courts, and these courts have jurisdiction in suits arising under revenue laws, though the amount in dispute is less than $2,000. Downes v. Bidwell (1901) 21 Sup. Ct. 770, 772, 182 U. S. 244, 45 L. Ed. 1088; Spreckels Sugar Refining Co. v. McClain (1904) 24 Sup. Ct. 376, 378, 192 U. S. 397, 48 L. Ed. 496; Ames v. Hager (C. C. 1888) 36 Fed. 129, 1 L. R. A. 377.

The repeal (Act July 13, 1866, § 68) of Act June 30, 1864, § 50, leaves the

jurisdiction of the federal courts in cases arising under the revenue laws to stand on Act March 2, 1833, and that act does not confer jurisdiction in cases arising under the internal revenue laws. Stevens v. Mack (C. C. 1867) Fed. Cas. No. 13,404.

The old law embraced in section 629, R. S., gave jurisdiction of all suits at common law and in equity where the United States are plaintiffs or petitioners, and it also contained an independent special clause, giving jurisdiction of all suits arising, under the revenue, internal revenue, or postal laws. The act of March 3, 1887, conferred jurisdiction of all suits at common law or in equity where the United States are plaintiffs or petitioners, without reference to said special subjects. It is held that the latter provision does not repeal by implication the grant of jurisdiction over the special subjects mentioned in the independent clause of the original statute. U. S. v. Shaw (C. C. 1889) 39 Fed. 433, 435, 3 L. R. A. 232.

Scope of act.—Although, in practice, suits in rem for forfeitures for violations of the internal revenue laws were more frequently brought in the district courts, yet the circuit court, under R. S. § 629, subd. 4, embodied herein, had also original jurisdiction. Coffey v. United States (1886) 116 U. S. 427, 6 Sup. Ct. 432, 29 L. Ed. 681.

Collection of illegal taxes or withholding of refunds.—The federal court has jurisdiction of an action against a collector of customs to recover back money paid as duties, and alleged to have been illegally exacted, irrespective of the citizenship of the parties. Philadelphia v. Collector (1866) 72 U. S. (5 Wall.) 720, 18 L. Ed. 614; Schmeider v. Barney (C. C. 1875) Fed. Cas. No. 12,462.

This section, as formerly enacted, vested the court with jurisdiction of an action to recover back duties enacted under the Foraker Act and paid under protest on goods brought from Porto Rico. Downes v. Bidwell (1901) 21 Sup. Ct. 770, 772, 182 U. S. 244, 45 L. Ed. 1088.

An importer may maintain an action at law against a collector of customs who withholds refunds accruing under a decision by the Board of General Appraisers. Klumpp v. Thomas (1908) 162 Fed. 853, 89 C. C. A. 543, writ of certiorari denied (1908) 29 Sup. Ct. 688, 212 U. S. 579, 53 L. Ed. 659.

The federal courts have no jurisdiction, on the ground of subject-matter, of a bill to restrain a collector of internal revenue from the collection of an alleged illegal income tax. Roback v. Taylor (C. C. 1866) Fed. Cas. No. 11,877.

A suit against an internal revenue collector to recover taxes alleged to have been illegally collected is cognisable under this section. Commissioners of the Sinking Fund of Louisville v. Buckner (C. C. 1891) 48 Fed. 533.

Under Act March 3, 1887, § 1, post, § 1136, whether, in view of the discussion by Mr. Justice Brown, in Dooley v. United States, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074, that a United States Circuit Court has jurisdiction of a suit to recover from the United States taxes claimed to have been illegally exacted from plaintiff by a collector under color of the internal revenue laws, quære. Christie-Street Commission Co. v. United States (C. C. 1903) 126 Fed. 991.

Tax sales.—Whether the circuit court of the United States can acquire jurisdiction of an action of ejectment between citizens of the same state, under the act of March 3, 1833 (4 Stat. 632; R. S. § 629, subsec. 4), embodied herein, where the land in controversy is claimed by the plaintiff through a sale under Act of June 7, 1862 (12 Stat. 422), for the sale of lands subject to the direct tax within the insurrectionary districts of the United States, it being doubtful if such a suit is one arising under "any law providing internal revenue"; or if, when the plaintiff is a remote purchaser, and the controversy is not with a revenue officer, the suit can be said to be within that act as amended by the Revised Statutes,—quære. Eaton v. Calhoun (C. C. 1880) 15 Fed. 155.

Seizures and forfeitures.—Where a seizure by a collector for a violation of the revenue laws of the United States is voluntarily abandoned, and the property is restored before libel or information is filed and allowed, the district court has no jurisdiction. The Ann (1815) 9 Cranch, 289, 290, 3 L. Ed. 734.

In cases of seizures made under the revenue laws, on waters navigable from the sea by vessels of 10 or more tons burden, the district court sits as a court of admiralty. The Sarah (1823) 21 U. S. (8 Wheat.) 391, 5 L. Ed. 644.

The court has jurisdiction in revenue causes, although the property seized may never have come into possession of its officers. The Bolina (C. C. 1812) Fed. Cas. No. 1,608.

The district court as a court of revenue has jurisdiction of an action to recover property wrongfully seized by customs officers, and to award damages, or to compel the seizor to proceed to adjudication. Burke v. Trevitt (C. C. 1816) Fed. Cas. No. 2,163.

Salvage claims.—A suit to recover from the United States for the salvage of duties collected and paid over to the government on a cargo of sugar afterwards saved from loss by fire while on board a lighter, in the harbor of New York and in the possession of the customs officers, does not arise under the revenue laws so as to be excluded from

the jurisdiction of the District Court under the Tucker Act. U. S. v. Cornell Steamboat Co. (1906) 26 Sup. Ct. 648, 651, 202 U. S. 184, 50 L. Ed. 987.

Revenues from imports.—In revenue cases the court has jurisdiction, though the property seized may never have come into the possession of its officers. The Ann (1815) 13 U. S. (9 Cranch) 289, 3 L. Ed. 734; The Bolina (C. C. 1812) Fed. Cas. No. 1,608.

Federal courts are denied jurisdiction of suits for penalties and forfeitures arising under acts providing for revenue from imports and tonnage, though they have it in suits for penalties and forfeitures under internal revenue laws. Coffey v. U. S. (1886) 6 Sup. Ct. 432, 435, 116 U. S. 427, 29 L. Ed. 681.

Jurisdiction of an action to recover back duties exacted under the Foraker Act of April 12, 1900, and paid under protest, upon goods brought from Porto Rico, is given to a court of the United States by R. S. § 629, subd. 4, embodied herein, vesting it with jurisdiction "of all suits at law or equity arising under any act providing for a revenue from imports or tonnage," when construed with R. S. § 643, post, § 1015, providing for the removal from state courts of suits against a revenue officer "on account of any act done under color of his office, or of any such revenue law, or on account of any right, title, or authority claimed by such officer or other person under any such law." Downes v. Bidwell (1901) 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088.

A district court of the United States has jurisdiction of an action of debt to recover duties due from an importer to the United States, which through accident, mistake, or fraud have not been paid, the government not being limited to its remedy by summary proceedings against the goods under sections 13 and 14 of the customs administrative act, or other provisions of the tariff laws for the collection of duties, which are not only a charge against the goods, but also a personal debt of the importer. U. S. v. National Fibre Board Co. (D. C. 1904) 133 Fed. 596.

Cited without definite application. In re Smith (1876) 94 U. S. 455, 456, 24 L. Ed. 165; U. S. v. Mooney (1885) 6 Sup. Ct. 304, 116 U. S. 104, 29 L. Ed. 550; In re Louisville Underwriters (1890) 10 Sup. Ct. 587, 588, 134 U. S. 488, 33 L. Ed. 991; Johnson v. Wells Fargo & Co. (C. C. 1899) 98 Fed. 3, 4; U. S. v. Payne (D. C. 1884) 22 Fed. 426, 427.

(6) Of suits under postal laws.

Sixth. Of all cases arising under the postal laws.

R. S. § 563, par. 7, § 629, par. 4. Act March 3, 1911, c. 231, § 24, par. 6, 36 Stat. 1092.

Notes of Decisions

Scope and application of provision.—A suit in the name of the Postmaster General on a postmaster's bond held within the jurisdiction of the federal court. Postmaster-General v. Early (1827) 12 Wheat. 136, 144, 6 L. Ed. 577.

This section does not authorize a federal court to issue a writ of mandamus as an original proceeding to compel a postmaster to enter and transmit through the mails a publication as second and not as third class matter. U. S. v. Pearson (C. C. 1887) 32 Fed. 309, 310.

Subdivision 4 of section 629, R. S., substantially re-enacted herein, does not confer exclusive jurisdiction on the courts of the United States in controversies arising under the postal laws of the United States, but only concurrent with the courts of the states, and for this reason state courts may take cognizance of such causes. Lewis Pub. Co. v. Wyman (C. C. 1907) 152 Fed. 200.

Federal courts have jurisdiction to re-examine the action of the Postmaster General in denying a periodical publisher the right to have his publication mailed as second-class mail matter, when it is asserted that such executive officer acted without authority of law or in excess of the power granted to him by Congress. Lewis Pub. Co. v. Wyman (C. C. 1907) 152 Fed. 787.

(7) Of suits under the patent, the copyright, and the trade-mark laws.

Seventh. Of all suits at law or in equity arising under the patent, the copyright, and the trade-mark laws.

R. S. § 629, par. 9. Act March 3, 1911, c. 231, § 24, par. 7, 36 Stat. 1092.

Notes of Decisions

1. Scope and validity.
2. Suits under patent laws.
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13. Suits for infringement of patents.
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17. —— Allegations in pleadings.
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19. Suits under copyright laws.
20. —— Infringement.
21. —— Title to and rights under copyright.
22. —— Allegations in pleadings.
23. Suits under trade-mark laws.
24. —— Infringement and unfair competition.
25. —— Allegations in pleadings.

1. Scope and validity.—The act of March 3, 1897, defining the jurisdiction of the federal courts in patent suits, and authorizing the bringing of such suits in the district of which defendant is an inhabitant, or in which he "shall have committed the acts of infringement, and have a regular established place of business," did not repeal prior statutes, so as to oust the courts of jurisdiction in pending cases not falling within the jurisdictional limits prescribed in the new act. Westinghouse Air-Brake Co. v. Great Northern Ry. Co. (1898) 88 Fed. 258, 31 C. C. A. 525.

This provision treats of cases arising under acts of congress like the Patent Act. Smith v. Farbenfabriken of Elberfeld Co. (1913) 203 Fed. 476, 121 C. C. A. 598.

This clause was not repealed by the act of 1888 requiring suits to be brought in the district whereof the defendant is an inhabitant. Lederer v. Rankin (C. C. 1898) 90 Fed. 449, 450.

2. Suits under patent laws.—Exclusive jurisdiction in actions at law and suits in equity arising under any act of Congress granting or confirming patents is conferred on the federal courts. Mitchell v. Tilghman (1873) 19 Wall. 287, 378, 22 L. Ed. 125.

A complaint for specific performance of an oral agreement to advance money for manufacturing a patented article for a half interest in the profits, to set aside as fraudulent an assignment of an interest in a patent, and, as incidental and supplemental to the main relief, praying that defendant be enjoined from using the assignment, or claiming any interest in the patent, or interfering with complainants' absolute ownership thereof, no infringement or apprehended infringement being alleged, does not state a case arising under the patent law, so as to give federal courts jurisdiction, but one arising under contract. Kurtz v. Straus (1901) 106 Fed. 414, 45 C. C. A. 366.

To sustain the jurisdiction of a patent suit the entire right in the patent must be represented. Hewitt v. Pennsylvania Steel Co. (C. C. 1885) 24 Fed. 367, 369.

Under this section and section 1233 (5), post, the federal court has original and exclusive jurisdiction of all patent suits without regard to citizenship or amount. United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co. (C. C. 1904) 133 Fed. 930.

3. —— Equity jurisdiction.—An existing federal equity jurisdiction of a suit against an army officer based on his alleged infringement of certain patents for the benefit of the United States was ousted by the provisions of Act June 25, 1910, post, § 9465, the effect of which was to provide for the appropriation of a license to use the invention, and the appropriation being sanctioned by means of the compensation for which the statute provides. Crozier v. Fried. Krupp Aktiengesellschaft (1912) 32 S. Ct. 488, 224 U. S. 290, 56 L. Ed. 771, reversing judgment Fried. Krupp Aktiengesellschaft v. Crozier (1908) 32 App. D. C. 1, 15 Ann. Cas. 1108.

The grant of jurisdiction in patent cases is as full in equity as it is at law. Hoffheins v. Brandt (C. C. 1867) Fed. Cas. No. 6,575.

The courts of the United States in the exercise of the equitable jurisdiction conferred upon them in controversies arising under the patent laws, with the additional power to grant injunctions according to the course of courts of equity, may entertain a suit by a patentee for an accounting, though an injunction cannot be issued, the patent having expired. Atwood v. Portland Co. (C. C. 1880) 10 Fed. 283.

The general principles of equity jurisprudence control in patent cases, as exemplified by this section. Goodwin v. Randolph (C. C. 1884) 21 Fed. 574.

Courts of equity can exercise jurisdiction in patent causes only where the circumstances call for equitable relief by injunction. Hewitt v. Pennsylvania Steel Co. (C. C. 1885) 24 Fed. 367, 369.

4. —— Citizenship or residence.—Jurisdiction of an action under the patent laws depends upon the subject-matter and not upon citizenship. Allen v. Blunt (C. C. 1849) Fed. Cas. No. 215; Bernardin v. Northall (C. C. 1897) 77 Fed. 849; Duke v. Graham (D. C. 1884) 19 Fed. 647.

A patentee held entitled to sue in the federal court, though the defendant was a citizen of the same state with him. Evans v. Eaton (1818) 3 Wheat. 454, 518, 4 L. Ed. 433.

In an action under the patent laws neither plaintiff nor defendant need be an inhabitant of the state where brought. It is sufficient if the writ is served personally upon defendant in the district. Allen v. Blunt (C. C. 1849) Fed. Cas. No. 215.

Defendant in a case arising under the patent laws must be an inhabitant of the district in which the suit is brought, or be found within it at the time of

serving the original process. Day v. Newark India Rubber Mfg. Co. (C. C. 1850) Fed. Cas. No. 3685.

In patent cases it is no objection to the jurisdiction that one of the defendants is a citizen of another state and district than that in which the suit is brought. Noonan v. Chester Park Athletic Club Co. (C. C. 1896) 75 Fed. 334.

See, also, notes under § 991 (1).

5. —— **Validity of patent.**—A controversy turning on the validity of a patent from the United States under which plaintiff claims and which is denied by defendants is within the jurisdiction of the federal court without reference to the citizenship of either party. Doolan v. Carr (1888) 8 Sup. Ct. 1228, 1229, 125 U. S. 618, 31 L. Ed. 844.

The state courts have no jurisdiction to try and determine cases involving the validity of patent rights. Day v. Kellogg (1870) 1 Mich. N. P. 173.

6. —— **Issuance of patents.**—The United States courts have jurisdiction of bills to obtain the issue of patents refused by the commissioner. Vermont Farm Mach. Co. v. Marble (C. C. 1884) 20 Fed. 117.

7. —— **Assignments.**—A suit by the assignee of patent to compel the assignor and assignee of a later patent appearing to be for an improvement to assign the patent for such improvement to the complainant is within the jurisdiction of a state court. New Marshall Engine Co. v. Marshall Engine Co. (1912) 32 Sup. Ct. 238, 223 U. S. 473, 56 L. Ed. 513.

A bill to compel specific performance of a contract to assign a patent and to restrain the alleged violation of a license contract under a patent states no ground for relief under the patent laws, and a federal court is without jurisdiction to grant relief thereon, unless there is diversity of citizenship between the parties. St. Louis Street Flushing Mach. Co. v. Sanitary Street Flushing Mach. Co. (1908) 161 Fed. 725, 88 C. C. A. 585.

An action where the relief demanded is an assignment of letters patent, and damages, and where all the parties are residents of the same state, is not within federal jurisdiction. McCarty & Hall Trading Co. v. Glaenzer (C. C. 1887) 30 Fed. 387; Wren v. Annin (C. C. 1888) 34 Fed. 435, judgment affirmed Gottlieb v. Thatcher (1894) 14 S. Ct. 319, 151 U. S. 271, 38 L. Ed. 157.

Plaintiff assigned to defendant one-third of the right to an invention. The patent office divided the application for the patent into three applications for as many inventions. The question in issue was whether this subdivision of the claims devested defendant of his interest in one of the patents issued. Held, that this was a question purely of patent law, of which the court of the United States had jurisdiction. Puetz v. Bransford (C. C. 1887) 32 Fed. 318.

Where application for an injunction against the assignment of patent is founded solely upon some contract or arrangement with the defendant, it does not arise under the patent laws, and the federal court would have no jurisdiction, but, if the sole claim is based on R. S. § 4899, post, § 9445, the court may have jurisdiction, but may refuse relief asked for, because no right is shown. Brooklyn Watch-Case Co. v. Leach (C. C. 1888) 35 Fed. 2, 3.

K., the grantee of letters patent, assigned one-half of the patent to W., by an instrument recorded in the patent office; stipulating that neither K. nor W. should make any transfer of his interest, nor grant any license to use the patent, without the written consent of the other, and that neither should build more than one boat with the patented improvement on it, without the written consent of the other; and the boat each is permitted to build to be used only by said party as an individual, and not as a member of any firm, without the written consent of the other. W. filed a bill against K. and his associates in business acting under him, charging them with using the invention in violation of the above clause, and praying for an injunction, etc. Held not a case arising under the patent laws. Williams v. Star Sand Co. (C. C. 1888) 35 Fed. 369.

Where a suit is brought to determine the ownership of patents assigned to defendants, but which plaintiff claims under a contract by the patentee that all patented improvements on former patents granted him, as those in suit are alleged to be, shall belong to the corporation under whom plaintiff claims, and both parties are citizens of the same state, the United States circuit court has no jurisdiction. Montgomery Palace Stock Car Co. v. Street Stable Car Line (C. C. 1890) 43 Fed. 329.

A suit in equity to determine the ownership of a patent claimed by both parties under assignments from the patentee is not one arising under the patent laws of the United States, so as to give a federal court jurisdiction where the parties are citizens of the same state. Atherton Mach. Co. v. Atwood-Morrison Co. (C. C. 1900) 99 Fed. 113.

Defendant sued by complainant corporation on account of a patent sold by defendant to complainant but wrongfully assigned by defendant to a codefendant, having been a director and a salaried officer of complainant at the time he assigned the patent, was also chargeable as trustee regardless of the written assignment; and, diverse citizenship appearing, the suit was maintainable in a federal court to require an accounting and to compel a transfer of the patent. Prest-O-Lite Co. v.

Avery Portable Lighting Co. (C. C. 1908) 164 Fed. 60.

A corporation granted plaintiff the exclusive right to sell patented articles in certain territory, and, upon the subsequent insolvency of the corporation, its assets were sold by the receiver and the bid assigned to another company and it assigned its interest in the contracts of the insolvent corporation to O., who agreed to perform the several covenants therein, and the company purchasing the assets of the insolvent corporation proceeded to develop the business independent of the licensees of the insolvent company. Held, in a suit to enjoin defendant from purchasing articles from the purchaser of the insolvent's assets, that there was no contract relation between the insolvent corporation and such purchaser, and, while the latter took title to the patents subject to the rights of licensees, they were property rights and not contract rights, and arose under R. S. § 4898, post, § 9444, permitting the assignment of patents, and hence plaintiff's rights against defendant or his vendor were patent rights, and the courts of this state cannot take jurisdiction of the suit. New York Phonograph Co. v. Davega (1908) 111 N. Y. S. 363, 127 App. Div. 222.

8. —— **Patent licenses.**—A suit relating to a license held not to be one arising under the patent laws so as to give the court jurisdiction under this subdivision. Hartell v. Tilghman (1878) 99 U. S. 547, 548, 25 L. Ed. 357.

A decision by the state court in an action between citizens of that state on an agreement by which plaintiffs, as the owner of letters patent, granted defendant an exclusive license, the defendant expressly acknowledging the validity of the patent and stipulating that plaintiff might obtain reissuance, is not a decision of any question arising under the patent laws. Dale Tile Mfg. Co. v. Hyatt (1888) 8 Sup. Ct. 756, 758, 125 U. S. 46, 31 L. Ed. 683.

Agreement for purchase of a rotary mimeograph subject to a license restriction held not collateral, so that its validity would be dependent on general law of which a federal court will have no jurisdiction. Henry v. A. B. Dick Co. (1912) 32 Sup. Ct. 364, 365, 224 U. S. 1, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

Action by patentee of rotary mimeograph sold under a license restriction against one selling ink to the purchaser to be used in connection therewith held one arising under patent laws, of which a federal court has jurisdiction. Id.

Whether a patentee selling a rotary mimeograph under a license restriction reserves to himself as patentee the exclusive right to all unpermitted uses of his invention is a question of which a federal court has jurisdiction. Henry v. A. B. Dick Co. (1912) 32 Sup. Ct. 364, 368, 224 U. S. 1, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

So much of a bill as charges defendants with inducing patent licensees from plaintiff to sell devices embodying the patents in a manner not permitted by their licenses and praying for an injunction presents a case arising under the patent laws of which a federal court has jurisdiction. Geneva Furniture Mfg. Co. v. S. Karpen & Bros. (1915) 35 S. Ct. 788, 238 U. S. 254, 59 L. Ed. 1295.

The federal court has no jurisdiction of a bill by a patentee for the specific performance of covenants by a licensee to keep correct accounts, and to permit examination of his books, and to enjoin the use of the patent until such performance. Goodyear v. Union India Rubber Co. (C. C. 1857) Fed. Cas. No. 5,586.

The federal court has no jurisdiction, on the ground of the subject-matter, of a suit to enforce a license granted under a patent, or a suit to set it aside on the ground that the patent is void. Merserole v. Union Paper Collar Co. (C. C. 1869) Fed. Cas. No. 9,488.

Complainant filed a bill in the state court, alleging that defendant had been granted a license to make and sell bird cages, patented by him, and praying that defendant be compelled to disclose the amount of license fees due, and the number of cages made and sold since a date named, and that complainant be granted such other and further relief as his case might require. The case was removed to the circuit court, where defendant demurred to the bill. Held that, so far as the bill was one for general relief, the court had no jurisdiction, as there existed an adequate and complete remedy at law. Perkins v. Hendryx (C. C. 1885) 23 Fed. 418.

Where a grant of the exclusive right to make, use, and sell a patented article for the full term of the patent is made by the patentee, the federal courts have jurisdiction of a suit by the assignee against the patentee for infringement, as arising under the laws of the United States, even though one issue in the case is whether the grant is still in force. Rapp v. Kelling (C. C. 1890) 41 Fed. 792.

A bill for specific performance of a patent license can only be maintained in a federal court in case the requisite diversity of citizenship appears. Indiana Mfg. Co. v. Nichols & Shepard Co. (C. C. 1911) 190 Fed. 579.

9. —— **Contracts.**—The fact that the subject-matter of a contract is a patent right does not give the federal courts jurisdiction of a bill for specific performance. Burr v. Gregory (C. C. 1828) Fed. Cas. No. 2,191; Brooks v. Stolley (C. C. 1845) Fed. Cas. No. 1,962; Nesmith v. Calvert (C. C. 1845) Fed. Cas. No. 10,123; Perry v. Little-

field (C. C. 1879) Fed. Cas. No. 11,008.

The court has no jurisdiction of a suit in equity for breach of a contract in relation to a patent and for an account, where neither party is a citizen of the state. Goodyear v. Day (C. C. 1850) Fed. Cas. No. 5,568.

The parties to a contract respecting patent rights not provided for or regulated by act of congress stand upon the same ground as other litigants in respect to the jurisdiction of the court. Blanchard v. Sprague (C. C. 1859) Fed. Cas. No. 1,516; Bloomer v. Gilpin, Id. 1,558.

The federal courts have no jurisdiction on the ground of the subject-matter of controversies involving the construction of contracts relating to patents, where the validity of the patent is not involved. Consolidated Fruit Jar Co. v. Whitney (C. C. 1875) Fed. Cas. No. 3,133; Randolph v. Robinson (C. C. 1879) Fed. Cas. No. 11,561.

The federal court has no jurisdiction, on the ground of subject-matter, of a suit by the licensee of an exclusive territorial right to use a patented article, to enjoin a use by one to whom the patentee sold the patented article in violation of his contract. Hill v. Whitcomb (C. C. 1882) Fed. Cas. No. 6,502.

The subject-matter of contracts made in relation to patents, where neither the validity of the patent nor its infringement is concerned in the controversy, does not give the courts of the United States jurisdiction. The rights of the patentee under the patent laws of the United States must be directly and not collaterally brought in issue to give jurisdiction. Teas v. Albright (C. C. 1882) 13 Fed. 406.

Where the validity and use of a patent are admitted, and the rights of the parties depend entirely upon a subsisting contract, the case is not one arising under the patent laws of the United States; and where the requisite diversity of citizenship between the parties does not exist, a circuit court of the United States has no jurisdiction. Ingalls v. Tice (C. C. 1882) 14 Fed. 352.

On application for an injunction to prevent defendant from assigning a patent for a certain improvement in machinery, held that, if complainant's case were founded solely on some contract with defendant, it did not arise under the patent laws, and the federal court would have no jurisdiction. If based on R. S. § 4899, post. § 9445, providing that the purchaser or licensee of a patentable device before the inventor applies for a patent shall not be liable for infringement, then the court, while having jurisdiction, would refuse the application; no right being shown to the relief. Brooklyn Watch Case Co. v. Leach (C. C. 1888) 35 Fed. 2.

The court of the United States has no jurisdiction of a suit by the assignee of a patent against the licensee of his assignor, for infringement, where the preliminary questions to be determined are —First, the construction of the contract licensing defendant; second, whether the terms of the contract have been complied with by defendant; third, if they have not, whether the noncompliance has worked a forfeiture of the contract, so that complainant can enforce his rights as owner of the patent, instead of those arising to him as licensor, by virtue of the assignment of the contract to him by the original licensor. Such preliminary questions do not arise under the patent laws, and the court has no jurisdiction, both parties being citizens of the same state. Densmore v. Three Rivers Mfg. Co. (C. C. 1889) 38 Fed. 747.

Where the right to manufacture and sell a certain patented improvement was dependent on the performance of a condition contained in the agreement of transfer, the question of the breach of the condition must be first settled in favor of plaintiff, before the federal courts can have jurisdiction of an action to recover damages for the unauthorized manufacture and sale of the articles. Routh v. Boyd (C. C. 1892) 51 Fed. 821.

A bill by the owners of a patent to compel the specific performance of a contract for the introduction and manufacture of the patented article, and also for the cancellation of an alleged forged assignment of a part interest in the patent, does not state causes of action arising under the patent laws which will give a federal court jurisdiction of the suit. Kurtz v. Strauss (C. C. 1900) 100 Fed. 800.

Other courts may entertain jurisdiction of suits for the enforcement of contracts founded upon patents. Morse Arms Mfg. Co. v. U. S. (1880) 16 Ct. Cl. 296.

10. —— **Sales.**—The federal court has no jurisdiction to order the interest of a patentee sold to pay a judgment due by him rendered by a state court; the suit not arising under the patent laws. Ryan v. Lee (C. C. 1882) 10 Fed. 917.

A suit in equity to set aside a contract for the sale of a patent involves no federal question, and cannot be maintained in a federal court, where an indispensable party defendant is a citizen of the same state as complainant. Cely v. Griffin (C. C. 1902) 113 Fed. 981.

11. —— **Royalties.**—In a suit between citizens of the same state, the bill alleged that defendants fraudulently excluded complainant from an inspection of their books of account, and refused to pay him royalties due under his contract with them, but made no issue as to construction of the claims of his patents, or of their infringement. Held not a case arising under the patent laws of the United States. Albright v. Teas (1883) 1 Sup. Ct. 550, 106 U. S. 613, 27 L. Ed. 295.

A suit does not arise under the pat-

ent laws of the United States, where it is brought to enforce payment of royalties under a contract and to annul a patent for an improvement issued after the contract and assigned to defendant. Briggs v. United Shoe Machinery Co. (1915) 36 Sup. Ct. 6.

An action by the patentee against his licensee, for the stipulated royalty, presents no question of patent law, and no subject-matter, which can give the national courts jurisdiction on that ground. Kelly v. Porter (C. C. 1883) 17 Fed. 519.

When the parties to a contract granting a license to manufacture under certain patents are citizens of different states, a bill praying a discovery and an account for refusing to pay royalties may be maintained in the circuit court. McKay v. Mace (C. C. 1884) 23 Fed. 76.

A bill for an accounting, under a contract by which a patentee licenses another to manufacture the patented article, and the licensee agrees to pay royalty, and to make monthly reports of sales, will not be entertained, the remedy at law being ample. Washburn & Moen Mfg. Co. v. Freeman Wire Co. (C. C. 1890) 41 Fed. 410, appeal dismissed (1895) 15 Sup. Ct. 1043, 159 U. S. 269, 40 L. Ed. 141.

12. —— Taxation.—A suit to enjoin state taxes as illegal because levied in effect on patents or patent rights is not one "arising under the patent laws" of which the federal court can take jurisdiction under this clause. Holt v. Indiana Mfg. Co. (1900) 20 Sup. Ct. 272, 273, 176 U. S. 68, 44 L. Ed. 374.

13. Suits for infringement of patents.—Courts of the United States have jurisdiction of all questions arising upon the title to a patent, and to recover for an infringement of it under the laws of the United States, regardless of citizenship or amount involved. Healy v. Sea Gull Specialty Co. (1915) 35 Sup. Ct. 658, 237 U. S. 479, 59 L. Ed. 1056; Stanley Rule & Level Co. v. Bailey (C. C. 1878) Fed. Cas. No. 13,287; Campbell v. James (C. C. 1880) 2 Fed. 338; Vermont Farm Mach. Co. v. Gibson (C. C. 1892) 50 Fed. 423 (decree affirmed [1893] 56 Fed. 143, 5 C. C. A. 451); National Casket Co. v. New York & Brooklyn Casket Co. (C. C. 1911) 185 Fed. 533; Indiana Mfg. Co. v. Nichols & Shepard Co. (C. C. 1911) 190 Fed. 579; Cheatham Electric Switching D. Co. v. Transit D. Co. (C. C. 1911) 191 Fed. 727; American Graphophone Co. v. Pickard (D. C. 1912) 201 Fed. 546.

Where a suit involves the question of infringement of patents, it is one arising under the patent laws and within the jurisdiction of a Court of the United States by virtue of this clause, although it also involves the question of the ownership of the patents or other contract rights. Atherton Mach. Co. v. Atwood Morrison Co. (1900) 102 Fed. 949, 43 C. C. A. 72; Victor Talking Mach. Co. v. The Fair (1903) 123 Fed. 424, 61 C. C. A. 58; Harrington v. Atlantic & Pacific Telegraph Co. (C. C. 1906) 143 Fed. 329, decree reversed (1911) 185 Fed. 493, 107 C. C. A. 593.

While the federal courts have no jurisdiction of litigation over contract rights under a patent, yet, where a bill for infringement is in the usual form and for the usual relief, and does not suggest the existence of any contract relation, the mere fact that the answer alleges a contract for an assignment of an interest in the patent, and that a copy thereof, with other papers, is embodied in a stipulation of submission and agreed facts under a provision that it may be offered in evidence subject to any objections open against the original, will not warrant a federal court in dismissing the cause for want of jurisdiction without any finding as to the existence or validity of the contract. White v. Rankin (1892) 12 Sup. Ct. 768, 771, 144 U. S. 628, 36 L. Ed. 569.

A case arises under the federal patent laws, of which the federal courts have original jurisdiction without regard to the citizenship of the parties, even if the bill can be so construed as to confine the claim of infringements of plaintiff's rights under its patent to the alleged sales of its patented devices in violation of a price restriction attempted to be imposed upon second purchasers. The Fair v. Kohler Die & Specialty Co. (1913) 33 Sup. Ct. 410, 228 U. S. 22, 57 L. Ed. 716.

The jurisdiction of a federal court of a suit for infringement of a patent is not defeated by a plea of license, which admits the use and validity of the patent. Elgin Wind Power & Pump Co. v. Nichols (1895) 65 Fed. 215, 12 C. C. A. 578.

Complainant granted a license to a corporation to construct and use within a specified territory dredging apparatus made in accordance with patents owned by him, the contract providing for the forfeiture to complainant of any of such apparatus used outside the territory named. The corporation became insolvent, and a dredging machine built under such license was sold by a receiver, and was subsequently purchased by defendant, who removed and used it outside the prescribed territory. Held, that a suit by complainant for the forfeiture of the dredge and for infringement of his patents, alleged to have resulted from its use outside the territory covered by the license, in which the validity of such patents was not denied, was not one arising under the patent laws of the United States, but one on contract, in which the rights of the parties were governed by the general principals of law and equity, and not by the patent laws, the question of infringement being dependent entirely on the construction of the contract; and that, the parties being citizens of the same state, the federal courts were without jurisdiction. McMullen v. Bow-

ers (1900) 102 Fed. 494, 42 C. C. A. 470.

Where a contract, the validity of which is involved in a suit for infringement of a patent, is not one between the parties to the suit, it is collateral thereto, and cannot characterize the suit as on the contract, and not one arising under the patent laws, and therefore not within the special jurisdiction of the courts of the United States. Atherton Mach. Co. v. Atwood-Morrison Co. (1900) 102 Fed. 949, 43 C. C. A. 72.

Where the gravamen of an action is the alleged breach of a contract of license by defendant, and the parties are citizens of the same state, the plaintiff cannot invoke the jurisdiction of a federal court by joining in the declaration a minor claim, imperfectly stated, for infringement of a patent. Reliable Incubator & Brooder Co. v. Stahl (1901) 105 Fed. 663, 44 C. C. A. 657.

A complaint for specific performance of an oral agreement to advance money for manufacturing a patented article for a half interest in the profits, to set aside as fraudulent an assignment of an interest in a patent, and, as incidental and supplemental to the main relief, praying that defendant be enjoined from using the assignment, or claiming any interest in the patent, or interfering with complainants' absolute ownership thereof, no infringement or apprehended infringement being alleged. does not state a case arising under the patent law, so as to give federal courts jurisdiction, but one arising under contract. Kurtz v. Straus (1901) 106 Fed. 414, 45 C. C. A. 366.

A bill in a federal court alleged that complainants, who were owners of certain patents, and pending applications for patents, assigned the same in trust to one of the defendants, to be by him assigned to defendant telegraph company in exchange for shares of its stock; that its codefendant wrongfully assigned the patents to it; that it refused to issue the stock, but retained the assignments and was using the inventions. The bill prayed that the assignments be declared inoperative, and for a reconveyance of the patents, and also for an injunction and accounting for infringement against the telegraph company. That company in its answer claimed ownership of the patents by virtue of the assignments. Held, that the suit could not be maintained as one for infringement, under the patent laws, until the alleged fraudulent assignments had been set aside in equity, and title to the patents, either legal or equitable, vested in complainants, and that, it being admitted that the requisite diversity of citizenship did not exist between the parties, the court was without jurisdiction to grant such relief. Harrington v. Atlantic & Pacific Telegraph Co. (1911) 185 Fed. 493, 107 C. C. A. 593, reversing decree (C. C. 1906) 143 Fed. 329.

A federal court is without jurisdiction of a suit as one for infringement arising under the patent laws, where the bill shows that defendant entered on the use of the invention under a license contract which has not been rescinded nor abrogated by agreement of the parties or the decree of a court, and that the real question involved is one of contract rights. American Graphophone Co. v. Victor Talking Mach. Co. (1911) 188 Fed. 428, 110 C. C. A. 308, affirming decree (C. C. 1911) 188 Fed 431.

Where the owner of a patent grants an exclusive license to a corporation to make and sell the article patented during the term of the patent, requiring sales to be returned monthly and license fees to be paid monthly, and retains the right to terminate by written notice the license, on failure to make returns and payments for three consecutive months, after due service of notice of the termination of the license for failure to make returns, an action for infringement, in which the corporation sets up in its answer that the license was not lawfully terminated, and that it had not sold any of the patented articles, and was not making and selling them, involves a question of infringement, and is cognizable in a federal court, although the parties are citizens of the same state. Smith v. Standard Laundry-Mach. Co. (C. C. 1882) 19 Fed. 825.

If an infringement case is cognizable in equity at the time the bill is filed, the mere fact that the patent has since expired does not oust the jurisdiction of the court. Dick v. Struthers (C. C. 1885) 25 Fed. 103.

The federal courts have jurisdiction of a suit for infringement of a patent notwithstanding that a license is set up in defense, so that the question of its existence is involved, and must be tried in trying the question of infringement. Hammacher v. Wilson (C. C. 1886) 26 Fed. 239 (appeal dismissed Wilson v. Hammacher [1892] 12 Sup. Ct. 991, 145 U. S. 662, 36 L. Ed. 853); Everett v. Haulenbeek (C. C. 1895) 68 Fed. 911.

Where the parties to an action for the infringement of a patent are both citizens of the same state, if the defendant admits the validity of the patent, and his use of it, and the only question is the construction of a contract between them as to the use, involving wholly common-law and equity principles, the federal courts have no jurisdiction of the action, and the plaintiff must resort to the state court for his remedy, although the state court has previously ruled that it had no jurisdiction, and that relief must be sought in the federal court, the plaintiff being thus left without remedy. McCarty & Hall Trading Co. v. Glaenzer (C. C. 1887) 30 Fed. 387.

On application for an injunction to prevent defendant from assigning a patent for a certain improvement in machinery, held that, if complainant's case were founded solely on some con-

tract with defendant, it did not arise under the patent laws, and the federal court would have no jurisdiction. If based on R. S. § 4899, post, § 9445, providing that the purchaser or licensee of a patentable device before the inventor applies for a patent shall not be liable for infringement, then the court, while having jurisdiction, would refuse the application, no right being shown to the relief. Brooklyn Watch-Case Co. v. Leach (C. C. 1888) 35 Fed. 2.

Plaintiff alleged infringement, and defendant set up a right to manufacture and sell under plaintiff's patents, under a license which it held by assignment from the licensee. Plaintiff claimed that the license was unassignable, and that defendant had no rights thereunder. Held, that the matters to be determined arose out of and depended on the patent laws, and the case was therefore one of federal jurisdiction. Walter A. Wood Harvester Co. v. Minneapolis-Esterly Harvester Co. (C. C. 1894) 61 Fed. 256, distinguishing Hartell v. Tilghman (1878) 99 U. S. 547, 25 L. Ed. 357.

To carry out an agreement between complainants, who were owners of certain patents, and the controlling stockholder in defendant corporation, acting in its behalf for the transfer of the patents to the corporation in exchange for a stated amount of its stock, an absolute assignment of the patents was made to such stockholder, but accompanied by written directions that they should not be conveyed to the corporation until it delivered to him the stock, and also directions for the distribution of the stock by him between complainants and others, for whom they were trustees. He assented to the arrangement, but thereafter conveyed the patents to the corporation ignoring the conditions which were never performed. Held, that a suit for infringement because of the use of patented devices was one arising under patent laws, within this clause, of which a Circuit Court was thereby given jurisdiction, though it incidentally sought other relief by compelling a reconveyance of the patents. Harrington v. Atlantic & Pacific Telegraph Co. (C. C. 1906) 143 Fed. 329, decree reversed (1911) 185 Fed. 493, 107 C. C. A. 593.

An action, by the owner of a judgment recovered against a corporation for infringement of a patent, to charge directors of such corporation with payment of the judgment on the ground that they were joint trespassers with the corporation, is not within the jurisdiction of the federal court as one arising under the patent laws. H. C. Cook Co. v. Beecher (C. C. 1909) 172 Fed. 166.

A suit for infringement of patents is within the jurisdiction of a District Court of the United States, as one arising under the patent laws, although the bill alleges a license to the defendant for the purpose of showing acquiescence in the patents, where it also shows that the license has expired, and bases no right of action thereon. Rauhe v. Justi (D. C. 1912) 196 Fed. 54.

14. —— Restraint of infringement.—A federal court, sitting as a court of equity, has a full concurrent jurisdiction with the court sitting as a court of law of all actions for the infringement of a patent. Perry v. Corning (C. C. 1870) Fed. Cas. No. 11,004.

The federal court in one state, in a suit for infringement of patents, cannot restrain plaintiff's suing in other jurisdictions for the same infringements. Rumford Chemical Works v. Hecker (C. C. 1874) Fed. Cas. No. 12,132.

Prior to Act Feb. 15, 1819, the circuit courts had no jurisdiction of a bill to restrain the infringement of a patent where both parties were citizens of the same state. Livingston v. Van Ingen (C. C. 1811) Fed. Cas. No. 8,420.

A federal court may by injunction protect the right of the patentee or his assignee from infringement, irrespective of the citizenship of the parties. Brooks v. Stolley (C. C. 1845) Fed. Cas. No. 1,962.

In cases of infringement of patents, courts of equity have original and concurrent jurisdiction, and they may determine plaintiff's legal rights and the infringement of defendant, and determine damages and enjoin a continuance of the infringement. Avery v. Wilson (C. C. 1884) 20 Fed. 856, 859.

A bill averring the infringement of a patent by a corporation and its assignee under a state insolvent law, and that such assignee is about to distribute the assets among creditors without regard to rights of complainant, and praying for injunction and account, is properly brought in the United States court. Gordon v. St. Paul Harvester Works (C. C. 1885) 23 Fed. 147.

Under R. S. § 4921, post, § 9467, providing that "the several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of any right secured by patent," a bill will lie between residents of the same state to prevent an anticipated infringement of a patent. Sherman v. Nutt (C. C. 1888) 35 Fed. 149.

15. —— Unfair competition.—As to ancillary jurisdiction see notes under subdivision 1, ante, this section.

A complainant in a federal court cannot join with a cause of action for infringement of a patent one for unfair competition in trade, although both relate to the same subject-matter, where there is no allegation of diverse citizenship to give the court jurisdiction of the second cause. C. L. King & Co. v. Inlander (C. C. 1902) 133 Fed. 416; Mecky v. Grabowski (C. C. 1910) 177 Fed. 591.

A bill to restrain the infringement of

a patent, which thus presents a federal question, does not draw within the jurisdiction of the federal court a further issue as to unfair competition growing out of the same acts of defendant. Cushman v. Atlantic Fountain Pen Co. (C. C. 1908) 164 Fed. 94.

A bill, alleging infringement of a patent in the manufacture and sale of filters and unfair competition in selling filters, and praying for an injunction restraining the infringement and the unfair competition, is demurrable, on the ground that the court has no jurisdiction over the unfair competition, where the parties are citizens of the same state. Johnston v. Brass Goods Mfg. Co. (D. C. 1912) 201 Fed. 368.

Where, in a suit for infringement, the patents in suit are adjudged void, and the parties are both citizens of the same state, the court is without jurisdiction to determine a cause of action alleged for unfair competition. Schiebel Toy & Novelty Co. v. Clark (1914) 217 Fed. 760, 133 C. C. A. 490.

Where the acts of defendant alleged in a bill constituted an infringement of complainant's patent, and also unfair competition in trade, the cause of action for the infringement gives a federal court jurisdiction of the suit and to grant any relief to which complainant may be entitled on either ground. Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co. (C. C. 1910) 182 Fed. 832.

In a suit for infringement of a patent, of which a federal court has jurisdiction because of the subject-matter, it has also jurisdiction to grant relief against unfair competition by imitating in the infringing article the distinctive form and appearance of complainant's patented article. T. B. Woods Sons Co. v. Valley Iron Works (C. C. 1909) 166 Fed. 770.

Where infringement is aggravated by unfair competition by making the infringing article in imitation of the patented device in form and appearance, damages therefor are recoverable in a suit for the infringement, regardless of the citizenship of the parties. Ludwigs v. Payson Mfg. Co. (1913) 206 Fed. 60, 124 C. C. A. 194.

16. —— Jurisdiction of state courts. —The state courts have jurisdiction of a bill alleging that complainants are the owners of a patented device; that defendant owns a similar patent, and has published, and is about to publish, a notice that complainants' device is an infringement of defendant's patent; that such publication is false, and known by defendant to be false; that it is made maliciously, and with intent to injure complainants' business; and praying an injunction to restrain such further publication. The question of infringement is not the sole, nor even the principal, issue in such case. Flint v. Hutchinson Smoke-Burner Co. (C. C. 1889) 38 Fed. 546.

State courts have no jurisdiction of a suit to enjoin the infringement of patent rights; but if the rights asserted are contractual, which equity or common-law courts will enforce, that a patent is incidentally involved does not oust the state courts of jurisdiction. Wise v. Tube Bending Mach. Co. (1909) 87 N. E. 430, 194 N. Y. 272, affirming judgment (1907) 105 N. Y. S. 1150, 119 App. Div. 920.

A state court has no power to enjoin proceedings in a court of the United States, especially in a suit at law for damages for the infringement of a patent, so expressly, if not exclusively, confided by law to the federal courts. Kendall v. Winsor (1860) 6 R. I. 453.

The federal courts have no exclusive jurisdiction of an action for breach of contract based on an act which is an infringement of a patent, and such action may be brought in the state courts. Manning v. Galland-Henning Pneumatic Malting Drum Mfg. Co. (1910) 124 N. W. 291, 141 Wis. 199.

17. —— Allegations in pleadings. —A suit by a licensee against his patentee and a third person, in which the bill sets up title under the license and alleges the validity of the patent and infringement, is a case arising under the patent laws, and not a suit on a contract, although the answer raises no issue as to the validity of the patent or as to the infringement, and admits the license, but denies that it is a subsisting one, and pleads abandonment, forfeiture, and revocation. Excelsior Wooden Pipe Co. v. Pacific Bridge Co. (1902) 22 S. Ct. 681, 185 U. S. 282, 46 L. Ed. 910, 99 O. G. 2102, reversing decree (1901) 109 Fed. 497, 48 C. C. A. 349.

A bill charging that, after termination of a contract between complainants and defendants for the sale of complainants' patented devices, defendants obtained large numbers of such devices from sources to complainants unknown and sold the same within the district, without right or authority, alleged an infringement of complainants' patents after the termination of the contract, and was sufficient to confer federal jurisdiction, regardless of the amount involved. New Jersey Patent Co. v. Martin (C. C. 1909) 172 Fed. 760.

A bill of complaint setting forth a cause of action for patent infringement, "further" showing adoption by defendant of a trade-name deceptively similar to complainant's, "further" showing unfair competition in trade, resulting, among other things, from the location of defendant in complainant's former place of business, and praying injunction against imitating complainant's invention, from employing such name, and from unfairly competing states distinct causes of action, as affecting the court's jurisdiction; the allegations respecting unfair competition and use of complainant's trade-name not being mere incidents to the suit for

infringement. National Casket Co. v. New York & Brooklyn Casket Co. (C. C. 1911) 185 Fed. 533.

18. —— Parties.—In Kentucky, a county is a corporation, and an action can be maintained against it for the infringement of a patent. May v. Mercer County (C. C. 1887) 30 Fed. 246.

The federal courts will entertain jurisdiction of a suit to restrain the infringement of a patent by a receiver appointed by a state court, without leave of the state court to sue being first obtained. Hupfeld v. Automàton Piano Co. (C. C. 1895) 66 Fed. 788.

The court is without jurisdiction of an action for infringement by the United States. Beach v. U. S. (1906) 41 Ct. Cl. 110.

19. Suits under copyright laws.—Irrespective of citizenship, the federal courts have jurisdiction of suits to enforce rights under the copyright statutes. Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation (1915) 220 Fed. 448, affirming order (D. C. 1914) 213 Fed. 374.

Where, in a suit for infringement of copyright, the parties are residents of the same state, and plaintiff fails to make out his title to the copyright, the court has no jurisdiction to restrain the use of the title of the work upon principles relating to the good will of trades. Jollie v. Jaques (C. C. 1850) Fed. Cas. No. 7,437.

Under R. S. § 629, subd. 9, substantially re-enacted herein, the federal courts have exclusive jurisdiction. Outcault v. Lamar (1909) 119 N. Y. S. 930, 135 App. Div. 110.

20. —— Infringement.—A suit, the primary object of which is to enforce a right secured by the copyright laws which is being infringed by defendant, is a suit under those laws and within the jurisdiction of the federal court, though it incidentally draws in question the validity and effect of the contract through which complainant derives title. Wooster v. Crane & Co. (1906) 147 Fed. 515, 77 C. C. A. 211.

After a federal court has determined, in an action for infringement, that a copyright is invalid, it has no jurisdiction, as between parties who are citizens of the same state, to grant relief on other grounds. Larrowe-Loisette v. O'Loughlin (C. C. 1898) 88 Fed. 896.

Where plaintiff sues to enjoin the infringement of an alleged copyright by the person who assigned the same to him, but the matter was not subject to copyright, he cannot claim that defendant, as assignor, was estopped from alleging that the federal court had no jurisdiction because the copyright which he sold did not cover the matter in question, and where there is no requisite diversity of citizenship his bill will be dismissed. Royal Sales Co. v. Gaynor (C. C. 1908) 164 Fed. 207.

Where the jurisdiction of a federal court in a suit depends entirely upon the alleged infringement of a copyright, and the thing so alleged to be infringed is not within the copyright laws, no estoppel on the part of defendant to deny such fact can confer jurisdiction. Id.

Vacation of an attachment in a federal court for infringement of a copyright held not to oust federal jurisdiction specially conferred by this clause. Dixon v. Corinne Runkel Stock Co. (D. C. 1914) 214 Fed. 418.

The United States courts have exclusive jurisdiction of actions for an infringement of a copyright. Potter v. McPherson (N. Y. 1880) 21 Hun, 559.

21. —— Title to and rights under copyright.—Whether the owners of the copyright in a book can have relief in a court of equity by virtue of their rights, independent of statutory copyright, in view of an alleged conditional sale, is a question which the federal courts cannot consider in a suit to restrain the sale of the book at retail at less than the fixed price, in which there is no claim of damages in the jurisdictional sum, and no diversity of citizenship. Scribner v. Straus (1908) 28 S. Ct. 735, 210 U. S. 352, 52 L. Ed. 1094, affirming judgment (1906) 147 Fed. 28, 78 C. C. A. 122.

Where the question of copyright is merely incidental to a dispute about a contract for the original composition of a literary work, a federal court will not entertain jurisdiction. Haworth v. Nystrom (C. C. 1879) Fed. Cas. No. 6,251.

A suit which, though charging infringement, and praying an injunction and account, is in reality merely a suit to enforce a contract between author and publisher, is not a case arising under the copyright laws, so as to be within the jurisdiction of the federal courts. Silver v. Holt (C. C. 1895) 84 Fed. 809.

A bill filed in the state court alleged that complainant was the author of a certain song; that the song and accompanying music were his property; and that defendants, without his knowledge, procured a copyright thereon. The bill prayed that defendants be ordered to assign the copyright to complainant, "by instrument of assignment such as is provided for by the statute of the United States," and also prayed an injunction to restrain defendants from interfering with his right to the use of the song. Held, that this was not a suit arising under the copyright laws of the United States, so as to be within the jurisdiction of the federal courts, but was one merely involving the title to the copyright. Hoyt v. Bates (C. C. 1897) 81 Fed. 641.

An artist conceived a series of cartoons entitled "Buster," "Buster Brown," and "Tige," dealing with the adventures of a small boy and his dog.

The artist assigned the right to print and publish the cartoons, and copyright the same to defendants' assignor, from which defendants procured alleged rights of dramatization. Held, in a suit by plaintiffs, who had secured the rights of dramatization from the artist, for unlawful competition in the use of the words "Buster," "Buster Brown," and "Tige," in connection with their dramatization, that the fact that plaintiffs in anticipation of defendants' defense proved as a part of their main case that the assignment to defendants did not cover dramatization rights did not show that plaintiffs' case was based on the copyright statutes so as to deprive the state courts of jurisdiction. Outcault v. Lamar (1909) 119 N. Y. S. 930, 135 App. Div. 110.

A state court has jurisdiction of a suit for unlawful competition, unless it appears from the complaint that plaintiff is seeking to enforce a right based on the copyright laws of the United States, and, if this does not appear, the federal courts have no jurisdiction of the case in the absence of diversity of citizenship, though the answer presents a defense based on the copyright laws. Id.

22. —— **Allegations in pleadings.**—Allegations in a bill that complainant is the owner of a statutory copyright and that it has been infringed by defendant are sufficient to give a federal District Court jurisdiction of the suit. Photo Drama Motion Picture Co. v. Social Uplift Film Corporation (D. C. 1914) 213 Fed. 374.

23. **Suits under trade-mark laws.**—Act March 3, 1881, c. 138, conferring upon the United States courts jurisdiction over suits arising from the wrongful use of a trade-mark used in foreign commerce, does not impair the jurisdiction of the state courts over suits for the infringement of trade-marks. In re Keasbey & Mattison Co. (1895) 16 Sup. Ct. 273, 274, 160 U. S. 221, 40 L. Ed. 402.

The federal courts have jurisdiction of all matters arising under the trade-mark statute, even though both parties be citizens of the same state. Rossmann v. Garnier (1914) 211 Fed. 401, 128 C. C. A. 73.

24. —— **Infringement and unfair competition.**—The fact that the similarity between goods manufactured by defendants and complainants is such as to show an intent by the latter to deceive the purchasing public is not ground for the assumption by the federal court of jurisdiction of a suit to restrain defendants. Burt v. Smith (1895) 71 Fed. 161, 17 C. C. A. 573.

In an action to restrain defendants from using bottles and labels in imitation of those of the plaintiff, where the patent for the design of such bottles has expired, the question whether defendants are using the same in good faith, in which case their acts would be lawful, or for the purpose of misleading the public to believe that they are selling the article made by plaintiff, in which case the expiration of the patent would be no defense, does not arise under the laws of the United States so as to give the federal courts jurisdiction. Société Anonyme de la Distillerie de la Liqueur Benedictine de l'Abbaye de Fecamp v. Cook (C. C. 1889) 40 Fed. 382.

A bill may be maintained in the federal court to restrain the infringement of a common-law trade-mark where other jurisdictional facts are present. Capewell Horse Nail Co. v. Mooney (1909) 172 Fed. 826, 97 C. C. A. 248, affirming decree (C. C. 1909) 167 Fed. 575.

A federal court has no jurisdiction of a suit between citizens of the same state for unfair competition carried on otherwise than by the infringement of a registered trade-mark. Sprigg v. Fisher (D. C. 1915) 222 Fed. 964.

Where diverse citizenship exists between the parties and the requisite amount is involved to give a federal court jurisdiction, a cause of action for infringement of a trade-mark and one for unfair competition may be joined in one suit. Samson Cordage Works v. Puritan Cordage Mills (1914) 211 Fed. 603, 128 C. C. A. 203.

Jurisdiction of a suit between citizens of the same state for infringement of trade-mark and unfair competition held not to be retained; no infringement appearing. Bernstein v. Danwits (C. C. 1911) 190 Fed. 604; Sprigg v. Fisher (D. C. 1915) 222 Fed. 964.

The right to an injunction against unfair competition in trade does not rest on the right of complainant to be protected in the exclusive use of a trade-mark, but upon the ground of fraud; and the federal courts have no jurisdiction of a suit for such an injunction, even with respect to foreign commerce, unless by reason of diversity of citizenship between the parties, or at least its jurisdiction is so limited, and the act of March 3, 1881, by which, if at all, it is conferred, is of such doubtful constitutionality that it will not be exercised in a suit between citizens of the same state. Illinois Watch-Case Co. v. Elgin Nat. Watch Co. (1899) 94 Fed. 667, 35 C. C. A. 237, reversing decree Elgin Nat. Watch Co. v. Illinois Watch-Case Co. (C. C. 1898) 89 Fed. 487.

A federal court, in a suit to enjoin infringement of a trade-mark, cannot enjoin future acts amounting to unfair competition only. Ross v. H. S. Geer Co. (C. C. 1911) 188 Fed. 731.

If acts constituting infringement of a trade-mark and other acts constituting unfair competition in trade are independent, though relating to the same article, each set of acts is a separate

cause of action, of the former of which a federal court has jurisdiction, but not of the latter, both parties being residents of the same state; but, where the wrongful acts are not distinct, unfair competition as well as infringement of the trade-mark may be enjoined in the same suit. Ross v. H. S. Geer Co. (C. C. 1911) 188 Fed. 731.

Where a trade-name had not been registered, as required by Act March 3, 1881, c. 138, 21 Stat. 502, federal jurisdiction of a suit for unfair competition was not conferred by such act, but existed only under the rules governing ordinary suits at law or in equity. A. B. Andrews Co. v. Puncture Proof Footwear Co. (C. C. 1909) 168 Fed. 762.

Where the registration of a valid trade-mark is void, the trade-mark is not thereby nullified, but still retains the properties of a common-law trade-mark, and for its infringement suit may be brought in the federal court, if the requisite diversity of citizenship exists and the requisite judicial amount is involved. Edison v. Thomas A. Edison, Jr., Chemical Co. (C. C. 1904) 128 Fed. 1013.

The fact that a corporation has been chartered by a state under a certain name, which it selected, does not afford it immunity from a suit in a federal court by a corporation of another state to enjoin it from prosecuting its business under such name, where the name was deliberately adopted by its incorporators in imitation of complainant's for the fraudulent purpose of deceiving the public and appropriating complainant's good will and reputation. The Peck Brothers & Company v. Peck Bros. Co. (1902) 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81, writ of certiorari denied Peck Bros. Co. of Illinois v. Peck Bros. & Co. of Connecticut (1902) 23 S. Ct. 843, 187 U. S. 643, 47 L. Ed. 346.

The federal court has jurisdiction to restrain infringement of a registered trade-mark, though the parties are both residents of the state. Duwell v. Bohmer (C. C. 1878) Fed. Cas. No. 4,213.

Where there is no diversity of citizenship in an action in the federal court for infringement of trade-mark and unfair competition, jurisdiction can only be sustained in case there is a cause of action for infringement of a valid trade-mark. Thaddeus Davids Co. v. Davids (C. C. 1908) 165 Fed. 792, decree reversed (1910) 178 Fed. 801, 102 C. C. A. 249.

To confer jurisdiction on the courts of the United States of a suit for the infringement of a trade-mark at common law, or for unfair trade, there must exist diverse citizenship between the parties. Allen B. Wrisley Co. v. George E. Rouse Soap Co. (1898) 90 Fed. 5, 32 C. C. A. 496 (dismissing appeal [C. C. 1898] 87 Fed. 589); Illinois Watch-Case Co. v. Elgin Nat. Watch Co. (1899) 94 Fed. 667, 35 C. C. A. 237 (reversing decree Elgin Nat. Watch Co. v. Illinois Watch-Case Co. [C. C. 1898] 89 Fed. 487); Planten v. Gedney (1915) 224 Fed. 382, 140 C. C. A. 68 (reversing decree [D. C. 1915] 221 Fed. 281, and decree amended [C. C. A. 1915] 228 Fed. 338); National Casket Co. v. New York & Brooklyn Casket Co. (C. C. 1911) 185 Fed. 533.

A federal court has no jurisdiction of a suit for the infringement of a trade-mark by a citizen of the same state as the complainant, unless such infringement consists in using the trade-mark by the defendant upon goods intended to be transported to a foreign country, or used in lawful commercial intercourse with an Indian tribe. Ryder v. Holt (1888) 128 U. S. 525, 9 S. Ct. 145, 32 L. Ed. 529; Schumacher v. Schwencke (C. C. 1886) 26 Fed. 818; Graveley v. Graveley (C. C. 1890) 42 Fed. 265; Prince's Metallic Paint Co. v. Prince Mfg. Co. (C. C. 1892) 53 Fed. 493.

Where both parties to a suit for infringement of a registered trade-mark and for unfair competition were citizens of the same state, federal jurisdiction would not obtain, in the absence of provisions in the bill or decree confining the relief prayed for or granted to commerce with foreign nations, among the several states, or with the Indian tribes. Bernstein v. Danwitz (C. C. 1911) 190 Fed. 604.

A fraternal beneficiary society incorporated under the laws of a state may maintain a suit in equity in a federal court in another state to restrain unfair competition by citizens of the latter state by forming a like corporation under its laws having a name so similar to complainants as to deceive its members and the public. Modern Woodmen of America v. Hatfield (D. C. 1912) 199 Fed. 270.

25. —— **Allegations in pleadings.**— Diversity of citizenship must appear on the record. Allen B. Wrisley Co. v. George E. Rouse Soap Co. (1898) 90 Fed. 5, 32 C. C. A. 496, dismissing appeal (C. C. 1898) 87 Fed. 589.

Rights and remedies pertaining to trade-marks generally exist independently of the federal statute, and, where a federal court acquires jurisdiction of a suit in equity for the protection of a trade-mark by reason of diverse citizenship, it is not necessary that the bill should allege that the parties, or either of them, are engaged in foreign commerce, or commerce with Indian tribes, as is required by the act of March 3, 1881, to give jurisdiction where the parties are citizens of the same state. Hennessy v. Braunschweiger & Co. (C. C. 1898) 89 Fed. 664.

A federal court has jurisdiction of a suit between citizens of different states to enjoin infringement of a trade-mark,

though the actual value of the trademark is not alleged, and it is not averred that it will be destroyed by defendant's unlawful use. Griggs, Cooper & Co. v. Erie Preserving Co. (C. C. 1904) 131 Fed. 359.

Where a bill for unfair competition in the use of a trade-name did not allege that the name was used or to be used on goods intended to be transported to a foreign country or in commerce with Indian Tribes, the federal court did not acquire jurisdiction. A. B. Andrews Co. v. Puncture Proof Footwear Co. (C. C. 1909) 168 Fed. 762.

In a suit to enjoin an infringement of an alleged trade-mark, complainant's bill held not to sufficiently allege the interstate character of the use of such registered trade-mark, so as to confer federal jurisdiction, on the ground that the case arose under the laws of the United States. Louis Bergdoll Brewing Co. v. Bergdoll Brewing Co. (D. C. 1914) 218 Fed. 131.

The complaint in a suit for trademark infringement must allege infringement of a proprietary right arising out of registration and facts necessary to confer jurisdiction. Id.

Cited without definite application, Cochrane v. Deener (1876) 94 U. S. 780, 782, 24 L. Ed. 139; Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Walker v. Globe Newspaper Co. (1905) 140 Fed. 305, 72 C. C. A. 77, 2 L. R. A. (N. S.) 913, 5 Ann. Cas. 274 (reversed [1908] 28 Sup. Ct. 726, 210 U. S. 356, 52 L. Ed. 1096); Goldsmith v. American Paper Collar Co. (C. C. 1880) 2 Fed. 239, 240; Butler v. Shaw (C. C. 1884) 21 Fed. 321, 326; California Artificial Stone Pav. Co. v. Starr (C. C. 1891) 48 Fed. 560.

(8) Of suits for violation of interstate commerce laws.

Eighth. Of all suits and proceedings arising under any law regulating commerce, except those suits and proceedings exclusive jurisdiction of which has been conferred upon the Commerce Court.

Act March 3, 1911, c. 231, § 24, par. 8, 36 Stat. 1092.

Notes of Decisions

See § 992 et seq., and notes thereunder.

See, also, notes under subdivision 1, ante.

Interstate commerce in general.—That property affected by a judgment in ejectment rendered by a state court is used as a highway for interstate commerce and as a national mail route cannot be urged in support of the jurisdiction of a federal court over a suit to restrain the enforcement of the judgment, which is brought by a party not suing or authorized to sue on behalf of the public, and in which the United States or the attorney general is not a party complainant. Central Trust Co. v. Grantham (1897) 83 Fed. 540, 27 C. C. A. 570.

The federal courts have exclusive jurisdiction of all suits arising under the Interstate Commerce Act (Act Feb. 4, 1887, post, § 8563 et seq., and its amendments). Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n (1908) 165 Fed. 1, 91 C. C. A. 39; Union Pac. R. Co. v. Oregon & Washington Lumber Mfrs.' Ass'n (1908) 165 Fed. 13, 91 C. C. A. 51.

A bill by an express company to restrain a messenger's wife from suing a railroad company for her husband's death because of the messenger's contract to save the express company and any of its contracting railroads harmless from any liability resulting from personal injuries to him, etc., did not state a case arising under the commerce clause, or under the fourteenth amendment of the Constitution, so as to entitle complainant to sue in the federal courts on that ground. Rountree v. Adams Express Co. (1908) 165 Fed. 152, 91 C. C. A. 186.

A national court has full jurisdiction to entertain a suit to enjoin state officers from preventing the owner of natural gas from taking it out of the state for the purpose of interstate commerce. Haskell v. Cowham (1911) 187 Fed. 403, 109 C. C. A. 235.

Where a federal court has acquired jurisdiction of a suit to cancel a contract for illegality, as in violation of the Interstate Commerce Act, it also has jurisdiction to determine its validity under the law of the state, where it affects both interstate and intrastate commerce. Cleveland, C., C. & St. L. Ry. Co. v. Hirsch (1913) 204 Fed. 849, 123 C. C. A. 145.

Construction of a rule of an express company, to determine whether it has received excessive charges, held not exclusively within the jurisdiction of the Interstate Commerce Commission, but the District Court has jurisdiction. Barrett v. Gimbel Bros. (1915) 226 Fed. 623.

Under this subdivision and subdivision 1, ante, § 1010, post, and Carmack Amendment to Interstate Commerce Act, action against initial and connecting carriers for nondelivery of interstate shipment held removable. Alabama Great Southern Ry. Co. v. American Cotton Oil Co. (C. C. A. 1916) 229 Fed. 11.

Circuit courts have jurisdiction of a bill in equity to restrain violations of the interstate commerce law to the irreparable injury of complainant, because of the subject-matter, and without regard to the citizenship of the parties. Kentucky & I. Bridge Co. v. Lou-

isville & N. R. Co. (C. C. 1889) 37 Fed. 567; Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co. (C. C. 1893) 54 Fed. 730, 19 L. R. A. 387, appeal dismissed Ex parte Lennon (1893) 14 S. Ct. 123, 150 U. S. 393, 37 L. Ed. 1120.

The fact that a lease exempting the lessor from liability for destruction of the buildings on the leased land is of a railroad company's station grounds, that are used for a cold-storage warehouse, does not render the question of the validity of the exemption one affecting interstate commerce,—a matter of federal control. Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co. (C. C. 1894) 62 Fed. 904, judgment affirmed (1895) 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193.

The limitation as to the district within which suit can be brought in a United States circuit court, contained in the judiciary acts of 1887 and 1888, does not apply to suits brought under sections 8 and 9 of the interstate commerce act, to recover damages for overcharging, but such suits may be brought in any district in which the defendant can be found. Van Patten v. Chicago, M. & St. P. R. Co. (C. C. 1896) 74 Fed. 981.

The jurisdiction of the federal courts to enjoin unreasonable rates of common carriers is a right given under the interstate commerce act, with its amendments. Tift v. Southern Ry. Co. (C. C. 1903) 123 Fed. 789.

The United States District Court has jurisdiction of an action by a telegraph company to restrain the enforcement of a tax of $1,000 by the municipality, on the ground that it is a tax on interstate commerce and is discriminatory; it being alleged that the damage to the complainant was greatly in excess of $2,000. Postal Telegraph-Cable Co. v. City of Mobile (C. C. 1909) 179 Fed. 955.

Where a suit brought under federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65, involved a determination of the meaning of the phrase "person employed by such carrier in interstate commerce," federal jurisdiction existed, even though the complaint should be dismissed because plaintiff was not a person so employed. Colasurdo v. Central R. R. of New Jersey (C. C. 1910) 180 Fed. 832, judgment affirmed Central R. Co. of New Jersey v. Colasurdo (1911) 192 Fed. 901, 113 C. C. A. 379.

Section 15 of the interstate commerce act, as amended by Act June 29, 1906, § 4, held not to deprive a Circuit Court of jurisdiction to entertain an action by a shipper under section 9 of the original act of February 4, 1887. Langdon v. Pennsylvania R. Co. (D. C. 1912) 194 Fed. 486.

In an action by an employé against a railroad engaged in interstate commerce, an objection to the jurisdiction of the federal court will not be sustained. Kern v. Chicago, M. & P. S. Ry. Co. (D. C. 1912) 201 Fed. 404.

An action by a railroad company against a shipper to recover the difference between the freight paid on an interstate shipment and that due under the published schedules is within the jurisdiction of a federal District Court, regardless of the citizenship of the parties or the amount in controversy, under this subdivision, as one arising under the Interstate Commerce Act. Atchison, T. & S. F. Ry. Co. v. Kinkade (D. C. 1912) 203 Fed. 165.

Under this subdivision a federal District Court had jurisdiction of a suit to recover undercharges on interstate freight regardless of diversity of citizenship. Illinois Cent. R. Co. v. S. Segari & Co. (D. C. 1913) 205 Fed. 998.

Action for negligent handling of interstate shipment, penalty for failing to stop shipment and feed cattle, overcharge in freight, and attorney's fees, held to arise under the Interstate Commerce Act within this subdivision, and hence to be removable to the United States District Court under section 28. Smith v. Atchison, T. & S. F. Ry. Co. (D. C. 1913) 210 Fed. 988.

Obstructions and nuisances in navigable waters.—The conformity of a log boom to the provisions of a state statute, so as to exempt it from prohibition under section 10 of the river and harbor act of 1890, is not a question for the state courts alone, but must be decided by a federal court, when suit is brought for an injunction against the boom as an obstruction to navigation prohibited by the federal law. U. S. v. Bellingham Bay Boom Co. (1900) 20 Sup. Ct. 343, 345, 176 U. S. 211, 44 L. Ed. 437, reversing decree (1897) 81 Fed. 658, 26 C. C. A. 547.

That a log boom constructed under authority of a state statute on a river lying wholly within the state may not conform to the regulations prescribed by the state statute does not make it an unlawful structure, so as to be cognizable in the federal courts, under Act Sept. 19, 1890 (26 Stat. 426). The question whether it does comply with the provisions of the state statute is a state, and not a federal, question. U. S. v. Bellingham Bay Boom Co. (1897) 81 Fed. 658, 26 C. C. A. 547, affirming judgment (C. C. 1896) 72 Fed. 585, judgment reversed (1900) 20 Sup. Ct. 343, 176 U. S. 211, 44 L. Ed. 437.

To bring obstructions and nuisances in navigable waters lying within a state within the cognizance of the federal courts, there must be some statute of the United States directly applicable to such streams. Id.

Where a river within a state was navigable for some distance from its mouth, and was actually navigated by small steamboats and river craft for the purpose of carrying up groceries, supplies, clothing, loggers' tools, etc., to the head of navigation, and returning

with farmers' products, a bill was maintainable in the federal courts to restrain a boom company from maintaining a boom in the river in such a manner as to be an obstruction to navigation, though the river was chiefly valuable for floating logs, and there was no proof of actual carriage of goods on the river in interstate commerce. U. S. v. Wishkah Boom Co. (1905) 136 Fed. 42, 68 C. C. A. 592, appeal dismissed Wishkah Boom Co. v. U. S. (1906) 26 Sup. Ct. 765, 202 U. S. 613, 50 L. Ed. 1171.

When congress has declared a navigable river to be a common highway, the state cannot authorize an obstruction therein, and anything which materially interferes with or limits the navigability thereof, considering the use which it is or may be subject to, is an obstruction and a violation of such act of congress, over which the United States circuit court had jurisdiction, under the judiciary act of 1875 (18 Stat. 470), to prevent or abate by injunction. Hatch v. Wallamet Bridge Co. (C. C. 1881) 6 Fed. 780.

Under the ruling in Cardwell v. American Bridge Co. (1885) 113 U. S. 205, 5 S. Ct. 423, 28 L. Ed. 959, the provision in Act Feb. 14, 1859 (11 Stat. 383), admitting Oregon into the Union, which declares that "the navigable waters of said state shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor," does not prevent the state from authorizing the erection of a bridge across the Wallamet river, at Portland, however much it may impede and obstruct the navigation thereof, nor has the United States circuit court any jurisdiction of a suit to enjoin the same. Scheurer v. Columbia Street Bridge Co. (C. C. 1886) 27 Fed. 172.

The federal courts have jurisdiction of an action by a steamboat company to recover damages of a railroad company for obstructing a navigable river of the United States by building a bridge across it, regardless of the citizenship of the parties. Sunflower River-Packet Co. v. Georgia Pac. R. Co. (C. C. 1889) 39 Fed. 229.

By 24 Stat. 326, appropriations were made for the improvement of certain rivers in California, with a provision that part of such appropriation should not be used until certain hydraulic mining, hurtful to navigation, had ceased on such rivers, and the secretary of war was authorized to institute legal proceedings to prevent the continuance of such mining. Held, that this legislation was a sufficient assumption of national jurisdiction over the waters in question to confer on the federal courts jurisdiction of a suit by the United States to enjoin the deposit of mining débris injurious to navigation. U. S. v. North Bloomfield Gravel Min. Co. (C. C. 1892) 53 Fed. 625.

Where a private canal constructed and used as a cut-off to take the place commercially of the tortuous channel of a navigable stream has been abandoned, and its uses for such purpose entirely destroyed by the owner of the rights therein, the rights of the public revert to the original channel of the stream, and under Act March 3, 1899, c. 425, 30 Stat. 1151, the United States may maintain a suit to enjoin the obstruction of such channel by a bridge. U. S. v. President, etc., of Jamaica & R. Turnpike Roads (C. C. 1910) 183 Fed. 598, decree reversed (1913) 204 Fed. 759, 123 C. C. A. 128.

(9) Of penalties and forfeitures.

Ninth. Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States.

R. S. § 563, pars. 3, 6, § 629, par. 5. Act March 3, 1911, c. 231, § 24, par. 9, 36 Stat. 1092.

Notes of Decisions

See notes under § 1027, post.

See, also, notes under subdivisions 1 and 3, ante.

Repeal of former statute.—There is no conflict between Act March 3, 1875, § 1, c. 137 (18 Stat. 470), and Act Sept. 24, 1789, § 9, c. 20 (1 Stat. 76), which conferred exclusive jurisdiction upon the district courts of suits for penalties and forfeitures incurred under the laws of the United States, and the latter, except as modified by statutes conferring jurisdiction upon the circuit courts in special cases, still remains in force. U. S. v. Mooney (1885) 6 S. Ct. 304, 116 U. S. 104, 29 L. Ed. 550, affirming judgment (C. C. 1882) 11 F. 476.

The judiciary act of 1789, giving exclusive original cognizance to the district courts in cases of penalties incurred under the federal laws, was pro tanto repealed by Act Aug. 2, 1813, giving the state courts jurisdiction in certain cases. Stearns v. U. S. (C. C. 1835) Fed. Cas. No. 13,341.

Penalties in general.—See, also, notes under subdivision 16, post.

There was no conflict between Act March 3, 1875, § 1, c. 137 (18 Stat. 470), and Act Sept. 24, 1789, § 9, c. 20 (1 Stat. 76), which conferred exclusive jurisdiction upon the district courts of suits for penalties and forfeitures incurred under the laws of the United States, and the latter, except as modified by statutes conferring jurisdiction upon the circuit courts in special cases, still remained in force. U. S. v. Mooney (1885) 116 U. S. 104, 6 Sup. Ct. 304, 29 L. Ed. 550.

Act 1789, § 9 (R. S. § 563, and section 711, post, § 1233), gave the United States district courts exclusive jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States. The national banking act of June 3, 1864, as amended Feb. 18. 1875 (R. S. §§ 5197, 5198, post, §§ 9758, 9759), authorized national banks to sue and be sued in any court as fully as natural persons and provided that suits against them might be brought in the United States courts, in the district, or "in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." Held, that the latter act modified the former in respect to jurisdiction of actions against national banks for penalties, and gave concurrent jurisdiction to the state courts. First Nat. Bank v. Morgan (1889) 10 Sup. Ct. 37, 132 U. S. 141, 33 L. Ed. 282.

The "further sum," equal to 2 per cent. of the appraised value of imported merchandise for each 1 per cent. that such appraised value exceeds the value declared in the entry, which, under Customs Administrative Act June 10, 1890, § 7, 26 Stat. 131, c. 407, may be collected from an importer for undervaluation "in addition to the duties imposed by law," is a penalty, and exclusive jurisdiction of a suit to recover such sum is therefore, by R. S. § 563, vested in the District Courts of the United States. Helwig v. U. S. (1903) 23 Sup. Ct. 427, 432, 188 U. S. 605, 47 L. Ed. 614.

The district courts have exclusive original jurisdiction of all suits for penalties and forfeitures. The Cassius (C. C. 1796) Fed. Cas. No. 7,743, 2 Dall. 365, 368, 1 L. Ed. 418.

The circuit court could not take original cognizance of a suit for a penalty incurred by an offense against the laws of the United States. If the offense was committed within the state, it must be tried in such state. Evans v. Bollen (C. C. 1800) Fed. Cas. No. 4,554, 4 Dall. 342, 344, 1 L. Ed. 859.

The district courts have exclusive jurisdiction of actions for penalties and forfeitures under the Customs Laws, and the Act of March 3, 1875, § 1, giving the circuit court original cognizance with the courts of the several states of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds $500, and arising under the Constitution and laws of the United States or treaties, does not confer jurisdiction in such cases on the circuit courts. U. S. v. Mooney (C. C. 1882) 11 Fed. 476, affirmed (1885) 6 Sup. Ct. 304, 116 U. S. 104, 29 L. Ed. 550.

The general words of the act of 1875 did not give the circuit court jurisdiction of suits for penalties and forfeitures, of which the district court before had exclusive jurisdiction. Smith v. Sargent Mfg. Co. (C. C. 1895) 67 Fed. 801.

The district court has jurisdiction of the subject-matter of an action for the penalty imposed under the civil rights act of March 1, 1875. Cooper v. New Haven Steam Boat Co. (D. C. 1883) 18 Fed. 588, 589.

An action for the penalty prescribed by R. S. § 4449, post, § 8211, for a failure to comply with any of the provisions of title 52 of the Revised Statutes in navigating a steam vessel, is within the jurisdiction of the district court. The Idaho (D. C. 1886) 29 Fed. 187, 189.

The jurisdiction of district courts over suits for penalties and forfeitures, and in regard to the rights of informers and seizing-officers and persons entitled to share in the distribution, examined and stated. Bradley v. U. S. (1876) 12 Ct. Cl. 578.

Importation of contract labor.—The provision in the contract labor law of 1885 (23 Stat. 332, § 3) that the penalty of $1,000 "may be sued for * * * as debts of like amount are now recovered in the circuit courts of the United States" referred to the form of action, and not the forum, and the district court had jurisdiction, as in suits for other penalties. Lees v. U. S. (1893) 150 U. S. 476, 14 Sup. Ct. 163, 37 L. Ed. 1150.

Act Feb. 26, 1885, prohibiting the importation of contract labor, provided (section 3) that, for every violation of its provisions, the offender shall forfeit for every such offense the sum of $1,000, which may be recovered by the United States in a circuit court. 25 Stat. 434, conferred on the circuit courts jurisdiction of all civil suits at common law or in equity where the amount in controversy exceeds $2,000. Held, that an action for the penalty under the former act, being criminal in its nature, was within the jurisdiction of the circuit court. U. S. v. Mexican Nat. Ry. Co. (C. C. 1889) 40 Fed. 769.

The jurisdiction granted by this section is not limited by Act Feb. 26, 1888, c. 16, § 3, that the penalty for the importation of alien contract laborers may be recovered as debts of like amount are recovered in the circuit court of the United States, but such penalty may be recovered in the district court. Lees v. U. S. (1893) 14 Sup. Ct. 163, 164, 150 U. S. 476, 37 L. Ed. 1150.

Act Feb. 26, 1885, prescribing a penalty of $1,000 for importing foreigners under contract to perform labor, and providing that the penalty may be sued for and recovered "as debts of like amount are now recovered in the circuit courts," does not give the circuit courts exclusive jurisdiction of such suits. The district courts have concurrent jurisdiction under R. S. § 563, which gives them jurisdiction of "all suits for penalties and forfeitures incurred under any law of the United States." U. S. v. Whitcomb Metallic Bedstead Co. (D. C. 1891) 45 Fed. 89.

Such jurisdiction is not taken from

the district courts by Act Aug. 13, 1888, providing that the circuit courts shall have original cognizance of "all suits of a civil nature," where the amount involved exceeds $2,000; since a suit to recover the penalty under the act of Feb. 26, 1885, is of a penal and quasi criminal nature. U. S. v. Whitcomb Metallic Bedstead Co. (D. C. 1891) 45 Fed. 89.

A suit under Act Feb. 26, 1885, to recover penalties for importing foreigners under contract to perform labor, may be maintained regardless of the amount. U. S. v. Whitcomb Metallic Bedstead Co. (D. C. 1891) 45 Fed. 89.

Under R. S. § 563, subd. 3, embodied herein, giving district courts of the United States jurisdiction "of all suits for penalties and forfeitures incurred under any law of the United States," such court has jurisdiction of a suit to recover the penalty imposed by Act Feb. 26, 1885, c. 164, § 3, 23 Stat. 333, for importing a foreign laborer under contract. Rosenberg v. Union Iron Works (D. C. 1901) 109 Fed. 844, 845.

Forfeitures.—See note ante.

A seizure of corporate stocks held sufficient to give the court jurisdiction to condemn them as forfeited under the confiscation acts. Page v. U. S. (1870) 11 Wall. 268, 294, 20 L. Ed. 135.

Seizure of land held sufficient to give the court jurisdiction to condemn it as forfeited. Tyler v. Defrees (1870) 11 Wall. 331, 345, 20 L. Ed. 161.

An order of the president for the seizure, under Confiscation Act July 17, 1862, of the property of persons engaged in armed rebellion against the United States, or in aiding and abetting the same, is a prerequisite to the exercise by a United States district court of its jurisdiction to adjudge the forfeiture, and decree the condemnation, of such property. U. S. v. Winchester (1878) 99 U. S. 372, 25 L. Ed. 479.

The circuit courts had no original jurisdiction of a proceeding for the forfeiture of a vessel for an offense. Ketland v. The Cassius (C. C. 1796) Fed. Cas. No. 7,743.

The exclusive jurisdiction to determine whether property which has been seized by customs officers has become forfeited to the United States, under the revenue laws, is vested in the federal courts, and is to be exercised by proceedings in rem; and it depends upon the final decree of such courts whether the seizure is to be deemed rightful or tortious. McGuire v. Winslow (C. C. 1886) 26 Fed. 304.

To give the court jurisdiction to adjudicate upon a cause of forfeiture, the property must have been seized by process within its territorial jurisdiction, or brought within its limits, where the seizure is upon the high seas. The Washington (D. C. 1855) Fed. Cas. No. 17,222.

The District Court of the United States was without jurisdiction in a confiscation proceeding, where the record fails to show any seizure of the property under executive order before the filing of the information, as the executive seizure is the foundation of all subsequent proceedings under the confiscation act. Henry v. Carson (1884) 96 Ind. 412.

Cited without definite application, Stern v. Jerome H. Remick & Co. (C. C. 1908) 164 Fed. 781, writ of error dismissed (1909) 30 Sup. Ct. 404, 215 U. S. 585, 54 L. Ed. 338.

(10) Of suits on debentures.

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

R. S. § 563, par. 10, § 629, par. 8. Act March 3, 1911, c. 231, § 24, par. 10, 36 Stat. 1092.

Notes of Decisions

Repeal of former statute.—The repealing clause of the Judiciary Act of 1887-88 (24 Stat. 552, c. 373; 25 Stat. 433, c. 866), did not reach the act of March 3, 1875, § 8 (R. S. § 629, subd. embodied herein). Citizens' Savings & Trust Co. v. Illinois Cent. R. Co. (1907) 27 Sup. Ct. 425, 427, 205 U. S. 46, 51 L. Ed. 703.

(11) Of suits for injuries on account of acts done under laws of the United States.

Eleventh. Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States.

R. S. § 629, par. 12. Act March 3, 1911, c. 231, § 24, par. 111, 36 Stat. 1092.

Notes of Decisions

Repeal of former statute.—The jurisdictional act of 1875 or the subsequent act of August 13, 1888, did not repeal R. S. § 629, subd. 4 (this section, subd.

5), giving jurisdiction to the circuit courts or suits against revenue officers, on account of any act done under color of their office, or of any revenue law, or on account of any right, title or authority claimed by such officer or other person, under any such law, as they were not intended to interfere with prior statutes conferring jurisdiction upon the circuit or district courts in special cases and over particular subjects. Downes v. Bidwell (1901) 21 Sup. Ct. 770, 772, 182 U. S. 244, 45 L. Ed. 1088.

Collection of revenue.—An action will lie in the circuit court of the United States on the bond of a deputy collector of internal revenue, for embezzlement of taxes collected by him. Act July 13, 1866, § 67. Crawford v. Johnson (C. C. 1868) Fed. Cas. No. 3,369.

(12) Of suits concerning civil rights.

Twelfth. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty, Revised Statutes.

R. S. § 563, par. 11, § 629, par. 17. Act March 3, 1911, c. 231, § 24, par. 12, 36 Stat. 1092.

Notes of Decisions

When persons can be held to answer for conspiracy in federal courts.—Before persons can be held to answer in the federal courts for conspiracy, they must be charged with conspiring to effect a purpose forbidden by some statute of the United States, or with doing some act in furthering the conspiracy, forbidden by a law of the United States; and where a petition claims damages for an alleged conspiracy to disbar plaintiff from practicing law in the state courts because he has filed a bill in a federal court charging defendants with misconduct and corruption in certain litigation pending in a state court, no cause of action is made out. Green v. Rogers (C. C. 1893) 56 Fed. 220.

(13) Of suits against persons having knowledge of conspiracy, etc.

Thirteenth. Of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty, Revised Statutes, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.

R. S. § 629, par. 18. Act March 3, 1911, c. 231, § 24, par. 13, 36 Stat. 1092.

R. S. § 1980, mentioned in this paragraph, is set forth post, § 3933.

(14) Of suits to redress the deprivation, under color of law, of civil rights.

Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

R. S. § 563, par. 12, § 629, par. 16. Act March 3, 1911, c. 231, § 24, par. 14, 36 Stat. 1092.

R. S. § 1980, mentioned in this paragraph, is set forth post, § 3933.

Notes of Decisions

1. Protection of civil rights in general.
2. Right to vote.
3. Proceedings by state against railroad company.
4. Suit by citizen of African descent for assault.
5. Suit for excluding colored children from schools.
6. Restraining discrimination against aliens.
7. Restraining enforcement of ordinance.
8. Enjoining proceedings to prevent sale of liquors in original packages.
9. Enjoining contempt proceedings for violation of state injunction.
10. Action for damages against collector of taxes.
11. Recovery of money paid under ordinance imposing license tax.
12. Suit for imprisonment in suppressing insurrection.

1. Protection of civil rights in general.—See In re Parrott (C. C. 1880) 1 Fed. 481.

The rights for the deprivation of which suits may be brought in a court of the United States under R. S. § 629, subd. 16, embodied herein, for the

protection of rights secured by the constitution of the United States or by any law providing for equal rights of citizens, include civil rights only, as the provisions of that section were brought forward from the act of congress of April 20, 1871, to enforce the provisions of the fourteenth amendment. Holt v. Indiana Mfg. Co., 20 S. Ct. 272, 273, 176 U. S. 68, 44 L. Ed. 374, affirming decree (1897) 80 Fed. 1, 25 C. C. A. 301.

This subdivision refers solely to those actions brought to redress the deprivation of the civil rights secured by R. S. §§ 1977, 1979, post, §§ 3925, 3932. Farson v. Chicago (C. C. 1905) 138 Fed. 184, 185.

The "civil rights" protected by section 1 of the fourteenth amendment to the Constitution, and to redress deprivation of which the federal courts are given jurisdiction by this subdivision, are only such rights as are derived from the Constitution or some statute of the United States. Simpson v. Geary (D. C. 1913) 204 Fed. 507.

2. Right to vote.—The federal courts have jurisdiction in contested elections of state officers only where the title to office arises out of the denial of the right to vote to citizens on account of race, color, or previous condition of servitude. Harrison v. Hadley (C. C. 1873) Fed. Cas. No. 6,137.

3. Proceedings by state against railroad company.—The United States circuit court has no jurisdiction of a writ of certiorari to a state court to remove proceedings by the state against a railroad company under Act Ill. May 2, 1873. Illinois v. Chicago & A. R. Co. (C. C. 1874) Fed. Cas. No. 7,006.

4. Suit by citizen of African descent for assault.—Federal courts have no jurisdiction of a suit for damages by a citizen of African descent against an Anglo-Saxon of the same state for unlawful assault under color of executive authority. Brawner v. Irvin (C. C. 1909) 169 Fed. 964.

5. Suit for excluding colored children from schools.—The district court had jurisdiction of a suit by colored children, alleging that, under an unconstitutional state statute, they are deprived of the equal protection of the laws, in being excluded from the schools in the district of their residence. Davenport v. Cloverport (D. C. 1896) 72 Fed. 689.

6. Restraining discrimination against aliens.—The district court has jurisdiction of an alien's suit to enjoin enforcement of state law requiring employment of citizens in preference to aliens, without regard to the amount in controversy. Raich v. Truax (D. C. 1915) 219 Fed. 273.

7. Restraining enforcement of ordinance.—A suit to restrain the enforcement of a city ordinance on the ground that it is in violation of the fourteenth amendment is not one of which the circuit courts had original jurisdiction under section 629 of the Revised Statutes. Farson v. Chicago (C. C. 1905) 138 Fed. 184, 185.

8. Enjoining proceedings to prevent sale of liquors in original packages.—Though a court of equity has no jurisdiction to enjoin purely criminal proceedings, injunction will lie against proceedings by a prosecuting attorney to prevent the agents of a nonresident importer from selling intoxicating liquors in the original packages in which they were imported, under a state law which, in so far as it prohibits such sales, is in violation of the interstate commerce clause of the federal constitution, since such proceedings are an interference with complainant's property rights under the constitution, for which, as provided by R. S. § 1979, post, § 3932, an action at law or suit in equity may be maintained. M. Schandler Bottling Co. v. Welch (C. C. 1890) 42 Fed. 561.

9. Enjoining contempt proceedings for violation of state injunction.—Since a state law prohibiting the sale of intoxicating liquors by nonresident importers, in the same packages in which they were brought into the state, is void as being in contravention of the interstate commerce clause of the federal constitution, where a state court has enjoined such sales an injunction will lie from the federal courts against the institution of contempt proceedings by the county attorney for the violation of the state injunction, under Comp. Laws Kan. 1885, c. 13, § 35; since R. S. § 1979, post, § 3932, provides that any person who, under color of any state law or statute, subjects another to the deprivation of any rights, privileges, or immunities secured by the constitution of the United States, shall be liable to the injured person in an action at law or suit in equity, to be prosecuted in the federal courts. Tuchman v. Welch (C. C. 1890) 42 Fed. 548.

10. Action for damages against collector of taxes.—An action for damages against a collector of taxes in Virginia for seizing plaintiff's property for the purpose of enforcing payment of taxes due to the state, after refusing to receive from plaintiff in payment thereof coupons made receivable for such taxes by Act Va. March 30, 1871, is not within R. S. § 629, subd. 16, embodied herein, giving the United States circuit courts cognizance, without reference to the sum or value in controversy or the citizenship of the parties, of suits to redress the deprivation, under color of any law, etc., of any state, of any right, privilege, or immunity secured by the constitution of the United States, such suits being authorized by R. S. § 1979, post, § 3932. Although the right to have such coupons received in payment

of taxes is founded on a contract with the state, protected by Const. art. 1, § 10, forbidding any state to pass laws impairing the obligation of contracts, the only right secured to an individual by that clause is the right to have a judicial determination declaring the nullity of the attempt to impair its obligation. A direct action for the denial of the right is not authorized. Carter v. Greenhow (1885) 114 U. S. 317, 5 Sup. Ct. 928, 962, 29 L. Ed. 202; Pleasants v. Same (1885) 114 U. S. 323, 5 Sup. Ct. 931, 962, 29 L. Ed. 204.

11. Recovery of money paid under ordinance imposing license tax.—An action to recover money, paid under an alleged unconstitutional city ordinance imposing a license tax on users of tradings stamps, not involving $3,000, held not within the jurisdiction of a District Court, as one brought under this subdivision. Salander v. City of Tacoma (D. C. 1913) 208 Fed. 427.

12. Suit for imprisonment in suppressing insurrection.—A suit against the Governor and officers of the National Guard because of imprisonment for 2½ months under the order of the Governor made in good faith in the exercise of his power to suppress an insurrection, was not within the original jurisdiction of a federal Circuit Court, as a suit to redress the deprivation of any right secured by the Constitution of the United States. Moyer v. Peabody (1909) 29 Sup. Ct. 235, 236, 212 U. S. 78, 53 L. Ed. 410, affirming judgment (C. C. 1906) 148 Fed. 870.

Cited without definite application, Giles v. Harris (1903) 23 Sup. Ct. 639, 641, 189 U. S. 475, 47 L. Ed. 909; James v. Bowman (1903) 23 Sup. Ct. 678, 680, 190 U. S. 127, 47 L. Ed. 979; Anderson v. Myers (C. C. 1910) 182 Fed. 223; Claybrook v. Owensboro (D. C. 1883) 16 Fed. 297, 303.

(15) Of suits to recover certain offices.

Fifteenth. Of all suits to recover possession of any office, except that of elector of President or Vice President, Representative in or Delegate to Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: Provided, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

R. S. § 563, par. 13, § 629, par. 13. Act March 3, 1911, c. 231, § 24, par. 15, 36 Stat. 1092.

Notes of Decisions

Limitation of jurisdiction to cases not embracing power to fill vacancy during recess of Senate.—The jurisdiction conferred by this provision is limited to a particular class of cases not embracing the question of the power of the President to fill a vacancy happening during a recess of the Senate, filled during the subsequent recess of the Senate. (Per Hammond, J.) In re Yancey (C. C. 1886) 28 Fed. 445, 451.

(16) Of suits against national-banking associations.

Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "National Banks," Revised Statutes, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title. And all national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located.

R. S. § 563, par. 15, § 629, pars. 10, 11. Act March 3, 1911, c. 231, § 24, par. 16, 36 Stat. 1092.

Notes of Decisions

See notes under subdivision 1, ante.

See, also, notes under §§ 1010, 9661, 9668 and 9759, post.

1. Provisions of former statute.
2. Former statute cited.
3. Constitutionality of former statute.
4. Repeal of former statute.
5. Cases by or against banks in general.
6. Bank as party to suit.
7. Defendants residing in different districts.

8. Attachment.
9. Actions on notes.
10. Cross-bill by bank in suit to have shares of depositors determined.
11. Suits for usury.
12. Restraining collection of tax.
13. Bill for appointment of receiver.
14. Suits on liability of officers.
15. Suit by stockholders to restrain illegal application of funds.
16. Suit to compel officers to permit examination of records and documents.
17. Creditors' suit.
18. Cases for winding up affairs.
19. Suits by or against receivers.

1. Provisions of former statute.—By R. S. § 629, subd. 10, embodied herein, the circuit courts had original jurisdiction "of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations," and by subdivision 11 "of all suits brought by [or against] any banking association established in the district for which the court is held under the provisions of title 'The National Banks,' to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title."

2. Former statute cited.—Turner v. Richardson (1901) 21 Sup. Ct. 295, 296, 180 U. S. 87, 45 L. Ed. 438; Wyman v. Wallace (1906) 26 Sup. Ct. 495, 496, 201 U. S. 230, 50 L. Ed. 738; United States Fidelity & Guaranty Co. v. Bray (1912) 32 Sup. Ct. 620, 621, 225 U. S. 205, 56 L. Ed. 1055; Rankin v. Herod (C. C. 1904) 130 Fed. 390.

3. Constitutionality of former statute.—Under Const. art. 3, § 2, limiting the judicial power of the United States to cases arising under the constitution, the laws of the United States and treaties, congress had power to pass R. S. § 629, conferring on federal circuit courts jurisdiction of all suits by or against national banks, irrespective of the subject-matter. Foss v. First Nat. Bank (C. C. 1880) 3 Fed. 185, decree affirmed Bissell v. Foss (1885) 5 Sup. Ct. 851, 114 U. S. 252, 29 L. Ed. 126.

4. Repeal of former statute.—Act March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from the state courts, and for other purposes," did not repeal R. S. § 629, subd. 11, embodied herein. Third Nat. Bank v. Harrison (C. C. 1881) 8 Fed. 721.

R. S. § 629, subd. 10, embodied herein, providing that "the circuit court shall have original jurisdiction of all suits by or against any banking association established in the district for which the court is held under any law providing for national banking associations," was repealed by the proviso in St. 1881–82, c. 290, § 4, which provides "that the jurisdiction of suits hereafter brought by or against any association established under any law providing for national banking associations, suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States, and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed," and a national bank cannot now institute and maintain a suit against residents of its own state and judicial district in United States courts. National Bank v. Fore (C. C. 1885) 25 Fed. 209.

5. Cases by or against banks in general.—A national bank may remove from a state to the federal court a suit brought against it. Such a suit is one arising under the laws of the United States. Cruikshank v. Fourth Nat. Bank (C. C. 1883) 16 Fed. 888, 21 Blatchf. 322; Id. (N. Y. 1883) 65 How. Prac. 280.

The Bank of the United States, established by Act Feb. 25, 1791, could not sue in the United States courts under the mere provision that it should have capacity to sue and be sued "in courts of record, or any other place whatsoever." Bank of U. S. v. Deveaux (1809) 5 Cranch, 85, 3 L. Ed. 38.

The charter of the Bank of the United States making it capable "to sue and to be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States," gave the circuit courts of the United States jurisdiction of suits by and against that bank. Osborn v. Bank of United States (1824) 9 Wheat. 738, 6 L. Ed. 204.

The circuit courts of the United States had jurisdiction of suits brought by the Bank of the United States against a bank incorporated by a state law, and of which the state is a stockholder, together with individuals who are citizens of a state of which some of the stockholders of the United States Bank are also citizens. Bank of United States v. Planters' Bank of Georgia (1824) 9 Wheat. 904, 6 L. Ed. 244.

The United States district court of Alabama had no jurisdiction of suits instituted by the Bank of the United States, as such jurisdiction was not given either by the act of congress establishing the court nor by the act incorporating the bank. Bank of United States v. Martin (1831) 5 Pet. 479, 8 L. Ed. 198.

Jurisdiction in suits against national banks is vested in any federal court within the district in which such bank is established, but any state, county, or municipal court in the territory in which the bank is established has jurisdiction in all suits against the bank where it would have jurisdiction in similar cases against other defendants.

Proceedings to enjoin the comptroller of the currency may be instituted only in a federal court. Bank of Bethel v. Pahquioque Bank (1871) 14 Wall. 383, 395, 20 L. Ed. 840.

The federal courts have jurisdiction of suits by or against national banks without regard to the citizenship of the parties. Wilson County v. Third Nat. Bank (1880) 103 U. S. 770, 776, 26 L. Ed. 488.

R. S. §§ 5136, 5198, post, §§ 9661, 9759, authorizing national banks to sue and be sued in any court as fully as natural persons, and providing that suits against them may be brought in the United States courts in the district, or in any state, county or municipal court in the county or city in which the association is located, having jurisdiction in similar cases, modify the Judiciary Act of 1789, § 9 (R. S. §§ 563, 711) this section, and section 1233, post, as to jurisdiction of actions against national banks for penalties, and give concurrent jurisdiction to the state courts. First Nat. Bank v. Morgan (1889) 10 Sup. Ct. 37, 38, 132 U. S. 141, 33 L. Ed. 282.

Act March 3, 1887 (24 Stat. 552), as corrected by Act Aug. 13, 1888 (25 Stat. 433), declared in section 4 that national banks shall, for the purposes of all actions and suits in equity by or against them, he deemed citizens of the states in which they are located, and that in such cases the federal courts "shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state." Held, that the provision quoted does not, when one of the parties is a national bank, take away the jurisdiction inhering in the federal courts by reason of diverse citizenship, but is merely intended to preserve such jurisdiction in cases in which both parties are citizens of the same state and a federal question is involved, or there are conflicting claims to land under grants of different states; thus placing national banks on precisely the same footing as individuals or other corporations, with respect to the right to sue or be sued in the federal courts. Petri v. Commercial Nat. Bank (1892) 12 Sup. Ct. 325, 326, 142 U. S. 644, 35 L. Ed. 1144.

Act Aug. 13, 1888, § 4, providing that national banks, for the purposes of all suits by or against them, shall be deemed citizens of the states in which they are located, deprives such banks of the right to sue or be sued in the federal courts, except where the suit is based on the diversity of citizenship of the parties. Ex parte Jones (1897) 17 Sup. Ct. 222, 223, 164 U. S. 691, 41 L. Ed. 601.

The judgment of the Circuit Court of Appeals is final, and not subject to review by the United States Supreme Court, in an action by a national bank against a corporation of another state, where no federal questions are presented upon which the suit depends, under Judiciary Act March 3, 1891, c. 517, 26 Stat. 826, making the judgment of the Circuit Court of Appeals final where the jurisdiction of the court below depended entirely on the diverse citizenship of the parties, and Act Aug. 13, 1888, c. 866, 25 Stat. 433, providing that in an action against national banking associations the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. Continental Nat. Bank of Memphis v. Buford (1903) 24 Sup. Ct. 54, 55, 191 U. S. 119, 48 L. Ed. 119.

Under Act 1887–88 a national bank, or a receiver thereof, cannot remove a suit against the bank, upon the ground that it is a federal corporation. Wichita Nat. Bank v. Smith (1896) 72 Fed. 568, 19 C. C. A. 42, 36 U. S. App. 530, writ of error dismissed Smith v. Wichita Nat. Bank (1897) 18 Sup. Ct. 946, 42 L. Ed. 1214.

The purpose of Congress in enacting Act Aug. 13, 1888, c. 866, § 4, was not to deprive the circuit courts of jurisdiction of all suits by or against national banks, but only to provide that jurisdiction should no longer be asserted solely on the ground of the federal origin of such banks. George v. Wallace (1904) 135 Fed. 286, 68 C. C. A. 40, affirmed (1906) 26 Sup. Ct. 495, 201 U. S. 230, 50 L. Ed. 738, and (1906) 26 Sup. Ct. 498, 201 U. S. 244, 50 L. Ed. 742.

Act Aug. 13, 1888, § 4, was intended to displace and to be a substitute for the proviso of Act July 12, 1882, § 4, post, § 9668. Id.

Act Feb. 25, 1791 (1 Stat. 191, c. 10), incorporating the first Bank of the United States, giving power "to sue and be sued in courts of record or any other place whatsoever," did not confer the right to sue in federal courts. Bank of U. S. v. Deveaux (C. C. 1808) Fed. Cas. No. 916, reversed in (1809) 5 Cranch, 61, 3 L. Ed. 38.

Suits may be maintained by as well as against national banks in the federal courts of the district of their location (Act June 2, 1864, § 57). Union Nat. Bank v. Chicago (C. C. 1871) Fed. Cas. No. 14,374.

A national bank incorporated under Act June 3, 1867, can be sued only in the courts designated in section 57. Cadle v. Tracy (C. C. 1873) Fed. Cas. No. 2,279.

The national banks have a right to sue in the federal courts by virtue of the act under which they were created, and such right is not controlled by the judiciary act. First Nat. Bank v. Douglas County (C. C. 1873) Fed. Cas. No. 4,809; Commercial Nat. Bank v. Simmons (C. C. 1876) Id. 3,062.

The jurisdiction of the federal courts over national banks under this section

was only concurrent with that of the state courts, and a suit brought against such bank in a state court is not subject to removal thereunder. Pettilon v. Noble (C. C. 1877) Fed. Cas. No. 11,044.

The circuit courts had jurisdiction of all actions brought by or against national banks without regard to citizenship or the amount involved. Mitchell v. Walker (C. C. 1879) Fed. Cas. No. 9,670.

Under Act March 3, 1875 (18 Stat. 470), and Act July 27, 1868 (15 Stat. 227), relating to the removal of causes, the fact that one of the parties to a suit is a national bank is no ground for removal from a state to the federal court. Wilder v. Union Nat. Bank (C. C. 1879) Fed. Cas. No. 17,651.

Under R. S. § 629, subd. 11, embodied herein, giving the federal circuit courts jurisdiction of all suits by or against any national bank established in the district for which the court is held, such jurisdiction is not dependent upon the amount in controversy. St. Louis Nat. Bank v. Brinkham (C. C. 1880) 1 Fed. 45.

A federal court has no jurisdiction of an action brought by a national bank established in a district other than that where such court is held when the amount involved does not exceed $500. Id.

Congress had power to pass R. S. § 629, conferring on federal circuit courts jurisdiction of all suits by or against national banks, irrespective of the subject-matter. Foss v. First Nat. Bank (C. C. 1880) 3 Fed. 185, decree affirmed Bissell v. Foss (1885) 5 Sup. Ct. 851, 114 U. S. 252, 29 L. Ed. 126.

R. S. § 629, subd. 11, embodied herein, does not oust the circuit court of jurisdiction in any case which under the banking itself or under the judiciary act or any of its amendments might have been brought independently thereof. St. Louis Nat. Bank v. Allen (C. C. 1881) 5 Fed. 551, 554.

A national bank as such is not authorized to sue in a federal court outside the district in which it is located; but under 13 Stat. 12, authorizing national banks to sue and be sued in any court as fully as natural persons, a bank located in one state is authorized to sue a citizen in another in a United States court held in the district where the defendant resides; since, for the purpose of determining the jurisdiction of a federal court, a national bank will be regarded as a citizen of the state where it is established or located. Id.

A corporation formed under "the national banking act" is either a citizen of the United States only, or a citizen of the state where it is organized and located. If the former, it is not a foreign corporation in another state; if the latter, it is a foreign corporation, but for that reason may sue in the national courts therein, irrespective of the state legislation. Orange Nat. Bank v. Traver (C. C. 1881) 7 Fed. 146.

Circuit courts had jurisdiction over suits by or against national banks without regard to question in controversy. Third Nat. Bank v. Harrison (C. C. 1881) 8 Fed. 721.

Act Aug. 13, 1888, § 4, provides that national banks shall, "for the purpose of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located," and that the circuit and district courts of the United States shall not have in such cases "jurisdiction other than such as they would have in cases between individual citizens of the same state." Held, that the federal courts have jurisdiction of an action between a national bank located in one state and a citizen of another state. First Nat. Bank v. Forest (C. C. 1889) 40 Fed. 705.

R. S. § 629, subd. 10, embodied herein, applied only to suits in the district where the national bank is situated. Brown v. Ellis (C. C. 1899) 95 Fed. 1, 2.

Under the federal judiciary act (Act March 3, 1887, c. 373, § 4, 24 Stat. 554), which makes national banks citizens of the state in which they are located for the purposes of the jurisdiction of a federal court, and section 1 of the same act, providing that such courts shall not have cognizance of any suit on a chose in action brought by an assignee, unless such suit might have been maintained in that court if no assignment had been made, the assignment of a chose in action by such a bank does not vest the assignee with the right to maintain an action thereon in a federal court against a citizen of the state in which the bank is located. Sullivan v. Ayer (C. C. 1909) 174 Fed. 199.

A national bank cannot be sued outside the district in which it is located. Service on the cashier when found within another district does not give jurisdiction. Main v. Second Nat. Bank (D. C. 1874) Fed. Cas. No. 8,976.

St. U. S. 1864, c. 106, § 57, providing that a national bank may be sued in any state, county, or municipal court in the county or city, in which the bank is located, is not merely permissive, giving to the courts named jurisdiction in common with other state courts, but it excludes the jurisdiction of all state courts except those of the county or city in which the bank is located. Crocker v. Marine Nat. Bank (1869) 101 Mass. 240, 3 Am. Rep. 336, Thomp. Nat. Bank Cas. 575.

The provision of the national currency act, so called (13 Stat. 99, § 57), which declared "that suits, actions or proceedings against any associations under the act may be had" in the federal courts held in the districts or in

any state, county, or municipal court in the city or county where the association is located, is permissive, not mandatory. Cooke v. State Nat. Bank (1873) 52 N. Y. 96, 11 Am. Rep. 667.

National banks are "citizens" of the state in which they are organized and located; and when sued by national banks of other states have a right to demand the removal of the cause from the state court to a federal court. Chatham Nat. Bank v. Merchants' Nat. Bank (N. Y. 1874) 4 Thomp. & C. 196, 1 Hun, 702.

It is not enough that a corporation is a creation of the law of the United States to deprive the state court of jurisdiction on removal, but the matter in dispute in the action must arise under the laws of the United States. Ulster County Sav. Inst. v. Fourth Nat. Bank (N. Y. 1880) 59 How. Prac. 482.

A national bank had no authority, by virtue of its charter as a federal corporation, to remove a cause from a state to a federal court, under Judicial Act 1789, § 12, and especially, where there are other codefendants interested in the cause, not entitled to remove it, since a privileged defendant under that section could not extend his privilege to codefendants not so entitled. Ludlow's Heirs v. Kidd's Heirs (1827) 3 Ohio (3 Ham.) 48; State v. Common Pleas of Hamilton County, Id. 49.

The bank of the United States could not remove a cause from a state court, under the judiciary act of 1789; that act giving the privilege only to parties particularly enumerated. Ludlow's Heirs v. Kidd's Heirs (1827) 3 Ohio (3 Ham.) 48.

Banking Act 1864, § 57, authorizing national banks to be sued only in the state courts in the counties or cities where located, conferred a privilege on such banks which they could waive. Lee v. Citizens' Bank (1872) 5 Ohio Dec. 21.

Under 25 Stat. 433, providing that all national banking associations shall, for the purposes of actions against them and suits in equity, be deemed citizens of the states in which they are respectively located, a national bank is a citizen of a state for the purposes of a suit to enjoin it from prosecuting an action in another state. Hazen v. Lyndonville Nat. Bank (1898) 41 A. 1046, 70 Vt. 543, 67 Am. St. Rep. 680.

Defendant is not entitled to remove a cause to the federal court because plaintiff is a national bank. National Bank of Commerce v. Galland (1896) 14 Wash. 502, 45 Pac. 35.

6. Bank as party to suit.—Jurisdiction can be maintained only when the bank is a real party in interest in the litigation. Foss v. First Nat. Bank (C. C. 1880) 3 Fed. 185, decree affirmed Bissell v. Foss (1885) 5 Sup. Ct. 851, 114 U. S. 252, 29 L. Ed. 126.

Where several claimants of a fund in the custody of a national bank bring a bill of equity against the bank and another claimant, and the bank exhibits a cross bill, praying that the parties interplead and adjudicate between them the title to the fund, disclaiming all title itself, the bank is such a party to the suit as to confer jurisdiction on the federal courts. Id.

7. Defendants residing in different districts.—Under R. S. § 629, jurisdiction of suits by or against national banks was vested in any circuit, district, or territorial court of the United States held within the district in which such bank is located; and where a state comprises two districts, and the suit is not of a local nature, a circuit court in a district in which the bank is located had jurisdiction of a suit by the bank against two or more defendants, though one or more of them resides in the other district, if one defendant resides in the district where the suit was brought. Third Nat. Bank v. Harrison (C. C. 1881) 8 Fed. 721.

8. Attachment.—A national bank located out of this state is a "foreign corporation," within the meaning of section 227, Code Proc. N. Y., subjecting foreign corporations to proceedings by way of attachment. Cooke v. State Nat. Bank (N. Y. 1867) 50 Barb. 339, 3 Abb. Prac. (N. S.) 339.

National banks, organized and doing business under the act of congress, are to be regarded as foreign corporations within the provisions of the Code of Procedure, authorizing actions to be brought and attachments to be issued against corporations "created by or under the laws of any other state, government, or country." These terms are evidently intended to include all corporations formed under the laws of any other government than the one enacting the law, and plainly include the government of the United States. So held where the bank was organized and located within the state. Bowen v. First Nat. Bank (N. Y. 1867) 34 How. Prac. 408.

9. Actions on notes.—The Bank of the United States might sue in the circuit courts as indorsee or bearer of a note, though the original payee or indorser was a citizen of the same state with the defendant, and could not have sued in those courts. Bank of United States v. Planters' Bank of Georgia (1824) 9 Wheat. 904, 6 L. Ed. 244.

Federal courts have no jurisdiction of an action by a national bank on a note, where the record does not show diverse citizenship. Danahy v. National Bank of Denison (1894) 64 Fed. 148, 12 C. C. A. 75.

A federal question is not raised in a suit on a note by reason of the fact that the complainant is a national bank. State Nat. Bank of Denison v. Eureka Springs Water Co. (C. C. 1909) 174 Fed. 827.

Under R. S. § 563, and Act Aug. 13,

1888, § 4, making national banking associations, for the purpose of all actions, citizens of the state wherein they are located, "and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state," district courts had no jurisdiction of an action on a promissory note brought by a national bank in a district other than that in which the bank is located. Farmers' Nat. Bank v. McElhinney (D. C. 1890) 42 Fed. 801.

10. Cross-bill by bank in suit to have shares of depositors determined.—Where part of several joint depositors of a fund in a national bank had commenced a suit in equity, against the bank and the other depositors, to have the share of each depositor determined, and the bank filed a cross-bill, setting out the facts, and seeking to have all the depositors interplead and their respective claims adjusted, the bill will be treated as an original suit by the bank, so as to give the federal circuit court jurisdiction, under R. S. § 629, giving it jurisdiction of all suits by or against national banks. Foss v. First Nat. Bank (C. C. 1880) 3 Fed. 185.

11. Suits for usury.—See, also, § 9759, and notes thereunder.

The fact that R. S. § 5197, post, § 9758, authorizes a national bank to receive only the interest allowed by the state laws does not make the construction of the state usury law, in the case of a loan by a national bank, a federal question. Union Nat. Bank v. Louisville, N. A. & C. Ry. Co. (1896) 16 Sup. Ct. 1039, 1040, 163 U. S. 325, 41 L. Ed. 177.

The circuit courts did not have exclusive jurisdiction of actions against national banks under R. S. § 5198, post, § 9759. New Orleans Nat. Banking Ass'n v. Adams (C. C. 1876) Fed. Cas. No. 10,184.

Court held to have jurisdiction of a suit by a trustee in bankruptcy against a national bank to recover usury. Reid v. American-German Nat. Bank (C. C. 1907) 155 Fed. 233.

Under 13 Stat. 117, § 57, providing that all actions arising under the national banking act may be brought in any state, county, or municipal court in the place in which the bank is located, having jurisdiction in similar cases, the courts of one state have no jurisdiction of an action by a corporation of another state against a national bank located in the latter state to recover the penalty fixed by congress, when such a bank receives more than the lawful rate of interest. Missouri River Tel. Co. v. First Nat. Bank (1874) 74 Ill. 217, Thomp. Nat. Bank Cas. 401.

Act March 3, 1887, § 4, relating to the removal of causes, as corrected by Act Aug. 13, 1888, providing that all national banks shall be deemed citizens of the states in which they are located for the purpose of all actions by or against them, does not subject national banks to the laws of the states in which they are located as to remedies of the debtor for exaction by the creditor of usurious interest. Norfolk Nat. Bank v. Schwenk (1895) 46 Neb. 381, 64 N. W. 1073.

12. Restraining collection of tax.—Under Act March 3, 1875, a bank could sue in its own name in a circuit court to restrain collection of a tax, without resorting to one of its shareholders for that purpose. Hawes v. Contra Costa Water Co. (1881) 104 U. S. 450, 459, 26 L. Ed. 827.

While by Act July 12, 1882, § 4, the right of a national bank to sue in a federal court by virtue of its organization as such was abrogated, and that right placed on the same footing as other banks; yet a United States circuit court has jurisdiction of an action by a national bank to enjoin the collection of an excessive tax levied by a county in which it is located; since such suit involves the construction and application of R. S. § 5219, post, § 9784, giving a state authority to tax national banks, but providing that such taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state; which is a matter involving federal authority. Union Nat. Bank v. Miller (C. C. 1883) 15 Fed. 703.

National banks may, like other banks and citizens, sue in the federal courts whenever the subject-matter of litigation involves some element of jurisdiction. Thus a suit by a national bank against a county treasurer, to enjoin the collection of an excessive tax upon its personal property, alleged to be made in violation of the act of congress permitting the state to tax national banks, presents a case arising under a law of congress, and is maintainable in a federal court. Id.

There is no doubt of the jurisdiction and remedy by injunction in the United States courts to prevent the collection of illegal taxes upon national banks. Covington City Nat. Bank v. City of Covington (C. C. 1884) 21 Fed. 484.

13. Bill for appointment of receiver.—A district court of the United States has jurisdiction of a bill in equity praying for the appointment of a receiver of an insolvent corporation, filed by a national bank established within the district within which such court is held. Fifth Nat. Bank v. Pittsburgh & C. S. R. Co. (D. C. 1880) 1 Fed. 190, 191.

14. Suits on liability of officers.—In absence of diverse citizenship, an action by a stockholder of a national bank against the bank and its directors to recover moneys lost by their misconduct was not justiciable by a federal District Court under Act Aug. 13, 1888, § 4. Herrmann v. Edwards (1915) 35

Sup. Ct. 839, 238 U. S. 107, 59 L. Ed. 1224.

The omission in re-enactment by Judicial Code, § 24, par. 16, of provisions of Act Aug. 13, 1888, § 4, defining federal jurisdiction of suits by and against national banks, does not extend jurisdiction of federal courts to suits based on common-law liability of officers of such bank, where there is no diversity of citizenship. Id.

15. Suit by stockholders to restrain illegal application of funds.—The circuit court had jurisdiction of a bill filed by a stockholder of a national bank to enjoin its officers from an illegal application of funds to his prejudice. Shoemaker v. National Mechanics' Bank (C. C. 1869) Fed. Cas. No. 12,801.

16. Suit to compel officers to permit examination of records and documents.—Any legal right which a stockholder of a national bank may have to obtain an inspection of its books may be enforced in the state courts by mandamus, in view of the provision of Act Aug. 13, 1888, c. 866, 25 Stat. 433, that for actions against national banks at law or in equity they shall be deemed citizens of the state in which they are located, and that in such cases the federal Circuit and District Courts shall have jurisdiction only as in cases between individual citizens of the same state. Guthrie v. Harkness (1905) 26 Sup. Ct. 4, 5, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433, affirming judgment Harkness v. Guthrie (1904) 75 Pac. 624, 27 Utah, 248, 107 Am. St. Rep. 664, 1 Ann. Cas. 129.

State courts have jurisdiction to compel officers of a national bank to permit a stockholder's examination of its records and documents for a proper purpose. Woodworth v. Old Second Nat. Bank (1908) 117 N. W. 893, 15 Detroit Leg. N. 773, 154 Mich. 459.

R. S. § 5210, post, § 9773, requires a national bank to keep a list of shareholders, which shall be subject to the inspection of all shareholders during business hours. Stock Corporation Law (Laws N. Y. 1892, c. 688) § 29, requires stock corporations to keep a stockbook, which shall be open to the inspection of stockholders, who may make extracts therefrom. Banking Act Aug. 13, 1888, c. 866, § 4, 25 Stat. 436, provides that national banking associations shall be deemed citizens of the state within which they are located. Held, that a shareholder of a national bank located in the city of New York was entitled to examine its list of shareholders, and to make extracts therefrom for the purpose of negotiating for the purchase of stock. People v. Consolidated Nat. Bank (1905) 94 N. Y. S. 173, 105 App. Div. 409.

17. Creditors' suit.—See, also, § 9807, post, and notes thereunder.

The jurisdiction of the federal circuit court on a creditors' bill against a national bank, for discovery and other relief upon allegations of fraud by the officers, was not superseded by the appointment of a receiver by the comptroller. McElhenny v. First Nat. Bank (C. C. 1879) Fed. Cas. No. 8,779.

In such case, the costs of a master appointed to investigate the affairs of the bank would be ordered to be paid by the receiver. Id.

18. Cases for winding up affairs.—See, also, note, post, as to "Suits by or against receivers."

An action for rent, brought against the agent for the shareholders of an insolvent national bank to whom the comptroller of the currency has released the estate of the bank, is one to wind up the affairs of the bank, and, as such, is within the jurisdiction of the federal Circuit Court. International Trust Co. v. Weeks (1906) 27 Sup. Ct. 69, 203 U. S. 364, 51 L. Ed. 224, affirming judgment (1905) 139 Fed. 5, 71 C. C. A. 417.

Under the provision in the judiciary act of 1887–88 that "the provisions of this section" shall not affect the jurisdiction of the circuit courts in cases for "winding up the affairs" of any national bank, the circuit courts have at least concurrent jurisdiction with the state courts in cases of that kind, without regard to the citizenship of the parties. Lake Nat. Bank v. Wolfeborough Sav. Bank (1897) 78 Fed. 517, 24 C. C. A. 195.

A suit brought by the receiver of a national bank, by direction of the comptroller of the currency, to enforce a liability due to the bank, and to secure a sale under the order of the court of pledged securities, constituting a considerable part of its assets, held one for winding up the affairs of the bank, within the meaning of the proviso to section 4 of the federal judiciary act, Aug. 13, 1888, c. 866, 25 Stat. 436, and within the jurisdiction of a circuit court without regard to the citizenship of the parties. McCartney v. Earle (1902) 115 Fed. 462, 53 C. C. A. 392, affirming decree Earle v. McCartney (C. C. 1901) 112 Fed. 372.

An action against a stockholder's agent for winding up the affairs of a national bank is one of which a federal court had jurisdiction, irrespective of citizenship, under section 4, Judiciary Act Aug. 13, 1888, c. 866, 25 Stat. 436. Weeks v. International Trust Co. (1903) 125 Fed. 370, 60 C. C. A. 236, reversing judgment International Trust Co. v. Weeks (C. C. 1902) 116 Fed. 898, writ of error dismissed (1904) 24 Sup. Ct. 853, 193 U. S. 667, 48 L. Ed. 839.

The question whether an insolvent national bank should pay a savings bank in full (Laws N. Y. 1882, c. 409, § 282) or pro rata (R. S. §§ 5236, 5242, post, §§ 9823, 9838), is one to be determined by the United States courts. Auburn

Sav. Bank v. Hayes (C. C. 1894) 61 Fed. 911.

A suit against an insolvent national bank and others for conspiracy to defraud, and to recover from the bank moneys alleged to have been obtained from the bank by the fraud, is removable as a case "for winding up the affairs" of a national bank under the judiciary acts, and a receiver of the bank who becomes a party defendant is entitled to remove it. Speckart v. German Nat. Bank (C. C. 1898) 85 Fed. 12.

Act July 12, 1882, c. 290, § 4, 22 Stat. 163, relating to national banks, did not deprive a circuit court of the United States of the jurisdiction conferred by prior statutes over suits brought by receivers of such banks, without regard to the citizenship of the parties; but such jurisdiction was expressly recognized and preserved, both at law and in equity, where the suit was one brought by direction of the comptroller or for winding up the affairs of the bank, by the proviso to section 4 of the judiciary act of Aug. 13, 1888, c. 866, 25 Stat. 436. Earle v. McCartney (C. C. 1901) 109 Fed. 13, decree affirmed McCartney v. Earle (1902) 115 Fed. 462, 53 C. C. A. 392.

Where suit against national bank and its receiver was one to wind up the affairs of the bank, held, that a federal court had jurisdiction. Providence Bldg. Co. v. Atlantic Nat. Bank (D. C. 1916) 228 Fed. 814.

Under Act Aug. 13, 1888, § 4, and this section, a state court cannot entertain a stockholder's suit to wind up the affairs of a national bank, where no other relief is prayed. Birdsey v. Commercial Nat. Bank of Macon (1915) 85 S. E. 881, 143 Ga. 627.

Where directors of an insolvent national bank undertake to liquidate its affairs and consolidate it with another bank, a stockholder's suit attacking such consolidation, but praying no relief against the directors of the absorbing bank, though praying to wind up the affairs of the liquidating bank, must be brought in a federal court. Id.

19. Suits by or against receivers.—See note, ante, as to "Cases for winding up affairs."

See, also, notes under subdivision 1, ante.

A receiver of a national bank has no right, by virtue of his being receiver, to remove from a state to a federal court an action against him for refusing to surrender property alleged to belong to plaintiff. Bird v. Cockrem (C. C. 1874) Fed. Cas. No. 1,429.

Plaintiff was appointed receiver of an insolvent national bank in Vermont, and obtained an order from the circuit court for the district of Vermont for the sale of certain bonds pledged to the bank as security for a debt due the bank by defendant railroad company in Canada, which brought suit in the Canadian court to recover the bonds, whereupon plaintiff filed a bill in the circuit court for the district of Vermont for an injunction against the further prosecution of the suit in Canada. Held, that the circuit court had jurisdiction, and that the injunction should be granted. Hendee v. Connecticut & P. R. R. Co. (C. C. 1886) 26 Fed. 677.

Act March 3, 1887, § 4, declares that national banks are, for the purpose of actions, to be deemed citizens of the states in which they are respectively located, but "the provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." Held, that a receiver of a national bank may still sue on a claim due the bank in the circuit court, without reference to the citizenship of the parties or to the amount involved. Armstrong v. Trautman (C. C. 1888) 36 Fed. 275.

That a bank whose receiver was sued by a depositor was a national bank did not affect the jurisdiction of the federal court under act March 3, 1887, § 4. Tehan v. First Nat. Bank (C. C. 1889) 39 Fed. 577, 578.

A suit in a federal court against an executor, to recover a legacy, wherein a receiver of a national bank which held assets of the estate is party defendant, will be dismissed, on demurrer, as to the executor, for want of jurisdiction, when all the parties are citizens of the same state. Wardens, etc., St. Luke's Church v. Sowles (C. C. 1892) 51 Fed. 609.

A suit, brought against the receiver of an insolvent national bank, as such, to establish a claim of the plaintiff as a depositor in the bank, is a case arising under the laws of the United States, of which the United States circuit court has jurisdiction, irrespective of the citizenship of the parties. Bartley v. Hayden (C. C. 1896) 74 Fed. 913.

A receiver of a national bank, appointed by the comptroller of the currency when sued in a state court on a claim of less than $2,000, has no power to remove the case to a federal court. Hallam v. Tillinghast (C. C. 1896) 75 Fed. 849.

The federal courts have no jurisdiction of a suit in equity against a national bank receiver, appointed by the comptroller, unless the amount in controversy exceeds $2,000. Smithson v. Hubbell (C. C. 1897) 81 Fed. 593.

A receiver of an insolvent national bank appointed by the comptroller of the currency, against whom an action was brought in a state court to recover less than $2,000, had no right to remove the same to a federal court. Follett v. Tillinghast (C. C. 1897) 82 Fed. 241.

To confer on a circuit court of the United States of a district other than that in which a national bank is located jurisdiction of a suit in equity brought by the receiver of such bank under the

judiciary act of 1888, it is necessary that such suit should involve the required amount or value of $2,000, exclusive of interest and costs. Brown v. Ellis (C. C. 1899) 95 Fed. 1.

The receiver of a national bank may be sued in a federal court in relation to a contract made by him on behalf of the estate in the course of its administration. Gilbert v. McNulta (C. C. 1899) 96 Fed. 83.

R. S. § 563, gives the district courts jurisdiction of "all suits at common law, brought by the United States or any officer thereof authorized by law to sue." Act Aug. 13, 1888 (25 Stat. 433), confers the same jurisdiction on the district courts, and declares (section 4) that for jurisdictional purposes national banks shall be deemed citizens of the state in which they are located, but that this provision shall not affect the jurisdiction of the federal courts "in cases commenced by the United States, or by the direction of any officer thereof, or cases for winding up the affairs of any such bank." Held, that the district court has jurisdiction of an action by the receiver of an insolvent national bank to collect assessments on stock. Such jurisdiction is not taken away by Act July 12, 1882, § 4, and Act Aug. 13, 1888, § 4, which take away the special jurisdiction of the district courts over suits in which a national bank is a party. Stephens v. Bernays (D. C. 1890) 41 Fed. 401, affirmed (C. C. 1890) 44 Fed. 642.

A receiver of a national bank being entitled to remove actions against him to the federal courts as an action arising under the laws of the United States, as provided by R. S. § 629, a defendant, when sued in a state court by such receiver, is also entitled to exercise the same right. Johnson v. Rankin (Tex. Civ. App. 1906) 95 S. W. 665.

(17) Of suits by aliens for torts.

Seventeenth. Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States.

R. S. § 563, par. 16. Act March 3, 1911, c. 231, § 24, par. 17, 36 Stat. 1093.

Notes of Decisions

Injuries and right of action.—This section provides a right of action and a forum to citizens of Mexico who have been injured by the action of the irrigation company. (1907) 26 Op. Atty. Gen. 250.

It is the duty of the United States to vindicate the injury done to Mexico regarding the boundary line, and to that end the United States may proceed by bill in equity to obtain mandatory relief in some appropriate form to compel the restoration of the status quo ante. Id.

An action by an alien and a subject and citizen of a foreign country for personal injuries in the sum of $10,000 is within the jurisdiction of the courts of the United States. Sagara v. Chicago, R. I. & P. Ry. Co. (C. C. 1911) 189 Fed. 220.

Military governor held exonerated from liability as for tort. O'Reilly De Camara v. Brooke (1908) 28 Sup. Ct. 439, 209 U. S. 45, 52 L. Ed. 676.

The district courts have jurisdiction of a tort committed by the military governor of Cuba in his official capacity against an individual in the course of the civil administration of the affairs of the country. O'Reilly De Camara v. Brooke (D. C. 1905) 135 Fed. 384, 385.

To give jurisdiction to a federal court it is not enough that an alien is a party; it must also appear that the other party is a citizen. Mossman v. Higginson (1800) 4 Dall. 12, 14, 1 L. Ed. 720.

Where the jurisdiction of the federal court depends on alienage or citizenship of the parties it must be set forth on the record. Turner v. Enrille (1799) 4 Dall. 7, 8, 1 L. Ed. 717.

(18) Of suits against consuls and vice consuls.

Eighteenth. Of all suits against consuls and vice consuls.

R. S. § 563, par. 17. Act March 3, 1911, c. 231, § 24, par. 18, 36 Stat. 1093.

Notes of Decisions

Scope and effect of statute.—The federal court has jurisdiction of a suit against a foreign consul. Davis v. Packard (1833) 7 Pet. 276, 281, 8 L. Ed. 684; Bors v. Preston (1884) 4 Sup. Ct. 407, 411, 111 U. S. 252, 28 L. Ed. 419; St. Luke's Hospital v. Barclay (C. C. 1855) Fed. Cas. No. 12,241; Graham v. Stucken (C. C. 1857) Id. 5,677; Lorway v. Lousada (D. C. 1866) Fed. Cas. No. 8,517.

The conferring of jurisdiction on the district courts of all suits against consuls or vice consuls, is not unconstitutional. Texas v. Lewis (C. C. 1882) 14 Fed. 65, 67; Pooley v. Luco (D. C. 1896) 76 Fed. 146.

In absence of the minister from Guatemala, the consul general, a citizen of the United States, exercised the minister's functions by consent of the secretary of state. Official letters were addressed to him as consul general, and two were addressed to him as in charge of the legation. His own letters he signed as consul general. Held, that the district court had jurisdiction over a suit against him, as he is not a public

minister, within the meaning of R. S. § 687, post, § 1210. In re Baiz (1890) 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222, denying writ of prohibition Hollander v. Baiz (D. C. 1890) 41 Fed. 732.

Under the Judicial Act of 1789, the circuit courts had concurrent jurisdiction with the Supreme Court in cases affecting foreign consuls. U. S. v. Ravara (C. C. 1793) Fed. Cas. No. 16,122, 1 L. Ed. 388.

Act Sept. 24, 1789, § 9, giving the district courts jurisdiction in civil cases against consuls and vice consuls, was not in conflict with Const. art. 3, giving the supreme court original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls. Gittings v. Crawford (C. C. 1838) Fed. Cas. No. 5,465.

Prior to the act of 1875 this section and R. S. § 711, post, § 1233, and the judiciary act of 1789, giving, up to the passage of the act of 1875, exclusive jurisdiction to federal courts of "all suits against consuls or vice consuls," embraced all suits to which the consul or vice consul was a necessary defendant, and the same construction must still prevail. Held, therefore, that a motion to dissolve an attachment against a consul's necessary co-defendant, for want of jurisdiction, should be denied. Froment v. Duclos (D. C. 1887) 30 Fed. 385.

Act Feb. 18, 1875, amending R. S. § 711, post, § 1233, by repealing the previous express exclusion of the state courts as to jurisdiction over suits against consuls, did not diminish the jurisdiction of the federal courts over the same actions. Id.

The constitutional provision giving to the supreme court "original jurisdiction" in all cases affecting ambassadors, other public ministers, and consuls (article 3, § 2) does not make that jurisdiction exclusive. Pooley v. Luco (D. C. 1896) 76 Fed. 146.

Joinder of consul as party as jurisdictional ground.—The fact that a consul of a foreign nation is a party to a suit does not give the federal court of the United States jurisdiction thereof. Pooley v. Luco (C. C. 1896) 72 Fed. 561.

A federal court has no jurisdiction merely because one party is a United States consul at a foreign port. Milward v. McSaul (D. C. 1846) Fed. Cas. No. 9,624.

Codefendants.—Where jurisdiction depends upon the fact that one of the defendants is a foreign consul, and he is held not liable, judgment cannot be rendered against the others. Bixby v. Janssen (C. C. 1869) Fed. Cas. No. 1,452.

The consul of a foreign nation can be sued alone in the federal district court on a contract executed by him jointly with another person. Valerino v. Thompson (D. C. 1856) Fed. Cas. No. 16,813a.

Estoppel to claim or waiver of privilege.—Where the pleadings in an action against a foreign consul do not show that he is such, a judgment by default against him is valid; his failure to appear and plead to the jurisdiction of the court being a waiver of the want of jurisdiction. Hall v. Young (1825) 20 Mass. (3 Pick.) 80, 15 Am. Dec. 180.

Where, after suit brought in a state court, defendant accepted the office of consul of a foreign power, and allowed the action to proceed to trial upon the merits, without objecting that he was privileged to be sued in the federal courts alone, he was estopped to set up his privilege in proceedings in error. Koppel v. Heinrichs (N. Y. 1847) 1 Barb. 449.

Where a foreign consul is sued in a state court, he waives his privilege to be sued in the federal courts alone, by pleading to the merits; and, after verdict against him, he cannot avail himself of his privilege by affidavit on special motion. Flynn v. Stoughton (N. Y. 1848) 5 Barb. 115.

Where one who is a foreign consul pleads to the merits in the court below, and assigns his consulship as error in fact, neither the fact that he did not claim his privilege in the trial court, nor the fact that he contracted the debt jointly with one not having such privilege, is a waiver of the privilege to be exempt from suit in the state courts. Thompson v. Valarino (N. Y. 1850) 3 Code Rep. 143.

A foreign consul does not waive his privilege to be sued in the United States courts by appearing in the state court and pleading to the merits. Valarino v. Thompson (1853) 7 N. Y. (3 Seld.) 576.

Criminal prosecutions.—See Const. art. 3, § 2, cl. 1.

(19) Of suits and proceedings in bankruptcy.

Nineteenth. Of all matters and proceedings in bankruptcy.

R. S. § 563, par. 18. Act July 1, 1898, c 541, §§ 2, 23, 30 Stat. 545, 552. Act March 3, 1911, c. 231, § 24, par. 19, 36 Stat. 1093.

Notes of Decisions

See, also, post, §§ 9586, 9607, and notes thereunder.

Nature and extent of jurisdiction.—District courts have original jurisdiction in their respective districts of all matters and proceedings in bankruptcy, and may hear and adjudicate the same according to the provisions of the Bankruptcy Act. Coit v. Robinson (1873) 19 Wall. 274, 278, 22 L. Ed. 152; Price v. Price (D. C. 1880) 48

Fed. 823; In re Tully (D. C. 1907) 156 Fed. 634, 635.

In a case arising under the bankrupt law of 1867, it was held that the circuit court had power to dismiss an appeal because it had not been entered in time. In re Woollen (1881) 104 U. S. 300, 26 L. Ed. 768.

The federal courts have jurisdiction in all cases in which suit is brought by or against the assignees, and he cannot be compelled to go into the state courts to assert his right as such. McLean v. Lafayette Bank (C. C. 1843) Fed. Cas. No. 8,885.

The federal court will exercise jurisdiction over distinct interests and parties, on allegations of fraud, in order to adjust liens and make distribution of assets. McLean v. Lafayette Bank (C. C. 1846) Fed. Cas. No. 8,888.

A bill will lie in the federal court to enjoin enforcement of a fraudulent judgment obtained by an assignee in bankruptcy against an alleged debtor of the bankrupt, though all parties are citizens of the same state. Noyes v. Willard (C. C. 1871) Fed. Cas. No. 10,374.

The federal court has jurisdiction of a common-law or equity suit by an assignee in bankruptcy appointed in another district, in a case of diverse citizenship, where the amount in dispute is sufficient. Payson v. Dietz (C. C. 1873) Fed. Cas. No. 10,861.

The federal court will entertain a bill by an assignee against several mortgagors and other lienholders to ascertain the amounts due, and sell all the property free from incumbrances. Sutherland v. Lake Superior Ship Canal, Railroad & Iron Co. (C. C. 1874) Fed. Cas. No. 13,643.

Where the bankrupts collect from their undertenants rent accruing before the bankruptcy, and secured by a lien upon crops, the district court has jurisdiction of a petition filed by the landlord to recover such fund. Wylie v. Smith (C. C. 1875) Fed. Cas. No. 18,-110.

The jurisdiction acquired by a federal court sitting in equity, by virtue of the character of the complainant as assignee in bankruptcy, is not lost merely because the complainant has parted with all his title pendente lite; and the court also has jurisdiction of a cross bill filed by a new defendant, irrespective of his residence. Barnard v. Hartford, P. & F. R. Co. (C. C. 1878) Fed. Cas. No. 1,003.

The jurisdiction of bankruptcy courts includes everything necessary to settle, administer, and distribute the bankrupt's estate, but it does not include the protection of property set over to the bankrupt as exempt from adverse liens. Jeffries v. Bartlett (C. C. 1884) 20 Fed. 496, 498.

The fact that the state is a creditor does not affect the jurisdiction of the bankruptcy court. In re Greenville & C. R. Co. (D. C. 1872) Fed. Cas. No. 5,787.

Under Act 1867, the federal district courts had jurisdiction both in law and equity. In re Fendley (D. C. 1874) Fed. Cas. No. 4,728.

The district court has full power, as a court of equity, to settle all controversies between the bankrupt and his creditors. Fowler v. Dillon (D. C. 1875) Fed. Cas. No. 5,000.

The district court has jurisdiction of a controversy as to the ownership of a fund in the hands or under the control of the assignee, without regard to the residence of the parties in interest. In re Sabin (D. C. 1878) Fed. Cas. No. 12,195.

Where the jurisdiction depends upon the fact that one of the plaintiffs is assignee of a bankrupt whose estate is interested in the controversy, jurisdiction ceases if the interest of the estate ceases, and the cause will be dismissed as to the assignee. Moore v. O'Fallon (D. C. 1882) 10 Fed. 593.

A district court of the United States has jurisdiction of an action brought by a trustee in bankruptcy in the name of the United States on the bond of a former trustee to recover the value of property for which he has failed to account. U. S. v. Union Surety & Guaranty Co. (D. C. 1902) 118 Fed. 482, 486.

Where a court of admiralty in a suit in rem acquired jurisdiction of the libeled vessel and the parties before the institution of bankruptcy proceedings against the owner in another district, and has sold the vessel and holds the proceeds, it can exercise its jurisdiction only so far as to determine the rights of the parties in admiralty, and any rights claimed under the bankruptcy law must be submitted to and determined by the court of bankruptcy having jurisdiction. The William B. Kibbee (D. C. 1908) 164 Fed. 653.

Adverse claimants in bankruptcy proceedings may, in the proper case, sue or be sued, in the Court of the United States, when the bankrupt might have sued there on the same cause of action, viz., where there is a diversity of citizenship and the requisite amount is involved. In re MacDougall (D. C. 1909) 175 Fed. 400.

A federal question within the jurisdiction of the United States court is raised where, in ejectment, it appears that the land was set apart to plaintiff as an exemption in bankruptcy proceedings, and that notwithstanding the land was sold by the United States marshal after the adjudication, under an execution levied before; the purchaser being defendant's grantor. Lord v. Cannon (1885) 75 Ga. 300.

Diversity of citizenship.—The federal court has no jurisdiction of a bill by the assignee of a bankrupt firm against a member thereof and his assignee, where both are citizens of the same state, to

require such assignee to pay complainant a surplus after individual creditors are satisfied. Act 1867, § 2. Stevens v. Appleton (C. C. 1874) Fed. Cas. No. 13,394.

Suits by an assignee in bankruptcy are excepted from the general rule that the federal courts have no jurisdiction of controversies between citizens of the same states, and this exception includes a suit by such assignee against a person not a party to the proceedings in bankruptcy. Atkinson v. Purdy (D. C. 1844) Fed. Cas. No. 616.

Derivation of title from decree in bankruptcy.—The fact that a complainant in a suit to quiet title founds his claim on a title derived from a decree in bankruptcy will not give the federal court jurisdiction to entertain the suit when an action of ejectment for the land in controversy is pending in the state court, and no relief could be granted without enjoining such action. McAlpine v. Tourtelotte (C. C. 1885) 24 Fed. 69.

Controversies between assignee and third persons.—The district courts have original jurisdiction of all cases and controversies between third persons and an assignee in bankruptcy as such. Bachman v. Packard (C. C. 1872) Fed. Cas. No. 709; Hallack v. Tritch (C. C. 1878) Fed. Cas. No. 5,956.

Controversies between bankrupt and assignee.—The district court has exclusive jurisdiction of all controversies between the assignee and the bankrupt, depending on his relation as such. Carr v. Gale (C. C. 1847) Fed. Cas. No. 2,434.

Collection of assets and recovery of preferences.—The district court of the United States, in a district other than that in which the bankruptcy proceedings are pending, has no jurisdiction of a suit by an assignee to recover assets of the bankrupt or moneys paid in violation of the bankruptcy acts. Shearman v. Bingham (D. C. 1871) Fed. Cas. No. 12,733; Jobbins v. Montague (D. C. 1872) Fed. Cas. No. 7,330; Lamb v. Damron (D. C. 1873) Fed. Cas. No. 8,014. CONTRA, Sherman v. Bingham (C. C. 1872) Fed. Cas. No. 12,762; Moore v. Jones (D. C. 1848) Fed. Cas. No. 9,768; Goodall v. Tuttle (D. C. 1872) Fed. Cas. No. 5,533.

Under R. S. § 630, the federal court had jurisdiction of a bill by an assignee to recover money or property of the bankrupt preferentially or fraudulently conveyed. Giveen v. Smith (C. C. 1871) Fed. Cas. No. 5,467; Flanders v. Abbey (C. C. 1874) Fed. Cas. No. 4,851; Little v. Alexander, Id. 8,393; Main v. Glen (D. C. 1875) Fed. Cas. No. 8,973.

Suits may be brought by an assignee in bankruptcy in the federal courts to collect assets due the estate, without reference to amount or value in controversy. Dutcher v. Wright (1876) 94 U. S. 553, 558, 24 L. Ed. 130; Payson v. Coffin (C. C. 1877) Fed. Cas. No. 10,858.

United States district courts have no jurisdiction over independent suits brought by a trustee in bankruptcy to assert a title to money or property as assets of the bankrupt, against strangers to the bankruptcy proceedings, unless by consent of the proposed defendant; such jurisdiction being denied to them by section 23 of the bankruptcy act of 1898. Bardes v. First Nat. Bank (1900) 20 Sup. Ct. 1000, 1003, 178 U. S. 524, 44 L. Ed. 1175.

In summary proceedings in bankruptcy by a trustee against third persons to recover property claimed adversely, the bankruptcy court has jurisdiction to determine whether the claim asserted is merely colorable, but may not, against claimants' objection, pass on the truthfulness of the witnesses and the weight of the testimony as affecting the merits of the claim. In re Yorkville Coal Co. (1914) 211 Fed. 619, 128 C. C. A. 570.

The court had jurisdiction under R. S. § 630, of an action against a resident of the district, brought by an assignee appointed in another state to recover a preference or to collect assets. Brooke v. McCraken (C. C. 1874) Fed. Cas. No. 1,932; Hunt v. Jackson (C. C. 1866) Fed. Cas. No. 6,893; Gindrat v. Dane (C. C. 1874) Fed. Cas. No. 5,455; Post v. Rouse (C. C. 1874) Fed. Cas. No. 11,300. CONTRA, Lathrop v. Drake (C. C. 1873) Fed. Cas. No. 8,109.

The district court has jurisdiction of an action by an assignee to recover a balance due from a principal to the bankrupt as factor at the time of the presentation of his petition in bankruptcy. Kelly v. Smith (C. C. 1848) Fed. Cas. No. 7,675.

The assignee may sue in the circuit court on a note of which the bankrupt is payee (Act 1841). Pritchard v. Chandler (C. C. 1855) Fed. Cas. No. 11,436.

The federal court has not jurisdiction of suits brought by the assignee of the bankrupt, simply to collect the assets. Woods v. Forsyth (C. C. 1868) Fed. Cas. No. 17,992; Same v. Jackson Iron Mfg. Co. (C. C. 1874) Fed. Cas. No. 17,993.

The federal court has jurisdiction of a bill filed by an assignee in bankruptcy in the nature of a creditors' bill to reach assets in the hands of third parties, where the amount in dispute exceeds the statutory amount, and the controversy is between citizens of the state where it was brought and the citizens of another state. Spaulding v. McGovern (C. C. 1874) Fed. Cas. No. 13,217.

The federal court has no jurisdiction of a bill in equity filed by creditors before the appointment of an assignee to

restrain a chattel mortgagee in possession from disposing of the goods of an alleged bankrupt. Johnson v. Price (C. C. 1876) Fed. Cas. No. 7,407.

Under Act 1867, § 2, a circuit court had jurisdiction of a cross bill, filed by an assignee in bankruptcy in a district other than that in which the decree in bankruptcy was made, to redeem mortgaged property in which the complainant has the legal title to the equity of redemption. Barnard v. Hartford, P. & F. R. Co. (C. C. 1878) Fed. Cas. No. 1,003.

A suit by an assignee to set aside a fraudulent conveyance, after the discharge of property concealed prior thereto, is not a suit to annul the discharge, and may therefore be brought in the circuit court. Nicholas v. Murray (C. C. 1878) Fed. Cas. No. 10,223.

Avoidance of assignments.—The federal court has jurisdiction of an action to set aside a general assignment by the bankrupt, and distribute the property among the lien and general creditors. McLean v. Meline (C. C. 1843) Fed. Cas. No. 8,890.

A receiver, appointed in supplementary proceedings prior to the filing of a petition in bankruptcy against the debtor, may sue the assignee in bankruptcy and a prior voluntary assignee in the district court to set aside an assignment to the latter as void in fact and under the statute. Olney v. Tanner (D. C. 1879) Fed. Cas. No. 10,506.

Annulment of discharge.—The district court in which a bankrupt obtained his discharge has jurisdiction to entertain an original bill by a creditor who has proved his debt against a bankrupt, in order to vacate and discharge a certificate in bankruptcy obtained in such court on the imputations of fraud. Commercial Bank v. Buckner (1857) 20 How. 108, 15 L. Ed. 862.

The district court has inherent power to entertain a petition of creditors to vacate a certificate of discharge of a bankrupt. Allen v. Thompson (D. C. 1882) 10 Fed. 116.

Pleading.—Where a cause of action under the Bankruptcy Law over which a United States court has jurisdiction is stated, the jurisdiction is not ousted by failure to allege diverse citizenship, or that the amount involved is more than $3,000. Milkman v. Arthe (D. C. 1914) 213 Fed. 642.

Cited without definite application, Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Leroux v. Hudson (1883) 3 Sup. Ct. 309, 312, 109 U. S. 468, 27 L. Ed. 1000; In re Wood (1908) 28 Sup. Ct. 621, 210 U. S. 246, 52 L. Ed. 1046; Lehman v. La Forge (C. C. 1890) 42 Fed. 493, 494.

(20) Of suits against the United States.

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: Provided, however, That nothing in this paragraph shall be construed as giving to either the district courts or the Court of Claims jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," or to hear and determine other claims which had been rejected or reported on adversely prior to the third day of March, eighteen hundred and eighty-seven, by any court, department, or commission authorized to hear and determine the same, or to hear and determine claims for pensions; or as giving to the district courts jurisdiction of cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof; but no suit pending on the twenty-seventh day of June, eighteen hundred and ninety-eight, shall abate or be affected by this provision: And provided further, That no suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, That the claims of married women, first accrued during marriage, of

persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

Act March 3, 1887, c. 359, § 1, 24 Stat. 505. Act June 27, 1898, c. 503, § 1, 30 Stat. 494. Act July 1, 1898, c. 546, § 3, 30 Stat. 649. Act Feb. 26, 1900, c. 25, 31 Stat. 33. Act March 3, 1911, c. 231, § 24, par. 20, 36 Stat. 1093.

Notes of Decisions

See § 1136, and notes thereunder.

See, also, notes at end of the Constitution.

1. Re-enactment of former statute, and saving of jurisdiction.
2. Suits against government in general.
3. Suits against federal officers or agents.
4. Claims against government in general.
5. Jurisdictional amount.
6. Assignment of claim against government.
7. Suit by assignee of claim.
8. Claims by aliens.
9. Actions of tort.
10. Implied contract in general.
11. Claim or suit for salvage.
12. Suit for use of machinery.
13. Action by contractor for extra work and damages.
14. Ejectment against one holding possession as agent or in official capacity.
15. Suit by entryman to recover money paid.
16. Claim to patent to lands earned by railroad company.
17. Claim by purchaser of timber land for patent.
18. Restraining public land department officials.
19. Suit for destruction of value of real property.
20. Suit for use and occupation.
21. Restitution of fine paid.
22. Petition to cancel judgment lien.
23. Claims for taxes collected.
24. Action to recover back duties illegally exacted.
25. Claims for fees, salary, or compensation of officers.
26. Official determination of claims in general.
27. Rejection of claims or reporting the same adversely.
28. Set-offs and counterclaims.
29. Limitations.
30. Procedure in exercise of jurisdiction.

1. Re-enactment of former statute, and saving of jurisdiction.—See, also, note post, as to "Claims for fees, salary, or compensation of officers."

By this subdivision the amendment by Act June 27, 1898, c. 503, to Act March 3, 1887, c. 359, was re-enacted, but to save the jurisdiction of cases then pending under the Act of 1887 it was enacted that no suit pending on June 27, 1898, shall abate or be affected by this provision, and this language is clear and means that while suits under the act of 1887 then pending shall not be executed, causes of action existing, but not pending, cannot be maintained in a District Court under the judicial code. Wells v. Russellville Anthracite Coal Min. Co. (D. C. 1913) 206 Fed. 528.

2. Suits against government in general.—See, also, notes at end of the Constitution.

Since the United States are not suable of common right, a party who institutes such suit must bring same within the authority of some act of Congress, or the court cannot exercise jurisdiction over it. U. S. v. Clarke (1834) 8 Pet. 436, 444, 8 L. Ed. 1001.

The judiciary act does not authorize a suit against the United States in any of the federal courts. U. S. v. Tillou (1867) 73 U. S. (6 Wall.) 484, 18 L. Ed. 920; Id. (1867) 3 Ct. Cl. 454.

The United States cannot be sued without its consent. Cunningham v. Macon & B. R. Co. (1883) 3 Sup. Ct. 292, 296, 109 U. S. 446, 27 L. Ed. 992.

The government is not liable to be sued for the torts, misconduct, misfeasances, or laches of its officers or employés, unless its consent thereto is given in some act of Congress. Bigby v. U. S. (1903) 23 Sup. Ct. 468, 471, 188 U. S. 400, 47 L. Ed. 519.

Since a sovereign can be sued only by his own consent, he may prescribe the conditions on which he will be sued. Treat v. Farmers' Loan & Trust Co. (1911) 185 Fed. 760, 108 C. C. A. 98, affirming judgments Central Trust Co. of New York v. Treat (C. C. 1909) 171 Fed. 301, and Farmers' Loan & Trust Co. v. Same, Id. 302.

Right to sue the United States in their own courts is strictly limited by the statutes granting the consent (Tucker Act), which cannot be extended by the courts. Reid Wrecking Co. v. U. S. (D. C. 1913) 202 Fed. 314.

3. Suits against federal officers or agents.—See, also, notes at end of the Constitution.

A suit to restrain the Secretary of the Interior from carrying out the provisions of Act June 27, 1902, c. 1157, 32 Stat. 400, controlling the disposition of the pine lands ceded by the Indians of the state of Minnesota, under Act Jan. 14, 1889, c. 24, 25 Stat. 642, to the United States, to be administered for their benefit, and to require him to execute the trust, and account, is, in ef-

fect, a suit against the United States, which the courts have no jurisdiction to entertain. Naganab v. Hitchcock (1906) 26 Sup. Ct. 667, 202 U. S. 473, 50 L. Ed. 1113, affirming decree (1905) 25 App. D. C. 200.

A suit to enjoin an Indian agent from obstructing the complainant in prospecting on lands of a reservation for the purpose of making a selection of mineral lands thereon, as he was authorized to do by an act of Congress, is one to restrain an individual tort which would result in irreparable injury to complainant, and not one against the United States, and for that reason not within the jurisdiction of the court, although defendant claims to be acting in his official capacity as a representative of the government, where such action is without warrant of law. Wadsworth v. Boysen (1906) 148 Fed. 771, 78 C. C. A. 437.

That the defendant is an officer of the United States, and claims to have been acting under an act of Congress in doing the acts complained of, does not give a federal court original jurisdiction under Judiciary Act March 3, 1887, §§ 1, 2. City of Stanfield v. Umatilla River Water Users' Ass'n (C. C. 1911) 192 Fed. 596.

A suit against government officers to restrain acts claimed to be without authority of law, by which complainant will be deprived of rights accorded to him by the law, is not one against the United States. Baker v. Swigart (D. C. 1912) 196 Fed. 569, decree reversed (1912) 199 Fed. 865, 118 C. C. A. 313, which is reversed (1913) 33 S. Ct. 645, 229 U. S. 187, 57 L. Ed. 1143.

4. Claims against government in general.—Acts 1792, c. 11, conferring on the circuit courts power to adjudicate pension claims, did not authorize the judges of those courts to exercise out of court, and in the character of commissioners, the powers conferred by the act. U. S. v. Todd (1851) 54 U. S. (13 How.) 52, note, 14 L. Ed. 47.

Neither the receiver of an insolvent national bank nor the comptroller of the currency has power to submit to the determination of the federal circuit court, in a suit against them by creditors of the bank, the question of priority of payment, or the amount, of claims of the United States; the court of claims alone having jurisdiction. Case v. Terrell (1870) 78 U. S. (11 Wall.) 199, 20 L. Ed. 134.

Act March 3, 1887, c. 359, having given jurisdiction to the circuit court of all claims against the United States exceeding $1,000, founded on contracts, express or implied, or for damages, liquidated or unliquidated, in cases not sounding in tort, if claimant's petition shows that the claim is not founded upon torts of officers of the government, but on acts of theirs authorized by legislation of congress, it is immaterial whether the petition claims compensation as on an implied contract or as for damages. Chappell v. U. S. (C. C. 1888) 34 Fed. 673.

By Act March 3, 1887, the district court is given concurrent jurisdiction with the court of claims "where the amount of the claim does not exceed $1,000," and the same right to appeal and take writs of error is given to the plaintiff or the United States as "now reserved in the statutes of the United States in that behalf made." Held, that the statutes referred to as reserving the right to appeal and take writs of error were those relating to appeals and writs of error from judgments of the court of claims to the supreme court, and that in such cases the circuit courts have no jurisdiction of appeals from, and writs of error to, the district courts. Strong v. U. S. (C. C. 1889) 40 Fed. 183, following U. S. v. Davis (1889) 9 S. Ct. 657, 131 U. S. 36, 33 L. Ed. 93.

The district courts have jurisdiction to hear and determine claims against the United States. Swigett v. U. S. (D. C. 1896) 78 Fed. 456, 458, 460, affirmed (1897) 83 Fed. 97, 27 C. C. A. 465.

5. Jurisdictional amount.—Under Act March 3, 1887, § 1, the court of claims has jurisdiction over "all claims founded upon the constitution of the United States, * * * or upon any contract, express or implied, with the government of the United States, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable." Section 2 gives the circuit courts concurrent jurisdiction when the amount involved exceeds $1,000 and does not exceed $10,000. Held, that the word "claims" embraced a claim to a patent to lands earned by a land-grant railroad company, and that the United States circuit court had jurisdiction of an action to determine the right to a patent under the grant. Southern Pac. R. Co. v. U. S. (C. C. 1889) 38 Fed. 55.

A claim against the United States was not beyond the jurisdiction of a circuit court, as exceeding $10,000, under the Tucker Act of March 3, 1887, c. 359, § 2, 24 Stat. 505, where plaintiff in his petition limited his claim to $10,000, and expressly waived all right to recover a larger sum. Hill v. U. S. (C. C. 1889) 40 Fed. 441, 442.

6. Assignment of claim against government.—An assignment of a claim against the United States for money paid to the Land Office by plaintiff's assignors as the purchase price and fees pursuant to a timber land entry which was subsequently rejected is invalid, and does not sustain an action against the government in a federal

court by the assignee. Emmons v. U. S. (C. C. 1911) 189 Fed. 414.

7. **Suit by assignee of claim.**—Under the act of 1887 (24 Stat. 505), the assignee of a claim against the United States may sue thereon in his own name. Emmons v. U. S. (C. C. 1891) 48 Fed. 43.

8. **Claims by aliens.**—See, also, § 1146, and notes thereunder.

The Tucker Act of March 3, 1887, authorizes suits against the United States as respects the claims specified therein by aliens as well as citizens. U. S. v. New York & O. S. S. Co. (C. C. A. 1914) 216 Fed. 61.

An alien being entitled to sue the United States in the Court of Claims under R. S. § 1068, post, § 1146, a federal District Court had concurrent jurisdiction of the subject-matter under Tucker Act, § 2. New York & O. S. S. Co. v. U. S. (D. C. 1912) 202 Fed. 311.

9. **Actions of tort.**—The United States have never, either by act of March 3, 1887 (24 Stat. 506, c. 359), or by any other law, permitted themselves to be sued for torts committed by their officers, as, for instance. a trespass on private lands; and the settled distinction in this respect cannot be evaded by framing the claim so as to count upon an implied contract to compensate for use and occupation. Hill v. U. S. (1893) 13 Sup. Ct. 1011, 1013, 149 U. S. 593, 37 L. Ed. 862, reversing judgment (C. C. 1889) 39 Fed. 172.

The United States, while they may be sued, as upon an implied contract, for the value of land actually appropriated to public use, when the title of the plaintiff is admitted, are yet not subject to such suit when plaintiff's title has never been acknowledged, but, on the contrary, the government pleads that it has a paramount right to use the lands; for, in the latter case, the injury, if any, constitutes a tort by the government agents, for which the United States is not suable. Mr. Justice Shiras, dissenting. Hill v. U. S. (1893) 13 Sup. Ct. 1011, 149 U. S. 593, 37 L. Ed. 862, reversing judgment (C. C. 1889) 39 Fed. 172.

The United States is not suable under Tucker Act March 3, 1887, c. 359, 24 Stat. 505, on a claim for the value of the use by the army of a Spanish merchant vessel captured during the war with Spain, since the action is one sounding in tort, and is not converted into one of implied contract because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898, especially in view of the provision of the treaty of peace for the mutual relinquishment of all claims for national or individual indemnity that may have arisen since the beginning of the Cuban insurrection, and prior to the exchange of ratifications of such treaty. Ribas y Hijo v. U. S. (1904) 24 Sup. Ct. 727, 194 U. S. 315, 48 L. Ed. 994.

In an action by a government officer against the United States for indemnity against his liability for damages for the seizure of a flatboat, if it be viewed as sounding in tort, a demurrer to the petition will be sustained, under Act March 3, 1887, c. 359, § 1, excluding actions of tort from the jurisdiction of the court. Carpenter v. U. S. (C. C. 1890) 42 Fed. 264.

Where a government employé, having property in his possession for a certain purpose, by consent of the owner, uses it by order of his superior officer for another purpose, and the owner recovers judgment for conversion of the property against the employé, the latter cannot sue the United States for indemnification, since Act March 3, 1887, c. 359. § 1, giving the court of claims jurisdiction of all claims on any contract express or implied with the United States, expressly excepts cases sounding in tort. Carpenter v. U. S. (C. C. 1891) 45 Fed. 341.

An action may not be maintained against the United States for injuries received by reason of a defective elevator in a federal building. Bigby v. U. S. (C. C. 1900) 103 Fed. 597, affirmed (1903) 23 Sup. Ct. 468, 188 U. S. 400, 47 L. Ed. 519.

The United States does not, by undertaking to carry a passenger in an elevator in one of its public buildings, impliedly contract that its employés in charge of it will exercise due care, so as to confer jurisdiction on a federal court, under Tucker Act March 3, 1887, c. 359, 24 Stat. 505, of an action to recover damages for personal injuries sustained by reason of the negligence of such employés, on the theory that such action is upon a "contract, express or implied, with the government of the United States," within the meaning of that act; but the case is one "sounding in tort," which by that act is excluded from judicial cognizance. Bigby v. U. S. (1903) 23 Sup. Ct. 468, 472, 188 U. S. 400, 47 L. Ed. 519, affirming judgment (C. C. 1900) 103 Fed. 597.

Tucker Act March 3, 1887, c. 359, 24 Stat. 505, authorizing suits against the United States does not authorize a recovery of damages for a consequential injury to property not amounting to a taking and for which recovery could be had only in an action of tort. Coleman v. U. S. (C. C. 1910) 181 Fed. 599.

Act March 3, 1887 (24 Stat. 505), which gives the federal courts jurisdiction of actions against the government for claims upon contracts or for damages in cases not sounding in tort, does not give them jurisdiction of an action against the government for an alleged wrongful diversion of a water course, since that is an action sounding in tort. Mills v. U. S. (D. C. 1891) 46 Fed. 738, 12 L. R. A. 673.

10. Implied contract in general.—The United States does not, by undertaking to carry a passenger in an elevator in one of its public buildings, impliedly contract that its employés in charge of it will exercise due care, so as to confer jurisdiction on a federal court, under Tucker Act March 3, 1887, c. 359, 24 Stat. 505, of an action to recover damages for personal injuries sustained by reason of the negligence of such employés, on the theory that such action is upon a "contract, express or implied, with the government of the United States," within the meaning of that act; but the case is one "sounding in tort," which by that act is excluded from judicial cognizance. Bigby v. U. S. (1903) 23 Sup. Ct. 468, 188 U. S. 400, 47 L. Ed. 519, affirming judgment (C. C. 1900) 103 Fed. 597.

A seller of an engine to a contractor under the reclamation act may sue the United States on an implied contract where the government subsequently took possession of the engine. U. S. v. Buffalo Pitts Co. (1912) 193 Fed. 905, 114 C. C. A. 119.

Implied contract defined. Bigby v. U. S. (C. C. 1900) 103 Fed. 597, affirmed (1903) 23 Sup. Ct. 468, 188 U. S. 400, 47 L. Ed. 519.

While the license extended by the United States to the public to use its passenger elevator in a post-office building imposes upon the government the duty to use ordinary care to see that the facilities offered to its licensees are in a condition of reasonable safety, no implied contract arises from such relation to carry the passenger to his destination, which will entitle one who is injured through the incompetence of a person in charge of the elevator to maintain an action against the United States for damages under Act March 3, 1887, c. 359, 24 Stat. 505, permitting a recovery against the United States for claims founded upon any contract, express or implied, with the government of the United States, or for damages, in cases not sounding in tort. Bigby v. U. S. (C. C. 1900) 103 Fed. 597, judgment affirmed (1903) 23 Sup. Ct. 468, 188 U. S. 400, 47 L. Ed. 519.

Army Regulations, § 1452, provides that when medical attendance is required by an officer or enlisted man on duty, and the attendance of a medical officer cannot be had, the officer, or, in his absence such enlisted man, may employ a civilian physician, and a just account for his services and necessary medicines will be paid by the medical department. Section 1457 requires that accounts for board, lodging, nursing, and medical attendance of sick soldiers in private hospitals shall be sent to the surgeon general for settlement. Held, that where a corporal was taken sick while detached on recruiting service, and required immediate medical attention, which could not be afforded by the department, and he was sent to a private hospital by his captain in command, who requested that board, lodging, medical attendance, etc., be furnished to him, an implied contract was thereby created, which entitled plaintiff to recover against the United States for the reasonable value of the services so furnished. Davis v. U. S. (D. C. 1903) 120 Fed. 190.

11. Claim or suit for salvage.—A suit to recover from the United States for the salvage of duties collected and paid over to the government on a cargo of sugar afterwards saved from loss by fire while on board a lighter, in the harbor of New York, and in the possession and control of the customs officers, does not arise under the revenue laws so as to be excluded from the jurisdiction of the District Court under the Tucker act, because the liability of the United States, as having a direct pecuniary interest in the property saved, is founded on the assumption that the Secretary of the Treasury acting under the authority of R. S. §§ 2984, 3689, post, §§ 5677, 6799, would have refunded the duties if the property had been destroyed by the fire. U. S. v. Cornell Steamboat Co. (1906) 26 Sup. Ct. 648, 202 U. S. 184, 50 L. Ed. 987, affirming decrees (1905) 137 Fed. 455, 69 C. C. A. 603, and Cornell Steamboat Co. v. 1,883 Bags of Sugar (D. C. 1901) 108 Fed. 277.

Act March 3, 1887 (24 Stat. 505), gives jurisdiction to the court of claims, inter alia, on any contract, express or implied with the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable. Section 2 gives the federal district and circuit courts concurrent jurisdiction with the court of claims as to matters named in the preceding section, except that the district courts have jurisdiction not to exceed $1,000, and the circuit courts between $1,000 and $10,000. Held, that a claim against the United States for salvage in the sum of $10,000 is within the jurisdiction of the circuit court. U. S. v. Morgan (1900) 99 Fed. 570, 39 C. C. A. 653.

Tucker Act March 3, 1887, c. 359, §§ 1–7, 24 Stat. 505, 506, conferring jurisdiction upon District Courts over certain claims against the United States, gives such courts authority to entertain petitions for a salvage award where the government has been benefited by salvage service. U. S. v. Cornell Steamboat Co. (1905) 137 Fed. 455, 69 C. C. A. 603, affirming judgment Cornell Steamboat Co. v. U. S. (D. C. 1904) 130 Fed. 480, and decree affirmed U. S. v. Cornell Steamboat Co. (1906) 26 Sup. Ct. 648, 202 U. S. 184, 50 L. Ed. 987.

A tug which went to the assistance of a United States vessel having on board ammunition for delivery to a war ship,

in answer to her signal for help, and aided in putting out a fire which had broken out on such vessel, at considerable risk to the tug and crew on account of the nature of the cargo, the service lasting half an hour, held entitled to a salvage on an implied contract. Hartford & N. Y. Transp. Co. v. U. S. (C. C. 1905) 138 Fed. 618.

A claim for salvage is founded on implied contract. Cornell Steamboat Co. v. U. S. (D. C. 1904) 130 Fed. 480, affirmed (1905) 137 Fed. 455, 69 C. C. A. 603.

A claim for salvage is founded on an implied contract, and where it does not exceed $1,000, a suit thereon may be maintained against the United States in a District Court, under the Tucker act of March 3, 1887, c. 359, §§ 1-7, 24 Stat. 505, 506, which provide for suits in either the Court of Claims or a Circuit or District Court on "all claims founded upon * * * any contract, express or implied, with the government of the United States * * * in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable." Cornell Steamboat Co. v. U. S. (D. C. 1904) 130 Fed. 480, decree affirmed U. S. v. Cornell Steamboat Co. (1905) 137 Fed. 455, 69 C. C. A. 603, and (1906) 26 Sup. Ct. 648, 202 U. S. 184, 50 L. Ed. 927.

12. Suit for use of machinery.—Under the Tucker act of March 3, 1887, one held entitled to sue the government for the use of machinery in completing work under a contract authorized by the reclamation act of June 17, 1902. U. S. v. Buffalo Pitts Co. (1912) 193 Fed. 905, 114 C. C. A. 119.

13. Action by contractor for extra work and damages.—Under Act March 3, 1887, c. 359, which allows suits to be brought against the United States "upon contract, expressed or implied, or for damages in cases not sounding in tort," an action may be brought by a contractor for extra work done by him under the direction of the government's agent, and for damages for an improper interference by such agent with the fulfillment of the contract. Bowe v. U. S. (C. C. 1890) 42 Fed. 761.

14. Ejectment against one holding possession as agent or in official capacity.—The circuit court has jurisdiction of an ejectment suit by a landowner against an agent of the United States in charge of a public improvement alleged to be built on plaintiff's land; and if defendant relies on the government's title the court may determine whether it is the superior one, but its judgment will not conclude the United States, since the latter is not a party, and cannot be made one without its own consent. Scranton v. Wheeler (1893) 57 Fed. 803, 6 C. C. A. 585, 16 U. S. App. 152.

One claiming title and denying that the government has any title may maintain ejectment against one holding possession in his official capacity and representing the right of the government. Sawyer v. Osterhaus (D. C. 1912) 195 Fed. 655.

15. Suit by entryman to recover money paid.—An entryman whose entry is canceled may sue in the federal courts to recover the money paid by him. Emmons v. U. S. (C. C. 1890) 42 Fed. 26.

16. Claim to patent to lands earned by railroad company.—Under Act March 3, 1887, § 1, the court of claims has jurisdiction over "all claims founded upon the constitution of the United States, * * * or upon any contract, express or implied, with the government of the United States, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable." Section 2 gives the circuit courts concurrent jurisdiction when the amount involved exceeds $1,000 and does not exceed $10,000. Held, that the word "claims" embraced a claim to a patent to lands earned by a land grant railroad company, and that the United States circuit court has jurisdiction of an action to determine the right to a patent under the grant. Southern Pac. R. Co. v. U. S. (C. C. 1889) 38 Fed. 55.

17. Claim by purchaser of timber land for patent.—Act 1887 (24 Stat. 505), giving the circuit court jurisdiction of certain claims against the United States, includes a "claim" by a purchaser of timber land under the act of 1878 (20 Stat. 89) to have a patent issue for the same. Jones v. U. S. (C. C. 1888) 35 Fed. 561, decree reversed U. S. v. Jones (1888) 9 S. Ct. 669, 131 U. S. 1, 33 L. Ed. 90; Montgomery v. Same (C. C. 1888) 36 Fed. 4.

18. Restraining public land department officials.—Act March 3, 1887, which confers upon the court of claims jurisdiction to hear and determine all claims founded on the constitution of the United States, or any law of congress, or on any regulation of an executive department, or on any contract, express or implied with the government of the United States, and gives the United States circuit courts concurrent jurisdiction with the court of claims, simply removes the exemption of the United States from suit in those cases, and does not confer upon the circuit court jurisdiction to restrain the public land department officials from allowing land claimed by a railroad company to have been earned under its grant, to be entered as the public domain. Sioux City & St. P. R. Co. v. U. S. (C. C. 1888) 36 Fed. 610.

Act March 3, 1887, providing that in

certain cases suit may be brought against the United States, does not give the courts the right to interfere by injunction or otherwise with the action of the land department in matters requiring the exercise of judicial, as distinguished from ministerial, duties. Sioux City & St. P. R. Co. v. U. S. (C. C. 1888) 34 Fed. 835.

19. Suit for destruction of value of real property.—A Circuit Court of the United States had jurisdiction of a suit against the United States to recover compensation for the alleged total destruction of the value of real property as a necessary result of the acts of its officers and agents in improving navigation, where the government did not deny plaintiff's title, and admitted that the work done was authorized by Congress, but denied that such work produced the alleged injury and destruction. U. S. v. Lynah (1903) 23 S. Ct. 349, 356, 188 U. S. 445, 47 L. Ed. 539; Same v. Williams (1903) 23 S. Ct. 363, 188 U. S. 485, 47 L. Ed. 554.

20. Suit for use and occupation.—Under Act March 3, 1887, c. 359, the circuit court had jurisdiction of a claim exceeding $1,000, for compensation to the owner of the land, who, by command of the lighthouse board, under authority of congress, has been prevented from using his land between two range lights, the use intended being one which would have obstructed the lights. Chappell v. U. S. (C. C. 1888) 34 Fed. 673.

Where the United States, through its officers, acquires and maintains possession of land under a claim of ownership adverse to that of an individual, the latter cannot sue in assumpsit for the use and occupation, so as to give the circuit court jurisdiction, under 24 Stat. 506, c. 359, giving such court concurrent jurisdiction with the court of claims of all cases not sounding in tort. Hill v. U. S. (1893) 149 U. S. 593, 13 Sup. Ct. 1011, 37 L. Ed. 862, reversing judgment (C. C. 1889) 39 Fed. 172.

21. Restitution of fine paid.—Whether on reversal of contempt order restitution of fine paid can be enforced not determined. Brown v. Detroit Trust Co. (1912) 193 Fed. 622, 626, 113 C. C. A. 490.

22. Petition to cancel judgment lien.—Acts 1887, c. 359, giving the court of claims and district courts jurisdiction to hear and determine claims against the United States, does not authorize those courts to entertain a petition to cancel a judgment lien unlawfully placed on the property of the petitioners by a United States officer in an attempt to enforce a judgment recovered by the United States. Holmes v. U. S. (D. C. 1897) 78 Fed. 513.

23. Claims for taxes collected.—Claims under Act July 27, 1912, for refunding of stamp taxes under War Revenue Act June 13, 1898, were "founded on a law of Congress," within Judicial Code, § 24, par. 20, conferring jurisdiction on District Courts. U. S. v. Hvoslef (1915) 35 S. Ct. 459, 237 U. S. 1, 59 L. Ed. 813, affirming judgment Hvoslet v. U. S. (D. C. 1913) 217 Fed. 680.

Claims to recover back internal revenue taxes wrongfully collected under Act Aug. 5, 1909, § 38, are founded on that act, within Judicial Code, § 24, par. 20, conferring jurisdiction on District Courts of claims based on any law of Congress. U. S. v. Emery, Bird, Thayer Realty Co. (1915) 35 S. Ct. 499, 237 U. S. 28, 59 L. Ed. 825, affirming judgment Emery, Bird, Thayer Realty Co. v. U. S. (D. C. 1912) 198 Fed. 242.

A claim to recover back internal taxes illegally exacted under a misconstruction of the war revenue law of 1898 (Act June 27, 1898, c. 503, § 1, 30 Stat. 494), is a claim founded on a law of Congress, within Act March 3, 1887, c. 359, § 1, 24 Stat. 505, and may be enforced by an action directly against the United States under such act after it has been presented to the Commissioner of Internal Revenue, whether it has received his approval or not, and whether it is an action in contract or sounding in tort. Christie-Street Commission Co. v. U. S. (1905) 136 Fed. 326, 69 C. C. A. 464.

Tucker Act (Act March 3, 1887, c. 359, 24 Stat. 505) § 1, declares that the court of claims shall have jurisdiction over all claims against the United States founded on the Constitution of the United States or any law of Congress except for pensions. Held, that the circuit court had jurisdiction of a claim, involving the requisite amount, for a tobacco tax rebate granted by Act April 12, 1902, c. 500, § 4, 32 Stat. 97, though it involved no contractual liability. U. S. v. Hyams (1906) 146 Fed. 15, 76 C. C. A. 523, affirming decree Hyams v. U. S. (C. C. 1905) 139 Fed. 997.

R. S. §§ 3220, 3226, 3227, 3228, post, §§ 5944, 5949–5951, held not inconsistent with Tucker Act March 3, 1887, and hence a federal District Court had jurisdiction of an action against the United States to recover money paid on an erroneous internal revenue assessment. U. S. v. Finch (1912) 201 Fed. 95, 119 C. C. A. 433.

Under Act March 3, 1887, as amended by Act March 3, 1911, a suit to recover taxes alleged to have been wrongfully assessed and collected under the Corporation Tax Law may be brought directly against the United States, instead of being brought against the collector of internal revenue. Emery, Bird, Thayer Realty Co. v. U. S. (D. C. 1912) 198 Fed. 242.

24. Action to recover back duties illegally exacted.—An action to recover back duties illegally exacted and paid

under protest upon imports into Porto Rico from New York is within the jurisdiction of the circuit court as a court of claims, whether the exactions were tortious or not, since the importer can waive the tort and sue upon an implied contract of the United States to refund the money, and the case is founded upon an act of congress within the meaning of the Tucker act (24 Stat. 505, c. 359), namely, a revenue law. Dooley v. U. S. (1901) 21 Sup. Ct. 762, 763, 182 U. S. 222, 45 L. Ed. 1074; Armstrong v. Same (1901) 21 Sup. Ct. 827, 182 U. S. 243, 45 L. Ed. 1086.

25. Claims for fees, salary, or compensation of officers.—See note, post, as to "Set-offs and counterclaims."

Letter carriers in the postal service are officers of the United States, within the meaning of the amendment (30 Stat. 495) to section 2 of the judiciary act of 1887, taking away from circuit and district courts jurisdiction of suits against the United States by such officers to recover fees or compensation. U. S. v. McCrory (1899) 91 Fed. 295, 33 C. C. A. 515.

The effect of the act of June 27, 1898 (30 Stat. 494), amending section 2 of the judiciary act of 1887–88, which gave the circuit and district courts jurisdiction of suits on claims against the United States, by excepting from such jurisdiction cases brought to recover fees, salary, or compensation for official services of officers, was to deprive the circuit and district courts of jurisdiction to further proceed in such cases then pending therein; and a judgment thereafter rendered in such a case will be reversed on appeal, with directions to dismiss. U. S. v. Marsh (1899) 92 Fed. 689, 34 C. C. A. 619.

Such act does not affect the provisions of the act amended relating to appeals, and a judgment rendered by a circuit court prior to the passage of the amendatory act, and which is therefore unaffected thereby, may be reviewed on appeal by either party, the circuit court retaining jurisdiction to at least vacate its judgment if held erroneous. U. S. v. Jacobus (1899) 96 Fed. 260, 37 C. C. A. 466.

Act June 27, 1898, in effect repealed, without a saving clause, the grant of jurisdiction in such cases contained in the original act, and operated to deprive circuit and district courts of jurisdiction in pending cases, and the circuit courts of appeals of power to proceed further in proceedings pending therein for the review of judgments previously rendered in such cases. U. S. v. Kelly (1899) 97 Fed. 460, 38 C. C. A. 275.

A letter carrier had recovered judgment in the district court against the United States for extra compensation, and it had sued out a writ of error. Afterwards, but before the case was heard in the circuit court of appeals, Act June 27, 1898, was passed, amending Act March 3, 1887, thereby taking away the jurisdiction of the district court to entertain the suit, and the writ of error was, on motion, abated. Afterwards Act Feb. 26, 1900, was passed, which provided that no suit should abate or be affected by the act of June 27, 1898, which was pending in any circuit court of appeals, circuit or district court, at the time of its passage, "and all such suits which have been dismissed * * * shall be restored to their places within such courts." Held, that the action was plainly included within the terms of the latter act, and the cause was properly restored. U. S. v. McCrory (1903) 119 Fed. 861, 56 C. C. A. 373.

As all the proceedings under Act March 3, 1887, authorizing suits by officers against the United States to recover fees, and the amendatory acts, are permissive, and in the main intended to advise congress, and as judgments and decrees adverse to the United States are merely reported to congress for such action as it sees fit to take, the objection that the act of 1900 is unconstitutional is not entitled to be considered. U. S. v. McCrory (1903) 119 Fed. 861, 56 C. C. A. 373.

The second clause of section 2 of the Tucker act, as amended in 1898 (Act June 27, 1898, c. 503, 30 Stat. 494), which withholds from the jurisdiction conferred on the Circuit and District Courts by said section suits brought against the United States to recover "fees, salary or compensation for official services of officers of the United States," does not apply to a suit to recover disbursements made by a marshal in paying for the services of court bailiffs. U. S. v. Swift (1905) 139 Fed. 225, 71 C. C. A. 351, affirming judgment Swift v. U. S. (C. C. 1904) 128 Fed. 763.

Court bailiffs are not "officers of the United States." Id.

A postmaster may assert his right to commissions for canceling stamps in an independent suit against the government, brought in the court of claims or in a circuit or district court since the act of March 3, 1887. U. S. v. Hutcheson (C. C. 1889) 39 Fed. 540, 543, 2 L. R. A. 805.

A claim for fees for services as commissioner of the circuit court was within Act March 3, 1887, c. 359, § 1, conferring on circuit and district courts jurisdiction of suits against the government. McKinstry v. U. S. (C. C. 1889) 40 Fed. 813, 815.

Acts 1898, c. 503, amending section 2, Act March 3, 1887 (24 Stat. 505, c. 359), which conferred jurisdiction on the circuit and district courts over suits on claims against the government, by excluding from such jurisdiction suits by officers of the United States or their assigns for the recovery of fees or com-

pensation, having been passed without a saving clause, applies to such suits then pending, and deprives the courts of jurisdiction to proceed further therein. Fairchild v. U. S. (C. C. 1899) 91 Fed. 297.

Act June 27, 1898, repealing so much of Act March 3, 1887, § 2, as conferred on the district court concurrent jurisdiction with the court of claims of actions by United States officers for compensation, and providing that no person shall recover in the court of claims for such compensation who has not complied with Act July 31, 1894, requiring monthly and quarterly accounts of officers to be sent to the proper authority at Washington within 10 and 20 days, respectively, after the expiration of the period to which they relate, does not, though containing no saving clause as to pending suits, apply to such suits. Strong v. U. S. (C. C. 1899) 93 Fed. 257.

A deputy United States surveyor provided for by R. S. § 2223, post, § 4457, is not an officer of the United States within Act March 3, 1887, c. 359, § 2, as amended by Act June 27, 1898, c. 503. Scully v. U. S. (C. C. 1910) 193 Fed. 185.

Under Const. art. 2, § 2, a United States deputy surveyor, appointed under R. S. § 2223, post, § 4457, held not an "officer of the United States" within Act March 3, 1887, § 2, as amended by Act June 27, 1898, withdrawing from jurisdiction of the Circuit and District Courts suits for compensation of such officers. Scully v. U. S. (C. C. 1910) 193 Fed. 185.

The term "official services" means only those services which are peculiar to the office of an officer of the United States and which they are by law authorized to perform. Scully v. U. S. (C. C. 1910) 193 Fed. 185.

Act March 3, 1887, giving the United States courts jurisdiction of claims against the government, confers jurisdiction of a suit by a commissioner to recover fees earned before the passage of the act. Hoyne v. U. S. (D. C. 1889) 38 Fed. 542.

Act June 27, 1898, c. 504, 30 Stat. 495, taking away the jurisdiction conferred upon the circuit and district courts of suits against the United States by Act March 3, 1887, c. 359, § 2, 24 Stat. 505, so far as relates to suits brought by officers to recover fees or salaries, contains no saving clause, and applies to suits pending at the time of its passage. Amsden v. U. S. (D. C. 1901) 111 Fed. 1.

Acts June 27, 1898, c. 503, 30 Stat. 494, and July 1, 1898, c. 546, 30 Stat. 649, providing that no suit can be maintained by any United States officer to recover fees unless an account therefor has been presented for allowance and acted on in the auditing department, having no retroactive force, a clerk was not precluded from recovering fees in a suit begun before the passage of the act by reason of the fact that through inadvertence, or by reason of a custom to postpone such charges until termination of the cause, some of the charges included in the action had not been presented. Marvin v. U. S. (D. C. 1902) 114 Fed. 225.

A suit against the United States to recover the expense allowance given to a judge of the Commerce Court by Jud. Code, § 200, held not one to recover "fees, salary, or compensation for official services," and therefore one which was within the jurisdiction of the District Court, under section 24, par. 20, of such Code. Archbald v. U. S. (D. C. 1914) 217 Fed. 165.

A suit against the United States to recover the expense allowance given to a judge of the commerce court held within the jurisdiction of a District Court, under Judicial Code, § 24, par. 20. Archbald v. U. S. (D. C. 1914) 218 Fed. 270.

26. Official determination of claims in general.—The approval of the commissioner's account by the circuit court is not a prerequisite to the institution of a suit for the recovery of the amount claimed. U. S. v. Knox (1888) 9 Sup. Ct. 63, 128 U. S. 230, 32 L. Ed. 465; U. S. v. Ewing (1891) 11 Sup. Ct. 743, 140 U. S. 142, 35 L. Ed. 388.

Where an account against the United States for legal services has been approved by the attorney general, adjusted by the first auditor, certified to the first comptroller, and by him approved, but not paid, the circuit court has jurisdiction of an action to recover its amount, under Act March 3, 1887. Bliss v. U. S. (C. C. 1888) 34 Fed. 781.

As to effect of officers' determination upon claims. Stanton v. U. S. (C. C. 1889) 37 Fed. 252, 254, modified (1895) 70 Fed. 890, 17 C. C. A. 475.

The petition of a federal district attorney in an action for fees need not state how or when the account claimed was presented to the accounting officer. Weed v. U. S. (D. C. 1894) 65 Fed. 399.

27. Rejection of claims or reporting the same adversely.—The disallowance by the first comptroller of a marshal's account for fees is not such rejection or adverse report "by court, department, or commission" under the proviso of 24 Stat. 505, § 1, cl. 1, as to prevent a circuit court from taking jurisdiction of a suit for the claim. U. S. v. Harmon (1893) 13 Sup. Ct. 327, 329, 147 U. S. 268, 37 L. Ed. 164, affirming Harmon v. U. S. (C. C. 1890) 43 Fed. 560, 563.

Act March 3, 1887 (24 Stat. 505), giving the circuit and district courts concurrent jurisdiction of claims against the United States, excepts "claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to

hear and determine the same." R. S. § 269, directs the first comptroller of the treasury "to superintend the adjustment and preservation of the public accounts subject to his revision;" and section 191 provides that the balances which may from time to time be certified to the heads of departments by the comptrollers of the treasury, upon the settlement of public accounts, shall be conclusive upon the executive branch of the government, and be subject to revision only by congress or the proper courts. Held, that the disallowance of a circuit court commissioner's fees by the first comptroller of the treasury is not within the exception. U. S. v. Rand (1892) 53 Fed. 348, 3 C. C. A. 556, following Harmon v. U. S. (C. C. 1890) 43 Fed. 560.

The disallowance of a circuit court commissioner's fees by the first comptroller is not within the proviso of Act March 1887 (24 Stat. 505); his decisions being conclusive only within the executive department. U. S. v. Rand (1892) 53 Fed. 348, 350, 3 C. C. A. 556, overruling Rand v. U. S. (D. C. 1888) 36 Fed. 671, and following Harmon v. U. S. (C. C. 1890) 43 Fed. 560, which is affirmed (1893) 13 Sup. Ct. 327, 147 U. S. 268, 37 L. Ed. 164.

The disallowance, by a district court, of a claim against the United States for fees, for supposed want of jurisdiction to pass upon the merits, is not a bar to a subsequent petition for the allowance of the claim, after determination that the court has jurisdiction. U. S. v. Rand (1892) 53 Fed. 348, 3 C. C. A. 556.

Where an application for refunding of legacy taxes paid, made under Act June 27, 1902, § 3, is denied by the Secretary of the Treasury, the applicant may maintain an action to enforce the right under the Tucker Act. U. S. v. Shipley (1912) 197 Fed. 265, 116 C. C. A. 627.

The complaint upon a surveying contract set out that the surveyor general of California had approved the field notes, and certified them, as well as the performance of the work, but that before he forwarded his report to Washington, D. C., he was instructed by the commissioner of the general land office to proceed no further. Under the agreement, this report should have gone to the said commissioner, and, if approved by him, been then referred to the auditor for final allowance and payment. Held, that the claim had not been "heretofore rejected or reported on adversely," and that the circuit court, sitting in California, had jurisdiction; the amount sued for being between $1,000 and $10,000. Baker v. U. S. (1888) 34 Fed. 353; Perrin v. Same, Id. 354; Chappell v. Same, Id. 673.

Act of March 3, 1887, gave to United States circuit courts jurisdiction of claims against the United States, except claims "heretofore rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." Held that, the comptroller of the treasury having charge of the adjustment of accounts against the government, a rejection of an account by him is a rejection by a department authorized to hear and determine the same. Bliss v. U. S. (C. C. 1888) 34 Fed. 781.

Under Act March 3, 1887, authorizing suits against the United States to recover items in the account of a district attorney suspended or disallowed by the accounting officer, and providing that the courts "herein mentioned" shall not have jurisdiction "to hear and determine other claims which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same," a district attorney is not concluded by the rejection of items in his bill by the department having charge of the auditing of the accounts of district attorneys. Stanton v. U. S. (C. C. 1889) 37 Fed. 252, judgment reversed U. S. v. Stanton (1895) 70 Fed. 890, 17 C. C. A. 476.

Act March 3, 1887, c. 359 (24 Stat. 505) § 2, gave the circuit and district courts concurrent jurisdiction, within certain limits as to amount, of all matters which by section 1 "the court of claims shall have jurisdiction to hear and determine," including all claims founded on any law of congress, except for pensions, or on any contract with the government: "Provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims * * * which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." By R. S. § 269, ante, § 427, it is made the duty of the first comptroller of the treasury "to superintend the adjustment and preservation of the public accounts, subject to his revision." Section 191 provides that "the balances which may from time to time be stated by the auditor, and certified to the heads of departments by the commissioner of customs, or the comptrollers of the treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the government, and be subject to revision only by congress or the proper courts." Held, that the proviso must be limited to a rejection of a claim, or an adverse report thereon, by a court, department, or commission which determines the rights of parties, and that therefore the disallowance of a marshal's account for fees by the first comptroller of the treasury was not within the proviso, as his decision was conclusive only

within the executive department. Harmon v. U. S. (C. C. 1890) 43 Fed. 560, judgment affirmed U. S. v. Harmon (1893) 13 S. Ct. 327, 147 U. S. 268, 37 L. Ed. 164.

A decision by the commissioner of internal revenue rejecting a tobacco rebate claim held reviewable by the court. Hyams v. U. S. (C. C. 1905) 139 Fed. 997, affirmed (1906) 146 Fed. 15, 76 C. C. A. 523.

The district court has jurisdiction of an action against the United States for services and expenses of a chief supervisor of elections, on a claim for less than $1,000 in value, which had been refused by the accounting officer of the treasury department. Gayer v. U. S. (D. C. 1888) 33 Fed. 625.

Under Act March 3, 1887, forbidding district courts to entertain claims against the government, "which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same," the court must dismiss a claim rejected by the comptroller of the treasury. Preston v. U. S. (D. C. 1888) 37 Fed. 417, following Bliss v. Same (C. C. 1888) 34 Fed. 781, and Rand v. Same (D. C. 1888) 36 Fed. 671.

Act March 3, 1887, giving to United States courts jurisdiction of claims against the United States, contains a proviso "that nothing in this section shall be construed as giving either of the courts herein mentioned jurisdiction to hear and determine claims which have been heretofore rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same." Held that, the comptroller of the treasury having charge of the adjustment of accounts against the government, a rejection of an account by him is a rejection by a department authorized to hear and determine the same, within the meaning of the proviso. Rand v. U. S. (D. C. 1888) 36 Fed. 671, following Bliss v. Same (C. C. 1888) 34 Fed. 781.

Act Feb. 22, 1875 (18 Stat. 333), which requires that the accounts of district attorneys, clerks, marshals, etc., shall be forwarded, "when approved," "to the proper accounting officers of the treasury," does not make presentation to such officers a condition precedent to a right of action, nor is rejection of a claim by the accounting officers of the treasury such a determination of a "commission or department authorized to hear and determine," within the meaning of the act of March 3, 1887 (24 Stat. 505), as will bar an action in the proper courts. Erwin v. U. S. (D. C. 1889) 37 Fed. 470, 2 L. R. A. 229.

The rejection by a district court of a United States commissioner's claim for fees because of a supposed want of jurisdiction is no bar to a subsequent suit therefor, when the circuit court, in a similar case, has held in favor of the jurisdiction. Rand v. U. S. (D. C. 1891) 48 Fed. 357.

28. Set-offs and counterclaims.—See §§ 1136(2), 1137, 1588, and notes thereunder, and also notes at end of the constitution.

While no direct suit can be maintained against the United States, a party against whom suit is brought by the United States to recover money may set up any claim he has to such money. U. S. v. Ringgold (1834) 8 Pet. 150, 163, 8 L. Ed. 899.

The difference in quality and fuel value between the coal called for by the contract and a cargo of inferior coal furnished to the government and paid for may be set off against the government's liability to the same contractors under a later contract, where the parties agreed that the acceptance of the inferior coal should be a purchase outside the contract, and the contractors were notified before delivery that they would be charged with the difference if the coal proved inferior. Barry v. U. S. (1913) 33 S. Ct. 681, 229 U. S. 47, 57 L. Ed. 1060, affirming judgment Peabody v. Same (1910) 45 Ct. Cl. 532.

Under Act March 3, 1887 (24 Stat. 505, 506), providing for the bringing of suits against the United States, the court has power to render judgment for the United States for any balance found due on a set-off or counterclaim. U. S. v. Saunders (1897) 79 Fed. 407, 24 C. C. A. 649.

The Tucker Act, conferring on federal District Courts jurisdiction over certain suits against the United States, does not authorize a recovery of demands against the United States on counterclaims. U. S. v. Nipissing Mines Co. (1913) 206 Fed. 431, 124 C. C. A. 313, modifying judgment (D. C. 1912) 202 Fed. 803.

In a suit by the district attorney for compensation for prosecutions, the government may set off an excess retained by him over the statutory allowance in a particular case, under the act of March 3, 1887, providing for bringing suits against the United States; section 1 giving jurisdiction to determine set-offs on the part of the government. Bliss v. U. S. (C. C. 1889) 38 Fed. 230.

Where a marshal has in good faith rendered accounts against the United States, covering services of his deputies, which have been audited and allowed by the proper accounting officers, and paid in accordance with the rules which have always previously been recognized as governing such allowances, and with knowledge that the greater part of the money would be paid over to the deputies rendering the services, the government is not entitled to recover the sums so paid from the marshal after years have elapsed, and he has gone out of office, and is with-

out remedy to recoup his loss, and during which time no objection has been made to such payments by the executive departments or by Congress, which continued to appropriate money therefor, even though the allowances may have been made under an erroneous construction of the law. Walker v. U. S. (C. C. 1905) 139 Fed. 409, judgment affirmed U. S. v. Walker (1906) 148 Fed. 1022, 79 C. C. A. 392.

The district court has jurisdiction of a set-off interposed by the United States to an action by a district attorney for fees brought under Act March 3, 1887. Tuthill v. U. S. (D. C. 1889) 38 Fed. 538.

In a suit by an officer for fees, under the act of March 3, 1887 (24 Stat. 505), when the United States pleads any affirmative matter, such as set-off, the burden is on them to prove it, and not on the petitioner to disprove it. Jones v. U. S. (D. C. 1889) 39 Fed. 410, judgment reversed U. S. v. Jones (1893) 13 S. Ct. 437, 147 U. S. 672, 37 L. Ed. 325.

29. Limitations.—A right of action against the government, under a contract for cartage of imported goods in its custody, accrues as soon as the money becomes due, without a prior presentation of the claim to the executive department for allowance; and hence the six-years limitation in the act of March 3, 1887, begins to run from that time, and is not interrupted by such presentation of the claim, or while it is under investigation or in course of auditing by executive officers. U. S. v. Utz (1897) 80 Fed. 848, 26 C. C. A. 184, reversing judgment Utz v. U. S. (C. C. 1896) 75 Fed. 648.

The limitation of two years prescribed by R. S. § 3227, post, § 5950, for commencement of actions to recover back internal taxes illegally exacted, was not repealed by Act March 3, 1887, c. 359, § 1, 24 Stat. 505, providing that no suits shall be allowed under that law unless they are brought within six years after the causes of action respectively accrue. Christie Street Commission Co. v. U. S. (1905) 136 Fed. 326, 69 C. C. A. 464, affirming judgment (C. C. 1904) 129 Fed. 506.

The limitation contained in Act March 3, 1887, c. 359, § 1, 24 Stat. 505, authorizing suits against the United States that "no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made," in the case of a suit by a marshal to recover fees or disbursements, begins to run as to each item from the time the service was rendered or the disbursement made, and not from the expiration of the plaintiff's term of office. U. S. v. Walker (1906) 148 Fed. 1022, 79 C. C. A. 392, affirming judgment Walker v. U. S. (C. C. 1905) 139 Fed. 409.

The running of the statute of limitations against a claim against the United States for services as jury commissioner is not affected by the claimant having in his hands as marshal money due the United States, nor by the fact that he had no right before Act March 3, 1887, to sue in a circuit court. Kinney v. U. S. (C. C. 1894) 60 Fed. 883.

In a suit against the United States for drawbacks on exportation of imported goods, the six-years limitation contained in the act of March 3, 1887, relative to suits against the United States, begins to run from the date of exportation, not from the date of the decision of the treasury department passing upon the claim. Kennedy v. U. S. (C. C. 1897) 79 Fed. 893.

One suing the government, under the act of March 3, 1887, providing for bringing suits against the United States, is barred as to any part of his demand arising over six years before filing his petition. Timmonds v. U. S. (1898) 84 Fed. 933, 28 C. C. A. 570.

Act March 3, 1887, c. 359, § 1, 24 Stat. 505, providing generally for the bringing of suits against the United States, and limiting such suits to six years after the right accrued, did not supersede R. S. §§ 3226, 3227, post, §§ 5949, 5950, specifically authorizing suits for the recovery of internal taxes paid, and claimed to have been erroneously or illegally assessed or collected, within two years after an appeal has been taken and determined by the department; and such suits are governed by the limitation contained in those sections, which is made one of the conditions of the right of action thereby given. Christie Street Commission Co. v. U. S. (C. C. 1903) 126 Fed. 991.

Suits for the recovery of money due under Inheritance Tax Act June 27, 1902 (32 Stat. 406) were not actions for the recovery of taxes, but for money held by the government in trust for the benefit of the parties to whom it rightfully belonged. The obligation was therefore one payable on demand, and the statute of limitations did not begin to run until there had been a refusal to pay or the equivalent. U. S. v. Wardwell (1898) 172 U. S. 48, 19 Sup. Ct. 86, 43 L. Ed. 360; (1907) 26 Op. Atty. Gen. 194.

30. Procedure in exercise of jurisdiction.—See, also, § 1574 et seq., and notes thereunder.

The court of claims alone has jurisdiction to render money judgments against the government. Case v. Terrell (1870) 11 Wall. 199, 202, 20 L. Ed. 134.

On appeal from a judgment of the circuit court rendered in a suit against the United States under Act March 3, 1887, the question whether the findings of fact of the lower court support its conclusions of law may be reviewed on seasonable assignments of error, without exceptions having been taken. U.

S. v. Ady (1896) 76 Fed. 359, 22 C. C. A. 223.

A petition under Act March 3, 1887, by a clerk of court, to recover fees, is properly regarded as an action at law when debt or assumpsit would lie on the facts stated; and the judgment can be reviewed only by writ of error, and not by appeal. U. S. v. Fletcher (1894) 60 Fed. 53, 8 C. C. A. 453.

The circuit court of appeals has jurisdiction to review, on writ of error, a judgment rendered by the circuit court in an action against the United States, brought under the Tucker act of March 3, 1887 (24 Stat. 505). U. S. v. Coudert (1896) 73 Fed. 505, 19 C. C. A. 543.

One H. was arrested on the charge of obtaining money from post offices on forged money orders, and while in the custody of the marshal a sum of money was taken from his person by a special agent of the post office department. Afterwards H. gave to his attorney an order upon the said post office agent for the money, a specified sum thereof to be retained by the attorney as fees, and the remainder to be paid over to H.'s wife, to whom he was indebted. This order was not recognized, and the money was ultimately covered into the United States treasury. Subsequently H. gave the attorney an assignment of his rights to such money in trust for the same purposes. Thereafter the attorney filed a petition against the United States, under the act of March 3, 1887 (24 Stat. 505), to recover the money for the use of himself and H.'s wife. The wife, on the same day, was allowed to become a party plaintiff, and afterwards, the cause having been partly heard, H. himself was substituted as petitioner, for the use of his attorney and his wife. Held that, as the attorney had only an equitable title under the assignment, and as H. also, after his substitution, sued merely as a trustee, the suit was at all times of an equitable character, and consequently the proper method of reviewing the judgment rendered was by an appeal. U. S. v. Harris (1896) 76 Fed. 241, 22 C. C. A. 149.

Under the act of March 3, 1887, providing for the bringing of suits against the United States, which requires the court to file an opinion setting forth the specific findings of fact, etc., such findings must exhibit exactly the services for which compensation is asked; and, in a suit by a United States commissioner to recover for fees, a finding that he has rendered services as follows: "Charges for per diems for taking bail under capias, etc., $160.00"—is insufficient, because it cannot be inferred therefrom what the charges are for. U. S. v. Stratton (1898) 88 Fed. 54, 31 C. C. A. 384.

Under the act of March 3, 1887 (24 Stat. 505), providing for the bringing of suits against the United States, the requirements of section 7, section 1577, post, that it shall be the duty of the court to file a written opinion "setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved," and to render judgment thereon, are not complied with in a suit by a former marshal, based upon items of his accounts of fees and disbursements which had been disallowed by the treasury department, by findings which merely state that during a period named the plaintiff "performed at diverse and sundry times services for the defendant, the compensation for which was provided by law," and only specify the items in the account which the court holds to have been properly rejected by the treasury officials, and holds as a conclusion of law that all other disallowances "were improper, and in violation of law," and amounted to a sum stated; and such findings will not support a judgment. U. S. v. Kelly (1898) 89 Fed. 946, 32 C. C. A. 441.

In a suit against the United States under Act March 3, 1887, c. 359, 24 Stat. 505, providing for the bringing of suits against the United States, a failure to file answer and notice of counterclaim within the period prescribed by section 6 of that act (section 1576, post), is not a jurisdictional defect, but only an irregularity which may be waived. Charles Warner Co. v. U. S. (C. C. 1900) 101 Fed. 884.

A circuit court, in exercising jurisdiction concurrent with the court of claims, under Act March 3, 1887, c. 359, 24 Stat. 505, is governed by its own rules of procedure, and cannot grant a new trial on a motion made after the expiration of the term at which judgment was rendered. Lynah v. U. S. (C. C. 1901) 106 Fed. 121.

The provision of section 11 of the act creating the Circuit Courts of Appeals (Act March 3, 1891, post, § 1647, that no appeal or writ of error by which any order, judgment, or decree may be reviewed in such court shall be taken or sued out except within six months after the entry of judgment applies to suits on claims against the United States brought in the Circuit Court under Act March 3, 1887, § 2 (embodied herein), and the court has no power to allow an appeal therein by the United States after the expiration of six months from the entry of the decree. Butt v. U. S. (C. C. 1904) 126 Fed. 794, denying appeal (1903) 122 Fed. 511.

Cited without definite application, U. S. v. Coolidge (1816) 1 Wheat. 415, 4 L. Ed. 124; U. S. v. Poinier (1891) 11 Sup. Ct. 752, 140 U. S. 160, 35 L. Ed. 395; U. S. v. Clough (1893) 55 Fed. 373, 374, 5 C. C. A. 140; Conners v. U. S. (1905) 141 Fed. 16, 72 C. C. A. 272; U. S. v. Hurley (1910) 182 Fed. 776, 105 C. C. A. 208; Gulbenkian v. U. S. (1911) 186 Fed. 133, 108 C. C.

A. 245; Bayne v. U. S. (1912) 195 Fed. 236, 115 C. C. A. 188; Marvin v. U. S. (C. C. 1890) 44 Fed. 405, 406 (appeal dismissed [1893] 13 Sup. Ct. 1053, 149 U. S. 789, 37 L. Ed. 961); Ruhm v. U. S. (C. C. 1895) 66 Fed. 531, 532; Jacobus v. U. S. (C. C. 1898) 87 Fed. 99; Williams v. U. S. (C. C. 1900) 104 Fed. 50; Earn Line S. S. Co. v. U. S. (C. C. 1909) 170 Fed. 834; U. S. v. Payne (D. C. 1884) 22 Fed. 426, 427; Dimmick v. U. S. (D. C. 1887) 36 Fed. 82, 83; Van Buren v. U. S. (D. C. 1888) 36 Fed. 77, 78; Reid v. U. S. (D. C. 1908) 161 Fed. 469; Peterson v. U. S. (1890) 26 Ct. Cl. 93.

(21) Of suits for the unlawful inclosure of public lands.

Twenty-first. Of proceedings in equity, by writ of injunction, to restrain violations of the provisions of laws of the United States to prevent the unlawful inclosure of public lands; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure.

Act Feb. 25, 1885, c. 149, § 2, 23 Stat. 321. Act March 3, 1911, c. 231, § 24, par. 21, 36 Stat. 1093.

Notes of Decisions

See post, § 4998, and notes thereunder.

(22) Of suits under immigration and contract-labor laws.

Twenty-second. Of all suits and proceedings arising under any law regulating the immigration of aliens, or under the contract labor laws.

Act March 3, 1911, c. 231, § 24, par. 22, 36 Stat. 1093.

Notes of Decisions

See notes under subdivision 9, ante.

(23) Of suits against trusts, monopolies, and unlawful combinations.

Twenty-third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

Act March 3, 1911, c. 231, § 24, par. 23, 36 Stat. 1093.

Notes of Decisions

See post, § 8823, and notes thereunder.

Effect of provision.—Sherman Act July 2, 1890, § 7, held not repealed by this section, or sections 289, 291, 297, of the Judicial Code, post, §§ 1266, 1268, 1274, and hence section 51, post, § 1033, requiring certain suits to be brought in the district of defendant's residence, does not apply to suits for violations of the Sherman Act. Wogan Bros. v. American Sugar Refining Co. (D. C. 1914) 215 Fed. 273.

(24) Of suits concerning allotments of land to Indians; effect of decrees; lands excepted; right of appeal.

Twenty-fourth. Of all actions, suits, or proceedings involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty.

And the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him; but this provision shall not apply to any lands now or heretofore held by either of the Five Civilized Tribes, the Osage Nation of Indians, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases.

Act March 3, 1911, c. 231, § 24, par. 24, 36 Stat. 1094. Act Dec. 21, 1911, c. 5, 37 Stat. p. 46.

This subdivision of section 24, as enacted in the Judicial Code, contained only the first paragraph set forth here. The second paragraph was added by amendment by Act Dec. 21, 1911, c. 5, last cited above.

(25) Of partition suits where United States is joint tenant.

Twenty-fifth. Of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suits to be brought in the district in which such land is situate.

Act May 17, 1898, c. 339, § 1, 30 Stat. 416. Act March 3, 1911, c. 231, § 24, par. 25, 36 Stat. 1094.

§ 992. (Act Oct. 22, 1913, c. 32.) Commerce Court abolished and jurisdiction vested therein transferred to district courts; additional circuit judges of Commerce Court continued until death, resignation, or removal from office.

The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed. (38 Stat. 219.)

This paragraph and others following it, set forth post, §§ 994, 995, 998, 1000–1003, were provisions accompanying an appropriation for expenses of the Commerce Court during the first half of the fiscal year 1914, in the urgent deficiency appropriation act of Oct. 22, 1913, c. 32, cited above.

The provisions of Act June 18, 1910, c. 309, §§ 1–6, mentioned in this paragraph, which created the Commerce Court, prescribed its jurisdiction, and regulated its procedure, were incorporated in the Judicial Code, in chapter 9, §§ 200–214, thereof, and were repealed by section 297 of said Code, post, § 1274.

The provisions of Jud. Code, §§ 200, 202–206, 214, which related to the establishment and organization, officers, etc., of the Commerce Court, the powers of the court and its judges in cases within its jurisdiction, and the transfer to the court of cases pending in other courts, were superseded by the provisions of this paragraph abolishing the court and repealing all acts and parts of acts in so far as they related to its establishment.

Jud. Code, § 201, relating to the assignment of the additional circuit judges appointed under said Act June 18, 1910, c. 309, as judges of the district courts and circuit courts of appeals, who were to continue so to act under this paragraph, is set forth, in connection with other provisions relating to the circuit judges, post, § 1110.

The provisions of other sections of said chapter 9 of the Judicial Code, §§ 207–213, defining the jurisdiction of the Commerce Court, which was transferred to the district courts by this paragraph, and regulating the procedure, etc., and review on appeal in such cases, are set forth post, §§ 993, 996, 997, 999, 1004–1006.

Notes of Decisions

Expense allowances.—A judge of the Commerce Court can recover the expense allowance provided for by Judicial Code, § 200, up to the termination of his service as a member of such court. Archbald v. U. S. (D. C. 1914) 218 Fed. 270.

§ 993. (Jud. Code, § 207.) Jurisdiction of the Commerce Court.

The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudica-

tion and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes.

Act June 18, 1910, c. 309, § 1, 36 Stat. 539. Act March 3, 1911, c. 231, § 207, 36 Stat. 1148.

The jurisdiction vested in the Commerce Court was transferred to and vested in the several district courts, by provisions of Act Oct. 22, 1913, ante, § 992.

See notes to said section, ante, § 992.

Notes of Decisions

Revisory power.—An order of the Interstate Commerce Commission which, amending a prior order refusing to compel certain trunk line railroads to establish or re-establish through routes and joint rates to certain tap lines, and which required the trunk line to desist from making allowances to the tap lines, is affirmative in character and reviewable in the commerce court. U. S. v. Louisiana & P. R. Co. (1914) 34 Sup. Ct. 741, 234 U. S. 1, 58 L. Ed. 1185, affirming judgment Louisiana & P. Ry. Co. v. U. S. (Com. C. 1913) 209 Fed. 244.

The limitation of the jurisdiction of the Commerce Court to that "now possessed" by the Circuit Courts did not prevent that court from reviewing an order of the Interstate Commerce Commission on an application under section 8 of that act amending Act Feb. 4, 1887, § 4, post, § 8566, for relief from the short and long haul clause of that section. U. S. v. Atchison, T. & S. F. R. Co. (1914) 34 Sup. Ct. 986, 234 U. S. 476, 58 L. Ed. 1408; Same v. Union Pac. R. Co. (1914) 34 Sup. Ct. 995, 234 U. S. 495, 58 L. Ed. 1426, reversing decree Atchison, T. & S. F. Ry. Co. v. U. S. (Com. C. 1911) 191 Fed. 856.

The dismissal by the Interstate Commerce Commission of a petition by a carrier for leave to refund to a shipper an excessive charge collected held not equivalent to an order denying a complaint for reparation by the shipper under Interstate Commerce Act, § 13, post, § 8581, and not reviewable by the Commerce Court at suit of the shipper. Arkansas Fertilizer Co. v. U. S. (Com. C. 1911) 193 Fed. 667.

Where the facts upon which an order of the Interstate Commerce Commission is based are either admitted or undisputed, whether or not such facts show a violation of law by a carrier is a question of law, and a finding by the commission thereon is reviewable by the Commerce Court. Louisville & N. R. Co. v. U. S. (Com. C. 1912) 197 Fed. 58.

The Commerce Court is not authorized to review the determination of disputed questions of fact by the Interstate Commerce Commission, made after a full and fair hearing, on proper notice, unless the Commission exercised its power in an arbitrary and unreasonable manner, or in violation of petitioner's constitutional rights. Florida East Coast Ry. Co. v. U. S. (Com. C. 1912) 200 Fed. 797.

The Commerce Court held without jurisdiction, under this section, to review an order of the Interstate Commerce Commission denying relief to a petitioner. Louisville & N. R. Co. v. U. S. (Com. C. 1913) 207 Fed. 591.

Determination by Interstate Commerce Commission.—The commerce

court exceeded its authority in substituting its judgment as to a preference by carriers for that of the Interstate Commerce Commission on the ground that as the facts are undisputed it had a right so to do. U. S. v. Louisville & N. R. Co. (1914) 35 Sup. Ct. 113, 235 U. S. 314, 59 L. Ed. 245, reversing order Louisville & N. R. Co. v. U. S. (Com. C. 1912) 197 Fed. 58.

Commerce Court has no jurisdiction to consider a question of car distribution in advance of action by the Interstate Commerce Commission, on complaint of a shipper who claims that connecting carriers discriminate against him in refusing freight. U. S. v. Louisville & N. R. Co. (Com. C. 1912) 195 Fed. 88.

Restraining enforcement of orders of Interstate Commerce Commission.—The jurisdiction of the Commerce Court, of cases to enjoin or set aside any order of the Interstate Commerce Commission, does not confer jurisdiction to redress a complaint based on refusal of Commission to award relief to a shipper against demurrage regulations. Procter & Gamble Co. v. U. S. (1912) 32 Sup. Ct. 761, 225 U. S. 282, 56 L. Ed. 1091, reversing judgment (Com. C. 1911) 188 Fed. 221.

The jurisdiction given by Act June 18, 1910, § 1, to the Commerce Court of suits to enjoin orders of the Interstate Commerce Commission, is not defeated so far as an order on application by carriers under section 8 of that act, amending Act Feb. 4, 1887, § 4, post, § 8566, for relief against the long and short haul clause of that act is concerned, on the theory that the consequence would be to enjoin a criminal prosecution. U. S. v. Atchison, T. & S. F. R. Co. (1914) 34 S. Ct. 986, 234 U. S. 476, 58 L. Ed. 1408; Same v. Union Pac. R. Co. (1914) 34 S. Ct. 995, 234 U. S. 495, 58 L. Ed. 1426, reversing decree Atchison, T. & S. F. Ry. Co. v. U. S. (Com. C. 1911) 191 Fed. 856.

Cited without definite application, Storm Lake Tub & Tank Factory v. Minneapolis & St. L. R. Co. (D. C. 1913) 209 Fed. 895, 898.

§ 994. (Act Oct. 22, 1913, c. 32.) Venue of suits in district courts to enforce, suspend, or set aside orders of Interstate Commerce Commission.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment. (38 Stat. 219.)

These were part of the provisions abolishing the Commerce Court and transferring its jurisdiction to the district courts, of the urgent deficiency appropriation act of 1913, cited above.

See notes to preceding paragraph of the act, ante, § 992.

§ 995. (Act Oct. 22, 1913, c. 32.) Procedure in district courts in cases jurisdiction of which was transferred from Commerce Court.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. (38 Stat. 220.)

These were further provisions of the urgent deficiency act of 1913, cited above.

See notes to preceding paragraph of act, ante, § 992.

Cases jurisdiction of which was conferred on the district courts by this

act, as stated in this paragraph, were cases of which the Commerce Court had jurisdiction, under Jud. Code, § 207, ante, § 993.

The right of appeal from the Commerce Court, also mentioned in this paragraph, was provided for by Jud. Code, § 210, post, § 999.

Notes of Decisions

Effect on procedure.—Power of equity to maintain status quo pending appeal from decree changing it held not impaired by this act. Louisville & N. R. Co. v. U. S. (D. C. 1915) 227 Fed. 273.

§ 996. (Jud. Code, § 209.) Jurisdiction of the court, how invoked; practice and procedure.

The jurisdiction of the Commerce Court shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the Commerce Court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office, and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court; and may prescribe that the evidence be taken before a single judge of the court, with power to rule upon the admission of evidence. Except as may be otherwise provided in this chapter, or by rule of the court, the practice and procedure in the Commerce Court shall conform as nearly as may be to that in like cases in a district court of the United States.

Act June 18, 1910, c. 309, § 1, 36 Stat. 539. Act March 3, 1911, c. 231, § 209, 36 Stat. 1149.

The procedure in the district courts, in cases jurisdiction of which was transferred to them from the Commerce Court, was to be the same as that prevailing in the Commerce Court, by a provision of the act transferring such jurisdiction, Act Oct. 22, 1913, c. 32, ante, § 995.

§ 997. (Jud. Code, § 208.) Suits to enjoin, etc., orders of Interstate Commerce Commission to be against United States; restraining orders, when granted without notice.

Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

Act June 18, 1910, c. 309, § 3, 36 Stat. 542. Act March 3, 1911, c. 231, § 208, 36 Stat. 1149.

The jurisdiction of the Commerce Court was transferred to the district courts by provisions of Act Oct. 22, 1913, c. 32, ante, § 992.

Further provisions of this section regulated the making by the Commerce

Court of orders or injunctions restraining or suspending an order of the Interstate Commerce Commission, and the procedure on applications therefor. They were superseded by provisions regulating the making of such interlocutory injunctions by the district courts or judges thereof, and the proceedings on applications therefor, made by said Act Oct. 22, 1913, c. 32, post, § 998.

Jurisdiction of cases brought to enjoin, set aside, etc., orders of the Interstate Commerce Commission, was given by Jud. Code, § 207, subsec. 2, ante, § 993.

Notes of Decisions

Discretion of court.—The Commerce Court, in the exercise of the legal discretion vested in it by this section, will grant a preliminary injunction suspending the operation of an order of the Interstate Commerce Commission, where it is shown that its enforcement will result in the destruction of the business of a large class of shippers in a city and a large loss to them, while the damage which will result to others from its suspension will be small in comparison. Nashville Grain Exch. v. U. S. (Com. C. 1911) 191 Fed. 37.

The word "discretion," as used in this section, means a legal discretion, a discretion controlled and limited by sound principles of law applied to the facts in each particular case. Id.

Suits to enjoin or annul orders.—See, also, post, § 8583, and notes thereunder.

Carriers necessarily affected by an order of the Interstate Commerce Commission, although not parties thereto, may maintain a suit to enjoin its enforcement. Atlantic Coast Line R. Co. v. Interstate Commerce Commission (Com. C. 1911) 194 Fed. 449.

Allegations of the bill in a suit to annul an order of the Interstate Commerce Commission respecting the evidence on which the commission acted held sufficient on demurrer. Id.

A bill in a suit to annul an order of the Interstate Commerce Commission fixing rates held insufficient on demurrer. Id.

Any party against whom an order fixing rates is made by the Interstate Commerce Commission may petition the court for redress without joining other parties to the order, such suit being plenary, and the injury, if any, being several and not joint. Id.

In a suit by carriers to annul an order of the Interstate Commerce Commission, whether there is any evidence to sustain the findings of the commission was a question of law. Id.

§ 998. (Act Oct. 22, 1913, c. 32.) Interlocutory injunctions suspending or restraining enforcement, etc., of orders of Interstate Commerce Commission; application, and proceedings thereon; temporary stay or suspension; hearing; appeal to Supreme Court.

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: Provided, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submit-

ted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (38 Stat. 220.)

These were a further part of the provisions abolishing the Commerce Court, and transferring its jurisdiction to the district courts, of the urgent deficiency appropriation act of 1913, cited above.

See notes to preceding paragraph of this act, ante, § 992, and to Jud. Code, § 208, ante, § 997.

Previous provisions for appeal from interlocutory orders or decrees of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, were made by Jud. Code, § 210, post, § 999.

Notes of Decisions

Stay of enforcement of orders.—Only temporary restraining orders of the Commerce Court are affected by requirement as to statement of fact as to irreparable damage, and do not apply to a preliminary injunction. U. S. v. Baltimore & O. R. Co. (1912) 32 S. Ct. 817.

The granting by the Commerce Court of an injunction pendente lite, suspending, until determination of the suit, an order of the Interstate Commerce Commission, requiring carriers to desist from alleged discriminatory allowances, is not in excess of its power unless plainly unnecessary. Id.

Enforcement of order of Interstate Commerce Commission held to be stayed to enable railroad companies to perfect appeal, and to present to the Supreme Court an application for a preliminary suspension order. Louisville & N. R. Co. v. U. S. (D. C. 1915) 227 Fed. 273.

Injunction as dependent on damages.—Injunction against order of Interstate Commerce Commission held to be denied where, though it was in operation, plaintiff had suffered and probably would suffer no substantial damage therefrom. Galveston, H. & S. A. Ry. Co. v. U. S. (D. C. 1915) 222 Fed. 175.

Final hearings.—The hearing before three judges of a motion to dismiss for want of equity a petition to set aside an order of the Interstate Commerce Commission, is a final hearing within the meaning of Act Oct. 22, 1913. Louisville & N. R. Co. v. U. S. (D. C. 1915) 227 Fed. 258.

Appeal to Supreme Court.—The federal Supreme Court on appeal, under Act Oct. 22, 1913, from denial of an interlocutory injunction restraining enforcement of order of Interstate Commerce Commission, will determine whether, as a matter of law, findings of fact sustain the order. Louisville & N. R. Co. v. U. S. (1915) 35 S. Ct. 696, 238 U. S. 1, 59 L. Ed. 1177, affirming judgment (D. C. 1914) 216 Fed. 672.

An appeal will not lie to the Commerce Court to review act of the Interstate Commerce Commission in refusing to entertain a petition, upon the ground that the subject-matter was not within the scope of its powers. Interstate Commerce Commission v. U. S. (1912) 32 S. Ct. 556.

The federal Supreme Court will not disturb, on appeal, the granting by the Commerce Court of an injunction pendente lite, until final determination of the suit, suspending an order of the Interstate Commerce Commission requiring carriers to desist from alleged discriminatory allowances, unless an abuse of discretion appears. U. S. v. Baltimore & O. R. Co. (1912) 32 S. Ct. 817.

§ 999. (Jud. Code, § 210.) Final judgments and decrees reviewable in Supreme Court.

A final judgment or decree of the Commerce Court may be re-

viewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree. Such appeal may be taken in like manner as appeals from a district court of the United States to the Supreme Court, and the Commerce Court may direct the original record to be transmitted on appeal instead of a transcript thereof. The Supreme Court may affirm, reverse, or modify the final judgment or decree of the Commerce Court as the case may require. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the Commerce Court appealed from, unless the Supreme Court or a justice thereof shall so direct; and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of that court allowing the stay, may require. An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the Commerce Court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree. Appeals to the Supreme Court under this section shall have priority in hearing and determination over all other causes except criminal causes in that court.

Act June 18, 1910, c. 309, § 2, 36 Stat. 542. Act March 3, 1911, c. 231, § 210, 36 Stat. 1150.

On the abolition of the Commerce Court and the transfer of its jurisdiction to the district courts, the right of appeal from the district courts in cases jurisdiction of which was so transferred was to be the same as theretofore from the Commerce Court by a provision of the act making such transfer, Act Oct. 22, 1913, c. 32, ante, § 995.

Further provisions as to such appeals from final judgments or decrees of the district courts, made by said Act Oct. 22, 1913, c. 32, are set forth post, § 1000.

Further provisions, also, as to appeals from orders granting or denying interlocutory injunctions suspending or restraining enforcement, etc., of orders of the Interstate Commerce Commission, made by said Act Oct. 22, 1913, c. 32, are set forth ante, § 998.

Notes of Decisions

Questions of fact.—The supreme court will not feel disposed to review the question of fact whether the circumstances and conditions were so dissimilar as to justify the rates charged in a particular case, when the finding of the commission thereon has been accepted and approved by the circuit court of appeals, or to review a question as to the reasonableness of rates charged, when the circuit court and the circuit court of appeals have concurred in finding the existing rate reasonable. Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission (1896) 16 S. Ct. 700, 162 U. S. 184, 40 L. Ed. 935, affirming decree (C. C. 1893) 56 Fed. 925.

§ 1000. (Act Oct. 22, 1913, c. 32.) Final judgments and decrees of district courts reviewable in Supreme Court; taking appeal; notice.

A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State. (38 Stat. 220.)

These were further provisions of the urgent deficiency appropriation act of 1913, cited above.

See notes to preceding paragraphs of this act, ante, § 992.

Previous provisions as to such appeals from final judgments and decrees of the Commerce Court were made by Jud. Code, § 210, ante, § 999.

R. S. § 1008, post, § 1649, provides that no judgment, decree, or order of a district court, in any civil action, at law or in equity, shall be reviewed in the supreme court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment,

order or decree. Said section would seem to conflict with this section, if this section is to be construed as applying to all decrees or judgments of the district courts reviewable by the supreme court. If, however, this section is to be construed as applying only to those final judgments or decrees of the district courts in cases which come before such courts under the transfer of the jurisdiction of the commerce court to the district courts by § 992, ante, there would be no conflict between the two sections.

§ 1001. (Act Oct. 22, 1913, c. 32.) Transfer to district courts of cases pending in Commerce Court and records, etc., thereof; disposition of books, papers and other property of Commerce Court.

All cases pending in the Commerce Court at the date of the passage of this Act shall be deemed pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree and the latter to be transferred to the district courts if not decided by the Commerce Court before December first, nineteen hundred and thirteen, and all cases wherein injunctions or other orders or decrees, mandatory or otherwise, have been directed or entered prior to the abolition of the said court shall be transferred forthwith to said district courts, which shall have jurisdiction to proceed therewith and to enforce said injunctions, orders, or decrees. Each of said cases and all the records, papers, and proceedings shall be transferred to the district court wherein it might have been filed at the time it was filed in the Commerce Court if this Act had then been in effect; and if it might have been filed in any one of two or more district courts it shall be transferred to that one of said district courts which may be designated by the petitioner or petitioners in said case, or, upon failure of said petitioners to act in the premises within thirty days after the passage of this Act, to such one of said district courts as may be designated by the judges of the Commerce Court. The judges of the Commerce Court shall have authority, and are hereby directed, to make any and all orders and to take any other action necessary to transfer as aforesaid the cases and all the records, papers, and proceedings then pending in the Commerce Court to said district courts. All administrative books, dockets, files, and all papers of the Commerce Court not transferred as part of the record of any particular case shall be lodged in the Department of Justice. All furniture, carpets, and other property of the Commerce Court is turned over to the Department of Justice and the Attorney General is authorized to supply such portion thereof as in his judgment may be proper and necessary to the United States Board of Mediation and Conciliation. (38 Stat. 221.)

These were further provisions of the urgent deficiency appropriation act of 1913, cited above.

See notes to preceding paragraph of this act, ante, § 992.

§ 1002. (Act Oct. 22, 1913, c. 32.) Remand of cases in Supreme Court to district courts, and proceedings therein.

Any case hereafter remanded from the Supreme Court which, but for the passage of this Act, would have been remanded to the Commerce Court, shall be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the Commerce Court if this Act had then been in effect, and thereafter such district court shall take all necessary and proper proceedings in such case in accordance with law and such mandate, order, or decree therein as may be made by said Supreme Court. (38 Stat. 221.)

These were further provisions of the urgent deficiency appropriation act of 1913, cited above.

See notes to preceding paragraph of this act, ante, § 992.

§ 1003. (Act Oct. 22, 1913, c. 32.) Repeal.

All laws or parts of laws inconsistent with the foregoing provisions relating to the Commerce Court, are repealed. (38 Stat. 221.)

This was a further provision of the urgent deficiency appropriation act of 1913, cited above.

See notes to preceding paragraph of act, ante, § 992.

All acts or parts of acts in so far as they relate to the establishment of the Commerce Court were repealed by a preceding provision of this act, ante, § 992.

§ 1004. (Jud. Code, § 211.) Suits to be against United States; when United States may intervene.

All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved.

Act June 18, 1910, c. 309, § 4, 36 Stat. 542. Act March 3, 1911, c. 231, § 211, 36 Stat. 1150.

The Commerce Court was abolished, and the jurisdiction vested in it was transferred to the district courts, the procedure in them in cases jurisdiction of which was so conferred to be the same as that theretofore prevailing in the Commerce Court, by provisions of Act Oct. 22, 1913, c. 32, ante, § 992.

§ 1005. (Jud. Code, § 212.) Attorney General to control all cases; Interstate Commerce Commission may appear as of right; parties interested may intervene, etc.

The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys; and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: Provided, That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suits: Provided further, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue

said suit or proceeding unaffected by the action or non-action of the Attorney General therein.

Act June 18, 1910, c. 309, § 5, 36 Stat. 543. Act March 3, 1911, c. 231, § 212, 36 Stat. 1150.

See note to Jud. Code, § 211, ante, § 1004.

Notes of Decisions

Right to intervene.—Under the broad provisions of the last proviso of section 5 of Act June 18, 1910, c. 309, an incorporated grain exchange or a board of trade of a city, most or all of whose members are engaged in business which will be directly affected by an order of the commission, is interested in the question involved, and is entitled to intervene in a suit in the Commerce Court brought to enjoin the enforcement of such order. Nashville Grain Exch. v. U. S. (Com. C. 1911) 191 Fed. 37.

§ 1006. (Jud. Code, § 213.) Complainants may appear and be made parties to case.

Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel, under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States.

Act June 18, 1910, c. 309, § 5, 36 Stat. 543. Act March 3, 1911, c. 231, § 213, 36 Stat. 1151.

See note to Jud. Code, § 211, ante, § 1004.

§ 1007. (Jud. Code, § 25.) Appellate jurisdiction under Chinese-exclusion laws.

The district courts shall have appellate jurisdiction of the judgments and orders of United States commissioners in cases arising under the Chinese exclusion laws.

Act March 3, 1911, c. 231, § 25, 36 Stat. 1094.

Notes of Decisions

Appellate jurisdiction in general.—Since by section 4313, post, jurisdiction of exclusion proceedings is expressly conferred on United States commissioners with the right to appeal to the district court as provided by this section, a Chinaman arrested in such proceedings before a commissioner is not entitled to discharge on habeas corpus on the ground that he possessed a certificate of residence as a merchant entitling him to remain in the United States. Ex parte Jim Hong (1914) 211 Fed. 73, 127 C. C. A. 569.

A proceeding for the exclusion of a Chinese alien in the first instance is within the jurisdiction of the Chinese inspector, from whom an appeal may be taken to the Department of Commerce and Labor, after which resort may be had to the courts if the decision is adverse to the persons seeking admission. Ex parte Lee Kow (C. C. 1908) 161 Fed. 592.

Cited without definite application. U. S. v. Hung Chang (1904) 130 Fed. 439, 64 C. C. A. 641.

§ 1008. (Jud. Code, § 26.) Appellate jurisdiction over Yellowstone National Park.

The district court for the district of Wyoming shall have jurisdiction of all felonies committed within the Yellowstone National Park and appellate jurisdiction of judgments in cases of conviction before the commissioner authorized to be appointed under section five of an Act entitled "An Act to protect the birds and animals in Yellowstone National Park, and to punish crimes in said Park, and for other purposes," approved May seventh, eighteen hundred and ninety-four.

Act March 3, 1911, c. 231, § 26, 36 Stat. 1094.

Act May 7, 1894, c. 72, § 5, mentioned in this section, is set forth post, § 5194.

§ 1009. (Jud. Code, § 27.) Jurisdiction of crimes on Indian reservations in South Dakota.

The district court of the United States for the district of South Dakota shall have jurisdiction to hear, try, and determine all ac-

tions and proceedings in which any person shall be charged with the crime of murder, manslaughter, rape, assault with intent to kill, arson, burglary, larceny, or assault with a dangerous weapon, committed within the limits of any Indian reservation in the State of South Dakota.

Act Feb. 2, 1903, c. 351, 32 Stat. 793. Act March 4, 1909, c. 321, § 329, 35 Stat. 1151. Act March 3, 1911, c. 231, § 27, 36 Stat. 1094.

Provisions similar to those in this section are contained in Cr. Code, § 329, post, § 10503, together with other provisions relating to the punishment for the offenses enumerated therein.

Notes of Decisions

Validity.—This statute was within the power of Congress as an instrumentality employed in the discharge of a national duty to the Indians. As originally enacted, it was not objectionable as delegating to the state authority to fix punishment for federal offenses, in providing that persons committing certain offenses shall be subject to the same punishments as "are" all other persons convicted of such crimes under the laws of the state of South Dakota. Hollister v. U. S. (1906) 145 Fed. 778, 76 C. C. A. 337.

This section as originally enacted held inoperative, so far as any particular reservation was concerned, on the extinguishment of the Indian title. U. S. v. La Plant (D. C. 1911) 200 Fed. 92.

Offenses committed in town sites.—Under this section as originally enacted, an offense committed on a lot in a town site withdrawn from an Indian reservation, under Act May 29, 1908, c. 218, 35 Stat. 460, was not within the jurisdiction of the federal courts. U. S. v. La Plant (D. C. 1911) 200 Fed. 92.

Crimes committed by Indians.—An Indian amenable to the general criminal laws of the state may be prosecuted in the state courts for bigamy committed within an Indian reservation notwithstanding this section as originally enacted. State v. Nimrod (S. D. 1912) 138 N. W. 377.

CHAPTER THREE

District Courts—Removal of Causes

Sec.
1010. Removal of suits from State to United States district courts.
1011. Procedure for removal.
1012. Suits under grants of land from different States.
1013. Removal of causes against persons denied any civil rights, etc.
1014. When petitioner is in actual custody of State court.
1015. Suits and prosecutions against revenue officers, etc.
1016. Removal of suits by aliens.
1017. When copies of records are refused by clerk of State court.
1018. Previous attachment bonds, orders, etc., remain valid.
1019. Suits improperly in district court may be dismissed or remanded.
1020. Proceedings in suits removed.
1021. Time for filing record; return of record, how enforced.

§ 1010. (Jud. Code, § 28, as amended, Act Jan. 20, 1914, c. 11.) Removal of suits from State to United States district courts.

Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them,

then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: Provided, That no case arising under an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States. And provided further, That no suit brought in any State court of competent jurisdiction against a railroad company, or other corporation, or person, engaged in and carrying on the business of a common carrier, to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under section twenty of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended June twenty-ninth, nineteen hundred and six, April thirteenth, nineteen hundred and eight, February twenty-fifth, nineteen hundred and nine, and June eighteenth, nineteen hundred and ten, shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000.

Act March 3, 1875, c. 137, § 2, 18 Stat. 470. Act March 3, 1887, c. 373, § 1, 24 Stat. 552. Act Aug. 13, 1888, c. 866, 25 Stat. 433. Act April 5, 1910, c. 143, § 1, 36 Stat. 291. Act March 3, 1911, c. 231, § 28, 36 Stat. 1094. 38 Stat. 278.

This section, as enacted in the Judicial Code, was amended by Act Jan. 20, 1914, c. 11, cited above, by adding thereto the last proviso as set forth above.

Similar provisions for removal of causes arising under the act mentioned in

the next to the last proviso of this section were made by that act as amended by Act April 5, 1910, c. 143, § 1, post, § 8662.

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I. Validity and construction in general

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15. Source of right of removal.
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39. Courts from which suits may be removed.
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43. Jurisdiction of United States courts in general.
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55. Necessity for construction of constitution or laws of the United States.
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59. Questions of fact or of law.
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61. Removal by one or more coparties.
62. —— Effect of failure of one coparty to petition for removal in time.
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(B) Cases arising under the constitution of the United States

64. Proceedings by states, or governmental agencies or subdivisions thereof.
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(C) Cases arising under laws of United States

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67. Actions against or for acts of United States officers.
68. —— Actions or prosecutions against officers acting under the revenue or election laws.
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III. Removal of cases arising under constitution, laws or treaties of the United States—Cont'd.

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86. —— Decisions in cases under the employers' liability act prior to the enactment of the proviso restricting removal.
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92. Petition for removal.
93. Decisions under statutes before Act 1887-88.
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96. Actions by or against United States corporations in general.
97. Cases under laws relating to public lands.
98. Cases under laws relating to navigation.
99. Cases under laws relating to interstate commerce.
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104. Assignees.
105. —— Transfers to prevent removal.
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107. Actions by or against states.
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109. Time of existence of ground of removal.

(B) *Improper or collusive joinder of parties*

110. Joinder to give jurisdiction or authorize removal.
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112. —— Joinder of plaintiffs.
113. Right to join.
114. Cause of action against resident defendant.
115. Joinder of grantor and grantee.
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118. Joinder of principal and agent.
119. Joinder of master and servant.
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121. Pleading and proof of fraudulent purpose.
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123. General rules.
124. Who are plaintiffs and defendants.
125. Residence of party removing cause.
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127. Removal by one or more coparties.
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130. —— Joinder of coparties in petition for removal.
131. Interveners.
132. Substituted parties.

(D) *Allegations in pleadings*

133. General rules.
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(A) *Nature of controversy*

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138. —— Actions involving rights of mortgagors and mortgagees.
139. —— Owner and insurer of property.
140. —— Actions against trustee and beneficiary.
141. —— Actions involving claims to personal property.
142. —— Corporations and their officers and stockholders.
143. —— Actions involving the rights and liabilities of principals and sureties.
144. —— Principal and agent.
145. Creditors' bills.
146. —— Assignments.
147. —— Proceedings relating to estates of decedents.
148. —— Partition.
149. —— Condemnation and special assessment proceedings.
150. —— Partnership transactions.
151. —— Taxpayers' actions.
152. Determination of controversy without all parties.
153. —— Suits involving title or right to lands.
154. —— Suits involving rights and liabilities under mortgages and trust deeds.
155. —— Suits involving estates of decedents.
156. —— Suits involving rights and liabilities of corporations, their officers and stockholders.
157. —— Creditors' bills.
158. Determination or dismissal as to some defendants.
159. Removal of whole suit.

(B) *Joint or joint and several causes of action*

160. General rules.
161. Contracts.
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V. Separable controversies—Cont'd.

(B) *Joint or joint and several causes of action—Cont'd.*

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171. —— Title to real property.
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174. Interests in separate parts of subject-matter.
175. —— Condemnation proceedings.
176. Parties joined as claiming interest in subject-matter.
177. Priorities of liens or rights in subject-matter.
178. Separate relief against different defendants.
179. Separate defenses.
180. Set-offs, counterclaims, and cross-actions.

(D) *Parties*

181. Parties entitled to remove.
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183. Residence of party removing cause.

(E) *Allegations in pleadings*

184. Petition for removal.
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186. Particular allegations.

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187. Nature of prejudice or influence.
188. Existence and evidence of prejudice or local influence.
189. Remedy by removal to other state court.
190. Citizenship of parties.
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(B) *Parties*

192. Parties entitled to remove for prejudice or local influence.
193. Removal by one or more coparties.
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198. —— Effect of motion for new trial or appeal.
199. Time for taking proceedings—Construction of provision in general.
200. Before trial.
201. Effect of ruling on demurrer.
202. Effect of granting new trial.
203. Trial de novo on appeal.
204. Waiver of objection to delay in application.
205. Notice.
206. Petition, affidavits, and other proof of prejudice or local influence.
207. —— Decisions under Act of 1867 and R. S. § 639, subd. 3, authorizing removal where party makes affidavit to belief of local prejudice.
208. —— Averments as to citizenship of parties.
209. —— Persons who may make petition or affidavit.
210. —— Sufficiency of affidavit.
211. Traverse of prejudice or local influence.
212. Bond.
213. —— Decisions under Act 1867 and R. S. § 639, subd. 3, requiring a special form of bond for removal on ground of prejudice.
214. Determination by United States court as to removal on ground of prejudice or local influence.
215. —— Waiver of objection to insufficient showing.
216. Transfer of jurisdiction.
217. Motion to remand.
218. Separable controversy as to parties not affected by prejudice or local influence.

VII. Amount in controversy

219. Amount in controversy necessary to give jurisdiction to the federal courts.
220. Cases subject to pecuniary limitation.
221. —— Cases of prejudice or local influence.
222. Amount or value claimed or involved.
223. Allegations and prayers in pleadings.
224. Increase or reduction by amendment.

VIII. Effect of remand and review thereof

(A) *Effect of remand*

225. Jurisdiction of state court after remand
226. Proceedings in state court.
227. Revocation of order of remand.
228. Removal after remand.

(B) *Review of order remanding cause*

229. Review or order denying remand.
230. Decisions under prior statutes not prohibiting review of order remanding cause.
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232. Review by state court.

IX. Proceedings in state court after dismissal in federal court

233. Right to sue again on same cause of action.

I. VALIDITY AND CONSTRUCTION IN GENERAL

(A) *Constitutionality*

1. Constitutionality of removal acts in general.—If the case, whether civil or criminal, be one to which the judicial power of the United States extends, its removal to the federal court does not invade state jurisdiction. Tennessee v. Davis (1879) 100 U. S. 257, 25 L. Ed. 648.

A federal district court, which is created and its jurisdiction prescribed by Congress cannot hold unconstitutional a provision of a congressional act limiting the right to remove causes from a state court. Gibson v. Bellingham & N. Ry. Co. (D. C. 1914) 213 Fed. 488.

The Supreme Court of the United States, having upheld the right of removal of causes from the state to the

federal court, conferred by Congress, must of necessity have upheld the power of Congress under which that right was conferred. Clinger's Adm'x v. Chesapeake & O. Ry. Co. (Ky. 1910) 128 S. W. 1055.

The statutes providing for the removal of causes are constitutional. Goodman v. City of Oshkosh (1878) 45 Wis. 355. CONTRA, Johnson v. Gordon (1854) 4 Cal. 368; Moseley v. Chamberlain (1861) 18 Wis. 700.

2. **Particular provisions.**—A provision for the removal of a cause instituted against a corporation organized under a law of the United States, where it appears that the corporation defendant has a defense arising under or by virtue of the constitution of the United States or of any treaty or law of the United States, is constitutional. Fisk v. Union Pac. R. Co. (C. C. 1869) Fed. Cas. No. 4,827.

The term "suits of a civil nature" is less comprehensive than the term "cases," in the provision of the constitution defining the judicial power of the United States, as the latter may embrace proceedings not usually nor strictly termed suits, as well as prosecutions of a criminal nature. There can, therefore, be no question as to the validity of the legislation of congress. San Mateo County v. Southern Pac. R. Co. (C. C. 1882) 13 Fed. 145.

The provision that the circuit court shall remand a cause removed on the ground of local influence and prejudice when on application it has examined the affidavit and its grounds, and not become satisfied that the removing party will not be able to obtain justice in the state court, is not, as regards pending causes, unconstitutional. Birdseye v. Shaeffer (C. C. 1888) 37 Fed. 821.

The prohibition of the removal of cases arising under the federal Employers' Liability Act was in the exercise of the power granted to Congress by Const. art. 3. Kelly's Adm'x v. Chesapeake & O. Ry. Co. (D. C. 1912) 201 Fed. 602.

The provision authorizing the removal of causes from state to United States court "at any time before final hearing or trial of the suit," is unconstitutional, as devesting the state courts of acquired jurisdiction in cases in which their jurisdiction is concurrent with the United States courts. Stephens v. Howe (N. Y. 1872) 43 How. Prac. 134.

3. —— **Removal for prejudice or local influence.**—Act March 2, 1867, was not unconstitutional in its application to cases where it was the plaintiff who applied for a removal. Commencing suit in a state court is not such a voluntary submission to state jurisdiction as can debar plaintiff from seeking the benefit of the national laws. Chicago & N. W. R. Co. v. Whitton (1871) 80 U. S. (13 Wall.) 270, 20 L. Ed. 571; Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399; Burson v. National Park Bank (1872) 40 Ind. 173, 13 Am. Rep. 285; Meadow Val. Min. Co. v. Dodds (1871) 7 Nev. 143, 8 Am. Rep. 709. CONTRA, Whiton v. Chicago & N. W. Ry. Co. (1870) 25 Wis. 424, 3 Am. Rep. 101.

The provision for the removal of causes for prejudice or local influence is valid. Chicago & N. W. R. Co. v. Whitton (1871) 13 Wall. 270-289, 20 L. Ed. 571; Home Life Ins. Co. v. Dunn (1873) 86 U. S. (19 Wall.) 214, 22 L. Ed. 68.

Even though by virtue of the removal the circuit court obtains jurisdiction of the entire cause, including controversies between plaintiff and the resident defendants. Whelan v. New York, L. E. & W. R. Co. (C. C. 1888) 35 Fed. 849, 1 L. R. A. 65.

Congress may provide for the removal of one class of cases to the exclusion of others, though excluded suits may be surrounded by local prejudices and influences preventing a fair trial in the state court. Lombardo v. Boston & M. R. R. (D. C. 1915) 223 Fed. 427.

(B) Construction

4. **Decisions as to the effect and relation of the various removal acts.**—Green v. Custard (1859) 64 U. S. (23 How.) 484, 16 L. Ed. 471; Gableman v. Peoria, D. & E. Ry. Co. (1900) 21 Sup. Ct. 171, 172, 179 U. S. 335, 45 L. Ed. 220; Cole v. Garland (1901) 107 Fed. 759, 46 C. C. A. 626; Fisk v. Union Pac. R. Co. (C. C. 1869) Fed. Cas. No. 4,827; Allen v. Ryerson (C. C. 1873) Fed. Cas. No. 235; Hoadley v. San Francisco (C. C. 1875) Fed. Cas. No. 6,544; Young v. Andes Ins. Co. (C. C. 1876) Fed. Cas. No. 18,151; St. Louis Nat. Bank v. Allen (C. C. 1881) 5 Fed. 551, 555; Ballin v. Lehr (C. C. 1885) 24 Fed. 193; Lazensky v. Supreme Lodge Knights of Honor (C. C. 1887) 32 Fed. 417; Ames v. Chicago, S. F. & C. Ry. Co. (C. C. 1889) 39 Fed. 881, 882; Frishman v. Insurance Cos. (C. C. 1890) 41 Fed. 449; Hall v. Chattanooga Agricultural Works (C. C. 1891) 48 Fed. 599, 602; Sherwood v. Newport News & M. Val. Co. (C. C. 1893) 55 Fed. 1; Crawford v. Hubbell (C. C. 1898) 89 Fed. 1; Western Union Tel. Co. v. Levi (1874) 47 Ind. 552; Crane v. Reeder (1874) 28 Mich. 527, 15 Am. Rep. 223; Crane v. Gerloff (1875) 31 Mich. 454; Disbrow v. Driggs (N. Y. 1858) 8 Abb. Prac. 305, note, 16 How. Prac. 346; Kaufman v. McNutt (Ohio, 1876) 1 Wkly. Law Bul. 94.

5. —— **Repeals.**—Hyde v. Ruble (1881) 104 U. S. 407, 410, 26 L. Ed. 823; King v. Cornell (1882) 1 Sup. Ct. 312, 313, 106 U. S. 395, 27 L. Ed. 60; Holland v. Chambers (1884) 3 Sup. Ct. 427, 110 U. S. 59, 28 L. Ed. 70 (affirming Chambers v. Holland [C. C. 1882] 11 Fed. 355, 3 McCrary, 538); Hess v. Reynolds (1885) 113 U. S. 73,

5 Sup. Ct. 377, 28 L. Ed. 927; Baltimore & O. R. Co. v. Bates (1886) 7 Sup. Ct. 285, 286, 119 U. S. 464, 30 L. Ed. 436; Chicago, St. P., M. & O. R. Co. v. Roberts (1891) 12 Sup. Ct. 123, 141 U. S. 690, 35 L. Ed. 905 (dismissing writ of error Roberts v. Chicago, St. P., M. & O. Ry. Co. [C. C. 1891] 45 Fed. 433); Fisk v. Henarie (1892) 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080 (reversing [1887] 32 Fed. 417, and [1888] 35 Fed. 230); Hanrick v. Hanrick (1894) 14 Sup. Ct. 835, 837, 153 U. S. 192, 38 L. Ed. 685; Fields v. Lamb (C. C. 1868) Fed. Cas. No. 4,775; Fisk v. Union Pac. R. Co. (C. C. 1869) Id. 4,827; Kain v. Texas Pac. R. Co. (C. C. 1875) Id. 7,596; Minnett v. Milwaukee & St. P. Ry. Co. (C. C. 1875) Id. 9,636; Arapahoe County v. Kansas Pac. Ry. Co. (C. C. 1877) Id. 502; Cooke v. Ford, Id. 3,173; Dennis v. Alachua County, Id. 3,791; New Jersey Zinc Co. v. Trotter, Id. 10,167; Low v. Wayne County Sav. Bank (C. C. 1878) Id. 8,562; La Mothe Mfg. Co. v. National Tube Works Co. (C. C. 1879) Id. 8,033; Sims v. Sims, Id. 12,894; Whitehouse v. Continental Fire Ins. Co. (C. C. 1880) 2 Fed. 498; Norris v. Mineral Point Tunnel (C. C. 1881) 7 Fed. 272; Clark v. Chicago, M. & St. P. Ry. Co. (C. C. 1882) 11 Fed. 355; Connell v. Utica, U. & E. R. Co. (C. C. 1882) 13 Fed. 241; Tuedt v. Carson (C. C. 1882) 13 Fed. 353; Hobby v. Allison (C. C. 1882) 13 Fed. 401; State of Texas v. Lewis (C. C. 1882) 14 Fed. 65; Folsom v. Continental Nat. Bank (C. C. 1882) 14 Fed. 497; Hollister v. Bell (C. C. 1882) 17 Fed. 705; Kelly v. Houghton (C. C. 1883) 23 Fed. 417; Melendy v. Currier (C. C. 1884) 22 Fed. 129; Mairer v. Olmstead (C. C. 1885) 24 Fed. 193; Field v. Williams (C. C. 1885) 24 Fed. 513, 515; Short v. Chicago, M. & St. P. Ry. Co. (C. C. 1887) 33 Fed. 114; Woodrum v. Clay (C. C. 1888) 33 Fed. 897; Whelan v. New York, L. E. & W. R. Co. (C. C. 1888) 35 Fed. 849, 1 L. R. A. 65; Southworth v. Reid (C. C. 1888) 36 Fed. 451; Carson & Rand Lumber Co. v. Holtzclaw (C. C. 1889) 39 Fed. 885, 886; Minnick v. Union Ins. Co. (C. C. 1889) 40 Fed. 369; Hammond v. Buchanan (1882) 68 Ga. 728; Baltimore, P. & C. Ry. Co. v. New Albany & S. R. Co. (1876) 53 Ind. 597; Stone v. Sargent (1880) 129 Mass. 503; Butterfield v. Home Ins. Co. (1869) 14 Minn. 410 (Gil. 310); Lang v. Lynch (1884) 63 N. H. 243; Wickham v. Wickham (N. Y. 1880) 20 Hun, 239; Nye v. Northern Cent. R. Co. (N. Y. 1881) 24 Hun, 556; Kaufman v. McNutt (1876) 7 Ohio Dec. 60, 1 Wkly. Law Bul. 94; Bates v. Baltimore & O. R. Co. (1883) 39 Ohio St. 157; Fields v. Lamb (1868) 2 Or. 340; Jones v. Amazon Insurance Co. (Pa. 1865) 8 Leg. Gaz. 59; Whitehouse v. Bank (Pa. 1880) 1 Leg. Rec. 249; Washington, A. & G. R. Co. v. Alexandria & W. R. Co. (Va. 1870) 19 Grat. 592, 100 Am. Dec. 710.

6. Rules for construction.—The rules for construing a statute affecting vested rights do not apply to an act of congress depriving a federal court of jurisdiction over a removed case. Manley v. Olney (C. C. 1887) 32 Fed. 708.

The language of Act March 3, 1887, § 2, cl. 3, embodied in this section, being the same as that of Act March 3, 1875, c. 137, § 2, cl. 2, except that the right to remove is limited to the defendants, it should be construed, in respect to such defendants, as the prior act was. New York Const. Co. v. Simon (C. C. 1891) 53 Fed. 1.

The statutes regulating removal of causes from state to federal courts expressly cover only a few of the cases, and it is necessary to find the proper rule from intent and history of the legislation. Eddy v. Chicago & N. W. Ry. Co. (D. C. 1915) 226 Fed. 120.

7. Purpose of acts.—The purpose of the removal acts in giving the federal courts jurisdiction of controversies between citizens of different states or between citizens of one state and aliens was to secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides. Hall v. Great Northern Ry. Co. (D. C. 1912) 197 Fed. 488.

8. Construction of Judicial Code provisions.—The main purpose of Act March 3, 1887, was to restrict jurisdiction which was largely accomplished by withholding the right of removal from plaintiffs and according it only to defendants sued in plaintiff's district. Cochran v. Montgomery County (1905) 26 Sup. Ct. 58, 62, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451.

The Judicial Code in its general purpose seeks further to restrict the jurisdiction of federal courts and the proviso shows an intention that no case should be removed from a state court on any ground provided only that it arises under the acts of Congress. Strauser v. Chicago, B. & Q. R. Co. (D. C. 1912) 193 Fed. 293.

The scope and intent of this chapter and chapters 2, 4, must be ascertained by construing them as an entirety, and they treat of parties and subjects-matter within the jurisdiction of district courts, and also of places where suits shall be instituted. Smith v. Farbenfabriken of Elberfeld Co. (1913) 203 Fed. 476, 121 C. C. A. 598.

This section together with section 24, ante, § 991, codify and adopt the terms of Act 1887 as amended and corrected by the act of 1888. Western Union Tel. Co. v. Southeast & St. L. Ry. Co. (1913) 208 Fed. 266, 125 C. C. A. 466.

The separable controversy clause of the removal act does not enlarge the previous clauses of the section which particularly specify the suits which may be removed, but only provides that,

where in suits otherwise removable there is a controversy between citizens of different states, the entire suit may be removed. Tullar & Tullar v. Illinois Cent. R. Co. (D. C. 1914) 213 Fed. 280.

The right of action for injuries to employé given by Labor Law N. Y. § 200, is not limited to citizens, and an alien may sue thereunder in a United States court, in view of this section. Lewicki v. John C. Wiardi & Co. (D. C. 1914) 213 Fed. 647.

9. Applicability to pending causes.—An order setting aside another order remanding a cause to the state court, from which it had been removed on the ground of local prejudice, is not a final order, and the cause remains pending, so that the provision for an inquiry into the question of local prejudice applied to a cause at such a stage when the act was passed. Birdseye v. Shaeffer (C. C. 1888) 37 Fed. 821.

10. —— Judicial Code provisions.—See post, § 1276, and notes.

(C) State statutes restricting removal

11. Limiting remedy to particular court.—A clause in a state statute creating a right of action for causing death, "provided that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same," does not prevent removal. Railway Co. v. Whitton (1871) 80 U. S. (13 Wall.) 270, 20 L. Ed. 571.

A proceeding in a state court to establish a claim against an administrator, to obtain payment of a debt, is removable, notwithstanding the state statutes may enact that such claims can only be established in a probate court of the state, or by appeal from that court to some other state court. Hess v. Reynolds (1885) 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927; Clark v. Bever (1891) 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, affirming (C. C. 1887) 31 Fed. 670.

The proviso of Rev. St. Wis. § 4255, giving a right of action for death by wrongful act, requiring the action to be brought in a court established by the constitution and laws of Wisconsin, is void as a condition on the right previously granted, which would operate to exclude the jurisdiction of federal courts. Showalter, Circuit Judge, dissenting. Bigelow v. Nickerson (1895) 70 Fed. 113, 17 C. C. A. 1, 30 L. R. A. 336, affirming decree The Robert Holland and Parana (D. C. 1893) 59 Fed. 200.

A state statute providing that all proceedings of a party in default for nonpayment of costs of a motion shall be stayed until payment of such costs, does not prevent the removal of the case to the federal court by a party so in default. Hulbert v. Russo (C. C. 1894) 64 Fed. 8.

The right to remove a proceeding to contest a will is not affected by state statutes providing that the only way to contest a will shall be by objecting to its probate, or by appeal to the circuit court. Franz v. Wahl (D. C. 1897) 81 Fed. 9.

12. Restrictions on foreign corporations.—A state law providing for the service of process on a foreign corporation does not limit or restrict the jurisdiction of the courts of the United States. Western Union Telegraph Co. v. Dickinson (1872) 40 Ind. 444, 13 Am. Rep. 295; Hobbs v. Manhattan Ins. Co. (1869) 56 Me. 417, 96 Am. Dec. 472; Herryford v. Ætna Ins. Co. (1867) 42 Mo. 148. Nor does a statute authorizing a railroad company incorporated in Alabama to extend its road into Georgia, and subjecting it to suit in Georgia by citizens of that state. Chapman v. Alabama G. S. R. Co. (C. C. 1894) 59 Fed. 370.

Act Minn. March 9, 1885, entitled "An act relating to foreign corporations doing business in this state," provides that in suits or proceedings arising in that state in which a foreign corporation shall be a party, if such corporation shall make application to remove any such suit into a federal court, it shall be liable to certain penalties. Held, that the act is repugnant to the constitution of the United States, and void, as being designed to deprive a citizen of another state of the right to sue and be sued in a federal court. Chicago, M. & St. P. Ry. Co. v. Becker (C. C. 1887) 32 Fed. 849.

A state statute which provides that a foreign public service corporation which removes a suit to a federal court or institutes a suit therein "which it could not maintain if it were a domestic corporation" shall forfeit its right to do intrastate business, is not aimed solely at the act of removal, or the act of suing, but at the grounds of removal or jurisdiction. State v. Louisville & N. R. Co. (Miss. 1910) 53 So. 454, overruling suggestion of error (Miss. 1910) 51 So. 918.

13. —— Validity.—An agreement by a foreign corporation to abstain in all cases in the removal of causes to the United States court is void as against public policy, and a statute requiring such an agreement is in conflict with the constitution of the United States. Home Ins. Co. v. Morse (1874) 87 U. S. (20 Wall.) 445, 22 L. Ed. 365; Doyle v. Continental Ins. Co. (1876) 94 U. S. 535, 24 L. Ed. 148; Barron v. Burnside (1887) 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915 (reversing Goodrel v. Kreichbaum [1886] 70 Iowa, 362, 30 N. W. 872); Southern Pac. Co. v. Denton (1892) 13 Sup. Ct. 44, 46, 146 U. S. 202, 36 L. Ed. 942; Rowland v. Empire State Life Ins. Co. (C. C. 1877) Fed. Cas. No. 12,097; Ashe v. Union Cent. Life Ins. Co. (C. C. 1902) 115 Fed. 234; Western Union Telegraph Co. v.

Frear (D. C. 1914) 216 Fed. 199; Shawnee Fire Ins. Co. v. National Surety Co. (1915) 146 P. 412, 94 Kan. 305; Railway Passenger Assur. Co. v. Pierce (1875) 27 Ohio St. 155; Baltimore & O. R. Co. v. Cary (1876) 28 Ohio St. 208; Erie Ry. Co. v. Stringer (1877) 32 Ohio St. 468; Rece v. Newport News & M. V. Co. (1889) 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572. But see New York Life Ins. Co. v. Best (1872) 23 Ohio St. 105; Glens Falls Ins. Co. v. Judge of Jackson Circuit Court (1870) 21 Mich. 579, 4 Am. Rep. 504; Home Ins. Co. v. Davis (1874) 29 Mich. 238.

So is a state statute intended to make a consolidated corporation waive its right to remove cases to the federal courts, as a condition to consolidation. Allen v. Texas & P. R. Co. (C. C. 1885) 25 Fed. 513, 515. But the state may under its right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the federal Constitution, require the forfeiture of the permit to do business in the state issued to a foreign insurance corporation because such corporation has removed a suit against it to the federal court. Doyle v. Continental Ins. Co. (1876) 94 U. S. 535, 24 L. Ed. 148; Security Mut. Life Ins. Co. v. Prewitt (1906) 26 S. Ct. 619, 202 U. S. 246, 50 L. Ed. 1013 (affirming Prewitt v. Security Mut. Life Ins. Co. [1904] 83 S. W. 611, 119 Ky. 321, 26 Ky. Law Rep. 1239, 1 L. R. A. [N. S.] 1019, 115 Am. St. Rep. 264, and [1905] 84 S. W. 527, 119 Ky. 321, 27 Ky. Law Rep. 77, 1 L. R. A. [N. S.] 1019, 115 Am. St. Rep. 264); State v. Hodges (Ark. 1914) 169 S. W. 942.

However, a similar act applying to a foreign interstate railway company is unconstitutional. Herndon v. Chicago, R. I. & P. Ry. Co. (1910) 30 Sup. Ct. 634, 218 U. S. 135, 54 L. Ed. 970; Harrison v. St. Louis & S. F. R. Co. (1914) 34 Sup. Ct. 333, 232 U. S. 318, 58 L. Ed. 621, L. R. A. 1915F, 1187 (affirming decree St. Louis & S. F. R. Co. v. Cross [C. C. 1909] 171 Fed. 480); Chicago, R. I. & P. Ry. Co. v. Swanger (C. C. 1908) 157 Fed. 783; Louisville & N. R. Co. v. State (Miss. 1914) 65 So. 881 (overruling on subsequent appeal State v. Louisville & N. R. Co. [Miss. 1910] 51 So. 918). And see Commonwealth v. East Tennessee Coal Co. (1895) 97 Ky. 238, 30 S. W. 608, and Western Union Telegraph Co. v. Frear (D. C. 1914) 216 Fed. 199, which held unconstitutional a similar statute embracing all foreign corporations. Such a statute does not prevent removal. Judson v. Knights of the Maccabees of the World (D. C. 1914) 220 Fed. 1004.

Where it is apparent that the entire purpose of the state statute is to deprive a foreign corporation in certain suits of the right to remove a suit from the state court into the federal court, a provision of the statute making the surrender of such constitutional privilege a condition precedent to the granting of a permit to transact business within the state renders the statute void. Barron v. Burnside (1887) 7 Sup. Ct. 931, 934, 121 U. S. 186, 30 L. Ed. 915.

The right of removal of a proceeding to condemn land for a railroad under the power of eminent domain cannot be limited by state laws. Warren v. Wisconsin Valley R. Co. (C. C. 1875) Fed. Cas. No. 17,204.

The right of removal to a federal court is statutory, and does not exist in the absence of an act of Congress conferring that right, and so an act prohibiting removal cannot be unconstitutional. Kansas City Southern Ry. Co. v. Cook (Ark. 1911) 140 S. W. 579.

14. Restrictions on federal corporations.—A railroad company incorporated by Congress to engage in interstate commerce, and to serve the United States in the transportation of troops and munitions of war, cannot be excluded by a state Constitution from operating in the state because it exercised its right to remove suits against it. Mercantile Trust Co. v. Texas & P. Ry. Co. (C. C. 1908) 216 Fed. 225.

II. RIGHT OF REMOVAL IN GENERAL

(A) Source and nature of right

15. Source of right of removal.—The federal courts have no jurisdiction, and cannot exercise any, on removal of a cause, but such as congress, by legislative acts warranted by the constitution, has conferred on them. Gaines v. Fuentes (1875) 92 U. S. 10, 23 L. Ed. 524; Hubbard v. Northern R. Co. (C. C. 1853) Fed. Cas. No. 6,818; Manley v. Olney (C. C. 1887) 32 Fed. 708; Anaconda Copper Mining Co. v. Butte-Balaklava Copper Co. (D. C. 1912) 200 Fed. 808; State ex rel. Baskett v. Woodson (1901) 164 Mo. 440, 64 S. W. 774.

The right of removal of causes from a state to a federal court is purely statutory and exists only in such cases as Congress has seen proper to provide for. Little York Gold-Washing & Water Co. v. Keyes (1877) 96 U. S. 199, 201, 24 L. Ed. 656; Teel v. Chesapeake & O. Ry. Co. of Virginia (1913) 204 Fed. 918, 123 C. C. A. 240, 47 L. R. A. (N. S.) 21; Manley v. Olney (C. C. 1887) 32 Fed. 708; Shedd v. Fuller (C. C. 1888) 36 Fed. 609; Symonds v. St. Louis & S. E. Ry. Co. (C. C. 1911) 192 Fed. 353; Anaconda Copper Mining Co. v. Butte-Balaklava Copper Co. (D. C. 1912) 200 Fed. 808; Burnett v. Spokane, P. & S. Ry. Co. (D. C. 1913) 210 Fed. 94.

16. —— Removals from territorial courts.—Removal of causes pending in territorial courts on the admission of

the state is regulated, not by the general removal acts, but by the enabling act and the constitutional provisions adopted pursuant thereto. McCornick v. Western Union Tel. Co. (1897) 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684; Herman v. McKinney (C. C. 1890) 43 Fed. 689; Strasburger v. Beecher (C. C. 1890) 44 Fed. 209.

17. —— Removal from federal to state courts.—There is no law for the removal to the state courts of causes cognizable in the District or Circuit Courts of the United States. McCollom v. Pipe (1871) 7 Kan. 189.

18. Nature of right of removal.—A defendant is entitled to have the suit removed to the circuit court of the United States for such state as a matter of right, on complying with the conditions prescribed by the act of congress. Home Insurance Co. v. Morse (1874) 20 Wall. 445, 454, 455, 22 L. Ed. 365; Brownell v. Gordon (C. C. 1856) Fed. Cas. No. 2,039; Atlas Mut. Ins. Co. v. Byrus (1873) 45 Ind. 133; Jones v. Amazon Ins. Co. (Pa. 1885) 8 Leg. Gaz. 59; Brown v. Crippin (Va. 1809) 4 Hen. & M. 173.

The right of removal and the jurisdiction of the federal court depend on a compliance with the law of congress, and not on the action or non action of the state court. Pope v. Cheney (C. C. 1884) 22 Fed. 177, 178; Brigham v. C. C. Thompson Lumber Co. (C. C. 1893) 55 Fed. 881, 882.

A state court cannot resist the removal of a case to a federal court if it is legally removable thereto. People v. Judge of Superior Court (1879) 1 N. W. 985, 41 Mich. 31.

The right of a plaintiff to prevent a removal from the state court cannot be controlled by the fact that a different rule as to the measure of damages might be observed in the federal courts. Free v. Western Union Tel. Co. (C. C. 1903) 122 Fed. 309.

The change of a forum of a cause pending in a nisi prius state court cannot be made by such court to a federal court otherwise than upon the application of a party to the suit and as provided for by the laws of the United States. State ex rel. Baskett v. Woodson (1901) 164 Mo. 440, 64 S. W. 774.

A petition to remove a cause from the state to the federal court is similar to a motion and affidavit for change of venue, and is based upon the same reasoning. Hercules Torpedo Co. v. Smith (Ind. App. 1909) 87 N. E. 254.

An alien who is sued in a state court by a citizen of the state may remove the case to the federal court: but he cannot claim a dismissal of it. Webre v. Duroc (1860) 15 La. Ann. 65.

(B) Suits or actions removable

19. Suits at law or in equity.—A proceeding in a court of common law or equity, which culminates in a judgment that conclusively determines a right or obligation of the parties, so that the same matter cannot be further litigated except by writ of error or appeal is a "suit." In re Stutsman County (C. C. 1898) 88 Fed. 337, criticizing In re City of Chicago (C. C. 1894) 64 Fed. 897.

The phrase, "common law" is here used in contradistinction to equity, admiralty, and maritime jurisdiction, and includes all cases involving "legal" rights, though such rights are given by statute. Brisenden v. Chamberlain (C. C. 1892) 53 Fed. 307.

It is not within the province of the state or federal courts to say that a suit in equity, where there is a controversy between parties of different citizenship, cannot be removed because of its peculiar subject-matter. Filer v. Levy (C. C. 1883) 17 Fed. 609.

The mere filing of a petition of intervention, without the issuing or service of notice or process of any kind, does not constitute a suit. In re Iowa & M. Const. Co. (C. C. 1881) 6 Fed. 799. But the fact that the state law requires the questions of law and fact involved in a case to be brought into a court of the state by appeal, instead of by summons or other process, prevents removal. City of Terre Haute v. Evansville & T. H. R. Co. (C. C. 1901) 106 Fed. 545.

That an issue is legal as distinguished from an equitable claim has no bearing on the right of removal. Ketchum v. Black River Lumber Co. (C. C. 1880) 4 Fed. 139, 142. But see Rush v. Cobbet (Pa. 1898) 2 Yeates, 275, holding that the provision for removing a suit brought against an alien does not extend to actions for torts, etc., but is confined to questions of property.

The decision by a state court of last resort that a special proceeding under the state laws is not a civil suit is not controlling on the federal court on a question whether the proceeding is a civil suit in law or equity, within the removal acts. In re Jarnecke Ditch (C. C. 1895) 69 Fed. 161.

20. Civil or criminal nature of suit.—A writ of habeas corpus, sued out in a state court by one arrested for crime, is a civil suit. Kurtz v. Moffitt (1885) 6 Sup. Ct. 148, 115 U. S. 487, 29 L. Ed. 458.

There is no provision for the removal of a criminal case from a state court on a claim of alienage. New Hampshire v. Grand Trunk Ry. (C. C. 1880) 3 Fed. 887.

An information in equity to restrain violation of a state statute forbidding trust combinations is not a civil action. Moloney v. American Tobacco Co. (C. C. 1896) 72 Fed. 801. Nor is a suit by a city to restrain a telegraph company from doing intrastate business in the city without having paid a license tax imposed by a city ordinance, for violation of which it was subject to a fine. City of Montgomery, Ala., v. Pos-

tal Telegraph-Cable Co. (D. C. 1914) 218 Fed. 471. Nor an action on a recognizance for good behavior. Respublica v. Cobbet (Pa. 1788) 3 Dall. 467, 1 L. Ed. 683. But a proceeding by the state, even in its sovereign capacity, to accomplish a purpose other than enforcement of its penal laws, is "of a civil nature"; and hence an information in equity in behalf of the state to enjoin the receiver of a railroad is removable in so far as the right to remove it is dependent on the nature thereof. State v. Frost (1902) 89 N. W. 915, 113 Wis. 623.

On a recognizance for good behavior sued against an alien, he is not entitled to remove the case for trial into the federal court. Respublica v. Cobbet (Pa. 1798) 2 Yeates, 352.

21. —— Actions for penalties.—In determining whether a suit to enforce a penalty provided by a state statute is one "of a civil nature," the question is not whether the state statute is to be considered as remedial or penal for the purpose of the application of the rule of strict construction, but whether the action brought to enforce the penalty provided by the statute is essentially civil in its nature, as distinct from one which is criminal, or quasi criminal. Gruetter v. Cumberland Telephone & Telegraph Co. (C. C. 1909) 181 Fed. 248.

An action to recover a penalty imposed by a state statute, though civil in form, is in its nature criminal, and is not removable into a federal court. Iowa v. Chicago, B. & Q. R. Co. (1889) 37 Fed. 497, 3 L. R. A. 554 (appeal dismissed Chicago, M. & St. P. Ry. Co. v. Iowa [1892] 145 U. S. 632, 12 Sup. Ct. 978, 36 L. Ed. 857); Ferguson v. Ross (1889) 38 Fed. 161, 3 L. R. A. 322; Lyman v. Boston & A. R. Co. (C. C. 1895) 70 Fed. 409; State of Indiana v. Alleghany Oil Co. (C. C. 1898) 85 Fed. 870; Perkins v. Boston & A. R. Co. (C. C. 1898) 90 Fed. 321; Stockton v. Oregon Short Line R. Co. (C. C. 1909) 170 Fed. 627; State of Arkansas v. St. Louis & S. F. R. Co. (C. C. 1909) 173 Fed. 572.

But a suit under a statute which prescribes a penalty against telephone companies for discrimination in service, but creates no criminal offense, and provides for no criminal procedure or remedy for any public wrong, and merely for punitive damages for the breach of a common-law obligation or private wrong, is removable as a civil action. Gruetter v. Cumberland Telephone & Telegraph Co. (C. C. 1909) 181 Fed. 248. So is an action in a state court by a citizen thereof against a nonresident for $1,000 damages under a Kentucky statute subjecting the master of a steamboat to penalties for taking on board a slave to the United States court. Gordon v. Longest (1842) 16 Pet. 97, 103, 10 L. Ed. 900. And an action under a state statute stockholders and directors of a corporation for fraud is not an action to recover penalties, but unliquidated damages, and hence is removable to the federal courts. Buford & Co. v. Strother & Conklin (C. C. 1881) 10 Fed. 406, 410.

In an action to enforce a penalty, the petition held to allege essentially a criminal action not subject to removal to the circuit court. Texas v. Day Land & Cattle Co. (C. C. 1890) 41 Fed. 228.

After the remand of the cause to the state court, the amendment of the petition setting up, in the alternative, a civil cause of action did not destroy the original cause of action, and was not so combined with it as to permit the removal of the whole case. Texas v. Day Land & Cattle Co. (C. C. 1892) 49 Fed. 593.

An action based on Code Iowa, § 2423, which provides that all payments for intoxicating liquor sold in violation of that chapter shall be held to have been received in violation of law, and upon a valid promise to repay the same on demand, is one for the enforcement of a statutory penalty, which will not be entertained by a court of the United States, and is therefore not removable. Hamilton v. Jos. Schlitz Brewing Co. (C. C. 1900) 100 Fed. 675.

22. Statutory remedies and proceedings in general.—The following special proceedings under state statutes have been held to be removable:

A proceeding in a court calling on all persons to come in and show cause why a sale made by a sheriff or other public officer should not be confirmed. Parker v. Overman (1855) 59 U. S. (18 How.) 137, 15 L. Ed. 318.

A suit to enforce a statutory lien for the construction of a vessel. American Trust Co. v. W. & A. Fletcher Co. (1909) 173 Fed. 471, 97 C. C. A. 477, certiorari denied (1909) 30 Sup. Ct. 400, 215 U. S. 600, 54 L. Ed. 343.

An executory process under the Louisiana law to seize and sell a vessel under a mortgage. W. G. Coyle & Co. v. Stern (1912) 193 Fed. 582, 113 C. C. A. 450.

A suit against an assignee for the benefit of creditors, under a statute "regulating the mode of administering assignments in trust for the benefit of creditors," to decide on the allowance or disallowance of a claim, although no execution can be issued on a judgment obtained in such suit. Claflin v. Robbins (C. C. 1876) Fed. Cas. No. 2,776.

A controversy as to the validity of an attachment. Keith v. Levi (C. C. 1880) 2 Fed. 743, 1 McCrary, 343.

A suit under a statute giving a right of action for death by wrongful act. Brisenden v. Chamberlain (C. C. 1892) 53 Fed. 307.

A proceeding for the collection of de-

linquent taxes. In re Stutsman County (C. C. 1898) 88 Fed. 337.

An appeal from the decision of the state engineer canceling or refusing to cancel a permit to appropriate water. Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irr. Co. (C. C. 1907) 158 Fed. 137.

An action under a state statute by a person against another who claims an interest in real property adverse to him, to determine such adverse claim. Stockton v. Oregon Short Line R. Co. (C. C. 1909) 170 Fed. 627.

But the following were held not removable:

A motion for execution against a stockholder of a corporation. Webber v. Humphreys (C. C. 1879) Fed. Cas. No. 17,326.

A proceeding before the state board of control under Laws Or. 1909, p. 319, to determine water rights. In re Silvies River (D. C. 1912) 199 Fed. 495.

A proceeding before the Corporation Commission on petition of a merchants' association to compel defendant railroad company to furnish better freight facilities in a city by the removal of its depot from one side of its main line to the other. North Carolina Corp. Commission v. Southern Ry. Co. (1909) 66 S. E. 427, 151 N. C. 447.

A proceeding for the "identification and verification" of coupons tendered in payment of taxes, debts, and demands due the state. Stewart v. Virginia (1886) 117 U. S. 612, 6 Sup. Ct. 922, 29 L. Ed. 1006; Virginia Coupon Cases (C. C. 1885) 25 Fed. 666.

A cause founded upon a special statutory procedure authorized by a statute of the state is removable if the federal court has equal power with the state court to follow the procedure prescribed by the state law. Colorado Midland Ry. Co. v. Jones (C. C. 1886) 29 Fed. 193; Banigan v. City of Worcester (C. C. 1887) 30 Fed. 392.

The decision by a state court of last resort that a special proceeding under the state laws is not a civil suit, is not controlling on the federal court on a qustion whether the proceeding is a civil suit in law or equity, within the removal acts. In re Jarnecke Ditch (C. C. 1895) 69 Fed. 161.

23. **Proceedings concerning estates of decedents.**—Proceedings for the settlement of the estates of deceased persons are not removable. In re Foley (C. C. 1896) 76 Fed. 390; Id. (C. C. 1897) 80 Fed. 949; Clark v. Guy (C. C. 1902) 114 Fed. 783. Nor are proceedings in a probate court to determine whether the property of a deceased person is separate or community property. In re Foley (C. C. 1897) 80 Fed. 949.

But, when the estate is ready for distribution, a contested claim to all or a part thereof is a controversy that may be removed. Craigie v. McArthur (C. C. 1877) Fed. Cas. No. 3,341; Stafford v. Hightower (1882) 68 Ga. 394. So also a suit by one executor against another for an accounting by the latter as liquidating partner. Filer v. Levy (C. C. 1883) 17 Fed. 609.

A special proceeding by an administrator to obtain a license to sell the real estate of his intestate for the payment of debts. Elliott v. Shuler (C. C. 1892) 50 Fed. 454. And a suit instituted to compel an executor to assent to a legacy to plaintiff. Camp v. Field (C. C. 1911) 189 Fed. 285.

A claim against the estate of a deceased person, pending in the superior court on appeal from the decision of the probate commissioners, cannot be removed. Du Vivier v. Hopkins (1874) 116 Mass. 125, 17 Am. Rep. 141. But a suit on a claim against the estate of a decedent is within the removal act, although the claim was originally filed in the probate court. Schneider v. Eldredge (C. C. 1903) 125 Fed. 638.

24. —— **Probate of wills.**—A proceeding for the probate of a will is not a "suit of a civil nature at law or in equity," and is not removable. Wahl v. Franz (1900) 100 Fed. 680, 40 C. C. A. 638 (reversing Franz v. Wahl [D. C. 1897] 81 Fed. 9); In re Cilley (C. C. 1893) 58 Fed. 977; In re Aspinwall's Estate (C. C. 1897) 83 Fed. 851 (appeal dismissed [1898] 90 Fed. 675, 33 C. C. A. 217); Hargroves v. Redd (1871) 43 Ga. 142. CONTRA, Brodhead v. Shoemaker (1890) 44 Fed. 518, 11 L. R. A. 567.

But suits of an equitable nature to determine claims to property, are removable, though the claim depends on the validity of a will admitted to probate, and the decree admitting to probate must be set aside. Gaines v. Fuentes (1875) 92 U. S. 10, 23 L. Ed. 524; Ellis v. Davis (1883) 3 Sup. Ct. 327, 109 U. S. 485, 27 L. Ed. 1006. So is an action brought in the state court by an alleged legatee under a lost will, against the sole heir at law, to establish the will, under a state statute vesting jurisdiction over such action in the circuit courts, not in the probate courts. Southworth v. Adams (C. C. 1880) 4 Fed. 1, 9 Biss. 521.

25. **Account of guardian.**—A proceeding in the court of ordinary for the final settlement of a guardian's account is removable to a federal court; the necessary diversity of citizenship existing. Stafford v. Hightower (1882) 68 Ga. 394.

26. **Mandamus proceedings.**—A proceeding for an original writ of mandamus pending in a state court is not a "suit of a civil nature" at law or in equity, within the removal acts. Rosenbaum v. Bauer (1887) 7 S. Ct. 633, 120 U. S. 450, 30 L. Ed. 743 (affirming Same v. Board of Supervisors [C. C. 1886] 28 Fed. 223); State of Indi-

ana v. Lake Erie & W. Ry. Co. (C. C. 1898) 85 Fed. 1; Kelly v. Grand Circle, Women of Woodcraft (C. C. 1904) 129 Fed. 830; Mystic Milling Co. v. Chicago, M. & St. P. Ry. Co. (C. C. 1904) 132 Fed. 289; Western Union Telegraph Co. v. State (1905) 76 N. E. 100, 165 Ind. 492, 3 L. R. A. (N. S.) 153; State v. Flannelly (Kan. 1916) 154 P. 235; State ex rel. Jumel v. Johnson (1877) 29 La. Ann. 399; North Carolina Corp. Commission v. Southern Ry. Co. (1909) 66 S. E. 427, 151 N. C. 447. But see Washington Imp. Co. v. Kansas Pac. Ry. Co. (C. C. 1879) Fed. Cas. No. 17,242; Virginia Coupon Cases (C. C. 1884) 25 Fed. 641, 644.

27. Quo warranto proceedings.—See, also, notes to § 1013, post.

Under statutes abolishing the writ of quo warranto and the proceedings by information in the nature of quo warranto, and substituting for them a remedy by action, the proceeding by action is a suit of a civil nature. Ames v. Kansas (1884) 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482. So is an information in the nature of quo warranto against a railroad company for exercising possessory rights over lands without authority of law, though in form a criminal proceeding. State of Illinois v. Illinois Cent. R. Co. (C. C. 1888) 33 Fed. 721. But a quo warranto suit to test defendant's title to office in a corporation organized under the laws of the state in which the suit is brought is not removable. Place v. Illinois (1894) 69 Fed. 481, 16 C. C. A. 300.

28. Condemnation proceedings.—While the United States cannot interfere with the exercise by a state of her right of eminent domain within her limits, when the inquiry is as to whether the conditions prescribed by her statutes for the exercise of such power have been observed, taking the form of a judicial proceeding between the owner of lands and the corporation seeking to condemn them, the controversy is subject to the ordinary incidents of a civil suit, and its determination cannot derogate from the sovereignty of the state, and hence the controversy, taking the form of a suit at law, may, if it is between citizens of different states, be removed to a federal court. Mississippi & Rum River Boom Co. v. Patterson (1878) 98 U. S. 403, 25 L. Ed. 206 (affirming Patterson v. Mississippi & Rum River Boom Co. [C. C. 1875] Fed. Cas. No. 10,829); Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. (1881) 17 W. Va. 812, approved Quarrier v. Baltimore & O. R. Co. (1882) 20 W. Va. 424.

A proceeding by a municipality to condemn private property to its public use partakes of the character of a suit at law so far as to render it removable from the state to the proper federal court, where the conditions exist authorizing a removal as prescribed by the removal acts. Kansas City v. Hennegan (C. C. 1907) 152 Fed. 249; Metropolitan Water Co. v. Kansas City (C. C. 1908) 164 Fed. 738. And generally a proceeding under the right of eminent domain to condemn land for a private corporation is not a case in which the state is a party, nor a special proceeding, and is removable. Searl v. School Dist. No. 2, Lake County (1888) 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415; Madisonville Traction Co. v. St. Bernard Min. Co. (1905) 25 Sup. Ct. 251, 253, 196 U. S. 239, 49 L. Ed. 462 (affirming decree St. Bernard Min. Co. v. Madisonville Traction Co. [C. C. 1904] 130 Fed. 794); South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co. (1905) 141 Fed. 578, 73 C. C. A. 176; Warren v. Wisconsin Valley R. Co. (C. C. 1875) Fed. Cas. No. 17,204; Northern Pac. Terminal Co. v. Lowenberg (C. C. 1883) 18 Fed. 339, 9 Sawy. 348; Mineral Range R. Co. v. Detroit & L. S. Copper Co. (C. C. 1885) 25 Fed. 515; Banigan v. City of Worcester (C. C. 1887) 30 Fed. 392; Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C. 1888) 37 Fed. 3; Sugar Creek, P. B. & P. C. R. Co. v. McKell (C. C. 1896) 75 Fed. 34; Kirby v. Chicago & N. W. R. Co. (C. C. 1900) 106 Fed. 551; Helena Power Transmission Co. v. Spratt (C. C. 1906) 146 Fed. 310; Fishblatt v. Atlantic City (C. C. 1909) 174 Fed. 196. Even where the compensation may be ascertained by commissioners. Searl v. School Dist. No. 2 (1888) 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415; Banigan v. City of Worcester (C. C. 1887) 30 Fed. 392. Or where it could not have been instituted in the federal court, owing to the limitation of the state statute, which confines it to a particular state court. Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co. (C. C. 1902) 119 Fed. 209.

A state cannot by the form of procedure prescribed to condemn property prevent the removal of such proceedings if the owner be a citizen of a foreign state, and the value of the property exceeds the jurisdictional amount. Kansas City v. Metropolitan Water Co. (C. C. 1908) 164 Fed. 728. But under statutes which delegate to a judge of a state court the power to first determine the right to take the property, and then to appoint a commission to fix the compensation, the proceeding is not a suit at common law or in equity. Hartford & C. W. R. Co. v. Montague (C. C. 1899) 94 Fed. 227.

If the power of eminent domain is exercised by the state by administrative inquest permitting a determination of the amount of damages by a civil action at some period before the proceedings become final, the federal courts are without jurisdiction until the proceedings assume the character of a civil

action; but, if the power is exercised by a proceeding which is a civil action at the outset, they may have jurisdiction from the inception of the proceeding. Kaw Valley Drainage Dist. of Wyandotte County, Kan. v. Metropolitan Water Co. (1911) 186 Fed. 315, 108 C. C. A. 393; Same v. United States Trust Co. of Kansas City, Mo. (1911) 186 Fed. 324, 108 C. C. A. 402. So, where the sheriff appoints freeholders, who shall assess the damages and either party may appeal from such assessment to the district court, after which the court shall try the appeal as an action by ordinary proceedings, the proceeding prior to the appeal was in the nature of an inquest, and when it was transferred to the district court by appeal it took the form of a suit at law, and was removable. Myers v. Chicago N. W. Ry. Co. (1902) 91 N. W. 1076, 118 Iowa, 312. But a proceeding to condemn the property of a water company, which had progressed only so far as the organization of the court, is not. Des Moines Water Co. v. City of Des Moines (1913) 206 Fed. 657, 124 C. C. A. 445, affirming decree (D. C. 1912) 194 Fed. 557.

Laws Kan. 1908, p. 30, c. 33, authorizes cities of the first class having a population of over 50,000 to condemn waterworks property. It provides that when authorized by a resolution of the mayor and city council the city may apply to the judge of the district court, who shall appoint commissioners to appraise the property and assess the damages; that an appeal may be taken from such award and tried in the district court, but that on the payment of the amount of the award to the county treasurer by the city it shall become the owner of the property with the right of possession. Held, that a proceeding by a city under such statute is a judicial proceeding from its inception, and that a defendant water company which is a citizen of another state may remove the same into a federal court at any time after the application for the appointment of commissioners, and is not compelled to wait until an award has been made and an appeal taken, when it has been deprived of its property and the only question to be litigated is the amount of compensation to which it is entitled. Kansas City v. Metropolitan Water Co. (C. C. 1908) 164 Fed. 728.

Under a statute providing that condemnation proceedings should be instituted in the probate court, that the necessity for taking the lands, and their value, should be determined by commissioners or a jury selected by such court, and that such proceedings should only be subject to review by the supreme court, the case was removable directly from the probate court. Mineral Range R. Co. v. Detroit & L. S. Copper Co. (C. C. 1885) 25 Fed. 515.

An action which did not involve a question of whether property should be appropriated under the power of eminent domain against the owner's will, but involved solely a question as to what compensation should be paid for an unwarranted use of the land, by defendant company, constituting a trespass, is removable. McCulloch v. Southern Ry. Co. (1908) 62 S. E. 1096, 149 N. C. 305.

Proceedings by a foreign railroad company to condemn land of a domestic railroad company is not removable to the federal court. Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. (1881) 17 W. Va. 812, approved Quarrier v. Baltimore & O. R. Co. (1882) 20 W. Va. 424.

29. Tax proceedings.—A proceeding in court to correct assessments is not a suit. Upshur County v. Rich (1890) 10 Sup. Ct. 651, 652, 135 U. S. 467, 34 L. Ed. 196.

30. Assessment of damages and benefits for public improvements.—An assessment proceeding for a city improvement is not a "suit," within the removal act, though conducted under judicial forms by a court of general jurisdiction. In re City of Chicago (C. C. 1894) 64 Fed. 897. But under some state statutes proceedings for the assessment of benefits and damages for local improvements have been held to be removable. In re Jarnecke Ditch (C. C. 1895) 69 Fed. 161; City of Terre Haute v. Evansville & T. H. R. Co. (C. C. 1901) 106 Fed. 545; Drainage Dist. No. 19, Caldwell County, Mo., v. Chicago, M. & St. P. Ry. Co. (D. C. 1912) 198 Fed. 253.

31. Actions or proceedings ancillary or incidental to suit in state court.—A proceeding in a state court which is merely incidental to an original action there, and not an independent and separate litigation, cannot be removed into the federal courts. First Nat. Bank v. Turnbull (1872) 83 U. S. (16 Wall.) 190, 21 L. Ed. 296; State v. Flannelly (Kan. 1916) 154 P. 235. Though a case is otherwise removable, the fact that it is connected with and grows out of matters litigated in the state court will not prevent its removal. Hatch v. Preston (C. C. 1853) Fed. Cas. No. 6,208.

The fact that a bill in equity is intended to aid a court of law, or to prevent a party from availing himself of an inequitable suit or defense in a court of law, in some other action, does not deprive the bill of its character as an original bill. Such a suit in equity is properly removable. Charter Oak Fire Ins. Co. v. Star Ins. Co. (C. C. 1868) Fed. Cas. No. 2,623.

A petition, merely ancillary to an ejectment suit already passed to judgment, to have unsuccessful defendant's improvements valued and allowed to him, under the occupying claimant's

law, is not removable. Chapman v. Barger (C. C. 1877) Fed. Cas. No. 2,-603. Nor is a bill in equity by a lessee setting up only matters which the lessee could have set up in ejectment pending at the time of the lease, though the formal parties to the record are different. Richmond & D. R. Co. v. Findley (C. C. 1887) 32 Fed. 641. Nor a supplemental bill to bring in newly discovered property of defendant, after a decision of the original bill on its merits. Smith v. St. Louis Mut. Life Ins. Co. (1877) 3 Tenn. Ch. 350.

Where a receiver who has been appointed by a state court in the interest of the creditors of a construction company proceeds with the work of construction by entering into contracts, etc., the fact that a controversy arises between him and a contractor, or between a contractor and other claimants of a common fund, does not entitle the contractor to remove the cause to a federal court, especially after the state court has proceeded, without objection, to adjudicate upon the rights of the parties. Buell v. Cincinnati, E. & Q. Const. Co. (1881) 9 Fed. 351, 10 Biss. 555.

Where an action has been brought against an insolvent corporation under the special provision of a state statute, and a creditor, who is a citizen of another state, has, by order of that court, obtained leave to be made a party to the suit, he must proceed by supplemental bill or complaint to become such party, and as this is not an original suit, but an ancillary and auxiliary proceeding, it is not removable where the parties to the original suit are citizens of the state. Hospes v. Northwestern Mfg. & Car Co. (C. C. 1885) 22 Fed. 565.

A bill in equity against both partners and one individually, setting up a former judgment, and the pendency of a later action at law, against the partner sued individually, and praying for consolidation, perpetual injunction, and for damages accruing after the proceedings at law. Ladd v. West (C. C. 1893) 55 Fed. 353.

In an administrator's bill to marshal assets against creditors, and to enjoin common-law suits by creditors, the common-law suits are collateral to the equity cause. Burts v. Loyd (1872) 45 Ga. 104, 12 Am. Rep. 574.

The following proceedings have been held not to be merely ancillary, but to be removable:

A petition by counsel against the purchasers of property who had paid the claims sought to be made a lien on the property claiming a lien on the property for their fees. Pettus v. Georgia R. & Banking Co. (C. C. 1879) Fed. Cas. No. 11,048.

Replevin by nonresidents against a sheriff to recover chattels in his possession under a writ issued out of a state court. Kern v. Huidekoper (1880) 103 U. S. 485, 490, 26 L. Ed. 354.

A suit originally instituted in a state court by an executor, legatee, who also sues as the agent of other legatees, nonresidents, claiming a sum of money from a liquidating partner as due to the succession of his deceased partner. Filer v. Levy (C. C. 1883) 17 Fed. 609.

A feigned issue granted at the instance of an assignee for the benefit of creditors in Pennsylvania to try the validity of a judgment recovered by a creditor, which it is claimed was fraudulent as to the other creditors. Fuller v. Wright (C. C. 1885) 23 Fed. 833.

A suit for the appointment of an ancillary receiver in a different jurisdiction. Shinney v. North American Savings, Loan & Building Co. (C. C. 1899) 97 Fed. 9.

An hypothecary action against a third possessor of mortgaged lands, who was not a party to the previous suit, and judgment of the plaintiff against the former owner of the property. Garrett v. Bonner (1878) 30 La. Ann. 1305.

Where a distress warrant issued by a justice of the peace was levied on land, and the defendant therein filed a "plea," which was subsequently dismissed, such dismissal terminated the proceedings in that court, and a subsequent equitable action to restrain the progress of the warrant was a new, distinct, and original action, and not a mere ancillary proceeding to the justice court action. Withers v. John Hopkins Place Sav. Bank (1898) 30 S. E. 766, 104 Ga. 89.

32. Actions or proceedings supplementary to judgment or execution in state court.—A proceeding which was merely supplementary to and a continuation of an action which had already passed into judgment is not removable. Mutual Reserve Fund Life Ass'n v. Phelps (1903) 23 Sup. Ct. 707, 710, 190 U. S. 147, 47 L. Ed. 987.

Where the circuit court could not proceed with the cause without acting directly on a decree rendered in the state court, in another case, and the equity claimed by the bill could not be given to plaintiffs without interfering with that decree, the circuit court will decline to take jurisdiction. Sayer v. La Salle & P. Gaslight & Coke Co. (C. C. 1880) 14 Fed. 69.

Supplementary proceedings cannot be removed where they are merely a mode of execution and relief inseparably connected with the original judgment or decree; but where they involve a different controversy with a new or different party they may be removed. Buford v. Strother (C. C. 1881) 10 Fed. 406.

Proceedings in garnishment are generally to be considered as auxiliary to the main action, and not removable. Pratt v. Albright (C. C. 1881) 9 Fed. 634, 10 Biss. 511; Buford v. Strother (C. C. 1881) 10 Fed. 406; Poole v.

Thatcherdeft (C. C. 1883) 19 Fed. 49. But a proceeding in garnishment after judgment under a statute which makes it a civil suit in which an issue of fact is or may be joined between the plaintiff and garnishee is removable. Baker v. Duwamish Mill Co. (C. C. 1906) 149 Fed. 612.

Replevin against a sheriff who levied certain chattels as the property of another than plaintiff is removable. Kern v. Huidekoper (1880) 103 U. S. 485, 26 L. Ed. 354. But see Flash v. Dillon (C. C. 1884) 22 Fed. 1; Hochstadter v. Harrison (1883) 71 Ga. 21.

A petition to a state court, asking the appointment of a receiver in aid of execution, as authorized by a state statute, and that a judgment previously obtained in such court be declared a first lien on property as against others claiming an interest therein, is purely an ancillary proceeding for the enforcement of the judgment, and is not removable. Cœur d'Alene Ry. & Nav. Co. v. Spalding (1899) 93 Fed. 280, 35 C. C. A. 295, certiorari denied (1899) 19 Sup. Ct. 884, 174 U. S. 801, 43 L. Ed. 1187.

Where, after the rendition of a decree in a suit in equity in a state court enjoining the erection of buildings on certain grounds, a motion was filed by the complainant for an order restraining a third person, who was not a party to the suit, from violating the decree, and notice of such motion was served upon him, the proceeding, in the absence of objection on his part to its form, is equivalent to the filing of a supplemental bill bringing him in as a defendant, and is essentially a new suit, which he may remove to a federal court, where ground for removal exists. Ward v. Congress Const. Co. (1900) 99 F. 598, 39 C. C. A. 669.

A petition of intervention claiming the attached property is ancillary to the main suit and cannot be removed after the right to remove the main suit is lost. King v. Shepherd (C. C. 1884) 20 Fed. 337.

A suit instituted in the state court on petition for executory process on a title importing a confession of judgment is removable to the United States circuit court, after executory process has been ordered, and the debtor has filed an opposition denying the plaintiff's right, and asking the revocation of the order; the order not having the force of a judgment, and the opposition thereto being therefore not an ancillary proceeding, but one going to the gist of the action. Lockhart v. Morey (C. C. 1887) 31 Fed. 497.

Where plaintiff's title to the product of a mine has been established by a decree in a state court, a proceeding by plaintiffs against the same and other defendants, to obtain possession of their rights under the decree, although independent in form and involving a defendant who claims a superior title by purchase, is in effect merely a supplemental proceeding inseparably connected with the original decree. Wolcott v. Aspen Mining & Smelting Co. (C. C. 1888) 34 Fed. 821.

A suit by a judgment creditor to subject land in the name of the debtor's brother on the ground that the purchase price was paid by the debtor, and the deed taken in the brother's name to defraud creditors, is not supplementary to the original suit, but an independent proceeding, removable under the act of 1875. Kalamazoo Wagon Co. v. Snavely (C. C. 1888) 34 Fed. 823.

A statutory proceeding by a judgment creditor of the corporation to charge the stockholder for the amount of his unpaid stock is a "suit." Lackawanna Coal & Iron Co. v. Bates (C. C. 1893) 56 Fed. 737, overruling Webber v. Humphreys (C. C. 1879) Fed. Cas. No. 17,326.

Plaintiff sued in a state court on two policies of insurance, declaring on each in a separate count. It was agreed that the jury should return a verdict for him. By mistake, a verdict was returned on one count only. Judgment was entered thereon, and, after being affirmed, it was paid, and satisfaction entered on the record. The omission of verdict and judgment on the second count was not discovered until several years after, and plaintiff then filed a bill in the state court to correct the mistake and enter judgment thereon. Held, that his bill was not ancillary or supplemental to the original action, but was a separate proceeding, and hence removable, on the ground of diverse citizenship, if that existed. Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co. (C. C. 1894) 62 Fed. 1.

An action to redeem, brought by a second mortgagee, who was not a party to the action to foreclose the first mortgage, is not a suit to redeem from the former decree of foreclosure, and therefore of an ancillary nature, but is an independent suit, in effect, to redeem from a first mortgagee in possession, and is removable. Title Guarantee & Trust Co. v. Studebaker (C. C. 1900) 100 Fed. 358.

A suit or proceeding in a state court to determine the disposition to be made of a fund which has been deposited in the registry of such court to await its further order is not removable into a federal court. Dougherty v. Sharp (C. C. 1908) 171 Fed. 466.

33. Actions to restrain proceedings in state court.—Where an injunction to restrain a levy under judgment has been granted by the state court in a separate suit by one not a party to the judgment, that suit is removable by defendant. Bondurant v. Watson (1880) 103 U. S. 281, 26 L. Ed. 447, affirming Watson v. Bondurant (C. C. 1875) Fed. Cas. No. 17,278. CONTRA, Watson v. Bondurant (1878) 30 La. Ann. 1; Calhoun v. Levy (1881) 33 La. Ann. 1296.

But to restrain the sale of land under

execution issued on a judgment of the state court is not removable on plaintiff's petition prior to the granting of an injunction, since such a procedure is an evasion of the prohibition against restraining proceedings in state courts, post, § 1242. Lawrence v. Morgan's Louisiana & T. R. & S. S. Co. (1887) 121 U. S. 634, 7 Sup. Ct. 1013, 30 L. Ed. 1018; Goodrich v. Hunton (1877) 29 La. Ann. 372; Edwards Mfg. Co. v. Sprague (1884) 76 Me. 53.

And an action by a party to the judgment for an injunction to restrain a seizure and sale in course of execution on a judgment is not removable. Ralston v. British & American Mortg. Co. (1885) 37 La. Ann. 193.

34. Actions to review or set aside judgment of state court.—When the proper jurisdictional amount is involved, and the citizenship of the parties is diverse, a suit brought in a state court to enjoin the enforcement of a judgment obtained therein by fraud is removable. Marshall v. Holmes (1891) 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870; Carver v. Jarvis-Conklin Mortgage Trust Co. (C. C. 1896) 73 Fed. 9. CONTRA, Caswell v. Caswell (1886) 24 Ill. App. 548, affirmed (1887) 120 Ill. 377, 11 N. E. 342.

So, where a petition for intervention charges fraud or want of jurisdiction, without an attack on any final judgment, but only interlocutory orders, the interveners may remove the cause, though a receiver had been appointed by the state court to wind up the affairs of the corporation. In re Iowa & M. Const. Co. (C. C. 1882) 10 Fed. 401.

A suit to annul a judgment is not removable where the procedure is the equivalent of a motion to set aside the judgment for irregularity in the record. Barrow v. Hunton (1878) 99 U. S. 80, 82, 25 L. Ed. 407. But one which really amounts to "a new case arising on new facts, although having relation to the validity of a judgment," is removable. Stackhouse v. Zunts (C. C. 1883) 15 Fed. 481, 4 Woods, 171.

On the filing of a motion under a state statute for a retrial, after judgment against defendants served by publication, under which the judgment remained in force unless modified or set aside on the retrial, the cause was not removable; the federal court having no power to modify or set aside the judgment previously rendered therein by the state court. Davis v. Harris (C. C. 1903) 124 Fed. 713.

A suit brought in a state court to annul a judgment of that court is not removable. Goodrich v. Hunton (1877) 29 La. Ann. 372; Ranlett v. Collier White Lead Co. (1878) 30 La. Ann. 56; Jackson v. Gould (1883) 74 Me. 564.

A case arising on an affidavit of illegality to the process of a state court to collect a judgment cannot be removed into the federal courts. Besser v. Munford (1879) 63 Ga. 446.

35. Effect of action pending in state court.—The existence of a suit by stockholders of a railroad company, and even possession by trustees under the order of the state court therein do not affect the right to remove into the federal court a suit brought by bondholders under a deed of trust which is paramount to the rights of the stockholders. Scott v. Clinton & S. R. Co. (C. C. 1876) Fed. Cas. No. 12,527.

36. Existence of actual controversy.—There is no right of removal, after a stipulation has been filed in the state court admitting the claim sued upon. Keith v. Levi (C. C. 1880) 2 Fed. 743, 1 McCrary, 343.

Where defendant was in default, there was no controversy. Berrian v. Chetwood (C. C. 1881) 9 Fed. 678. And, where plaintiff dismissed his action, and then filed a petition for removal, there was no case to remove. New England Mortg. Sec. Co. v. Aughe (1882) 12 Neb. 504, 11 N. W. 753.

Where nothing appears to the contrary, it will be presumed, from the fact that a suit has been commenced, that there is a controversy between the parties; so that the cause may be removed before answer is filed. Memphis Sav. Bank v. Houchens (1902) 115 Fed. 96, 52 C. C. A. 176; Hodson v. Lake Shore & M. R. Co. (C. C. 1881) Fed. Cas. No. 6,571a; Bailey v. American Cent. Ins. Co. (C. C. 1881) 8 Fed. 686; Egan v. Chicago, M. & St. P. Ry. Co. (C. C. 1893) 53 Fed. 675. CONTRA, Stanbrough v. Griffin (1879) 52 Iowa, 112, 2 N. W. 1011; Flynn v. Des Moines & St. L. Ry. Co. (1884) 63 Iowa, 490, 19 N. W. 312, following Bosler v. Booge (1880) 54 Iowa, 251, 6 N. W. 301; Shepard v. Conrad (N. Y. 1878) 4 Abb. N. C. 254.

A controversy over the question of the jurisdiction of a state court over the subject-matter of an action is one which renders the cause removable, where it is between citizens of different states and the requisite amount is involved, and the question of the state court's jurisdiction may be raised and determined in the federal court after removal. Auracher v. Omaha & St. L. R. Co. (C. C. 1900) 102 Fed. 1.

37. Condition of the cause.—Seizure of the res by a state court does not affect the right to remove the cause from the state to the federal court, for that is necessarily transferred with the case. Nor do collateral issues connected with the res. Osgood v. Chicago, D. & V. R. Co. (C. C. 1875) Fed. Cas. No. 10,604.

Where a writ in the nature of a writ of scire facias was served upon two of the defendants, while an appeal was pending by others from a judgment against them, in order to make them

parties to the judgment, the case was not then in a condition to be removed. Mooney v. Agnew (C. C. 1880) 4 Fed. 7, 2 McCrary, 89.

A case not removable when brought can become so only by a subsequent pleading or proof of facts disclosing removability existing when suit was brought. Anaconda Copper Mining Co. v. Butte-Balaklava Copper Co. (D. C. 1912) 200 Fed. 808.

The right of removal of a cause from the state to the federal court depends on and must be determined by the condition of the record in the state court at the time the removal is sought. Texarkana Telephone Co. v. Bridges (1905) 86 S. W. 841, 75 Ark. 116.

Equitable defenses set up by defendants between themselves will not prevent the removal of a cause from a state to a federal court; complainant being a resident of another state. Tarver v. Ficklin (1878) 60 Ga. 373.

Although defendants in a suit of interpleader are citizens of different states, the cause will not be removed to the United States court until after an interpleader has been decreed. Leonard v. Jamison (N. Y. 1831) 2 Edw. Ch. 136.

An alien is entitled to have a cause in which he is a party removed to the circuit court of the United States from a state court, although a motion for an attachment for the infringement of an injunction is pending in the state court. Byam v. Stevens (N. Y. 1842) 4 Edw. Ch. 119.

38. Pendency of suit or action.—The validity of a removal is not affected by the fact that at the time the petition therefor was filed the summons had not been returned nor served on all the defendants. Parkinson v. Barr (C. C. 1900) 105 Fed. 81. But see Pond v. Sibley (C. C. 1881) 7 Fed. 129, 19 Blatchf. 189, holding that, where two corporations are both parties to the same controversy, upon the same side, the court cannot assume jurisdiction, upon removal, until both corporations have become parties to the suit.

In an action against known and unknown defendants to determine adverse claims, if the known defendants be served with process, they cannot be required to delay an application for removal of the suit until persons unknown, who might claim some interest in the matter in controversy, shall be served, and join in the application. Walker v. Richards (C. C. 1893) 55 Fed. 129.

Where, in an action by a state in its own courts, the right of recovery depends on the question of mixed law and fact whether service of summons has been made on a person who was at the time an agent of the company within the state on whom process might legally be served, there is no "suit brought." Germania Ins. Co. v. Wisconsin (1886) 119 U. S. 473, 7 Sup. Ct. 260, 30 L. Ed. 461; People's Ins. Co. v. Same (1886) 119 U. S. 477, 7 Sup. Ct. 262, 30 L. Ed. 462.

Where there is an infant defendant seeking a removal the petition and bond should not be filed until after service of process on the infant, or there be an authorized appearance for him in the state court. Woolridge v. McKenna (C. C. 1881) 8 Fed. 650.

Under Code Civ. Proc. N. Y. § 416, relative to the acquisition of jurisdiction by the granting of a provisional remedy, where summons was issued but not served and an order of arrest granted, after which defendant attempted to enter a general appearance, the cause was pending, so as to be removable under the Judicial Code. Williston v. Raymond (D. C. 1914) 213 Fed. 527.

(C) Courts from and to which causes may be removed

39. Courts from which suits may be removed.—A federal court cannot acquire jurisdiction by removal of proceedings instituted in what was supposed to be a state court, but which was subsequently determined by the Supreme Court of the state to have no legal existence. Crowley v. Southern Ry. Co. (C. C. 1905) 139 Fed. 851.

The removal act does not apply to courts of last resort in a state. Miller v. Finn (1871) 1 Neb. 254.

The act of 1875 applies to causes brought in state courts of original jurisdiction, and not to causes pending in the state supreme court. Williams v. Lowe (1876) 4 Neb. 382. CONTRA, Sneed v. Brownlow (1867) 44 Tenn. (4 Cold.) 253.

Exceptions to the assessment of benefits and damages in drainage proceedings in the county court, vested by the state constitution with judicial power, is removable, though the court exercises administrative as well as judicial functions in such proceedings. Drainage Dist. No. 19, Caldwell County, Mo., v. Chicago, M. & St. P. Ry. Co. (D. C. 1912) 198 Fed. 253.

R. S. § 3833, post, § 7192, confers jurisdiction upon state courts in certain instances, as courts of the state, but does not thereby make them federal courts; and cases instituted in the state courts thereunder are removable. New Orleans Nat. Bank v. Merchant (C. C. 1884) 18 Fed. 841.

The provision that any suit "now pending or hereafter brought in any state court" may be removed into a federal court is not applicable to a suit brought in a territorial court, although, on the admission of the territory as a state, such suit passed into the jurisdiction of a state court. Ames v. Colorado Cent. R. Co. (C. C. 1877) Fed. Cas. No. 325.

An action pending before a justice of the peace is removable. Katz v. Her-

schel Mfg. Co. (C. C. 1906) 150 Fed. 684.

A board of county commissioners or supervisors of a county created by the laws of the state of Nebraska is not a court, and a claim pending before the county board is not removable. Gurnee v. Brunswick (C. C. 1876) Fed. Cas. No. 5,872; Fuller v. Colfax County (C. C. 1882) 14 Fed. 177.

40. —— Jurisdiction of state court.—A federal court cannot acquire jurisdiction by removal proceedings of a cause of which the state court was without jurisdiction. And the jurisdiction of the federal court falls when the jurisdiction of the state court is taken away. Freeney v. First Nat. Bank (C. C. 1882) 16 Fed. 433, 434; Hummel v. Moore (C. C. 1885) 25 Fed. 380; Fidelity Trust Co. v. Gill Car Co. (C. C. 1885) 25 Fed. 737; Zikos v. Oregon R. & Nav. Co. (C. C. 1910) 179 Fed. 893; R. J. Darnell, Inc., v. Illinois Cent. R. Co. (C. C. 1911) 190 Fed. 656; Pittsburgh, C., C. & St. L. Ry. Co. v. Wood (Ind. App. 1908) 84 N. E. 1009.

A state court having no jurisdiction of an action to enforce rights given solely by the interstate commerce law, a federal court acquires no jurisdiction of such action by its removal. Auracher v. Omaha & St. L. R. Co. (C. C. 1900) 102 Fed. 1; Sheldon v. Wabash R. Co. (C. C. 1900) 105 Fed. 785.

That the state law requires the questions of law and fact involved in a case to be brought into a court of the state by appeal, instead of by summons or other process, does not affect the question of right to have the case removed to a federal court. City of Terre Haute v. Evansville & T. H. R. Co. (C. C. 1901) 106 Fed. 545.

41. Court to which cause may be removed.—The district where the suit is pending, means the district within the territorial limits of which the suit is pending in the state court. Hyde v. Victoria Land Co. (C. C. 1903) 125 Fed. 970.

The district to which a suit may be removed is that in which it is pending at the time of the removal, without regard to the place where it originated. Hess v. Reynolds (1885) 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927; Pavick v. Chicago, M. & St. P. Ry. Co. (D. C. 1914) 225 Fed. 395.

The court, to which the cause is removable is that for the district within whose territorial limits the cause is pending in the state court. Knowlton v. Congress & Empire Spring Co. (C. C. 1875) Fed. Cas. No. 7,902. And it can only be removed to that District Court for the district in which it is pending. St. John v. Taintor (D. C. 1915) 220 Fed. 457.

Where plaintiff sued a corporation of another state in a court in a state in which neither resided, defendant could not remove the cause to the federal court of the district of the state of its incorporation. St. John v. United States Fidelity & Guaranty Co. (D. C. 1914) 213 Fed. 685; Eddy v. Chicago & N. W. Ry. Co. (D. C. 1915) 226 Fed. 120. But see Stewart v. Cybur Lumber Co. (D. C. 1914) 211 Fed. 343; Mattison v. Boston & M. R. R. (D. C. 1913) 205 Fed. 821, and Park Square Automobile Station v. American Locomotive Co. (D. C. 1915) 222 Fed. 979, holding that, where a suit removable on the ground of diversity of citizenship is brought in a state court of a state where neither party resides, the "proper district" into which the cause is removable is not the district in which the suit is brought, but the district in which defendant resides.

Where a petition is presented by a citizen of another state, sued in a state court by a citizen of that state, for removal of the case to the United States circuit court, the state court may order the cause to be removed to either of the two judicial districts within that state. Suydam v. Smith (N. Y. 1845) 1 Denio, 263.

The federal court in which the copy of the record of the state court in a removed suit must be filed is the court held at the place in which the suit in the state court was brought, or the place of holding the federal court most convenient to that place. Cobb v. Globe Mut. Life Ins. Co. (C. C. 1877) Fed. Cas. No. 2,921.

Plaintiff's request that a cause be removed to the district in which he resided could not be granted, unless a ground of convenience were shown. Norton v. Hayes (N. Y. 1847) 4 Denio, 245.

Where the cause of action arose in Ohio, and the capias was served on defendant in the Northern district of the state, and defendant asked to have the cause removed to the circuit court of that district, it will be so ordered, though plaintiff has several witnesses on his part, residing in the city of New York. Suydam v. Smith (N. Y. 1845) 1 Denio, 263.

42. —— Change of boundary.—Where the boundaries of a federal judicial district were established by act of Congress such districts could not be affected by subsequent state legislation organizing new counties, and changing county lines so as to change the district to which suits brought in the state courts of such counties might be removed. And, where such change placed one of the counties in two federal districts, a suit originating in the state courts of such county, and removable to the federal courts, could be removed to either federal district, without regard to the district in which the county seat of the county

was located. Hyde v. Victoria Land Co. (C. C. 1903) 125 Fed. 970.

(D) Original jurisdiction of United States court

43. Jurisdiction of United States courts in general.—See Const. art. 3, § 2, and notes, and ante, § 991, and notes.

44. Decisions prior to Act of 1887 which first restricted the right of removal to cases of which the court had original jurisdiction.—Bushnell v. Kennedy (1869) 9 Wall. 387, 390, 19 L. Ed. 736; Gaines v. Fuentes (1875) 92 U. S. 10, 23 L. Ed. 524; Ames v. State (1884) 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482; Smith v. Rines (C. C. 1836) Fed. Cas. No. 13,100; Bliven v. New England Screw Co. (C. C. 1853) Fed. Cas. No. 1,550; Barney v. Globe Bank (C. C. 1862) Fed. Cas. No. 1,031; Warner v. Pennsylvania R. Co. (C. C. 1876) Fed. Cas. No. 17,186; Texas v. Texas & P. R. Co. (C. C. 1879) Fed. Cas. No. 13,848; Eureka Consol. Min. Co. v. Richmond Consol. Min. Co. (C. C. 1880) 2 Fed. 829, 6 Sawy. 471; Karns v. Atlantic & O. R. Co. (C. C. 1881) 10 Fed. 309, 311; State of Texas v. Lewis (C. C. 1882) 12 Fed. 1, 14 Fed. 65; Hobby v. Allison (C. C. 1882) 13 Fed. 401; Filer v. Levy (C. C. 1883) 17 Fed. 609; Erwin v. Walsh (C. C. 1886) 27 Fed. 579, 581, 23 Blatchf. 535; Board of Com'rs of Roads and Revenues for Floyd County v. Hurd (1873) 49 Ga. 462, 15 Am. Rep. 682; New Orleans, M. & T. Ry. Co. v. Mississippi (1880) 2 Ky. Law Rep. 137; Fuentes v. Gaines (1873) 25 La. Ann. 85; Succession of Burnside (1882) 34 La. Ann. 728; Jackson v. Gould (1883) 74 Me. 564; Denniston v. Potts (1848) 19 Miss. (11 Smedes & M.) 36; Rogers v. Rogers (N. Y. 1828) 1 Paige, 183; State v. Davis (1879) 12 S. C. 528; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. (1881) 17 W. Va. 812. See, also, People v. Colorado Cent. R. Co. (C. C. 1890) 42 Fed. 638.

45. —— Assignees.—Claflin v. Commonwealth Ins. Co. (1884) 110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76; Delaware County Com'rs v. Diebold Safe & Lock Co. (1890) 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674; Waterbury v. Laredo (C. C. 1879) Fed. Cas. No. 17,252; Berger v. Douglas County Com'rs (C. C. 1880) 5 Fed. 23; Mosgrove v. Kountze (C. C. 1882) 14 Fed. 315; Hardin v. Olson (C. C. 1882) 14 Fed. 705; Levy v. Laclede Bank (C. C. 1883) 18 Fed. 193; Rosenblatt v. Reliance Lumber Co. (C. C. 1883) 18 Fed. 705; Ferry v. Town of Merrimack (C. C. 1883) 18 Fed. 657; Same v. Town of Westfield (1883) 19 Fed. 155; Bell v. Noonan (C. C. 1884) 19 Fed. 225; Glenn v. Walker (C. C. 1886) 27 Fed. 577; Ayres v. Western R. Corp. (N. Y. 1865) 48 Barb. 132; Leutz v. Butterfield (N. Y. 1877) 52 How. Prac. 376; Leutze v. Same (N. Y. 1877) 1 Abb. N. C. 367; Colcord v. Wall (Pa. 1841) 2 Miles, 459.

46. Restriction on removal in general.—A cause, to be removable, as involving either a federal question or a controversy between citizens of different states, must be such as might have been originally brought in the federal court. Mexican Nat. R. Co. v. Davidson (1895) 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672; Arkansas v. Kansas & T. Coal Co. (1901) 22 Sup. Ct. 47, 48, 183 U. S. 185, 46 L. Ed. 144; Cochran v. Montgomery County (1905) 26 Sup. Ct. 58, 61, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451; Madisonville Traction Co. v. St. Bernard Min. Co. (1905) 25 Sup. Ct. 251, 253, 196 U. S. 239, 49 L. Ed. 462; In re Dunn (1909) 29 Sup. Ct. 299, 301, 212 U. S. 374, 53 L. Ed. 558; Pollitz v. Wabash R. Co. (1910) 176 Fed. 333, 100 C. C. A. 1; Western Union Telegraph Co. of Illinois v. Southeast & St. L. Ry. Co. (1913) 208 Fed. 266, 125 C. C. A. 466; Turk v. Illinois Cent. R. Co. (1914) 218 Fed. 315, 134 C. C. A. 111; Yuba County v. Pioneer Gold Min. Co. (C. C. 1887) 32 Fed. 183; In re Cilley (C. C. 1893) 58 Fed. 977; Plant v. Harrison (C. C. 1900) 101 Fed. 307; Terre Haute v. Evansville & T. R. Co. (C. C. 1901) 106 Fed. 545; West Virginia v. King (C. C. 1901) 112 Fed. 369; Hyde v. Victoria Land Co. (C. C. 1903) 125 Fed. 970; Blunt v. Southern Ry. Co. (C. C. 1907) 155 Fed. 499; Mahopoulus v. Chicago, R. I. & P. Ry. Co. (C. C. 1909) 167 Fed. 165; Carp v. Queen Ins. Co. (C. C. 1909) 168 Fed. 782; Canary Oil Co. v. Standard Asphalt & Rubber Co. (C. C. 1909) 182 Fed. 663; Anderson v. Sharp (C. C. 1911) 189 Fed. 247; The Dalles & Rockland Ferry Co. v. Hendryx (C. C. 1911) 189 Fed. 266; Kentucky Coal Lands Co. v. Mineral Development Co. (C. C. 1911) 191 Fed. 899; Younts v. Southwestern Telegraph & Telephone Co. (C. C. 1911) 192 Fed. 200; Hall v. Great Northern Ry. Co. (D. C. 1912) 197 Fed. 488; Waterman v. Chesapeake & O. Ry. Co. (D. C. 1912) 199 Fed. 667; H. G. Baker & Bro. v. Pinkham (D. C. 1914) 211 Fed. 728; Lemon's Adm'r v. Louisville & N. R. Co. (Ky. 1910) 125 S. W. 701; Fearon Lumber & Veneer Co. v. Lawson (1915) 178 S. W. 1121, 166 Ky. 123; State ex rel. Cumberland Telephone & Telegraph Co. v. Texas & P. Ry. Co. (1900) 28 South. 284, 52 La. Ann. 1850; Missouri, K. & T. Ry. Co. of Texas v. Smith (Tex. Civ. App. 1913) 164 S. W. 885; Beery v. Irick (Va. 1872) 22 Grat. 484, 12 Am. Rep. 539.

The restriction of the right of removal to cases over which the federal court had original jurisdiction applies also to removal on the ground of local prejudice. Ex parte Pennsylvania Co. (1890) 11 Sup. Ct. 141, 142, 137 U. S. 451, 456, 34 L. Ed. 738, 741; Coch-

ran v. Montgomery County (1905) 26 Sup. Ct. 58, 60, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451, reversing judgment (1904) 128 Fed. 1019, 62 C. C. A. 680.

The right to remove exists when the federal courts are given original concurrent, though not exclusive, jurisdiction of the subject of the action. Nichols v. Chesapeake & O. Ry. Co. (1907) 105 S. W. 481, 32 Ky. Law Rep. 270.

Though an action could not originally have been instituted in the federal courts, controversies therein might thereafter arise between parties thereto which would present grounds for removal. State of West Virginia v. King (C. C. 1901) 112 Fed. 369.

An action by a trustee in bankruptcy to recover the amount of an alleged preference is not one arising solely by virtue of a state statute, and of which a court of equity would not otherwise have jurisdiction, but is properly maintainable in equity in a state or federal court, and therefore may be removed into the federal court. Corbitt v. President, etc., of Farmers' Bank of Delaware (C. C. 1902) 113 Fed. 417.

Where a state court in which an action is pending has original jurisdiction of the subject-matter of the action, and the federal court does not have such jurisdiction, it is for the state court to determine the question of removal to the federal court. Chesapeake & O. Ry. Co. v. Banks' Adm'r (1911) 137 S. W. 1066, 144 Ky. 137.

This section does not require, as a condition of the removal of a case to the federal court, that in matters of procedure the case be one that could have originally been commenced in such court. Vermilya v. Brown (C. C. 1894) 65 Fed. 149; Wilson v. Smith (C. C. 1895) 66 Fed. 81; In re Stutsman County, N. D. (C. C. 1898) 88 Fed. 337; Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co. (C. C. 1902) 119 Fed. 209, 214.

That a statutory proceeding is required by the state statute to be brought in a particular court, and could not have been originally brought in a federal court, does not affect the right of the defendant to remove it to that court, where it is in the nature of a civil action at law, made removable by the federal statute. Kirby v. Chicago & N. W. R. Co. (C. C. 1900) 106 Fed. 551.

Where a suit possesses all the necessary requisites to give the federal court jurisdiction at the time the application for removal is made, the fact that by reason of a statutory mode of procedure the action must be begun in the state court does not preclude the defendant from removing it. Myers v. Chicago & N. W. Ry. Co. (1902) 91 N. W. 1076, 118 Iowa, 312.

In order to deprive a defendant of its right to remove a bill in equity the complainant must show that he has no remedy in equity in the federal court, that he has a remedy in equity in the state court, and that the existence of his remedy in the state court is based on a state statute, and not on a view of the ordinary jurisdiction of a court of equity different from that entertained by the federal court. Peters v. Equitable Life Assur. Soc. of the United States (C. C. 1906) 149 Fed. 290. The fact that the claim of a defendant who removes a suit in equity from a state court is a legal as distinguished from an equitable claim, and not triable in the equity suit, has no bearing on the right of removal, where, considered as a legal claim, it is still a proper matter of controversy in the suit. Ketchum v. Black River Lumber Co. (C. C. 1880) 4 Fed. 139.

A suit against a nonresident claimant of land within the state to remove a cloud from complainants' title to such land under a state statute authorizing such suit, though complainant is not in possession of the land, is within the original jurisdiction of the federal court and removable. Southern Pine Co. v. Hall (1900) 105 Fed. 88, 44 C. C. A. 363; Day v. Oatis (1904) 37 So. 559, 85 Miss. 128.

A complaint in a suit in form of trespass to try title, alleging that plaintiff was possessed of land by fee-simple equitable title, and that he was dispossessed by defendant, a trespasser, states a cause of action not maintainable in the federal court at law because of the equitable title, and not maintainable there at equity, because not seeking equitable relief, and therefore the cause was not removable. Anderson v. Sharp (C. C. 1911) 189 Fed. 247.

A partnership composed entirely of citizens of the state in which suit is brought cannot by suing as a partnership under the state statute prevent a nonresident defendant from removing the cause to the proper federal court. H. L. Bruett & Co. v. F. C. Austin Drainage Excavator Co. (C. C. 1909) 174 Fed. 668. CONTRA, Hallowell v. McLaughlin Bros. (Iowa 1909) 121 N. W. 1039.

An action against a firm by its partnership name, brought under a state statute, cannot be removed into such court on the ground of diverse citizenship, for the reason that the citizenship essential to give the court jurisdiction cannot be predicated of a partnership as such; and it is immaterial that the petition for removal shows the citizenship of the partners, where they are not, as individuals, parties to the suit. Ralya Market Co. v. Armour & Co. (C. C. 1900) 102 Fed. 530.

47. Jurisdiction over particular proceedings.—A federal court of equity is without jurisdiction to entertain a suit under a state statute by a contract creditor to obtain an attachment and to set aside as in fraud of creditors a

conveyance by his debtor; and such a suit is not removable into a circuit court from a state court. First Nat. Bank v. Prager (1899) 91 Fed. 689, 34 C. C. A. 51. But a suit to enforce a lien previously acquired by legal proceedings is within the jurisdiction of a federal court of equity, and removable. Craddock v. Fulton (C. C. 1905) 140 Fed. 426.

A federal court is without jurisdiction of proceedings for the administration of the estate of a deceased person, either original or by removal. Clark v. Guy (C. C. 1902) 114 Fed. 783. Likewise of a controversy under state statutes to contest the validity of a will by an original bill for that purpose. Reed v. Reed (C. C. 1887) 31 Fed. 49.

Since the federal court does not have power to issue a writ of mandamus as an original proceeding, an original proceeding in the state Supreme Court for mandamus, though arising under the laws of the United States, is not removable. State v. White River Valley Ry. Co. (S. D. 1911) 129 N. W. 1034; State of Ohio v. Columbus & X. R. Co. (C. C. 1891) 48 Fed. 626.

A suit brought by the state railroad commissioners to compel a railway company to obey the regulations of the commissioners cannot be removed to the federal courts, even though the parties are citizens of different states, and the answer raises a federal question, since such a suit, being in effect an attempt by the state to execute its laws, could not have been originally brought in a federal court. Dey v. Chicago, M. & St. P. Ry. Co. (C. C. 1891) 45 Fed. 82.

In mandamus brought upon the relation of a city to compel certain railroads to lower the grade of a street crossing, the state is the real party in interest, and for this reason the circuit court would have no jurisdiction of the case on removal. State of Ohio v. Columbus & Xenia R. Co. (C. C. 1891) 48 Fed. 626.

An information by a state in its own courts to enjoin a federal receiver from tearing up railroad tracks under orders of the court which appointed him, on the ground that it is an interference with one of its public highways, is removable, though the state is proceeding in the case in its sovereign and political capacity, and therefore cannot be compelled to submit itself to an alien jurisdiction, where the federal court otherwise has jurisdiction of the cause. State v. Frost (1902) 89 N. W. 915, 113 Wis. 623.

A petition filed by a railroad company with the state railroad commissioners, for the mere purpose of obtaining their consent to the taking of certain land by condemnation proceedings, is not removable. New York, N. H. & H. R. Co. v. Cockcroft (C. C. 1891) 46 Fed. 881.

An action by a state to enforce collection of a tax imposed by a state statute is not removable. Commonwealth of Kentucky v. Chicago, I. & L. Ry. Co. (C. C. 1903) 123 Fed. 457. Nor is a proceeding commenced in the county court to cause the assessment for taxation of omitted property. Chicago, St. L. & N. O. Ry. Co. v. Commonwealth (1903) 72 S. W. 1119, 24 Ky. Law Rep. 2124, 115 Ky. 278.

A suit to restrain a sale of chattels levied on under execution from a state court cannot be removed from a state to a federal court, though the controversy be one arising under the laws of the United States. Kelly, Maus & Co. v. Sioux Nat. Bank (C. C. 1897) 81 Fed. 3.

Where a citizen of Pennsylvania was appointed receiver of a corporation by the United States Circuit Court sitting in Massachusetts, he was authorized to bring suit in the federal courts against a citizen of New York in the district of his residence; and hence, such receiver having brought the suit in the Massachusetts state courts, the defendant could remove it. Pepper v. Rogers (C. C. 1904) 128 Fed. 987.

A federal court has jurisdiction of a suit to remove a cloud from the title to land lying within the district where the suit is brought, so, where neither of the parties to a suit for such relief were residents of the state in the courts of which the suit was brought, it was removable. Gillespie v. Pocahontas Coal & Coke Co. (C. C. 1907) 162 Fed. 742, judgment reversed (C. C. A. 1908) 163 Fed. 992.

A stockholders' suit against a foreign mining company whose property is situated within the state and federal district to set aside an alleged invalid election of directors and have a receiver appointed for the property is removable as a local action to enforce a claim to its property situated within the district of which the federal court has jurisdiction under Judicial Code, § 57, post, § 1039. Consolidated Interstate Callahan Mining Co. v. Callahan Mining Co. (D. C. 1915) 228 Fed. 528.

48. Jurisdiction dependent on citizenship or residence of parties — Citizenship or residence of defendant. —The requirement that suits in federal courts shall be brought in the district where defendant lives does not prevent removal by a nonresident defendant of a suit brought in the state of plaintiff's residence. Baltimore & O. R. Co. v. Meyers (1894) 62 Fed. 367, 10 C. C. A. 485, 18 U. S. App. 569; Fales v. Chicago, M. & St. P. R. Co. (C. C. 1887) 32 Fed. 673; Gavin v. Vance (C. C. 1887) 33 Fed. 84; Pitkin County Min. Co. v. Markell (C. C. 1887) 33 Fed. 386; Loomis v. New York & C. Gas Coal Co. (C. C. 1888) 33 Fed. 353; Tiffany v. Wilce (C. C. 1888) 34 Fed. 230; Wilson v. Western Union Tel. Co. (C. C.

1888) 34 Fed. 561; Cooley v. McArthur (C. C. 1888) 35 Fed. 372; Swayne v. Bolyston Ins. Co. (C. C. 1888) 35 Fed. 1; Crocker Nat. Bank v. Pagenstecher (C. C. 1890) 44 Fed. 705; Richmond v. Brookings (C. C. 1891) 48 Fed. 241; Short v. Chicago, M. & St. P. R. Co. (C. C. 1888) 34 Fed. 225, following Fales v. Chicago, M. & St. P. R. Co. (C. C. 1887) 32 Fed. 673, and overruling Yuba County v. Pioneer Gold Min. Co. (C. C. 1887) 32 Fed. 183. CONTRA, Yuba County v. Pioneer Gold Min. Co. (C. C. 1887) 32 Fed. 183.

The right to be sued in such district is one which defendant may waive, and does waive by the removal. Whitworth v. Illinois Cent. R. Co. (C. C. 1901) 107 Fed. 557; Woodcock v. Baltimore & O. R. Co. (C. C. 1901) 107 Fed. 767; Madisonville Traction Co. v. St. Bernard Min. Co. (C. C. 1904) 130 Fed. 789; Morris v. Clark Const. Co. (C. C. 1905) 140 Fed. 756; H. G. Baker & Bro. v. Pinkham (D. C. 1914) 211 Fed. 728.

That the court has not original jurisdiction of a suit against a resident and nonresident defendants where the controversy is not separable does not affect its jurisdiction on removal by the nonresident on the ground of local prejudice. Whelan v. New York, L. E. & W. R. Co. (C. C. 1888) 35 Fed. 849, 1 L. R. A. 65.

49. —— Citizenship or residence of plaintiff.—A suit against an alien is maintainable wherever service can be made, and removable to the district in which it is pending in a state court, though plaintiff is a nonresident of that state. Bradshaw v. Bowden (D. C. 1914) 226 Fed. 323. But an action in a state court for malicious prosecution against several corporations, some of which were aliens and all of which were nonresidents of the state, could not originally have been brought against the defendants, which were citizens of other states, without their consent, in a federal court in that state, and hence was not removable to that court. Carp v. Queen Ins. Co. (C. C. 1909) 168 Fed. 782. But see H. G. Baker & Bro. v. Pinkham (D. C. 1914) 211 Fed. 728, holding that, where suit was brought in a South Carolina court by residents of New York against two defendants who were aliens and a third who was a citizen and resident of another state, it was within the jurisdiction of the federal courts and removable.

An action by a nonresident, against a nonresident and a resident, in the state court, could not have originated in the federal court, and was not removable. McNeal Pipe & Foundry Co. v. Howland (1888) 99 N. C. 202, 5 S. E. 745, 6 Am. St. Rep. 513.

Plaintiff can sue defendant in the federal district of his own residence, as well as in that of which defendant is an inhabitant, when the federal jurisdiction depends only on the fact of a diverse citizenship of the parties; and therefore such a suit is removable by defendant, if brought in a state court of plaintiff's own state. Gavin v. Vance (C. C. 1887) 33 Fed. 84.

A suit which, by reason of the nonresidence of both parties, could not have been brought in the federal court in the first instance, cannot be removed where the plaintiff resists such removal. Ex parte Wisner (1906) 27 S. Ct. 150, 203 U. S. 449, 51 L. Ed. 264; Yellow Aster Min. & Mill. Co. v. Crane Co. (1907) 150 Fed. 580, 80 C. C. A. 566; Southern Pac. Co. v. Burch (1907) 152 Fed. 168, 82 C. C. A. 34; Foulk v. Gray (C. C. 1903) 120 Fed. 156; Gebbie & Co. v. Review of Reviews Co. (C. C. 1905) 134 Fed. 150; Goldberg, Bowen & Co. v. German Ins. Co. of Freeport, Ill. (C. C. 1907) 152 Fed. 831; Baxter, Straw & Storrs Const. Co. v. Hammond Mfg. Co. (C. C. 1907) 154 Fed. 992; Gillespie v. Pocahontas Coal & Coke Co. (C. C. 1907) 162 Fed. 742 (judgment reversed [C. C. A. 1908] 163 Fed. 992); Hill v. Woodland Amusement Co. (C. C. 1908) 158 Fed. 530; Wallenburg v. Missouri Pac. Ry. Co. (C. C. 1908) 159 Fed. 217; Moyer v. Chicago, M. & St. P. Ry. Co. (C. C. 1909) 168 Fed. 105; Clark v. Southern Pac. Co. (C. C. 1909) 175 Fed. 122; Shawnee Nat. Bank v. Missouri, K. & T. Ry. Co. (C. C. 1909) 175 Fed. 456; Gructter v. Cumberland Telephone & Telegraph Co. (C. C. 1909) 181 Fed. 248; Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994; Murdock v. Martin (C. C. 1910) 178 Fed. 307; Bottoms v. St. Louis & S. F. R. Co. (C. C. 1910) 179 Fed. 318; Odhner v. Northern Pac. Ry. Co. (C. C. 1910) 188 Fed. 507; Sherman v. Southern Pac. Co. (C. C. 1910) 192 Fed. 711; H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C. 1911) 189 Fed. 224; J. S. Appel Suit & Cloak Co. v. Baggott (D. C. 1904) 132 Fed. 1005; Turk v. Illinois Cent. R. Co. (D. C. 1912) 193 Fed. 252; Puget Sound Sheet Metal Works v. Great Northern R. Co. (D. C. 1912) 195 Fed. 350; Waterman v. Chesapeake & O. Ry. Co. (D. C. 1912) 199 Fed. 667; Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1912) 201 Fed. 932; Stewart v. Cybur Lumber Co. (D. C. 1914) 211 Fed. 343; Mutual Life Ins. Co. of New York v. Painter (D. C. 1915) 220 Fed. 998; Southern Ry. Co. v. Ansley (Ga. App. 1910) 68 S. E. 1086; Weed Sewing Mach. Co. v. Smith (1873) 71 Ill. 204; Wills v. Home Ins. Co. (1870) 28 Iowa, 545, 4 Am. Rep. 180; Beebe v. Armstrong (La. 1822) 11 Mart. (O. S.) 440; Liverpool, L. & G. Ins. Co. v. McGuire (1876) 52 Miss. 227; Hartford Fire Ins. Co. v. Green (1876) 52 Miss. 332; Caples v. Central Pac. R. Co. (1871) 6 Nev. 265; Smith v. Butler (N. Y. 1864) 38 How. Prac. 192; Amory v. Amory (1874) 36 N. Y. Super. Ct. (4 Jones & S.) 520; Lawson v. Richmond & D. R.

Co. (1893) 112 N. C. 390, 17 S. E. 169; St. Louis & S. F. R. Co. v. Kiser (Tex. Civ. App. 1911) 136 S. W. 852; St. Louis & S. F. R. Co. v. Casselberry (Tex. Civ. App. 1911) 139 S. W. 1161; St. Louis & S. F. R. Co. v. Matlock (Tex. Civ. App. 1911) 141 S. W. 1067; Gist v. Johnson Carey Co. (Wis. 1915) 151 N. W. 382.

But see the following cases, which hold generally that a suit is removable though neither party resides in the state in which it is brought: Cowell v. City Water Supply Co. (C. C. 1899) 96 Fed. 769, reversed (1903) 121 Fed. 53, 57 C. C. A. 393.

Although a plaintiff cannot invoke the exercise of the jurisdiction of a federal court in a district of which neither he nor defendant is an inhabitant, where he sues in such district in a state court, the defendant may invoke the exercise of such jurisdiction by removal, if the requisite grounds of removal exist. Manufacturers' Commercial Co. v. Brown Alaska Co. (D. C. 1906) 148 Fed. 308.

Where neither party resides in the state where suit is brought, but they are citizens of different states, and the sum in dispute exceeds $2,000, defendant may have the suit removed to the circuit court of the United States in a district where neither party resides, under Act March 3, 1887 (24 Stat. 552) §§ 1, 2, as amended by Act Aug. 13, 1888 (25 Stat. 433), notwithstanding the provision of section 1 that such suit shall be brought only in the district of the residence of either plaintiff or defendant, since such provision is solely for the benefit of defendant, who may waive it. Koshland v. National Fire Ins. Co. (1897) 49 P. 845, 31 Or. 205; Id. (1897) 49 P. 850, 31 Or. 597.

Though by the terms of Act March 3, 1887, § 2, 24 Stat. 552, c. 373, as corrected by Act Aug. 13, 1888, 25 Stat. 433, c. 866, jurisdiction of the Circuit Court of the United States on an application for removal by defendant of a cause from a state court is limited to such cases as might have been brought in the Circuit Court, a cause may be removed though neither party lives in the district, as the provision giving jurisdiction to the Circuit Court only in the district where one of the parties resides may be waived by defendant. Duff v. Hildreth (1903) 67 N. E. 356, 183 Mass. 440.

Under the judiciary act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 433, a cause is removable by a defendant who is a nonresident of the state, on the ground of diversity of citizenship, although neither party is an inhabitant of the district. Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co. (C. C. 1904) 130 Fed. 585.

If a case in a state court might have been brought originally in a federal court, it may be removed to the federal court of the district wherein it is pending, when the facts bring it within Act 1887–88, § 2, though neither party reside in such district. Duncan v. Associated Press (C. C. 1897) 81 Fed. 417; Long v. Long (C. C. 1896) 73 Fed. 369.

Under Judicial Code, §§ 28, 29, 51 (Act March 3, 1911, c. 231, 36 Stat. 1094, 1095, 1101, New Jersey corporation sued in Massachusetts state court on a cause arising under the Trade-Mark Laws held entitled to remove the cause to the District Court of the United States for the District of Massachusetts. Rubber & Celluloid Harness Trimming Co. v. John L. Whiting-J. J. Adams Co. (D. C. 1913) 210 Fed. 393.

Under Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433, the fact that both plaintiff and defendant are nonresidents of the federal district does not preclude a removal from the state court by defendant when property belonging to him has been attached within such district. American Finance Co. v. Bostwick (1890) 151 Mass. 19, 23 N. E. 656.

Where in a real action the state court has jurisdiction of the subject-matter and of the parties, by reason of defendant's general appearance, the cause may be removed to the circuit court of the United States, under the removal act of March 3, 1887, c. 373, 24 Stat. 552, on the ground of the diverse citizenship of the parties, though neither resided in the district, and the circuit court would have had no jurisdiction of an original suit between the parties. Craven v. Turner (1890) 82 Me. 383, 19 Atl. 864.

If a case in a state court might have been brought originally in a federal court, it may be removed to the federal court of the district wherein it is pending, when the facts bring it within Act 1887–88, § 2, though neither party reside in such district. Long v. Long (C. C. 1895) 73 Fed. 369.

A suit commenced in a state court, by a British subject, against a nonresident corporation, to recover $20,000 for personal injuries, is removable to the circuit court on the application of defendant. Stalker v. Pullman's Palace Car Co. (C. C. 1895) 81 Fed. 989.

Under the judiciary act of 1887, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433, a suit brought by alien plaintiffs against corporation defendants not chartered by the state in which suit is brought may be removed by defendants to the federal court. Sherwood v. Newport News & M. Val. Co. (C. C. 1893) 55 Fed. 1.

Under Act March 3, 1887, c. 373, § 2, 24 Stat. 553, authorizing the removal into the circuit court by a defendant, being a nonresident of the state, of an

action of which circuit courts "are given original jurisdiction by the preceding section," an action may be removed, though by the previous section it could not have been originally commenced in the district; neither party being resident therein. Amsinck v. Balderston (C. C. 1889) 41 Fed. 641; Uhle v. Burnham (C. C. 1890) 42 Fed. 1.

A cause as removable from a state court to the circuit court for the Northern district of Georgia, though it could not have been originally brought there, where it appears that the complainant is a citizen of Alabama, and the real defendant having an interest in the controversy, and who applies for the removal, is a citizen of Ohio. First Nat. Bank v. Merchants' Bank (C. C. 1888) 37 Fed. 657, 2 L. R. A. 469.

Under Act March 3, 1887, c. 373, 24 Stat. 552, providing that the circuit courts shall have original cognizance of actions between citizens of different states; that no suit shall be brought by original process in any district other than that whereof defendant is an inhabitant, but that where jurisdiction is founded only on diverse citizenship suit may be brought in the district of the residence of either party; and that any suit of which the circuit courts are thereby given jurisdiction may be removed—an action pending in a state court may be removed by defendant to the federal court, though neither party is a resident of the district; the restriction as to the place of bringing suit being in the nature of a personal privilege, which defendant may waive. Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C. 1888) 37 Fed. 3. CONTRA, Harold v. Iron Silver Min. Co. (C. C. 1888) 33 Fed. 529.

Under Act Aug. 13, 1888, § 2, 25 Stat. 435, providing that suits of which the federal Circuit Courts are given jurisdiction, brought in any state court, may be removed into the federal Circuit Court for the proper district of the defendant or defendants therein being nonresidents of the state, a suit between citizens of different states may be removed to the federal court, though neither party is a resident of the state where the suit is brought. Illinois Cent. R. Co. v. Whitworth (1903) 73 S. W. 766, 24 Ky. Law Rep. 2044, 15 Ky. 286; Id. (1903) 75 S. W. 849, 25 Ky. Law Rep. 439.

Where the parties to a suit in a state court are citizens of different states, and the other conditions necessary to make the cause one of federal cognizance exist, it is removable by the defendant, although neither party is a citizen or resident of the state in which suit is brought. Robert v. Pineland Club (C. C. 1905) 139 Fed. 1001.

Under Act Aug. 13, 1888, a suit between citizens of different states, commenced in a state court, may be removed to a federal court, though neither party is a citizen or resident of the state where such suit is commenced. Duncan v. Associated Press (C. C. 1897) 81 Fed. 417.

Right of a nonresident defendant to remove the suit to a federal court could not be defeated by the act of the plaintiff in bringing the suit in a state in which neither the plaintiff nor the defendant resided. Mattison v. Boston & M. R. R. (D. C. 1913) 205 Fed. 821; Virginia-Carolina Chemical Co. v. Sundry Ins. Cos. (C. C. 1901) 108 Fed. 451.

A suit between plaintiffs, citizens of different states, and a defendant, a corporation of a state other than that in which the suit is brought, is not removable on the ground of diversity of citizenship, under New Judicial Code, § 28, where plaintiffs resist such removal. Puget Sound Sheet Metal Works v. Great Northern Ry. Co. (D. C. 1912) 195 Fed. 350.

But plaintiff may waive his right to object to such removal. Ex parte Moore (1908) 209 U. S. 490, 28 Sup. Ct. 585, 586, 52 L. Ed. 904, 14 Ann. Cas. 1164. The objection is waived where the plaintiff fails to object in any way to the removal, and submits to trial on the merits. Louisville & N. R. Co. v. Fisher (1907) 155 Fed. 68, 83 C. C. A. 584, 11 L. R. A. (N. S.) 926; Corwin Mfg. Co. v. Henrici Washer Co. (C. C. 1907) 151 Fed. 938. Where his counsel files written consent to the filing of a general demurrer out of time by the defendant in the federal court. Moyer v. Chicago, M. & St. P. Ry. Co. (C. C. 1909) 168 Fed. 105. And where plaintiff obtained a commission to take depositions in the federal court, notwithstanding Gen. Laws Tex. 1907, p. 249, § 1, amending Rev. St. Tex. art. 1194b, providing that process for the taking of depositions shall not waive a plea of privilege; such statute not being binding on the federal courts. Clark v. Southern Pac. Co. (C. C. 1909) 175 Fed. 122.

Where plaintiff filed his action in a state court, and there is nothing in the record to indicate that subsequent thereto he consented to a removal of the cause to the Circuit Court of the United States, the presumption is that he objected to the removal. St. Louis & S. F. R. Co. v. Kiser (Tex. Civ. App. 1911) 136 S. W. 852.

Where both plaintiff and the defendant asking removal were nonresidents of the state in which the action was brought and of which the other defendant was a citizen, and residents of different states, the case could not be removed. Bowley v. Richmond & D. R. Co. (1892) 110 N. C. 315, 14 S. E. 777.

It is not necessary, to entitle a defendant to remove a case to the United States court on the ground of diverse citizenship, that the plaintiffs should all be citizens of the state where the

action is brought. Alley v. Edward Hines Lumber Co. (C. C. 1894) 64 Fed. 903.

Where an action in a state court against a foreign corporation, commenced in a federal district other than that in which plaintiff resided, was removed on change of venue into such district, the defendant had the right at the first term thereafter to remove the same into the federal court, when the amount involved gave that court jurisdiction. Roberts v. Chicago, B. & Q. R. Co. (C. C. 1909) 168 Fed. 316.

Where neither plaintiff nor defendant, citizens of different states, had a residence in the United States, the jurisdiction of the court of the district of defendant's citizenship was doubtful, and hence the case would be remanded to the state court. Jackson v. Hooper (C. C. 1911) 188 Fed. 509.

The voluntary joinder of a number of complainants in enforcing a common liability of the defendants has the same effect on the right of removal because of citizenship as if they had been compelled to unite. Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America (1894) 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195.

The question of a plaintiff's rightful status as a party in an action at law for the purpose of determining the right of removal is to be determined by the law of the state. Turk v. Illinois Cent. R. Co. (1914) 218 Fed. 315, 134 C. C. A. 111.

A suit commenced in a state court by an alien against a nonresident is removable. Stalker v. Pullman's Palace-Car Co. (C. C. 1895) 81 Fed. 989; Creagh v. Equitable Life Assur. Soc. (C. C. 1897) 83 Fed. 849; Barlow v. Chicago & N. W. Ry. Co. (C. C. 1908) 164 Fed. 765; Smellie v. Southern Pac. Co. (D. C. 1912) 197 Fed. 641.

The provision that such action shall be brought in the court of the district where defendant is an inhabitant is for the benefit of defendant alone, and the alien may not complain because defendant removed the cause into the federal court for that district. H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C. 1911) 189 Fed. 224. But an action brought in a state court by alien citizens and residents against a citizen and resident of another state is not removable to the federal District Court over plaintiff's objection. Hall v. Great Northern Ry. Co. (D. C. 1912) 197 Fed. 488.

An action brought by a nonresident alien in a state court against a citizen of another state is removable by the defendant where the requisite amount is involved. Barlow v. Chicago & N. W. Ry. Co. (C. C. 1909) 172 Fed. 513, denying rehearing (1908) 164 Fed. 765.

An action by an alien nonresident of the United States against a corporation, brought in a court of another state than that of defendant's incorporation, but in which it is doing business and for that reason under its laws subject to service and suit in the state courts, where there is no other ground of federal jurisdiction except diversity of citizenship, is not removable by defendant unless plaintiff consents or waives objection. Mahopoulus v. Chicago, R. I. & P. Ry. Co. (C. C. 1909) 167 Fed. 165; Knickerbocker Life Ins. Co. v. Gorbach (Pa. 1871) 70 Pa. (20 P. F. Smith) 150. But see Iowa Lillooet Gold Min. Co. v. Bliss (C. C. 1906) 144 Fed. 446.

In an action brought by three aliens and a citizen of one state against a corporation created in another state, an application for removal into the federal court will be denied, not being within the provision of the judiciary act, although such corporation is a citizen of the other state, within the meaning of the act. Dennistoun v. New York & N. H. R. Co. (N. Y. 1856) 1 Hilt. 62.

50. Restrictions as to district in which suit might have been brought.—A suit in a state court outside of the federal district in which the plaintiff resides is not removable on the ground of diversity of citizenship. Chicago, R. I. & P. Ry. Co. v. Smith (Ark. 1913) 156 S. W. 166. Even though the commencement of the action in the state court within that district was a device to prevent removal. Shawnee Nat. Bank v. Missouri, K. & T. Ry. Co. (C. C. 1909) 175 Fed. 456; St. Louis & S. F. R. Co. v. Kitchen (Ark. 1911) 136 S. W. 970. But see Burck v. Taylor (C. C. 1889) 39 Fed. 581 (judgment affirmed [1894] 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578), and Louisville & N. R. Co. v. Western Union Telegraph Co. (D. C. 1914) 218 Fed. 91.

By removing a cause to the federal court, defendant consents to the assumption of jurisdiction of his person by the court of the particular district to which the cause is removed. Cucciarre v. New York Cent. & H. R. R. Co. (C. C. A. 1908) 163 Fed. 38; Creagh v. Equitable Life Assur. Soc. (C. C. 1897) 83 Fed. 849; Woodcock v. Baltimore & O. R. Co. (C. C. 1901) 107 Fed. 767; De Valle Da Costa v. Southern Pac. Co. (C. C. 1908) 160 Fed. 216; Shawnee Nat. Bank v. Missouri, K. & T. Ry. Co. (C. C. 1909) 175 Fed. 456.

An action by a corporation created under an act of Congress in the district in which it has its place of business and post office address was removable. Canary Oil Co. v. Standard Asphalt & Rubber Co. (C. C. 1909) 182 Fed. 663.

Railroads incorporated in other states, but operating lines in the state in which suit is brought against them by a nonresident, are residents of that state, so that the action is removable. Bogue v. Chicago, B. & Q. R. Co. (D. C. 1912) 193 Fed. 728.

(E) Waiver of right to remove

51. Power to waive and mode of waiver.—A party to a suit may, in that particular suit, waive his right to remove the suit to the federal court, either by a stipulation or agreement, or by conduct which is equivalent to a waiver. Hanover Nat. Bank v. Smith (C. C. 1876) Fed. Cas. No. 6,035; Lesh v. Bailey (1911) 49 Ind. App. 254, 95 N. E. 341; Smithson v. Chicago G. W. Ry. Co. (1898) 73 N. W. 853, 71 Minn. 216 (affirmed Whitcomb v. Smithson [1900] 20 Sup. Ct. 248, 175 U. S. 635, 44 L. Ed. 303); Murphy v. Stone & Webster Engineering Corporation (Mont. 1911) 119 Pac. 717; Pollock v. Cohen (1877) 32 Ohio St. 514. And, where a party has filed a petition and bond for that purpose, but the record has not yet been sent to the federal court, he should be permitted to withdraw them on giving due notice to his adversary. Wadleigh v. Standard Life & Accident Ins. Co. (1890) 76 Wis. 439, 45 N. W. 109. But an agreement of a foreign insurance company, filed with a state officer, waiving the right to remove all causes against it to the federal courts, is absolutely void. Home Ins. Co. v. Morse (1874) 87 U. S. (20 Wall.) 445, 22 L. Ed. 365; Doyle v. Continental Ins. Co. (1876) 94 U. S. 535, 24 L. Ed. 148; Rowland v. Empire State Life Ins. Co. (C. C. 1877) Fed. Cas. No. 12,097.

A party who has good ground to remove a suit from a state to a federal court must not experiment on his case in the state court. Rosenthal v. Coates (1893) 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399; Gaffney v. Gillette (C. C. 1878) Fed. Cas. No. 5,168; Daugherty v. Sharp (C. C. 1908) 171 Fed. 466; Lesh v. Bailey (1911) 49 Ind. App. 254, 95 N. E. 341.

In several actions of the same cause between the same parties in a court of the state, the parties may not proceed to trial in one and afterwards remove another. Evans v. Smith (C. C. 1884) 21 Fed. 1.

A nonresident defendant who failed to request the court to suspend the trial to enable him to prepare a bond and application for removal of the action to the federal court on the dismissal of the action as to the resident defendant, but who continued in the trial, and took his chances with the jury, waived his right of removal to the federal court. Morgan's L. & T. R. & S. S. Co. v. Street (Tex. Civ. App. 1909) 122 S. W. 270.

Where there was no separable controversy, and one of the defendants had waived his right to remove the cause, a subsequent joint application for removal could not be granted. Calderhead v. Downing (C. C. 1900) 103 Fed. 27; Abel v. Book (C. C. 1903) 120 Fed. 47. But, where one is sued in the same action in a state court upon an individual liability and also as a member of a copartnership, the appearance of such defendant in the state court, to contest the validity of an attachment affecting his individual liability only, will not deprive him of the right, as a member of the partnership, to have a removal of the cause to the federal court on the ground that the action involves a separable controversy between citizens of different states. Calderhead v. Downing (C. C. 1900) 103 Fed. 27.

Where defendant entered its appearance at the appearance term, and agreed not to apply for a removal, the filing by plaintiff of an amended original petition, containing an additional charge of negligence, did not relieve defendant from its waiver. Texas & P. Ry. Co. v. Matkin (Tex. Civ. App. 1912) 142 S. W. 604.

A suit to restrain the prosecution of a suit at law could not be removed; the parties having submitted to the state jurisdiction by bringing the suit at law. Rogers v. Rogers (N. Y. 1828) 1 Paige, 183.

The assignees of a bankrupt who came voluntarily into the state court to assert their rights cannot remove the cause. Edwards v. Fairbanks & Gilman (La. 1880) Man. Unrep. Cas. 53.

Where the suit was dismissed as against the citizen of the state, but no notice of such dismissal was served on the other defendant, and thereafter, while ignorant of the dismissal, it requested a change in the time fixed for the trial of the case, it did not waive its rights to a removal. Fogarty v. Southern Pac. Co. (C. C. 1903) 121 Fed. 941.

In a suit against a nonresident employer and a resident fellow servant, the employer did not waive the right to a removal on plaintiff's failure to summon the resident defendant by stipulating that a setting of the case for trial should be canceled and the cause reset for trial and be tried "in said court" where the circumstances warranted the nonresident defendant in assuming that it would be compelled to submit to trial in that court. Murphy v. Stone & Webster Engineering Corporation (Mont. 1911) 119 P. 717.

52. Particular acts as waiver.—The general appearance of a defendant, entitled to remove a cause to the federal court, in the state court, did not operate as a waiver of its right to remove. Groton Bridge & Manufacturing Co. v. American Bridge Co. (C. C. 1905) 137 Fed. 284; Judson v. Knights of the Maccabees of the World (D. C. 1914) 220 Fed. 1004.

The right of removal is not defeated or lost if the petition therefor is filed in the state court after motion made, the decision of which does not affect the merits of the controversy. Richards v. Town of Rock Rapids (C. C. 1887) 31 Fed. 505.

The fact that one petitioning for re-

moval files his answer in the state court on the same day with his petition does not constitute a waiver of the right to remove. Brisenden v. Chamberlain (C. C. 1892) 53 Fed. 307.

A defendant does not submit to the jurisdiction of a state court so as to be estopped to remove the cause by moving in the state court to set aside the service. Baumgardner v. Bono Fertilizer Co. (C. C. 1893) 58 Fed. 1.

Where a defendant in a state court, a corporation of another state, appeared specially, and moved to quash the sheriff's return of service, and, on the overruling of its motion, reserved a bill of exceptions, and in its answer and at all times thereafter insisted on its objection to the jurisdiction of the court over it, the fact that it answered to the merits, and took other action, by motion and otherwise, in preparation for trial, did not constitute such a voluntary appearance as would debar it from exercising its right to remove the cause to a federal court, when, on its subsequent motion, the order overruling its objection to the service was set aside, leaving the question whether it could legally be required to answer still pending. Donahue v. Calumet Fire-Clay Co. (C. C. 1899) 94 Fed. 23; Johnson v. Computing Scale Co. (C. C. 1905) 139 Fed. 339.

Nor by proceedings to release an attachment. Purdy v. Wallace Müller & Co. (C. C. 1897) 81 Fed. 513; Whiteley Malleable Castings Co. v. Sterlingworth Railway Supply Co. (C. C. 1897) 83 Fed. 853; Southern Pac. Co. v. Stewart (1891) 88 Ga. 13, 13 S. E. 824.

A foreign corporation, by accepting service according to law, is not deprived of its right to remove the action to the federal court. Quimby v. Pennsylvania Ins. Co. (1878) 58 N. H. 494.

Where a party is brought into a state court by an order to interplead, made on motion of the original defendant, he will not be regarded as voluntarily before the state court and waiving his right of removal to the federal court. Healy v. Prevost (C. C. 1879) Fed. Cas. No. 6,297.

Defendant's appearance and his hearing on a preliminary motion regarding an injunction did not waive his right to remove. Atlanta, K. & N. Ry. Co. v. Southern Ry. Co. (1904) 131 Fed. 657, 66 C. C. A. 601; Cella, Adler & Tilles v. Brown (C. C. 1905) 136 Fed. 439. But see Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co. (C. C. 1886) 29 Fed. 337.

Where a defendant, after filing proper petition and bond in the state court for removal of the case to the federal court, again appears in the latter court and makes motions in the case, among others for continuance, such appearance does not waive the right of removal. Baltimore & O. R. Co. v. Ford (C. C. 1888) 35 Fed. 170, 171.

A landowner who has appealed from an award in condemnation proceedings waives his right of removal by having the record and prior proceedings sent up on certiorari to the state supreme court. Hudson River Railroad & Terminal Co. v. Day (C. C. 1893) 54 Fed. 545.

An heir of a decedent, who contests a claim against the estate in the probate court in Illinois, which is a court of record, and there goes to trial on the merits, cannot thereafter remove the cause from the circuit court, to which he has taken it on appeal. Schneider v. Eldredge (C. C. 1903) 125 Fed. 638.

The right of a federal corporation when sued in a state court, to remove the cause to a federal Circuit Court, as being one arising under the federal laws, is lost by bringing into the suit a cause of action against another corporation, with which plaintiff has no concern, and recovering judgment therein. Texas & P. Ry. Co. v. Eastin & Knox (1909) 29 S. Ct. 564, 214 U. S. 153, 53 L. Ed. 946, affirming judgment (1907) 102 S. W. 105, 100 Tex. 556.

Defendant is not estopped to insist upon its right to remove a cause from a state court to a federal circuit court because, on the day after the right of removal was made to appear, its motion to stay proceedings pending an appeal from an order denying a motion to set aside the service of summons was successfully argued in the state court. Remington v. Central Pac. R. Co. (1905) 25 S. Ct. 577, 198 U. S. 95, 49 L. Ed. 959.

Where a party nonresident moves into and becomes a citizen of the state where suit is brought, the right of removal is lost. Goodnow v. Grayson (C. C. 1883) 15 Fed. 1.

53. —— **Participation by party removing cause in proceedings in state court.**—A party does not waive the right of removal by remaining in the state court and contesting the case on the merits, if the state court, upon due application, wrongfully refused to order a removal of the cause. Home L. Ins. Co. v. Dunn (1873) 19 Wall. 214, 223, 22 L. Ed. 68; Removal Cases (1879) 100 U. S. 457, 475, 25 L. Ed. 593; Nat. Steamship Co. v. Tugman (1882) 1 Sup. Ct. 58, 60, 106 U. S. 118, 27 L. Ed. 87; Richards v. Incorporated Town of Rock Rapids (C. C. 1887) 31 Fed. 505; Baltimore & O. R. Co. v. Ford (C. C. 1888) 35 Fed. 170; Hickman v. Missouri, K. & T. Ry. Co. (C. C. 1899) 97 Fed. 113; McMullen v. Northern Pac. R. Co. (C. C. 1893) 57 Fed. 16; Ward v. San Diego Land & Town Co. (C. C. 1897) 79 Fed. 665; Kirby v. Chicago & N. W. R. Co. (C. C. 1900) 106 Fed. 551; State of

West Virginia v. King (C. C. 1901) 112 Fed. 369; Avent v. Deep River Lumber Co. (C. C. 1909) 174 Fed. 298; Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688; State Improvement-Development Co. v. Leininger (D. C. 1914) 226 Fed. 884; Stix v. Keith (1890) 90 Ala. 121, 7 South. 423; Upham v. Scoville (1882) 40 Ark. 170; Little Rock, M. R. & T. Ry. Co. v. Iredell (1887) 50 Ark. 388, 8 S. W. 21; Texarkana Telephone Co. v. Bridges (1905) 86 S. W. 841, 75 Ark. 116; Pennsylvania Co. v. Leeman (1903) 66 N. E. 48, 160 Ind. 16; Myers v. Chicago N. W. Ry. Co. (1902) 91 N. W. 1076, 118 Iowa, 312; Herryford v. Ætna Ins. Co. (1868) 42 Mo. 148.

Even though the state court erroneously decides that it has jurisdiction of the case upon the filing of a petition for removal to the federal court, defendant may, without waiving his right to a removal, except to the refusal to transfer the case and make all proper defense in the state court. Golden v. Northern Pac. Ry. Co. (1909) 104 Pac. 549, 39 Mont. 435, 34 L. R. A. (N. S.) 1154, 18 Ann. Cas. 886; Erie Ry. Co. v. Stringer (1877) 32 Ohio St. 468; Monnett v. Columbus, S. & H. Ry. Co. (1904) 26 Ohio Cir. Ct. R. 469; Western Coal & Mining Co. v. Osborne (Okl. 1911) 119 Pac. 973; Texas & P. Ry. Co. v. Davis (1900) 55 S. W. 562, 93 Tex. 378 (reversing [Tex. Civ. App. 1899] 54 S. W. 381); Northern Pac. R. Co. v. McMullen (1893) 86 Wis. 501, 56 N. W. 629.

Nor is the right waived by consenting to a trial before a referee. National S. S. Co. v. Tugman (1882) 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87. By agreeing that the case shall stand under the rule to plead and try at the next term. Waite v. Phœnix Ins. Co. (C. C. 1894) 62 Fed. 769. By appearing in the state appellate court and unsuccessfully defending the order of removal. Mecke v. Valley Town Mineral Co. (C. C. 1898) 89 Fed. 209. By filing a motion requiring the plaintiff to furnish security for costs. Western Coal & Mining Co. v. Osborne (Okl. 1911) 119 Pac. 973. Or by applying for a continuance for the purpose of making another corporation a party and in seeking and receiving relief against it. Texas & P. Ry. Co. v. Eastin & Knox (Tex. Civ. App. 1905) 89 S. W. 440, reversed Eastin & Knox v. Texas & P. Ry. Co. (1906) 92 S. W. 838, 99 Tex. 654. But see Marckwald v. Oceanic Steam Nav. Co. (N. Y. 1877) 11 Hun, 462, holding that, where the petition for the removal was denied, and defendant made no application in the federal court to arrest the further progress of the case, but proceeded to trial, he could not, on appeal, object that the state court had no jurisdiction of the proceeding.

Where parties who filed a bond and petition for removal proceed without calling the attention of the court to this fact, to a trial of the cause upon the merits, without questioning the jurisdiction in any way, they thereby waive their right to a removal. Home Ins. Co. v. Curtis (1875) 32 Mich. 402. And a failure to renew a motion for a removal of a cause for fraudulent joinder of a resident to prevent removal during the trial of an action, or after the conclusion of the evidence, was a waiver of the right to remove. Broadway Coal Mining Co. v. Robinson (1912) 150 S. W. 1000, 150 Ky. 707.

If a party exercises his right to remove a case, and through his own fault he fails to file the transcript, and, after a delay of a year procures the redocketing of the cause in the state court, and fully recognizes the jurisdiction of that court, he cannot remove the cause again on another ground, when his delay is not excused, and it is not shown that such ground did not exist at the time of the first removal. Pope v. Cheney (C. C. 1884) 22 Fed. 177.

Since the defendant, after having deprived the state court of jurisdiction by filing a petition to remove the cause to a federal court, did not, on refusal of the petition, restore jurisdiction to the state court by answering and defending, on a judgment in his favor, and appeal by the plaintiff, defendant did not restore jurisdiction, or waive his right to object thereto, by insisting on an affirmance of the judgment. Texas & P. Ry. Co. v. Davis (1900) 55 S. W. 562, 93 Tex. 378, reversing judgment (Tex. Civ. App. 1899) 54 S. W. 381.

III. REMOVAL OF CASES ARISING UNDER CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES

(A) Cases involving federal question in general

54. Jurisdiction of United States courts over cases arising under the constitution, laws, or treaties of the United States.—See Const. art. 3, § 2, and ante, § 991, and notes.

55. Necessity for construction of constitution or laws of the United States.—A case in law or in equity consists of the right of one party as well as the other, and is removable as arising under the Constitution or laws of the United States whenever its correct decision depends on the construction of either or when the title or right set up by the party may be defeated by one construction and sustained by the opposite construction. New Orleans, M. & T. R. Co. v. Mississippi (1880) 102 U. S. 135, 136, 26 L. Ed. 96; Van Allen v. Atchison, C. & P. R. Co. (C. C. 1880) 3 Fed. 545, 546; Miller v. Wattier (C. C. 1885) 24 Fed. 49, 54; State of Oregon v. Three Sisters Irr. Co. (C. C. 1907) 158

Fed. 346; Beck v. Johnson (C. C. 1909) 169 Fed. 154.

But it is not necessary to wait until after judgment in the state court to determine whether the constitutional question was involved. Murray v. Patrie (C. C. 1866) Fed. Cas. No. 9,967.

A cause cannot be removed to a federal court, on the ground that it is one arising under the Constitution, laws, or treaties of the United States, merely because it may become necessary to construe the Constitution or laws of the United States, but the cause must be one the decision of which depends on such construction. Little York Gold Washing & Water Co. v. Keyes (1877) 96 U. S. 199, 203, 24 L. Ed. 656; Fitzgerald v. Missouri Pac. R. Co. (C. C. 1891) 45 Fed. 812; Miller v. Illinois Cent. R. Co. (C. C. 1909) 168 Fed. 982; Leggett v. Great Northern Ry. Co. (C. C. 1910) 180 Fed. 314; City of New Orleans v. Seixas (1883) 35 La. Ann. 36; Shellenbarger v. Fewel (Okl. 1912) 124 Pac. 617; State v. Southern Pac. Co. (1893) 23 Or. 424, 31 Pac. 960; Galveston, H. & S. A. Ry. Co. v. State (Tex. Civ. App. 1896) 36 S. W. 111; Schuyler v. Southern Pac. Co. (Utah, 1909) 109 Pac. 458, rehearing denied (1910) 109 Pac. 1025.

To authorize removal it must appear that the suit actually arises under a federal statute. Myrtle v. Nevada, C. & O. Ry. Co. (C. C. 1905) 137 Fed. 193; Clark v. Southern Pac. Co. (C. C. 1909) 175 Fed. 122.

The court must ascertain whether, notwithstanding some of the averments in the pleadings, the federal question suggested is one which is a necessary ingredient in the case, and, where it is found not to be, the case cannot be removed from a state court to a federal court. But, if to any extent a federal law is an ingredient of the controversy by way of claim or defense, the suit is properly removed from a state court to a federal court. New York v. Independent Steamboat Co. (C. C. 1885) 22 Fed. 801.

This section does not refer at all to the pleadings in the action for a guide as to whether a case is removable to a federal court, and it need only be a matter in dispute arising under the laws of the United States while the mode of bringing on the dispute or of making its nature to appear is left open. Davies v. Marine Nat. Bank (C. C. 1885) 24 Fed. 194, 195.

The rule requiring that, where the ground of removal is diverse citizenship, such ground must appear at the commencement of the suit as well as at the time of removal, is inapplicable, when the ground of removal is that a federal question is involved, or that the removing party is a federal officer and intervenes as such. Speckart v. German Nat. Bank (C. C. 1898) 85 Fed. 12.

Where the facts stated in plaintiff's petition disclose a right of action given or created by an act of Congress, and also a right of action created by a state law, it would be for the court on petition to remove to determine under which statute the action was maintainable, if at all, and, if one construction of the federal statute would sustain and another defeat a recovery, the action would be one arising under a law of the United States, and therefore of federal cognizance. Hall v. Chicago, R. I. & P. Ry. Co. (C. C. 1906) 149 Fed. 564.

Where a plaintiff's pleading states every fact upon which the solution of a substantial question arising under the Constitution or laws depends, so that the question of the construction of a constitutional provision may be presented by a demurrer and may be determinative of the case, it is removable as one arising under such Constitution. Bowers v. First Nat. Bank (C. C. 1911) 190 Fed. 676.

56. Cases involving other questions also.—Where a federal question is involved, the cause is removable, although other questions of law and fact may also be involved. Fisk v. Union Pac. R. Co. (C. C. 1871) Fed. Cas. No. 4,828; People v. Sanitary Dist. of Chicago (C. C. 1899) 98 Fed. 150; Mastin v. Chicago, R. I. & P. Ry. Co. (C. C. 1903) 123 Fed. 827; Chalmers Chemical Co. v. Chadeloid Chemical Co. (C. C. 1909) 175 Fed. 995; New Orleans, M. & T. R. Co. v. State of Mississippi (1880) 2 Ky. Law Rep. 137.

57. Defense under United States Constitution or laws.—The nature of the action, and not the character of the defense to it, constitutes the test to determine whether it arises under the laws of the United States; and if the determination of the claim made in the action invokes a consideration of those laws, and the effect of the acts or omissions of parties to the suit under them, it arises under the laws of the United States, whether the defense to the suit is good or bad. Guarantee Co. of North Dakota v. Hanway (1900) 104 Fed. 369, 44 C. C. A. 312; People v. Southern Pac. R. Co. (1884) 165 Cal. 553, 4 Pac. 568. So allegations in the petition for the removal of a suit against an interstate express company that the defendant was subject to the federal laws to regulate commerce, and, under those laws, had a defense to the cause of action, will not justify removal on the ground that the cause is one arising under the federal Constitution and laws, where the cause of action itself is not based upon the interstate commerce act or any other federal law. In re Winn (1909) 29 Sup. Ct. 515, 213 U. S. 458, 53 L. Ed. 873.

The rule was otherwise prior to the enactment of the act of 1887. Hodgson v. Millward (C. C. 1863) Fed. Cas.

No. 6,568; San Mateo County v. Southern Pac. R. Co. (C. C. 1882) 13 Fed. 145; Ellis v. Norton (C. C. 1883) 16 Fed. 4, 4 Woods. 399; Western Union Tel. Co. v. National Tel. Co. (C. C. 1884) 19 Fed. 561.

An action does not arise under the Constitution or laws of the United States because the defendants relied for their defense on provisions of federal statutes which would only demonstrate that the suit could not be maintained at all, and not that the cause of action arose under the federal Constitution or laws. Arkansas v. Kansas & T. Coal Co. (1901) 22 Sup. Ct. 47, 49, 183 U. S. 185, 46 L. Ed. 144; Williams v. First Nat. Bank of Pauls Valley (1910) 30 Sup. Ct. 441, 216 U. S. 582, 54 L. Ed. 625, affirming judgment (1908) 95 Pac. 457, 20 Okl. 274.

The fact that a defendant in an action in a state court attacks the constitutionality of a state statute under which the action is brought does not render the case one arising under the constitution or laws of the United States, within the removal act. Shields v. Boardman (C. C. 1899) 98 Fed. 455; Ralya Market Co. v. Armour & Co. (C. C. 1900) 102 Fed. 530.

58. Effect of decision of question by United States courts.—A point, having once been decided by the supreme court of the United States, cannot be held to present a federal question. State of Kansas v. Bradley (C. C. 1885) 26 Fed. 289; Blue Bird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289; Largey v. Blue Bird Min. Co., Id. 292; People of State of California v. Brown's Valley Irr. Dist. (C. C. 1902) 119 Fed. 535; State of Arkansas v. Choctaw & M. R. Co. (C. C. 1905) 134 Fed. 106; Myrtle v. Nevada, C. & O. Ry. Co. (C. C. 1905) 137 Fed. 193. But see Alabama Great Southern Ry. Co. v. American Cotton Oil Co. (C. C. A. 1916) 229 Fed. 11, and Silva v. First Nat. Bank (1888) 10 Ky. Law Rep. (abstract) 365, holding that a suit arising under a law of the United States is no less removable because the law involved has already been decided, construed, and settled. The right of removal is not affected by the fact that the supreme court has laid down general principles which will probably control the decision, such previous decisions being on entirely different states of facts. Mallon v. Hyde (C. C. 1896) 76 Fed. 388.

59. Questions of fact or of law.—In order to remove a cause from a state court, under Act 1887–88, on the ground that it arises under a statute of the United States, the record must affirmatively show, from the facts alleged, that some disputed construction of the statute will arise for decision. Where the contest is about the facts only, there can be no removal. Austin v. Gagan (C. C. 1889) 39 Fed. 626, 5 L. R. A. 476; Myrtle v. Nevada, C. & O. Ry. Co. (C. C. 1905) 137 Fed. 193.

Questions as to the boundaries of a lode mining claim and as to what is the top or apex of a vein are questions of fact which involve no federal question. Blue Bird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289.

60. Removal of part of cause.—The clause of the removal act authorizing the removal of civil suits arising under the constitution or laws of the United States relates only to the entire action, and does not permit the removal of a part thereof when the rest is not removable. Texas v. Day Land & Cattle Co. (C. C. 1892) 49 Fed. 593. So an action against two defendants is not removable on their joint petition averring that the controversy arises under the laws of the United States as to one of them alone, where there is no separable controversy between plaintiff and the latter defendant, nor any evidence showing that the other defendant was made a party solely to defeat the removal. Texas & P. Ry. Co. v. Huber (1903) 75 S. W. 547, 33 Tex. Civ. App. 75. And, where plaintiff joined in the same suit against a carrier a cause of action for overcharge on an interstate shipment with the cause of action for damages for shrinkage of live poultry and expense of feed due to negligent delay, the second cause of action being in no event removable, the suit was not removable. Tullar & Tullar v. Illinois Cent. R. Co. (D. C. 1914) 213 Fed. 280.

61. Removal by one or more coparties.—In the application for the removal on the ground that the cause is one arising under the constitution, laws, or treaties of the United States, all defendants must join. Gableman v. Peoria, D. & E. Ry. Co. (1900) 21 Sup. Ct. 171, 172, 179 U. S. 335, 45 L. Ed. 220; Yarnell v. Felton (C. C. 1900) 104 Fed. 161; State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. 1901) 110 Fed. 10; Scott v. Choctaw, O. & G. R. Co. (D. C. 1901) 112 Fed. 180; Texas & P. Ry. Co. v. Young (Tex. Civ. App. 1894) 27 S. W. 145. But see Southern Pac. R. Co. v. Townsend (C. C. 1894) 62 Fed. 161, holding that where, in a suit to enforce a contract for the sale of land, brought by the vendor, his claim of title under an act of congress is contested by one of the defendants, a case arising under the laws of the United States is presented, removable on petition of such defendant, though his codefendant does not join therein.

Where a cause of action is stated against two defendants, one a federal corporation, the fact that that other who is not entitled to removal joins the application does not require a removal.

Texas & P. Ry. Co. v. Tucker (Tex. Civ. App. 1908) 106 S. W. 764.

62. —— **Effect of failure of one coparty to petition for removal in time.**—See post, § 1011, and notes.

63. —— **Joinder of coparties in petition for removal.**—See post, § 1011, and notes.

(B) Cases arising under the constitution of the United States

64. **Proceedings by states, or governmental agencies or subdivisions thereof.**—Where a mandamus proceeding against a railroad to compel it to remove a bridge across a navigable stream forming the boundary line of two states, and the erection of which was authorized by act of congress, was brought in a state court, the company was entitled to have it removed to the United States Circuit Court. New Orleans, M. & T. R. Co. v. Mississippi (1880) 102 U. S. 135, 136, 26 L. Ed. 96.

An action by a state in its own courts to recover penalties imposed on foreign insurance companies for doing business without complying with the state laws is not, on its face, a case arising under the Constitution and laws of the United States, and until the answer discloses such a fact it cannot be removed, and, where the right of recovery depends alone on whether service of summons has been made on one who was at the time an agent of the company on whom process might legally be served, there is no question dependent on a construction of the Constitution or any law of the United States, and therefore no cause for a removal. Germania Ins. Co. v. Wisconsin (1886) 7 Sup. Ct. 260, 261, 119 U. S. 473, 30 L. Ed. 461.

A suit in the state court to enjoin the threatened importation of armed men into a county where a strike existed, on the ground that this would amount to a public nuisance, as one arising under the constitution and laws of the United States, since, even assuming that the bill shows upon its face that the relief sought would be inconsistent with the power to regulate commerce, or with regulations established by congress, or with the fourteenth amendment, it only demonstrates that the bill cannot be maintained, and not that the cause of action arose under the constitution or laws of the United States. State of Arkansas v. Kansas & T. Coal Co. (1901) 22 Sup. Ct. 47, 183 U. S. 185, 46 L. Ed. 144, reversing (C. C. 1899) 96 Fed. 353.

The validity of the assessment of the property of a railroad company, and of the provisions of state law discriminating between the assessment for taxation of the property of such companies and the property of individuals, and whether the fourteenth amendment of the federal constitution applies to artificial as well as to natural persons, may depend upon the proper construction of such amendment; and the right of the company to a reduction in the estimated value of its property assessed for taxation, by the amount of the mortgage due thereon, depends upon the construction of said amendment, and constitutes a case for relief arising under the constitution and laws of the United States, and is removable into the circuit court. San Mateo County v. Southern Pac. R. Co. (C. C. 1882) 13 Fed. 145.

Where a railroad corporation sets up as a defense that its charter was a grant by the state, giving to the railroad company, without any qualification, the right to prescribe upon what terms and at what rates freight should be transported on the road, and that this grant was protected by the constitution of the United States, and that a subsequent statute of the state upon the subject impairs the validity of such grant in violation of the constitution, such defense involves a question arising under the constitution of the United States, and the case is removable from a state court, under the second section of the act of 1875. Illinois v. Chicago, B. & Q. R. Co. (C. C. 1883) 16 Fed. 706.

In quo warranto to prevent a railroad company from controlling certain lands, a petition for removal alleging that defendant acquired ownership in the land under an act of the legislature, that subsequently the act granting the land was repealed, and that such repealing act was a law impairing the obligation of contracts, and depriving persons of property without due process of law, showed an issue arising under the constitution, which is not eliminated by the attorney general's disclaimer of reliance on the repealing act. Illinois v. Illinois Cent. R. Co. (C. C. 1883) 16 Fed. 881; Id. (C. C. 1888) 33 Fed. 721.

A suit by a state in one of its own courts against a citizen of another state is not a denial of the equal protection of the laws, such as to be removable on that ground under this section. State of Alabama v. Wolffe (C. C. 1883) 18 Fed. 836.

A proceeding by a state to forfeit a franchise cannot be removed to the federal courts on the ground that it impairs the obligations of a contract, the prohibition of the constitution being that "no state shall pass any law" impairing the obligation of contracts. Kentucky v. Louisville Bridge Co. (C. C. 1890) 42 Fed. 241.

In mandamus brought upon the relation of a city to compel certain railroads to lower the grade of a street crossing, the fact that one of the roads claims to have a vested right in the existing crossing, which is entitled to protection under the constitution of the United States, does not, under such

circumstances, give the federal court jurisdiction on removal. State of Ohio v. Columbus & Xenia R. Co. (C. C. 1891) 48 Fed. 626.

In an action to vacate the charter of a railroad company because a majority interest therein had been purchased by a competing line, which purchase was alleged to be ultra vires, because the Georgia constitution forbade the legislature to grant such power to any corporation where its effect might be to lessen or destroy competition, the question whether the obligation of the contract embodied in the company's charter, which was granted before this provision of the constitution took effect, was impaired, was a federal question, though the supreme court of Georgia had theretofore decided that the charter did not confer the right claimed. South Carolina v. Port Royal & A. R. Co. (C. C. 1893) 56 Fed. 333.

A suit by a state to recover lands under a state statute forfeiting a previous railroad grant is removable where the validity of the act of forfeiture is questionable, under the provisions of the federal constitution. State of Minnesota v. Duluth & I. R. R. Co. (C. C. 1898) 87 Fed. 497.

Quo warranto to determine the right of an organization to exercise the functions and franchises of an irrigation district in which the information recites the proceedings by which defendant claims to have been organized as an irrigation district, and charges that they were not in conformity to the laws of the state authorizing the organization of such districts, but were in violation of the same and of the constitution of the state, is not one arising under the constitution of the United States because it is also charged as a further ground of illegality that the acts of defendant were in violation of certain provisions of the federal constitution. People of State of California v. Brown's Valley Irr. Dist. (C. C. 1902) 119 Fed. 535.

Mandamus to enforce an order of the commission to abolish a grade crossing for the removal of the tracks was based on the police power of the state, and not removable. Woodruff v. New York & N. E. R. Co. (1890) 59 Conn. 63, 20 Atl. 17.

A suit by a state to recover taxes on property omitted from taxation brought against nonresidents is not removable to the federal court; the complaint not raising any question arising under the Constitution of the United States within such statute. Darnell v. State (Ind. 1910) 90 N. E. 769. But, where defendant sets up the defense that the state had no power to tax the franchises of the corporation derived from the acts of congress, and that the statute under which the taxes were levied violated article 14 of the amendments of the constitution of the United States, in that it does not allow the deduction of mortgage indebtedness from the valuation of railroad property while such deduction is allowed in the case of other property, the suit is removable. Southern Pac. R. Co. v. California (1886) 118 U. S. 109, 6 Sup. Ct. 993, 30 L. Ed. 103.

That an order of the State Corporation Commission, directing a railroad company to remove its station from one side of its main line to the other, constituted an invasion of interstate commerce, and as such might be declared void by the Supreme Court of the United States on a writ of error, did not confer any jurisdiction on the inferior federal courts to pass on such question on removal. North Carolina Corp. Commission v. Southern Ry. Co. (1909) 66 S. E. 427, 151 N. C. 447.

An action in the nature of quo warranto, to determine the title to the office of electors of president and vice president of the United States, is not removable. State v. Bowen (1876) 8 S. C. (8 Rich.) 382.

65. Proceedings by private persons or corporations.—Proceedings to declare a saloon or brewery a nuisance, brought under a state statute, involve no federal question. (Divided court.) Schmidt v. Cobb (1886) 119 U. S. 286, 7 Sup. Ct. 1373, 30 L. Ed. 321; State of Kansas v. Beal (C. C. 1911) 193 Fed. 543; Lemen v. Wagner (1886) 68 Iowa, 660, 27 N. W. 814; Judge v. Arlen (1887) 71 Iowa, 186, 32 N. W. 326; Shear v. Bolinger (1888) 74 Iowa, 757, 37 N. W. 164, following Dickinson v. Herb Brewing Co. (1887) 73 Iowa, 705, 36 N. W. 651. CONTRA, Kansas v. Walruff (C. C. 1886) 26 Fed. 178; Kessinger v. Hinkhouse (C. C. 1886) 27 Fed. 883; Mahin v. Preiffer, Id. 892.

Where, in a suit in a Missouri court against an Illinois corporation, defendant urged that the contract sued on was ultra vires under its charter, to which plaintiff pleaded as an estoppel a former judgment of the Missouri court in another case between the same parties involving the same issue, no case was made for removal on the ground that "full faith and credit" were not given to the public acts of Illinois by the Missouri court. Chicago & A. R. Co. v. Wiggins Ferry Co. (1883) 108 U. S. 18, 1 Sup. Ct. 614, 27 L. Ed. 636, 154 U. S. 678, 1 Sup. Ct. 617, 27 L. Ed. 638, affirming order Wiggins' Ferry Co. v. Chicago & A. R. Co. (C. C. 1882) 11 Fed. 381, 3 McCrary, 609.

Where in an action of trespass against a tax gatherer for a levy on plaintiff's property, after a tender of coupons issued under a statute which made them receivable in payment of taxes, the defendant in his rejoinder justifies under a subsequent statute forbidding collectors to receive such coupons, a demurrer raises a constitutional question of which the federal court has jurisdiction. Smith v. Greenhow (1884)

3 Sup. Ct. 421, 422, 109 U. S. 669, 27 L. Ed. 1080.

In an action by stockholders of a corporation to set aside a lease executed by it as inconsistent with its charter, illegal and void, no federal question is involved. Central R. Co. of New Jersey v. Mills (1885) 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949, affirming judgment Mills v. Central R. Co. (C. C. 1884) 20 Fed. 449.

The question whether a party to proceedings in a state court continued such after a certain judgment in his favor, so that the estate represented by him as administrator became bound by proceedings subsequent to the judgment, is not dependent for solution on any construction of the constitution or laws of the United States. Where, in an action in the state court against an administrator and another, the judgment is rendered for the administrator, a new trial awarded to the other defendant, and on appeal from the judgment in the new trial judgment was rendered against both defendants, a suit brought by the heirs of the estate to annul the last judgment as against the estate is not removable to the United States court on an allegation that the judgment was void, as seeking to deprive petitioners of their property without due process of law. Gibbs v. Crandall (1887) 7 Sup. Ct. 497, 498, 120 U. S. 105, 30 L. Ed. 590.

The fact that the mortgage held by plaintiff was made by a citizen of South Carolina, at a time when that state was in rebellion against the United States, to a loyal citizen of the United States, in the absence of circumstances establishing that the transaction involved unlawful intercourse between the parties, does not make a suit arising under the constitution or laws of the United States. Carson v. Dunham (1887) 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992.

A suit by a street railroad company to restrain the city from interfering with the use of a street granted to it without reservation of right to amend or repeal before the constitution required incorporation laws to reserve power to amend involved a federal question. Citizens' St. R. Co. v. City of Memphis (C. C. 1892) 53 Fed. 715.

A suit by one operating a ferry across the Columbia river from a point in Oregon to a point in Washington, under a license issued by state authority granting an exclusive ferry right for a fixed period, to restrain another from operating a ferry between the same points without any license from either state, does not involve a federal question though defendant challenges plaintiff's ferry rights on the ground that the same unlawfully interferes with interstate commerce, and the cause is not removable to the federal court on that ground. The Dalles & Rockland Ferry Co. v. Hendryx (C. C. 1911) 189 Fed. 266.

The validity of resolutions prohibiting the construction by a street railway company of switches on a bridge, and approaches thereto, etc., adopted by a city possessing power under its charter, statutes, and its franchise ordinance to the street railway, to prescribe reasonable regulations, etc., does not involve a federal question. Eastern Wisconsin Ry. & Light Co. v. Hackett (Wis. 1908) 115 N. W. 376, 1136, rehearing denied Id., 1139.

(C) Cases arising under laws of United States

66. General rules.—No case can arise in a state court where the interests, property rights, or the authority of the federal government may come in question which cannot be removed into a federal court under existing laws. U. S. v. Lee (1882) 1 Sup. Ct. 240, 263, 106 U. S. 196, 27 L. Ed. 171.

The phrase, "laws of the United States," as used in the removal acts, authorizing removal of a cause arising under the laws of the United States, means acts of Congress, and does not include executive rules and regulations, unless a recovery of damages is expressly authorized by statute for a disregard of such regulations. Beck v. Johnson (C. C. 1909) 169 Fed. 154.

A suit which cannot be prosecuted, defended, or determined without resort to the articles of the Revised Statutes of the United States and a construction of them, is a suit arising under the laws of the United States, so as to authorize a removal to the United States courts. Feibelman v. Packard (1883) 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984; McKee v. Brooks (1885) 64 Tex. 255.

If the cause will necessarily involve a question depending on the construction of a law of congress, it is removable, notwithstanding it presents other questions which depend on general principles. Connor v. Scott (C. C. 1876) Fed. Cas. No. 3,119.

No removable question arises from the fact that plaintiff acquired title from the United States to the funds loaned defendant, and to recover which suit was brought. Houston & T. C. R. Co. v. State (Tex. Civ. App. 1897) 41 S. W. 157, reversed on other grounds Same v. State of Texas (1900) 20 Sup. Ct. 545, 177 U. S. 66, 44 L. Ed. 673.

67. Actions against or for acts of United States officers.—An action by a deputy marshal against his principal or by the marshal against the deputy for fees is not removable. Upham v. Scoville (1882) 40 Ark. 170; Setzer v. Douglass (1884) 91 N. C. 426; Hildebrand v. Douglass, Id. 430.

Where suit was brought in a state court against defendant as "the duly

qualified and acting postmaster at Dallas, Tex.," and sought relief against certain official acts performed by the defendant under orders of the Postmaster General, it was a suit against an officer of the United States in his official capacity, and removable. Bryant Bros. Co. v. Robinson (1906) 149 Fed. 321, 79 C. C. A. 259.

An action by the collector of internal revenue, against the deputy collector on his official bond, may be removed under this section. Orner v. Saunders (C. C. 1875) Fed. Cas. No. 10,584.

Where the condition of a marshal's official bond is in strict conformity with R. S. § 783, post, § 1307, and the exceptions filed raised the question of what is the proper construction of the condition, and the construction of the language of the section is brought in question, the cause is removable. Lawrence v. Norton (C. C. 1882) 13 Fed. 1.

An action against a United States district attorney for malicious prosecution is removable when all of the proceedings in the criminal action were by United States officials, in a federal court, for a violation of federal laws. Eighmy v. Poucher (C. C. 1898) 83 Fed. 855.

That the defendant is an officer of the United States, and claims to have been acting under an act of Congress in doing the acts complained of, does not authorize removal. City of Stanfield v. Umatilla River Water Users' Ass'n (C. C. 1911) 192 Fed. 596.

The mere fact that defendant sued for malicious prosecution an agent in the employment of the Post Office Department did not give him the right of removal. (1843) 4 Op. Atty. Gen. 300.

The appointment of receivers for a street railroad company by a federal court while condemnation proceedings by the company were pending on appeal did not authorize the removal of the case on a second trial to the federal court, on the ground that the case became one of federal cognizance by the appointment of the receivers, because they were officers of the United States; the receivers not being necessary parties, and their rights being no greater than those of the street railroad company. Jeffery v. Osborne (1911) 129 N. W. 931, 145 Wis. 351.

68. —— **Actions or prosecutions against officers acting under the revenue or election laws.**—See post, § 1015, and notes.

69. —— **Decisions under the act of 1863 for the removal of suits against officers for acts during the Civil War.**—Supreme Justices v. Murray (1869) 9 Wall. 274, 282, 19 L. Ed. 658; Bigelow v. Forrest (1869) 9 Wall. 339, 347, 19 L. Ed. 696; McKee v. Rains (1869) 10 Wall. 22, 19 L. Ed. 860; Hodgson v. Millward (C. C. 1863) Fed. Cas. No. 6,568; Clark v. Dick (C. C. 1870) Fed. Cas. No. 2,818; Sweeney v. Coffin, Id. 13,686; Woodson v. Fleck, Id. 17,-996; Skeen v. Huntington (1865) 25 Ind. 510; McCormick v. Humphrey (1866) 27 Ind. 144; Short v. Wilson (1867) 64 Ky. (1 Bush.) 350; Eifort v. Bevins, Id. 460; Jones v. Seward (N. Y. 1863) 40 Barb. 563, 26 How. Prac. 33, 17 Abb. Prac. 377; People v. Murray (N. Y. 1864) 5 Parker, Cr. R. 577; Jones v. Seward (N. Y. 1864) 41 Barb. 269; Patrie v. Murray (N. Y. 1864) 43 Barb. 323, 29 How. Prac. 312; Benjamin v. Murray (N. Y. 1865) 28 How. Prac. 193; Siebrecht v. Butler (N. Y. 1866) 2 Abb. Prac. (N. S.) 361, note; Mitchell v. Dix (N. Y. 1871) 42 How. Prac. 475; State v. Fairfield County Court of Common Pleas (1864) 15 Ohio St. 377; Hodgson v. Millward (1863) 3 Grant, Cas. 412; Kulp v. Ricketts, Id. 420; State of Ohio v. Bliss, Id. 427; Kulp v. Ricketts (Pa. 1863) 5 Phila. 305; Kneedler v. Lane (1863) 45 Pa. St. (9 Wright) 238, 3 Grant, Cas. 465; Martin v. Snowden (Va. 1868) 18 Grat. 100.

70. —— **Suits against officer acting under writ issued by federal court.**—A suit against a United States marshal for seizure of goods alleged to be plaintiff's under attachment sued out of the federal court, where the marshal's defense is that the goods were the property of defendant in attachment, is removable. Bock v. Perkins (1891) 11 Sup. Ct. 677, 139 U. S. 628, 35 L. Ed. 314; Kelsey v. Dallon (C. C. 1868) Fed. Cas. No. 7,678; McKee v. Brooks (1885) 64 Tex. 255. So is an action on the bond of a United States marshal to recover damages for the illegal seizure of goods under a writ or warrant issued from a district court in proceedings in bankruptcy. Feibelman v. Packard (1883) 3 Sup. Ct. 289, 290, 109 U. S. 421, 27 L. Ed. 984. And an action against private parties for wrongfully causing a United States marshal to levy execution on plaintiff's chattels. Hurst v. Cobb (C. C. 1894) 61 Fed. 1. But see Walker v. Coleman (1895) 55 Kan. 381, 40 Pac. 640, 49 Am. St. Rep. 254, Phillips v. Edelstein (Tex. 1884) 2 Willson, Civ. Cas. Ct. App. § 449, and McKee v. Coffin (1886) 66 Tex. 304, 1 S. W. 276, holding that an action against a United States marshal on his official bond, for the wrongful seizure of property under a writ issued on a judgment rendered in the United States circuit court, is not removable.

An action against a marshal, where a part of the plaintiff's case is to make the marshal liable for the acts of his deputy, and a part of the defense is justification under process from a United States court, arises under the laws of the United States. Ellis v. Norton (C. C. 1883) 16 Fed. 4, 4 Woods, 399.

An action for a wrongful levy and sale of goods by a United States marshal and his deputy may be removed

where the defendants plead justification under the process of the federal court, but a general denial of the facts stated in the petition is not sufficient. Howard v. Stewart (1892) 34 Neb. 765, 52 N. W. 714.

71. Enforcement and effect of judgments or orders of United States courts.—An action on a judgment recovered in a United States court is not necessarily a suit arising under the laws of the United States. Provident Sav. Life Assur. Soc. v. Ford (1885) 114 U. S. 635, 5 Sup. Ct. 1104, 29 L. Ed. 261; Long v. Quinn Bros. (1913) 102 N. E. 348, 215 Mass. 85. But a suit involving the regularity and validity of a decree of a federal court is removable. Johnson v. New Orleans Nat. Banking Ass'n (1881) 33 La. Ann. 479. And so are suits in equity in a state court, the effect of which, as disclosed on the face of the bills, are to delay and obstruct, and perhaps defeat, the enforcement of a judgment of a federal court. Cornue v. Ingersoll (C. C. 1909) 174 Fed. 666, decree affirmed (1910) 176 Fed. 194, 99 C. C. A. 548.

A case does not arise under the laws of the United States simply because the supreme court, or any other federal court, has decided, in another suit, the questions of law which are involved in it. Leather Manufacturers' Nat. Bank v. Cooper (1887) 120 U. S. 778, 7 Sup. Ct. 777, 30 L. Ed. 816, affirming order Cooper v. Leather Manufacturers' Nat. Bank (C. C. 1886) 29 Fed. 161. Nor because it involves the construction of orders and decrees of a federal court. U. S. v. Douglas (1893) 113 N. C. 190, 18 S. E. 202. And so is a suit to restrain the United States marshal from proceeding further under an execution issued out of a federal court. Frank v. Leopold & Feron Co. (C. C. 1909) 169 Fed. 922. And suits in equity in a state court, the effect of which, as disclosed on the face of the bills, are to delay and obstruct, and perhaps defeat, the enforcement of a judgment of a federal court, are removable, as involving a federal question. Cornue v. Ingersoll (C. C. 1909) 174 Fed. 666, decree affirmed (1910) 176 Fed. 194, 99 C. C. A. 548.

In an action against a corporation in a court of the state in which the defendant was incorporated, brought on a judgment recovered against it in a United States court for a district in another state, petition by it for removal which alleged that it was not an inhabitant of that state, and that process in the suit was not personally served on defendant or any of its officers, but did not allege that there was no service of process on its agent in the district in which the judgment was recovered, and that there was no appearance of defendant in that suit, did not raise a defense of want of jurisdiction, under R. S. § 739, post, § 1033. Provident Sav. Life Assur. Soc. v. Ford (1885) 114 U. S. 635, 5 Sup. Ct. 1104, 29 L. Ed. 261.

A supplemental bill alleging that a certain judgment rendered by the federal court after removal in a suit to which complainant was not a party had been obtained by collusion, and did not conclude her, does not raise a federal question. Rand v. Walker (1886) 117 U. S. 340, 6 Sup. Ct. 769, 29 L. Ed. 907.

A suit to enjoin officers of the United States charged with the construction of a government canal from changing the location of a highway bridge over the canal, in alleged violation of a decree of a district court in proceedings to condemn right of way across the highway, is one arising under the laws of the United States, and removable on that ground. Woods v. Root (1903) 123 Fed. 402, 59 C. C. A. 206.

A suit to recover taxes erroneously levied by the officials of a county, under a state statute, does not involve any federal question, although the invalidity of such taxes has been established by the decree of a federal court. Berger v. Douglas County Com'rs (C. C. 1880) 5 Fed. 23, 2 McCrary, 483.

An action on a supersedeas bond given on an appeal from the decree of a circuit court to the circuit court of appeals to recover the damages sustained by the appellee is one involving questions arising under the laws of the United States, and is removable into the federal court. Crane v. Buckley (C. C. 1900) 105 Fed. 401.

A suit between citizens of the same state, touching the title to a tract of land, cannot be removed to a federal court merely because one party claims title under a sale made by a United States marshal on a fi. fa. issued from a federal court. Carson v. Dunham (1887) 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; Gay v. Lyons (C. C. 1877) Fed. Cas. No. 5,281. But an action of trespass is removable from a state to a federal court where defendant justifies the alleged trespass under the authority of a court and of the laws of the United States. Houser v. Clayton (C. C. 1878) Fed. Cas. No. 6,739.

72. Cases under laws relating to claims against United States.—A suit to subject a judgment, obtained by the defendant against the United States in the court of claims, to the payment of a judgment against defendant, and for injunction to restrain defendant from collecting, transferring, or otherwise disposing of said claim against the government, and for the appointment of a receiver to collect and hold the fund, involved the construction of R. S. § 3477, post, § 6383. Willard v. Mueller (C. C. 1885) 23 Fed. 209.

73. Actions against receivers appointed by United States courts or their sureties.—Where receivers of an inter-

state railroad were appointed by a federal court, actions against them instituted by claimants in a state court were not removable to the federal court as involving a federal question on the theory that to permit such suits to be maintained in the state court would interfere with the receiver's operation of the road and their performance of its duties to the public. Dale v. Smith (C. C. 1910) 182 Fed. 360.

That a receiver appointed by a United States court had begun a suit against trustees for the bondholders does not make a federal question in a suit by the owner of bonds against the trustees, the receiver not being a party, no relief being demanded against him, and the principal relief demanded being the removal of defendants, and the appointment of another trustee. Vanderbilt v. Kerr (C. C. 1911) 188 Fed. 537.

Whether the liability of the sureties on the bond of a receiver appointed by a federal court is joint or several does not involve a federal question. U. S. v. Douglas (1893) 113 N. C. 190, 18 S. E. 202.

74. —— **Federal question dependent on federal appointment.**—See, post, § 1048, and notes.

75. **Actions by or against United States corporations in general.**—Corporations organized under acts of congress can remove suits against them on the ground that such suits are suits "arising under the laws of the United States." Union Pac. R. Co. v. Myers (1885) 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319 (reversing judgment Myers v. Union Pac. Ry. Co. [C. C. 1882] 16 Fed. 292, 3 McCrary, 578); Supreme Lodge of Knights of Pythias of the World v. Hill (1896) 76 Fed. 468, 22 C. C. A. 280; Cruikshank v. Fourth Nat. Bank (C. C. 1883) 16 Fed. 888; Allen v. Texas & P. R. Co. (C. C. 1885) 25 Fed. 513; Union Pac. R. Co. v. McComb (N. Y. 1880) 58 How. Prac. 478; Choctaw, O. & G. R. Co. v. Hendricks (Okl. 1908) 95 Pac. 970; Same v. Hamilton, Id. 972; Texas & P. Ry. Co. v. Watson (Tex. Civ. App. 1898) 43 S. W. 1060. CONTRA, Union Pac. Ry. Co. v. Dyche (1883) 31 Kan. 120, 1 Pac. 243; Ulster County Sav. Inst. v. Fourth Nat. Bank (N. Y. 1880) 59 How. Prac. 482.

An action brought against a corporation chartered under an act of Congress and a local defendant, upon a joint liability, is a suit arising under the laws of the United States, and, as such, is removable from a state court to a federal Circuit Court on petition of both defendants. In re Dunn (1909) 29 Sup. Ct. 299, 212 U. S. 374, 53 L. Ed. 558; Texas & P. Ry. Co. v. Eastin & Knox (1909) 29 Sup. Ct. 564, 214 U. S. 153, 53 L. Ed. 946 (affirming judgment [1907] 102 S. W. 105, 100 Tex. 556); Lund v. Chicago, R. I. & P. Ry. Co. (C. C. 1897) 78 Fed. 385; Martin v. St. Louis Southwestern Ry. Co. of Texas (C. C. 1904) 134 Fed. 134; Choctaw, O. & G. R. Co. v. Hamilton (Okl. 1908) 95 Pac. 972; Texas & P. Ry. Co. v. Huber (Tex. 1909) 121 S. W. 1106; Same v. Beckworth (Tex. Civ. App. 1909) 118 S. W. 729. CONTRA, Texas & P. Ry. Co. v. Huber (1906) 92 S. W. 832, 100 Tex. 1.

Acts of Congress conferring rights and privileges upon the territorial corporations did not give such corporations a federal character, such as will justify them in removing, on that ground, suits brought against them in the state courts. Oregon Short Line & U. N. R. Co. v. Skottowe (1896) 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048 (affirming Skottowe v. Oregon Short Line & U. N. Ry. Co. [1892] 22 Or. 430, 30 Pac. 222, 16 L. R. A. 593); Conlon v. Oregon Short-Line & U. N. Ry. Co. (1892) 21 Or. 462, 28 Pac. 501. Nor did the act which extended over Indian Territory certain laws of Arkansas relating to corporations making the Arkansas law a part of the act of Congress as though incorporated therein in hæc verba make a private corporation organized under such law a federal corporation. Boyd v. Great Western Coal & Coke Co. (C. C. 1911) 189 Fed. 115. CONTRA, Canary Oil Co. v. Standard Asphalt & Rubber Co. (C. C. 1909) 182 Fed. 663.

A suit brought by the attorney general of a state to test the validity of an alleged unlawful consolidation of railroad companies, which rests only on authority conferred for the purpose by acts of congress, presents a case arising under the laws of the United States. Ames v. Kansas (1884) 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482. And, where a state begins a suit in its own courts to recover taxes levied under its laws on the property of a corporation created by its power, and the corporation sets up the defense that the state had no power to tax the franchises of the corporation derived from the acts of congress, and that the statute under which the taxes were levied violated article 14 of the amendments of the constitution of the United States, such suit is removable, regardless of the validity of the claim set up. Southern Pac. R. Co. v. California (1886) 6 Sup. Ct. 993, 995, 118 U. S. 109, 30 L. Ed. 103.

Where, in an action for land against the lessor thereof and the lessee, a corporation created by the laws of the United States, the complaint alleged that such corporation was in actual possession, and the return of the summons alleged service upon both defendants, such corporation was a party, so that a federal question was involved, though the court, in rendering judgment, spoke of such party as not having been served and as not appearing. Washington & I. R. Co. v. Cœur d'Alene R. & Nav. Co. (1895) 160 U.

S. 77, 16 Sup. Ct. 231, 40 L. Ed. 355, affirming (1894) 60 Fed. 981, 9 C. C. A. 303, 15 U. S. App. 359.

By the consolidation of a federal with a state corporation, the former does not lose any of its rights or franchises as such, and is not estopped from removing suits brought against it in the state courts to those of the United States, notwithstanding that the laws of the state in question provide to the contrary. Allen v. Texas & P. R. Co. (C. C. 1885) 25 Fed. 513.

Proceedings for the condemnation of a right of way cannot be removed into a federal court by a federal corporation joined as a defendant, when it does not appear that such corporation is concerned in the litigation. Seattle & M. R. Co. v. State (C. C. 1892) 52 Fed. 594.

A provision in the charter of the National Life Insurance Company of the United States declaring it capable of suing and being sued in the federal courts does not give those courts exclusive jurisdiction, or give the corporation a right of removal to the federal courts when sued in the state courts. Scheffer v. National Life Ins. Co. (1879) 25 Minn. 53. Nor does an act giving aid in the construction of a railroad, which in all other matters was to be governed by the law of the state. State v. Southern Pac. Co. (1893) 23 Or. 424, 31 Pac. 960.

In an action against a railroad company for injuries to plaintiff while it was in the hands of a receiver, where defendant was entitled to a removal from the state court to the federal court because of having been created under federal laws, the fact that the receiver, a resident of the state, was improperly joined as a party defendant does not defeat defendant's right of removal. Texas & P. Ry. Co. v. Bloom (1892) 85 Tex. 279, 20 S. W. 133.

76. —— Decisions under R. S. § 640, expressly providing for removal of causes brought against federal corporations.—Fisk v. Union Pac. R. Co. (C. C. 1869) Fed. Cas. No. 4,827; Gard v. Durant, Id. 5,216; Jones v. Oceanic Steam Nav. Co. (C. C. 1873) Fed. Cas. No. 7,485; Magee v. Union Pac. R. Co., Id. 8,945; Kain v. Texas Pac. R. Co. (C. C. 1875) Fed. Cas. No. 7,596; Turton v. Union Pac. R. Co., Id. 14,-273; Texas v. Texas & P. R. Co. (C. C. 1879) Fed. Cas. No. 13,848; Reding v. Texas & P. R. Co. (C. C. 1880) Fed. Cas. No. 11,630a; Northern Line Packet Co. v. Binninger (1873) 70 Ill. 571; Hazard v. Durant (1870) 9 R. I. 602; Texas & P. Ry. Co. v. McAllister (1883) 59 Tex. 349.

77. Cases under laws relating to territories.—Though a complaint by a settler claiming title under the pre-emption laws of the United States against a railroad company states that defendant claims under the laws of the territory of Washington authorizing railroad companies to appropriate land for right of way, it discloses a cause of action arising under the laws of the United States, so as to authorize a removal from a state court to the federal court, the court having judicial knowledge that the authority of the territory to legislate as to the matter in question is derived from the act of congress granting to railroad companies the right of way through the public lands of the United States. Spokane Falls & N. Ry. Co. v. Ziegler (1897) 17 Sup. Ct. 728, 730, 167 U. S. 65, 42 L. Ed. 79, affirming judgment (1894) 61 Fed. 392, 9 C. C. A. 548.

In an action for injuries to plaintiff while switching cars on defendant's road in Indian Territory, while the Arkansas statute providing that the common law not inconsistent with the Constitution and laws of the state should be the rule of decision was in force in Indian Territory by virtue of an act of Congress, the action arises under the statutes of Arkansas, and not under the act of Congress. Missouri, K. & T. Ry. Co. of Texas v. Hollan (Tex. Civ. App. 1908) 107 S. W. 642; Same v. Blachley (1908) 50 Tex. Civ. App. 141, 109 S. W. 995.

78. Cases under laws relating to public lands.—A suit in ejectment in which defendants claim title under a patent from the United States, and plaintiff claims under a prior patent, and relies on want of authority in the land department to issue the patent to defendants, involves a case arising under the laws of the United States. Mitchell v. Smale (1891) 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442. So does a suit by the daughter of a deceased homestead settler to establish her title under the operation of the state laws, as against his widow, to whom the patent has issued. McCune v. Essig (1905) 26 Sup. Ct. 78, 199 U. S. 382, 50 L. Ed. 237, affirming decrees (C. C. 1902) 118 Fed. 273, and (C. C. A. 1903) 122 Fed. 588, 59 C. C. A. 429. A suit by a vendee of the state, under a state act, for the selection and sale of the swamp and overflowed lands granted to the state by act of congress, to enjoin the commission of a nuisance on the land so purchased, involves the question whether said land was granted to the state by said act at the time of its selection by the state. Miller v. Wattier (C. C. 1885) 24 Fed. 49. Likewise an action in ejectment, where it appears that both parties claim under deeds from the trustee holding the legal title of a town site on public lands, and both claim to be cestuis que trustent under the statute. Dunton v. Muth (C. C. 1891) 45 Fed. 390. An action to determine adverse claims to lands entered as a "soldier's additional homestead," where each of the enterers executed an instrument assigning his

right prior to doing any of the acts required to be done in order to perfect their rights, and alienating such lands contrary to law, and plaintiffs' title was wholly derived through such instruments; and defendants' title was derived through original entrymen holding under United States patent. Walker v. Richards (C. C. 1893) 55 Fed. 129. A suit to quiet title to certain real estate, where the real controversy is the proper construction of surveys of land made under the authority of acts of Congress. Green v. Valley (C. C. 1900) 101 Fed. 882. And an action by the state to annul a contract for the reclamation of land under the Carey Act because of defendant's failure to comply therewith. State of Oregon v. Three Sisters Irr. Co. (C. C. 1907) 158 Fed. 346.

In an action by a citizen of California in a district court of that state to quiet his title to certain of the Pueblo lands of the city of San Francisco, granted to that city by an act of Congress, the questions of title involved do not arise under the laws of the United States, so as to authorize its removal to the United States Circuit Court. Hoadley v. City and County of San Francisco (1876) 94 U. S. 4, 24 L. Ed. 34.

The issues raised by defendants in ejectment who were strangers to the paramount title as to whether the Mexican grant under which plaintiff claimed was valid and whether the land sued for was included in the grant, as defined by the patent, presents no federal question. Los Angeles Farming & Milling Co. v. Hoff (C. C. 1891) 48 Fed. 340.

An action against the register of United States land office and register of state land office, to enjoin former from entering cancellations of lieu land selections upon his records, involves a question arising under the laws of the United States. State Improvement-Development Co. v. Leininger (D. C. 1914) 226 Fed. 884.

The question whether a patent from the United States conveys part of the seashore below high-water mark in front of the land conveyed by the patent is a "federal question," authorizing the removal of the cause from the state to the federal court. Kenyon v. Squire (1890) 1 Wash. St. 9, 24 Pac. 28.

79. —— **Mines and mining rights.**—An adverse suit after application for a patent for a mining claim is removable. Frank G. & S. M. Co. v. Larimer M. & S. Co. (C. C. 1881) 8 Fed. 724, 2 McCrary, 138. But not a suit to determine the right to a mining claim, in which the only questions to be litigated are what are the local laws, rules, regulations, and customs by which the rights of the parties are governed, and whether the parties have in fact conformed to them. Trafton v. Nougues (C. C. 1877) Fed. Cas. No. 14,134. Nor an action in a state court, which appears by the complaint to be simply one to recover damages for trespass upon the plaintiff's mining claim. Argonaut Min. Co. v. Kennedy Mining & Milling Co. (C. C. 1897) 84 Fed. 1. But, where the right of the alleged trespasser to enter turns upon the construction to be given to the federal mining laws, the case is removable. Cheesman v. Shreve (C. C. 1888) 37 Fed. 36.

80. —— **Water rights.**—An action in a state court, based upon an allegation that the defendant, in operating its quartz mill, by means of a water right claimed by it, has poured over the complainant's lands a quantity of tailings and débris, only questions the defendant's right to so use the land, and does not involve any right secured by R. S. §§ 2339, 2340, post, §§ 4475, 4476. In re Helena & L. Smelting & Reduction Co. (C. C. 1891) 48 Fed. 609.

81. —— **Public highways.**—A petition by a telegraph company under a state statute for condemnation of a right of way along the right of way of a railroad company within the state did not present a federal question so as to confer federal jurisdiction because the proposed condemnation might interfere with interstate commerce and involved an interference with navigable waters of the United States within its jurisdiction. Western Union Telegraph Co. of Illinois v. Southeast & St. L. Ry. Co. (1913) 208 Fed. 266, 125 C. C. A. 466.

A proceeding to exclude a bridge company from the use of a franchise to operate railroad tracks in a public street does not raise a federal question, though such tracks lead to its bridge, built under the authority of acts of Congress which declared that it "shall be a lawful structure, and shall be recognized and known as a post route." Commonwealth of Kentucky v. Louisville Bridge Co. (C. C. 1890) 42 Fed. 241.

In proceedings by a railroad company to condemn a portion of the right of way of another railroad company, claiming under an act of congress granting the right of way on condition that the road should be a public highway for the use of the United States, free from toll or charge upon the transportation of any property or troops of the United States, and that the United States mail should at all times be transported thereon, a defense based partly on the alleged necessity of the whole of the right of way for the discharge of the conditions imposed by such grant does not involve a federal question entitling such grantee to a removal of the cause to the federal courts. Illinois Cent. R. Co. v. Chicago, B. & N. R. Co. (1887) 122 Ill. 473, 13 N. E. 140.

In an action against a telegraph company to recover damages for trespasses

upon plaintiff's land lying along a public highway, as the controversy was not as to what rights the company had to be upon the road, but as to whether, as a matter of fact, it was upon the public road or plaintiff's land, a decision of the issues does not require a construction of the acts of congress in relation to the right of telegraph companies to use public roads in the construction of their lines, and defendant was not entitled to a removal of the cause to the federal court on that ground. Postal Telegraph Co. v. Cofer (1893) 14 Ky. Law Rep. (abstract) 574.

An action to enforce a schedule of rates adopted by the railroad commissioners against a railroad company was not removable because the company had accepted aid under an act of Congress. State v. Southern Pac. Co. (1893) 23 Or. 424, 31 Pac. 960.

82. **Cases under revenue laws.**—See, also, post, § 1015, and notes.

In an action in a state court by a broker to recover commissions on sales of land, the exclusion of evidence that he had not paid the tax or received the license required by United States statute, when properly excepted to, raises a federal question. Ruckman v. Bergholz (1877) 131 U. S. (Appendix) cxliii, 23 L. Ed. 1008. So does an action to recover the possession of land involve a federal question where the matter in dispute depends on the legality or effect of a prior sale of the premises for delinquent taxes under an act of congress. Miller v. Wattier (C. C. 1885) 24 Fed. 49, 54.

Whether there could be a sale of cotton, so as to pass title to the vendee before the payment of the government tax, is not a federal question. Carson v. Ober (1879) 131 U. S. (Appendix) clx, 25 L. Ed. 157.

A cause involving the question whether an express company or its customer must furnish the stamp required by the war revenue act of 1898 to be affixed to a receipt given by the company is one arising under a law providing internal revenue, and is removable. Crawford v. Hubbell (C. C. 1898) 89 Fed. 1. But see Johnson v. Wells Fargo & Co. (C. C. 1899) 98 Fed. 3.

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85. Cases under laws relating to interstate commerce.—An action against an interstate common carrier by rail for damages caused by unjust discrimination in rates and charges against plaintiff as a shipper over its road, and in affording other shippers better facilities, and for unlawfully demanding and receiving extortionate rates from plaintiff, is an action arising under the interstate commerce act, though not in express terms based on that act, and though an action would lie for the same cause at common law, when the petition for removal sets up defenses based on the interstate commerce act. Lowry v. Chicago, B. & Q. R. Co. (C. C. 1891) 46 Fed. 83.

A bill by a state alleging that defendant corporation was chartered by the state to build and operate a railroad between the interior and the seaboard; that since it was built a competitor of defendant had purchased enough of the stock and bonds of defendant to give it control of the corporation, and had diverted the business of defendant, and crushed competition; that the competitor had no power to purchase stock in defendant corporation, and that the latter was disabled to fulfill the purposes for which it was chartered; and it prayed that such holding by the competitor be declared ultra vires, and that defendant's charter be forfeited—is removable where the competitor was an instrument of interstate commerce, and alleged that for the purposes of such commerce, and under the interstate commerce clause of the constitution and the laws passed in pursuance thereof, it had power to purchase defendant's stock, and control its operation. South Carolina v. Port Royal & A. R. Co. (C. C. 1893) 56 Fed. 333.

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An action against a railroad company to recover for loss or damage to an interstate shipment through the alleged negligence of the defendant is not one arising under any law of the United States, and is only removable on the ground of diversity of citizenship and where the jurisdictional amount is involved. Storm Lake Tub & Tank Factory v. Minneapolis & St. L. R. Co. (D. C. 1913) 209 Fed. 895. Nor is a suit against several carriers engaged in an interstate shipment of wool, on the ground that the terminal carrier failed to deliver the same, though the initial carrier was made liable for the default of any connecting carrier by Carmack Amendment. Adams v. Chicago Great Western R. Co. (D. C. 1914) 210 Fed. 362. But see Alabama Great Southern Ry. Co. v. American Cotton Oil Co. (C. C. A. 1916) 229 Fed. 11; McGoon v. Northern Pac. Ry. Co. (D. C. 1913) 204 Fed. 998; and Smith v. Atchison, T. & S. F. Ry. Co. (D. C. 1913) 210 Fed. 988, holding that a suit by a shipper against a railroad company to recover for damage or injury to property while being transported in interstate commerce is one arising under the Carmack Amendment to the Interstate Commerce Act, of which a District Court is given original jurisdiction by Judicial Code, § 24, par. 8, and is removable under section 28.

An action under the Carmack Amendment to the Interstate Commerce Act against an interstate carrier for loss of merchandise was not removable, where the only question for determination was one of fact, not arising under the laws of the United States. Orr v. Baltimore & O. R. Co. (City Ct. N. Y. 1913) 145 N. Y. S. 378, 83 Misc. Rep. 221.

An action in a state court to recover for personal injuries alleged to have been received by reason of the fail-

upon plaintiff's land lying along a public highway, as the controversy was not as to what rights the company had to be upon the road, but as to whether, as a matter of fact, it was upon the public road or plaintiff's land, a decision of the issues does not require a construction of the acts of congress in relation to the right of telegraph companies to use public roads in the construction of their lines, and defendant was not entitled to a removal of the cause to the federal court on that ground. Postal Telegraph Co. v. Cofer (1893) 14 Ky. Law Rep. (abstract) 574.

An action to enforce a schedule of rates adopted by the railroad commissioners against a railroad company was not removable because the company had accepted aid under an act of Congress. State v. Southern Pac. Co. (1893) 23 Or. 424, 31 Pac. 960.

82. Cases under revenue laws.—See, also, post, § 1015, and notes.

In an action in a state court by a broker to recover commissions on sales of land, the exclusion of evidence that he had not paid the tax or received the license required by United States statute, when properly excepted to, raises a federal question. Ruckman v. Bergholz (1877) 131 U. S. (Appendix) cxliii, 23 L. Ed. 1008. So does an action to recover the possession of land involve a federal question where the matter in dispute depends on the legality or effect of a prior sale of the premises for delinquent taxes under an act of congress. Miller v. Wattier (C. C. 1885) 24 Fed. 49, 54.

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ure of defendant railroad company to properly equip its cars with safety appliances is not removable merely because of an allegation in the complaint that defendant is engaged in interstate commerce, where it does not appear that there is any controversy as to the construction or effect of the federal law relating to railroads engaged in such commerce. Myrtle v. Nevada, C. & O. Ry. Co. (C. C. 1905) 137 Fed. 193. But see Nichols v. Chesapeake & O. Ry. Co. (1907) 105 S. W. 481, 32 Ky. Law Rep. 270.

Even if the allegation of the petition of a switchman against a railroad company for injury from defective couplers, that the "cars in use on defendant's said railway, and particularly the cars on which plaintiff was injured, were not properly equipped with automatic couplers, as required by law," necessarily implies a reliance on the act of Congress, the cause is not removable, where neither the petition in the case nor the petition for removal showed that defendant was engaged in interstate commerce, nor that the cars in question were being used in such commerce. International & G. N. Ry. Co. v. Elder (Tex. Civ. App. 1907) 99 S. W. 856.

86. —— Decisions in cases under the employers' liability act prior to the enactment of the proviso restricting removal.—Miller v. Illinois Cent. R. Co. (C. C. 1909) 168 Fed. 982; Nelson v. Southern Ry. Co. (C. C. 1909) 172 Fed. 478; Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994; Bottoms v. St. Louis & S. F. R. Co. (C. C. 1910) 179 Fed. 318; Leggett v. Great Northern Ry. Co. (C. C. 1910) 180 Fed. 314; Thompson v. Wabash R. Co. (C. C. 1911) 184 Fed. 554; Calhoun v. Central of Georgia Ry. Co. (1910) 67 S. E. 274, 7 Ga. App. 528; Lemon's Adm'r v. Louisville & N. R. Co. (Ky. 1910) 125 S. W. 701; Shohoney v. Quincy, O. & K. C. Ry. Co. (1909) 122 S. W. 1025, 223 Mo. 649.

87. —— Restriction on removal of cases under the employers' liability act.—The purpose and effect of the provision was to withdraw the right of removal of actions thereunder to federal courts, and to require the review of federal questions by writ of error to the state court. Lloyd v. North Carolina R. Co. (1913) 78 S. E. 489, 162 N. C. 485.

The provision that actions brought in a state court of competent jurisdiction under the Employers' Liability Act shall not be removable applies to all actions without regard to the grounds for removal. Kansas City Southern R. Co. v. Leslie (1915) 35 S. Ct. 844, 238 U. S. 599, 59 L. Ed. 1478 (reversing judgment [1914] 167 S. W. 83, 112 Ark. 305); Teel v. Chesapeake & O. Ry. Co. of Virginia (1913) 204 Fed. 918, 123 C. C. A. 240, 47 L. R. A. (N. S.) 21; Symonds v. St. Louis & S. E. Ry. Co. (C. C. 1911) 192 Fed. 353; Saiek v. Pennsylvania R. Co. (C. C. 1911) 193 Fed. 303; Strauser v. Chicago, B. & Q. R. Co. (D. C. 1912) 193 Fed. 293; Lee v. Toledo, St. L. & W. Ry. Co., Id. 685; Ullrich v. New York, N. H. & H. R. Co., Id. 768; Hulac v. Chicago & N. W. Ry. Co. (D. C. 1912) 194 Fed. 747; McChesney v. Illinois Cent. R. Co. (D. C. 1912) 197 Fed. 85; De Atley v. Chesapeake & O. Ry. Co. (D. C. 1912) 201 Fed. 591; Patton v. Cincinnati, N. O. & T. P. Ry. (D. C. 1913) 208 Fed. 29; Eng v. Southern Pac. Co. (D. C. 1913) 210 Fed. 92; Lombardo v. Boston & M. R. R. (D. C. 1915) 223 Fed. 427; Peek v. Same, Id. 448; Kansas City Southern Ry. Co. v. Cook (Ark. 1911) 140 S. W. 579; St. Louis & S. F. R. Co. v. Conarty (Ark. 1913) 155 S. W. 93; Kansas City Southern Ry. Co. v. Leslie (Ark. 1914) 167 S. W. 83; Fish v. Chicago, R. I. & P. Ry. Co. (Mo. 1914) 172 S. W. 340; Pankey v. Atchison, T. & S. F. Ry. Co. (1914) 168 S. W. 274, 180 Mo. App. 185; Missouri, K. & T. Ry. Co. of Texas v. Bunkley (Tex. Civ. App. 1913) 153 S. W. 937. Even though the complaint also stated a cause of action under the state statute. Ullrich v. New York, N. H. & H. R. Co. (D. C. 1912) 193 Fed. 768; Rice v. Boston & M. R. R. (D. C. 1913) 203 Fed. 580; Strother v. Union Pac. R. Co. (D. C. 1915) 220 Fed. 731. But see Van Brimmer v. Texas & P. Ry. Co. (C. C. 1911) 190 Fed. 394, holding that the act only provides that, where a cause of action arises under the employer's liability act, the suit may not, for that reason, be removed, and hence does not affect the right of removal in cases where the right exists by some other law.

Where separate counts stating causes of action under the Employers' Liability Act and under state law were joined, defendant can remove the cause of action under the state law, and such removal carried the entire case with it. Strother v. Union Pac. R. Co. (D. C. 1915) 220 Fed. 731.

The prohibition prevents the removal for diverse citizenship as a separable controversy of a suit brought under the federal Employers' Liability Act in which a resident and nonresident corporation were made defendants, upon a petition alleging fraudulent joinder and denying that the injury happened in interstate commerce. Southern Ry. Co. v. Lloyd (1916) 36 Sup. Ct. 210. And, where the plaintiff in an action in a state court to recover for the death of a railroad employé unequivocally bases the right of recovery on the Employers' Liability Act, the cause is not removable whether or not the facts alleged are sufficient to state a cause of action under such act. Smith v. Camas

Prarie Ry. Co. (D. C. 1914) 216 Fed. 799.

The prohibition applies to an action brought before the provision was amended, but not removed until thereafter. Teel v. Chesapeake & O. Ry. Co. of Virginia (1913) 204 Fed. 918, 123 C. C. A. 240, 47 L. R. A. (N. S.) 21. CONTRA, Hulac v. Chicago & N. W. Ry. Co. (D. C. 1912) 194 Fed. 747; Ft. Smith & W. R. Co. v. Blevins (1913) 130 Pac. 525, 35 Okl. 378.

The provision that no case arising thereunder shall be removed from the state court of competent jurisdiction to the federal court is not a mere privilege or exemption, but a limitation of jurisdiction, so that, where an action instituted in a state court was removed before the filing of a complaint, and on filing thereof in the federal court it appeared that the action was under the Employers' Liability Act, the court had no jurisdiction and was bound to remand it. Patton v. Cincinnati, N. O. & T. P. Ry. (D. C. 1913) 208 Fed. 29. Plaintiff's filing a reply after such removal did not constitute a waiver of his right to move for remand nor confer federal jurisdiction. Burnett v. Spokane, P. & S. Ry. Co. (D. C. 1913) 210 Fed. 94. But see Stephens v. Chicago, M. & P. S. Ry. Co. (D. C. 1913) 206 Fed. 854.

A state court in which there may be a constitutional jury of less than 12 men or a verdict which is not unanimous is one of "competent jurisdiction" within this section. Gibson v. Bellingham & N. Ry. Co. (D. C. 1914) 213 Fed. 488.

88. Cases under patent and copyright laws.—A suit in which the bill alleged that defendants fraudulently excluded complainant from an inspection of their books of account, and refused to pay him royalties due under his contract with them, but made no issue as to construction of the claims of his patents, or of their infringement, is not a case arising under the patent laws of the United States, and not removable. Albright v. Teas (1882) 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295. But a suit by a patentee against one who had contracted for the right to manufacture under the patent, in which questions might arise as to whether the manufacture had been carried on under this patent or another, and whether the latter was valid as against the former, is removable. Forncrook Mfg. Co. v. Barnum Wire Works (1884) 20 N. W. 582, 54 Mich. 552.

A suit by the equitable assignee of the patent right under an agreement executed many months before the patent was applied for, against the subsequent assignee of the patent after it was issued, to compel an assignment to complainant, where defendant claimed to be an assignee for a valuable consideration and without notice, and invoked for his protection R. S. § 4898, post, § 9444, is removable. American Solid Leather Button Co. v. Empire State Nail Co. (C. C. 1891) 47 Fed. 741.

In a suit for an injunction to restrain false statements by defendant to persons intending to purchase boilers from complainant that such boilers were an infringement of defendant's patent, the substantial controversy was as to the infringement of the patent, and the cause was removable. Moyes v. Stirling Co. (C. C. 1895) 71 Fed. 433.

A suit merely involving the title to a copyright is not removable. Hoyt v. Bates (C. C. 1897) 81 Fed. 641.

89. Cases under bankruptcy laws.—A suit in the state courts to enforce a vendor's lien, where the defense is that the land was sold to defendant by the assignee in bankruptcy of the maker of the notes constituting the lien, is removable. Connor v. Scott (C. C. 1876) Fed. Cas. No. 3,119. So is a bill by an assignee in bankruptcy to set aside a fraudulent conveyance by the bankrupt. Woolridge v. McKenna (C. C. 1881) 8 Fed. 650. But not a suit after a discharge in bankruptcy to protect property exempted by the bankrupt court from judgment liens existing prior to the application for bankruptcy. King v. Neill (C. C. 1885) 26 Fed. 721.

90. Cases under laws relating to national banks.—An agent appointed by the shareholders of a national bank to administer its affairs is appointed for winding up the affairs of a national bank, and his duties and liabilities arise under the constitution or laws of the United States; and therefore an action against such agent by the pledgor of corporate stock, based on the fact that such agent has improperly sold such stock as assets of the defunct bank may be removed. Guarantee Co. of North Dakota v. Hanway (1900) 104 Fed. 369, 44 C. C. A. 312.

A suit to recover property acquired by the removing defendant, as receiver of a national bank, appointed by the comptroller of the currency, arises under the laws of the United States. Sowles v. Witters (C. C. 1890) 43 Fed. 700; Same v. First Nat. Bank (C. C. 1891) 46 Fed. 513. So does a suit to compel the receiver of a national bank to pay a certain claim out of the bank assets. Hot Springs Independent School Dist. No. 10 of Fall River County v. First Nat. Bank (C. C. 1894) 61 Fed. 417.

The rule of taxation prescribed by R. S. § 5219, post, § 9784, is a federal question, though the provisions of the United States statute have been reenacted by the state legislature. Richards v. Town of Rock Rapids (1887) 72 Iowa, 77, 33 N. W. 372.

An action between a receiver of an insolvent national bank and a depositor, involving only the right of set-off of deposits against notes due by the depos-

itor, does not present a federal question, under R. S. § 5242, post, § 9834, avoiding preferences to creditors of such an insolvent bank. Tehan v. First Nat. Bank (C. C. 1889) 39 Fed. 577.

A complaint alleging false and fraudulent representations by directors of a national bank as to its condition, whereby plaintiffs were deceived and damaged, states a common-law cause of action for deceit, not removable as involving a federal question. Bailey v. Mosher (1894) 63 Fed. 488, 11 C. C. A. 304, 27 U. S. App. 339; Prescott v. Haughey (C. C. 1895) 65 Fed. 653; Stuart v. Bank of Staplehurst (1899) 78 N. W. 298, 57 Neb. 569.

A receiver of a national bank being entitled to remove actions against him to the federal courts as an action arising under the laws of the United States, a defendant, when sued in a state court by such receiver, is also entitled to exercise the same right. Johnson v. Rankin (Tex. Civ. App. 1906) 95 S. W. 665.

91. —— Actions against national banks or receivers thereof.—See ante, § 991 (16), and notes.

(D) Allegations in pleadings

92. Petition for removal.—See post, § 1011, and notes.

93. Decisions under statutes before Act 1887–88.—Carson v. Dunham (1887) 7 Sup. Ct. 1030, 1034, 121 U. S. 421, 30 L. Ed. 992; Wilder v. Union Nat. Bank (C. C. 1879) Fed. Cas. No. 17,651; Miller v. Tobin (C. C. 1883) 18 Fed. 609, 9 Sawy. 401; Rothschild v. Matthews (C. C. 1884) 22 Fed. 6; Iowa v. Chicago, M. & St. P. R. Co. (C. C. 1887) 33 Fed. 391 (appeal dismissed Chicago, M. & St. P. Ry. Co. v. Iowa [1892] 145 U. S. 632, 12 Sup. Ct. 978, 36 L. Ed. 857); McLane v. Leicht (1886) 69 Iowa, 401, 29 N. W. 327; Mills v. Central R. Co. of New Jersey (1884) 7 N. J. Law J. 230.

94. General rules.—A case cannot be removed from a state court into the Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless such appears by plaintiff's statement of his own claim; and, if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal, or in the subsequent pleading. Tennessee v. Union & Planters' Bank (1894) 14 Sup. Ct. 654, 152 U. S. 454, 38 L. Ed. 511; Chappell v. Waterworth (1894) 15 Sup. Ct. 34, 36, 155 U. S. 102, 39 L. Ed. 85; Postal Tel. Cable Co. v. Alabama (1894) 15 Sup. Ct. 192, 155 U. S. 482, 39 L. Ed. 231; East Lake Land Co. v. Brown (1894) 15 Sup. Ct. 357, 155 U. S. 488, 39 L. Ed. 233 (reversing judgment Hawkins Point Light House Case [C. C. 1889] 39 Fed. 77); Oregon Short Line & U. N. Ry. Co. v. Skottowe (1896) 16 Sup. Ct. 869, 162 U. S. 490, 40 L. Ed. 1048; Walker v. Collins (1897) 17 Sup. Ct. 738, 167 U. S. 57, 42 L. Ed. 76; Galveston, H. & S. A. Ry. Co. v. State of Texas (1898) 18 Sup. Ct. 603, 170 U. S. 226, 42 L. Ed. 1017: Houston & T. C. R. Co. v. State of Texas (1900) 20 Sup. Ct. 545, 177 U. S. 66, 44 L. Ed. 673 (reversing judgment [Tex. Civ. App. 1897] 41 S. W. 157); Gableman v. Peoria, D. & E. R. Co. (1900) 21 Sup. Ct. 171, 172, 179 U. S. 335, 45 L. Ed. 220; Mountain View Min. & Mill. Co. v. McFadden (1901) 21 Sup. Ct. 488, 180 U. S. 533, 45 L. Ed. 656 (reversing judgment McFadden v. Mountain View Min. & Mill. Co. [1899] 97 Fed. 670, 38 C. C. A. 354); State of Minnesota v. Northern Securities Co. (1904) 24 Sup. Ct. 598, 194 U. S. 48, 48 L. Ed. 870 (reversing decree [C. C. 1903] 123 Fed. 692); Wichita Nat. Bank v. Smith (1896) 72 Fed. 568, 19 C. C. A. 42 (writ of error dismissed Smith v. Wichita Nat. Bank [1897] 18 Sup. Ct. 946, 42 L. Ed. 1214); Florida v. Charlotte Harbor Phosphate Co. (1896) 74 Fed. 578, 20 C. C. A. 538; Cella v. Brown (1906) 144 Fed. 742, 75 C. C. A. 608; W. G. Coyle & Co. v. Stern (1912) 193 Fed. 582, 113 C. C. A. 450; Western Union Telegraph Co. of Illinois v. Southeast & St. L. Ry. Co. (1913) 208 Fed. 266, 125 C. C. A. 466; Walker v. Richards (C. C. 1893) 55 Fed. 129, 130; Haggin v. Lewis (C. C. 1894) 66 Fed. 199; Caples v. Texas & P. Ry. Co. (C. C. 1895) 67 Fed. 9; City of Lincoln v. Lincoln St. Ry. Co. (C. C. 1896) 77 Fed. 658; Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co. (C. C. 1898) 89 Fed. 113; Doremus v. Root (C. C. 1899) 94 Fed. 760; Henuy v. La Compagnie Générale Transatlantique, etc. (C. C. 1899) 96 Fed. 497; Shields v. Boardman (C. C. 1899) 98 Fed. 455; Broadway Ins. Co. v. Chicago G. W. Ry. Co. (C. C. 1900) 101 Fed. 507; Mayo v. Dockery (C. C. 1901) 108 Fed. 897; City of Wichita v. Missouri & K. Telephone Co. (C. C. 1903) 122 Fed. 100; Mitchell Engineering & Machinery Co. v. Worthington (C. C. 1905) 140 Fed. 947; Hall v. Chicago, R. I. & P. Ry. Co. (C. C. 1906) 149 Fed. 564; State of Oregon v. Three Sisters Irr. Co. (C. C. 1907) 158 Fed. 346; People's United States Bank v. Goodwin (C. C. 1908) 160 Fed. 727; Miller v. Illinois Cent. R. Co. (C. C. 1909) 168 Fed. 982; Beck v. Johnson (C. C. 1909) 169 Fed. 154; Rural Home Telephone Co. v. Powers (C. C. 1910) 176 Fed. 986; Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994; Leggett v. Great Northern Ry. Co. (C. C. 1910) 180 Fed. 314; Boyd v. Great Western Coal & Coke Co. (C. C. 1911) 189 Fed. 115; The Dalles & Rockland Ferry Co. v. Hendryx, Id. 266; Storm Lake Tub & Tank Factory v. Minneapolis & St. L. R. Co. (D. C. 1913) 209 Fed. 895; Adams v. Chicago Great Western R.

Co. (D. C. 1914) 210 Fed. 362; Darton v. Sperry (1899) 41 A. 1052, 71 Conn. 339; Echols v. Smith (1897) 42 S. W. 538, 101 Ky. 707, 19 Ky. Law Rep. 1826; State v. Louisville & N. R. Co. (Miss. 1913) 61 So. 425; Shellenbarger v. Fewel (Okl. 1912) 124 Pac. 617; State v. Port Royal & A. Ry. Co. (1895) 45 S. C. 413, 23 S. E. 363; Schuyler v. Southern Pac. Co. (Utah 1910) 109 Pac. 1025, denying rehearing (1909) 109 Pac. 458.

But see Wilcoxen v. Chicago, B. & Q. R. Co. (C. C. 1902) 116 Fed. 444, holding that the filing of an answer in the state court disclosing the existence of a controversy is not essential to the right of removal, where the petition for removal states that there is a controversy, and Shohoney v. Quincy, O. & K. C. Ry. Co. (1909) 122 S. W. 1025, 223 Mo. 649, holding that a defendant by his petition to remove cannot change plaintiff's cause of action as stated in his petition, so as to bring it within a federal law, nor can plaintiff so state his cause of action as to deprive defendant of the right of removal, if defendant by his answer or plea shows that he relies for his defense on an act of Congress or a provision of the federal Constitution.

Where a plaintiff's pleading states every fact upon which the solution of a substantial question arising under the Constitution depends, so that the question of the construction of a constitutional provision may be presented by a demurrer and may be determinative of the case, it is removable as one arising under such Constitution. Bowers v. First Nat. Bank (C. C. 1911) 190 Fed. 676.

To entitle a party to remove a cause to a federal court on the ground that a federal question is involved, it is necessary that the fact appear from plaintiff's statement of facts, that the allegation be real and substantial, that it appear from the complaint that in some aspect which the case may assume a federal question may be involved, and that it is set up in good faith; but, if there is a doubt as to the right to remove, the doubt must be resolved against jurisdiction. State of Arkansas v. Choctaw & M. R. Co. (C. C. 1905) 134 Fed. 106.

The rule that a cause is not removable, as one arising under the constitution or laws of the United States, unless such fact appears from the plaintiff's pleading, applies only to cases in which the federal question is one inhering in the controversy itself, so that if raised by the defendant, and determined against him by the state court, he may remove it for review by appeal or writ of error to the supreme court; and such rule cannot be so extended as to permit a plaintiff to prevent the removal of a suit against a receiver of a federal court by omitting to state in his pleadings by what court defendant was appointed receiver. Winters v. Drake (C. C. 1900) 102 Fed. 545.

An action for damages for false imprisonment, based on acts done by defendants, as marshal and deputy marshal of the United States, in execution of process of a federal court, may be removed though the complaint is so framed as to conceal the fact that defendants were acting as federal officers, if that fact must necessarily be shown by the plaintiff on the trial, and is disclosed by the petition for removal. Wood v. Drake (C. C. 1895) 70 Fed. 881.

No federal question is raised by a pleading that is irremediably bad in substance. Fitzgerald v. Missouri Pac. Ry. Co. (C. C. 1891) 45 Fed. 812.

Defendant is not entitled to a removal of a cause to the circuit court of the United States where the only federal question, appeared when plaintiff, by supplemental petition, denied the legality of payments claimed by defendant in its answer. Houston & T. C. R. Co. v. State (Tex. Civ. App. 1897) 41 S. W. 157, reversed Same v. State of Texas (1900) 20 Sup. Ct. 545, 177 U. S. 66, 44 L. Ed. 673.

The court takes notice of the laws of Congress, and, if the facts stated by plaintiff as the basis of his right of recovery show a right of action given or created by such law, then it may fairly be said that it appears from his own statement of his claim that the action is one arising under a law of the United States. Hall v. Chicago, R. I. & P. Ry. Co. (C. C. 1906) 149 Fed. 564, 566.

Where a complaint in the state court alleges that complainants claim under a designated state act, not set out in full in the complaint, and that defendant's claim arises under a previous designated act, alleged to be contrary to the state constitution, the federal court, on defendant's petition for removal, on the ground that the later act was contrary to the United States constitution, as impairing the obligation of their contract under the former act, will take judicial notice of the acts in determining its jurisdiction. South Carolina v. Coosaw Min. Co. (C. C. 1891) 45 Fed. 804.

Judicial notice of facts which the plaintiff has not chosen to rely upon in his pleading cannot make those facts a part of the complaint for the purpose of giving jurisdiction to a federal court. Mountain View M. & M. Co. v. McFadden (1901) 21 Sup. Ct. 488, 180 U. S. 533, 45 L. Ed. 656.

Plaintiff's statement by anticipation of a possible defense depending on a federal question will not give the right of removal. State of Kansas v. Atchison, T. & S. F. Ry. Co. (C. C. 1896) 77 Fed. 339; Yazoo & M. V. R. Co. v. Adams (1902) 32 So. 937, 81 Miss. 90.

An action by a state to subject a foreign corporation to penalties imposed

by a state statute is not removable on such ground where neither the complaint nor the statute makes any reference to the constitution or laws of the United States, but the statute purports to have been enacted by the state in the exercise of its police powers. State of South Carolina v. Virginia-Carolina Chemical Co. (C. C. 1902) 117 Fed. 727.

To authorize a state court to remove a cause to the federal court on the ground that a federal question is involved, it must be shown by the petition of plaintiff that the construction of a federal statute is necessary to the determination of the rights of the parties, and that the party seeking the removal has a substantial defense thereunder. Missouri, K. & T. Ry. Co. of Texas v. Hollan (Tex. Civ. App. 1908) 107 S. W. 642.

95. **Actions by or against receivers appointed by United States courts.**—A federal court will take judicial notice that defendants, who are sued in the state court as receivers operating a railroad, are acting under its own appointment, as shown by its records, and hence that a federal question is disclosed, although the plaintiff's petition is silent as to the authority under which defendants were acting. Pitkin v. Cowen (C. C. 1899) 91 Fed. 599.

The omission of a plaintiff in his declaration in an action against a receiver to state that the defendant was appointed such receiver by a court of the United States, where such was the fact, and the absence of such statement is relied upon to prevent the removal of the cause, may fairly be considered as a fraud upon the jurisdiction of the federal court, whether so intended or not. Winters v. Drake (C. C. 1900) 102 Fed. 545.

96. **Actions by or against United States corporations in general.**—A federal corporation may remove a cause on the ground that it was created by act of Congress, though that fact does not appear from the complaint. Texas & P. Ry. Co. v. Barrett (1897) 17 Sup. Ct. 707, 166 U. S. 617, 41 L. Ed. 1136 (affirming judgment [1895] 67 Fed. 214, 14 C. C. A. 373); Scott v. Choctaw, O. & G. R. Co. (D. C. 1901) 112 Fed. 180. Even if the complaint avers that it was created under state laws. Texas & P. Ry. Co. v. Cody (1897) 17 Sup. Ct. 703, 166 U. S. 606, 41 L. Ed. 1132, affirming judgment (1895) 67 Fed. 71, 14 C. C. A. 310. But see Oregon Short Line & U. N. R. Co. v. Skottowe (1896) 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048, holding that a bill or declaration which alleges that defendant is an incorporated company does not thereby tender, or impliedly allege, the charter or articles of incorporation, including all statutes by virtue of which it acquired the right to become a corporation and exercise corporate powers, so as thereby to require the court to take notice of the federal character of the corporation, for the purposes of removal, and Texas & P. Ry. Co. v. Hightower (1854) 12 Tex. Civ. App. 41, 33 S. W. 541, holding that, where the petition alleges that defendant is "a corporation duly chartered by law, and * * * owns and operates a line of railway * * * through" a certain county in Texas, and has a local agent in such county, the case cannot be removed to a federal court, on the ground that it is one arising under the federal laws, because defendant's charter was granted by the United States, though the petition for removal shows that the charter was so granted.

97. **Cases under laws relating to public lands.**—Though a complaint by a settler claiming title under the pre-emption laws of the United States against a railroad company states that defendant claims under the laws of the territory of Washington authorizing railroad companies to appropriate land for right of way, it discloses a cause of action arising under the laws of the United States, the court having judicial knowledge that the authority of the territory to legislate as to the matter in question is derived from Act March 3, 1875 (18 Stat. 482). Spokane Falls & N. Ry. Co. v. Ziegler (1897) 17 Sup. Ct. 728, 167 U. S. 65, 42 L. Ed. 79, affirming judgment (1894) 61 Fed. 392, 9 C. C. A. 548.

An action by the state to recover possession of a lot of land in section 36, and the value of limestone extracted from a quarry therein, cannot be removed to a federal court on the ground of involving the federal question whether a limestone quarry is excepted as mineral land from the grant by congress to the state of school sections; the complaint merely stating that plaintiff is owner in fee simple of the land, and has a right to possession, and alleging a wrongful ouster by defendant, without setting forth the facts or legal grounds on which plaintiff's claim is based, as the complaint, by itself, unaided by judicial inference and notice, must show that a federal question is involved. State of Washington v. Island Lime Co. (C. C. 1902) 117 Fed. 777.

98. **Cases under laws relating to navigation.**—A bill filed by the state of Illinois in a state court against the Chicago drainage district, a corporation created by act of the legislature, to enjoin the defendant, in the prosecution of the work for which it was chartered, from reducing the level of the water in the Illinois & Michigan Canal, and alleging as grounds for such relief that by the acts of congress authorizing the state to construct the canal, and granting lands in aid thereof, the state was required to forever maintain such canal as a navigable waterway for the free

passage of any property of the United States, and that under the terms of such acts the state could confer no power on the defendant to destroy the same,—shows that a federal question is involved in the suit, which renders it removable. People v. Sanitary Dist. of Chicago (C. C. 1899) 98 Fed. 150.

99. Cases under laws relating to interstate commerce.—A bill does not show that the suit arises under the Constitution and laws of the United States by an averment in a suit by a telegraph company for specific performance of a contract for the use of a railroad right of way and for an injunction against interference with its rights, to the effect that it has a right to maintain its telegraph line on the railroad "under the provisions of the statute of the United States," as it has long been settled that the statute does not confer on telegraph companies the right to enter on private property without the consent of the owner. Western Union Tel. Co. v. Ann Arbor R. Co. (1900) 20 Sup. Ct. 867, 869, 178 U. S. 239, 44 L. Ed. 1052.

Even if the petition necessarily implies a reliance on the act of Congress, requiring automatic couplers, a removable case is not shown, if neither the petition in the case nor the petition for removal shows that defendant was engaged in interstate commerce, nor that the cars in question were being used in such commerce. International & G. N. Ry. Co. v. Elder (Tex. Civ. App. 1907) 99 S. W. 856.

100. —— Employers' Liability Act.—A suit for injuries to an employé engaged in interstate commerce against a carrier will be regarded as having been brought under Employers' Liability Act April 22, 1908, for purposes of removal, though the negligence charged may not be covered by the act, or the facts alleged may not make out the negligence charged. De Atley v. Chesapeake & O. Ry. Co. (D. C. 1912) 201 Fed. 591; Stafford v. Norfolk & W. Ry. Co. (D. C. 1913) 202 Fed. 605.

Where a petition by an Iowa administrator against an Illinois railroad company for death of intestate, an employé alleged to have been killed while engaged in interstate commerce, did not allege that intestate left any of the beneficiaries for whose benefit a right of action survives under the federal Employers' Liability Act the suit was removable. Thomas v. Chicago & N. W. Ry. Co. (D. C. 1913) 202 Fed. 766.

101. Cases under laws relating to national banks.—The rule that, in order to warrant the removal of a cause to the circuit court on the ground that it arises under the laws of the United States, that fact must be shown in the plaintiff's pleading, does not operate to prevent a removal, where the original pleading alleges that defendant is a national banking association, and where a receiver thereof, appointed by the comptroller of the currency, is subsequently made a defendant and petitions for removal. Speckart v. German Nat. Bank (C. C. 1898) 85 Fed. 12.

IV. REMOVAL OF CAUSES FOR DIVERSITY OF CITIZENSHIP

(A) Diversity of citizenship as ground of removal

102. Diversity of citizenship necessary to give jurisdiction to United States courts.—See Const. art. 3, § 2, and ante, § 991, and notes.

103. Diversity of citizenship of co-plaintiffs and codefendants.—A cause should not be removed from a state court to a federal court merely because one of several defendants is a citizen of another state. Hyde v. Ruble (1881) 104 U. S. 407, 409, 26 L. Ed. 823; Sully v. Drennan (1884) 5 Sup. Ct. 453, 113 U. S. 287, 28 L. Ed. 1007; Davies v. Lathrop (C. C. 1882) 13 Fed. 565.

Where the nonresident landlord proposes to be made defendant in ejectment, for the purpose of removing the case from the state court, the plaintiff cannot insist on joining the tenants in possession, who made no request to be permitted to defend, for the purpose of preventing the removal. Gwynne v. Roe (1831) 4 Ohio (4 Ham.) 435.

104. Assignees.—A purchaser pendente lite connects himself with the suit, subject to all the disabilities of the other parties in respect to a removal at the time he came in. Jefferson v. Driver (1886) 6 Sup. Ct. 729, 730, 117 U. S. 272, 29 L. Ed. 897.

But see Jackson & Sharp Co. v. Pearson (C. C. 1892) 60 Fed. 113, holding that a nonresident assignee, upon being made a party by amendment to a suit between citizens of the same state, could have the suit removed.

Where an action had been instituted in Louisiana by citizens of the state against a life insurance company in Missouri, and pending the suit a citizen of Missouri has, under decree of a court of that state, been made an assignee of its entire property, on being admitted as a party to the suit in Louisiana, he is entitled by reason of his citizenship to remove it to the United States court. Relfe v. Rundle (1880) 103 U. S. 222, 26 L. Ed. 337.

A citizen of Iowa assigned a claim for damages for personal injury against a citizen of Illinois, to V., who was also a citizen of Illinois, and V. instituted suit in the state court of Iowa as assignee. Defendant made a motion to remove the case to the federal court on the ground that the assignor was the real party in interest. He appeared in the action, and filed a response to the motion, setting up his sale and assignment of the claim, and denying all

ownership therein, or control over the prosecution thereof. Held, that an order granting the motion for removal was error. Vimont v. Chicago & N. W. Ry. Co. (1884) 64 Iowa, 513, 17 N. W. 31, 21 N. W. 9.

Where the assignment of a claim to plaintiff invests him with the title thereto, and authorizes him to prosecute it by suit, a defendant has no right to a removal on the ground of the citizenship of the assignor. Goodnow v. Litchfield (1885) 67 Iowa, 691, 25 N. W. 882; Same v. Oakley (1885) 68 Iowa, 25, 25 N. W. 912.

Where the action was by an assignee of the cause of action, suing in his own name, as required by the practice in the state court, and the assignor, whose name must, if the cause were removed, be substituted as plaintiff, was a citizen of the same state as defendant, a motion to remove should be denied. Anderson v. Manufacturers' Bank (N. Y. 1862) 14 Abb. Prac. 436.

105. —— Transfers to prevent removal.—A colorable assignment of a cause, made to prevent its removal from the state to the federal courts, will prevent the latter courts from assuming jurisdiction. Resort can only be had to the state courts for protection against the consequences of such an encroachment upon the rights of a defendant. Provident Sav. Life Assur. Soc. v. Ford (1885) 114 U. S. 635, 5 Sup. Ct. 1104, 29 L. Ed. 261; Oakley v. Goodnow (1886) 118 U. S. 43, 6 Sup. Ct. 944, 30 L. Ed. 61; Leather Manufacturers' Nat. Bank v. Cooper (1887) 120 U. S. 778, 7 Sup. Ct. 777, 30 L. Ed. 816; Vimont v. Chicago & N. W. Ry. Co. (1884) 64 Iowa, 513, 17 N. W. 31, 21 N. W. 9; Id. (1886) 69 Iowa, 296, 22 N. W. 906, 28 N. W. 612; Hawley v. Chicago, B. & Q. Ry. Co. (1886) 71 Iowa, 717, 29 N. W. 787.

An assignment of a claim against a foreign telegraph company for transmitting a forged message purporting to be signed by a bank, and stating that it would honor a draft for $8,972, and resulting in financial loss in that amount, made to a nonresident who paid $3,000 therefor, is not without consideration, colorable, and fictitious, and the assignee may sue in the state courts over an objection that the assignment was made to prevent removal of the cause to the federal court, though the objection would be valid if the assignment was without consideration. Wells v. Western Union Telegraph Co. (1909) 123 N. W. 371, 24 L. R. A. (N. S.) 1045.

106. Grantees.—Condemnation proceedings cannot be deemed commenced before conveyance of land so as to preclude vendee from removing suit to federal court for diverse citizenship, where petition for commissioners was not filed until the conveyance had been made. City of New York v. Sage (1915) 36 S. Ct. 25.

Where land sought to be condemned for a New York City reservoir was conveyed to claimant, a resident of New Jersey, between the date when maps were filed in the clerk's office of Ulster county, where the land was located and notices posted, and the date of the actual filing of the petition to condemn in the state court, it sufficiently appeared that the proceeding involved a controversy between citizens of different states, and was therefore removable. In re Bensel (1913) 206 Fed. 369, 124 C. C. A. 251, affirming order In re Ashokan Dam (C. C. 1911) 190 Fed. 413.

107. Actions by or against states.—There is no statute which authorizes the removal of a suit between a state and citizens on account of citizenship, for a state cannot, in the nature of things, be a citizen of any state. Stone v. South Carolina (1886) 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Postal Telegraph Cable Co. v. Alabama (1894) 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231.

108. Actions by or against aliens.—Where there are several defendants in a suit sought to be removed on the ground of alienage, all the defendants must be aliens, and must join in the application. Hervey v. Illinois Midland Ry. Co. (C. C. 1876) Fed. Cas. No. 6,434; People v. Hager (1862) 20 Cal. 167; Davis v. Cook (1874) 9 Nev. 134.

A cause is not removable on the ground that it is a controversy between citizens of a state and foreign citizens, when one of the defendants is a citizen of a state, although of a different state from that of plaintiff. Tracy v. Morel (C. C. 1898) 88 Fed. 801.

If one defendant be an alien, and be properly served or be otherwise in court, and other persons, not aliens or citizens of a state or states other than that to which the plaintiff belongs, be named as defendants in the writ, but be not served, nor appear voluntarily, the alien defendant who is served may himself remove the case. Ex parte Girard (C. C. 1858) Fed. Cas. No. 5,457.

The extraterritorial service of process upon alien defendants, who have not voluntarily appeared, is ineffectual to bring them within the jurisdiction of the court, or make them parties to the suit; and the fact that these persons are named as defendants is no obstacle to its removal. McHenry v. New York, P. & O. R. Co. (C. C. 1885) 25 Fed. 65.

109. Time of existence of ground of removal.—To render an action removable to the federal court on the ground of diversity of citizenship or alienage of defendant, such diversity or alienage must exist at the beginning of the suit, and when the petition for removal is filed. Gibson v. Bruce (1883) 108 U. S. 561, 2 Sup. Ct. 873, 27 L. Ed. 825;

Houston & T. C. Ry. Co. v. Shirley (1884) 111 U. S. 358, 4 Sup. Ct. 472, 28 L. Ed. 455; Mansfield, C. & L. M. R. Co. v. Swan (1884) 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; Smith v. Akers (1886) 117 U. S. 197, 6 Sup. Ct. 669, 29 L. Ed. 888; Stevens v. Nichols (1889) 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914; Jackson v. Allen (1889) 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249; Kellam v. Keith (1892) 144 U. S. 568, 12 Sup. Ct. 922, 36 L. Ed. 544; German Savings & Loan Soc. v. Dormitzer (1902) 116 Fed. 471, 53 C. C. A. 639; Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399; McGinnity v. White (C. C. 1874) Fed. Cas. No. 8,802; Rawle v. Phelps (C. C. 1879) Fed. Cas. No. 11,588; Beede v. Cheeney (C. C. 1881) 5 Fed. 388; Bruce v. Gibson (C. C. 1881) 9 Fed. 540; Brinkerhoff v. Morris Canal & Banking Co. (C. C. 1883) 18 Fed. 97; Ferry v. Town of Merrimack (C. C. 1883) 18 Fed. 657; McNaughton v. South Pac. C. R. Co. (C. C. 1884) 19 Fed. 881; Carrick v. Landman (C. C. 1884) 20 Fed. 209; Endy v. Commercial Fire Ins. Co. (C. C. 1885) 24 Fed. 657; Hone v. Dillon (C. C. 1886) 29 Fed. 465; Moore v. Edgefield (C. C. 1887) 32 Fed. 498, 500; Foster v. Paragould S. E. R. Co. (C. C. 1896) 74 Fed. 273; O'Connor v. Chicago, R. I. & P. Ry. Co. (Iowa, 1909) 122 N. W. 947, reversing judgment on rehearing (1908) 117 N. W. 979; Tugman v. National S. S. Co. (N. Y. 1878) 13 Hun, 332; Nye v. Northern Cent. R. Co. (N. Y. 1881) 24 Hun, 556; Bradley v. Ohio River & C. Ry. Co. (1896) 26 S. E. 169, 119 N. C. 744. CONTRA, Curtin v. Decker (C. C. 1881) 5 Fed. 385; Glover v. Shepperd (C. C. 1883) 15 Fed. 833.

Where ground of removal was that there was in the suit a controversy between the plaintiff, who, when the suit was brought, was an alien, and the defendant, who was a citizen, the fact that the plaintiff, after the suit was brought, had become a citizen of the United States, did not prevent the removal of the cause. Houser v. Clayton (C. C. 1878) Fed. Cas. No. 6,739.

In determining whether a suit is one in which there is a controversy between citizens of different states, the condition of the controversy when the petition for removal is filed is what is to be considered, and not its condition at a subsequent time. Chicago, St. L. & N. O. R. Co. v. McComb (C. C. 1879) Fed. Cas. No. 2,670.

Where a consolidation of a foreign with a domestic railroad has not taken place till after suit brought against the foreign corporation by a domestic corporation, and the filing of a petition for removal, the consolidation does not alter the defendant's right to a removal of the cause. Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co. (C. C. 1886) 29 Fed. 337.

Where an original complaint stated a joint cause of action against a resident and nonresident defendant, and an amended complaint for the first time made the resident defendant a mere nominal party to the record, asserting no cause of action against him, the nonresident defendant was not precluded from removing the cause to the federal court because the case was not removable at the time when, by the literal terms of the statute, removal might be had, and he had answered the original complaint and went to trial thereon, the time within which application for removal must be made being not jurisdictional, but modal and formal. Bagenas v. Southern Pac. Co. (C. C. 1910) 180 Fed. 887.

In an action against a foreign railroad corporation, an amended petition, tendered after the filing by defendant of a petition for removal of the cause to the federal court, making a domestic corporation, original defendant's lessor, a party, came too late to prevent the removal. Davis' Adm'r v. Chesapeake & O. Ry. Co. (1903) 75 S. W. 275, 25 Ky. Law Rep. 342, 116 Ky. 144, withdrawing opinion (1902) 70 S. W. 857, 24 Ky. Law Rep. 1125.

The fact that a defendant, after suit brought in a state court, removes his residence to another state, does not entitle him to an order removing the cause to the United States circuit court on the ground that it is between citizens of different states. Dart v. Walker (N. Y. 1871) 43 How. Prac. 29.

(B) Improper or collusive joinder of parties

110. Joinder to give jurisdiction or authorize removal.—See post, § 1019, and notes.

111. Joinder to prevent removal.—The right of a citizen of another state, when sued in a state court, to have the controversy tried and determined in a federal court, cannot be defeated by fraudulent joinder as a codefendant of a citizen of the state in which the suit is brought. Dow v. Bradstreet Co. (C. C. 1891) 46 Fed. 824; Lewis v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1910) 192 Fed. 654; Clark v. Chicago, R. I. & P. Ry. Co. (D. C. 1912) 194 Fed. 505; Price v. Southern Power Co. (D. C. 1913) 206 Fed. 496.

Fraudulent joinder of defendants, in order to authorize removal, must in general consist in a willful or negligent misstatement of fact. McGarvey v. Butte Miner Co. (D. C. 1912) 199 Fed. 671.

When it is claimed that one defendant has been made a party solely to prevent removal of the cause, the court will look closely into his relations to the case and plaintiff's motives, and, if he appears an unnecessary party, will refuse to remand. Shepherd v. Bradstreet Co. (C. C. 1895) 65 Fed. 142.

Where it is apparent that the real

purpose of the joinder of a defendant was to prevent a removal by its codefendant, which is a citizen of another state, the federal court will, if possible, sustain the right of removal. Kelly v. Chicago & A. Ry. Co. (C. C. 1903) 122 Fed. 286.

The institution of a fictitious action in a court of the state of which the plaintiff is a citizen, for the purpose of bringing two defendants of diverse citizenship—one being a nonresident—into such court, to enable the resident defendant to litigate a cause of action against the nonresident defendant in that court, and to prevent the nonresident defendant from removing such cause into the federal court, is a fraud upon the jurisdiction of the federal court and upon the nonresident defendant, and upon a seasonable application by the nonresident defendant the sham plaintiff should be disregarded and the real controversy removed to the federal court. Boatmen's Bank of St. Louis v. Fritzlen (1907) 89 P. 915, 75 Kan. 479.

Where on the face of the record plaintiff appears to have a cause of action against each of the defendants joined, one of whom is a resident of the same state as plaintiff, it is not material that the actual purpose of plaintiff in joining the resident defendant was to prevent a removal of the cause to the federal courts. Chicago, R. I. & P. Ry. Co. v. Whiteaker (1915) 36 S. Ct. 152; Same v. Schwyhart (1913) 33 S. Ct. 250, 227 U. S. 184, 57 L. Ed. 473, affirming judgment Schwyhart v. Barrett (1910) 130 S. W. 388, 145 Mo. App. 332; Charman v. Lake Erie & W. R. Co. (C. C. 1900) 105 Fed. 449; Keller v. Kansas City, St. L. & C. R. Co. (C. C. 1903) 135 Fed. 202; Gustafson v. Chicago, R. I. & P. Ry. Co. (C. C. 1904) 128 Fed. 85; Evansberg v. Insurance Stove, Range & Foundry Co. (C. C. 1908) 168 Fed. 1001; Atlantic Coast Line R. Co. v. Daniels (C. C. 1909) 175 Fed. 302; Jacobson v. Chicago, R. I. & P. Ry. Co. (C. C. 1910) 176 Fed. 1004; Armstrong v. Kansas City Southern Ry. Co. (C. C. 1911) 192 Fed. 608; Bagenas v. Southern Pac. Co. (C. C. 1910) 180 Fed. 887; Southern Ry. Co. v. Sittasen (Ind. App. 1905) 74 N. E. 898, reversed (1906) 76 N. E. 973, 166 Ind. 257; Dowell v. Chicago, R. I. & P. Ry. Co. (1910) 112 Pac. 136, 83 Kan. 562; Chesapeake & O. Ry. Co. v. Dixon's Adm'x (1898) 104 Ky. 608, 47 S. W. 615, 20 Ky. Law Rep. 792 (affirmed Same v. Dixon [1900] 21 S. Ct. 67, 179 U. S. 131, 45 L. Ed. 121); Id. (1899) 50 S. W. 252, 20 Ky. Law Rep. 1883; Winston's Adm'r v. Illinois Cent. R. Co. (1901) 111 Ky. 954, 65 S. W. 13, 23 Ky. Law Rep. 1283, 55 L. R. A. 603; Pierce's Adm'r v. Same (1905) 86 S. W. 703, 27 Ky. Law Rep. 801; Broadway Coal Mining Co. v. Robinson (1912) 150 S. W. 1000, 150 Ky. 707; Hough v. Southern Ry. Co. (1907) 57 S. E. 469, 144 N. C. 692; Pruitt v. Charlotte Power Co. (1914) 81 S. E. 624, 165 N. C. 416.

Though one of the defendants in an action against a nonresident corporation and certain resident employés may have been fraudulently joined to defeat the right of removal, the right of the state court to retain the case is not destroyed, where there remains a proper party defendant residing in its jurisdiction and jointly liable. Louisville & N. R. Co. v. Roberts (1911) 71 S. E. 425, 136 Ga. 270.

Where a cause of action against an individual defendant for death of an engineer employed by an interstate carrier was fraudulently joined with a cause of action against the carrier, under federal Employers' Liability Act, the cause was not removable. Kelly's Adm'x v. Chesapeake & O. Ry. Co. (D. C. 1912) 201 Fed. 602.

In distinguishing between a wrongful and a justifiable joinder of defendants the court must be guided by the showing in each case. Shane v. Butte Electric Ry. Co. (C. C. 1906) 150 Fed. 801.

112. —— Joinder of plaintiffs.—Where a citizen plaintiff collusively joins with the alien plaintiffs to prevent a removal, such device will not defeat the jurisdiction of the circuit court. McHenry v. New York, P. & O. R. Co. (C. C. 1885) 25 Fed. 65.

113. Right to join.—Fraudulent joinder of a resident with a nonresident defendant, for the purpose of defeating the removal of the cause to a federal court, cannot be established, where, by the settled law of the state in which the action was brought, and in which the cause of action arose, both defendants were jointly liable to suit. Chicago, B. & Q. Ry. Co. v. Willard (1911) 31 S. Ct. 460, 220 U. S. 413, 55 L. Ed. 521 (affirming judgment Willard v. Chicago, B. & Q. R. Co. [1908] 165 Fed. 181, 91 C. C. A. 215); Knuth v. Butte Electric Ry. Co. (C. C. 1906) 148 Fed. 73; Ward v. Pullman Car Corp. (Ky. 1908) 114 S. W. 754; Able v. Southern Ry. (1906) 52 S. E. 962, 73 S. C. 173; Calder v. Southern Ry. Co. (1911) 71 S. E. 841, 89 S. C. 287. Or where the question is an open one, under the statutes and decisions of the state. Person v. Illinois Cent. R. Co. (C. C. 1902) 118 Fed. 342.

Plaintiff is entitled to allege a joint cause of action against a citizen and a noncitizen defendant and have the case tried in a state court, though he may be mistaken as to the joint character of his cause of action, if the allegation is not merely pretensive, to prevent a removal of the cause. Price v. Southern Power Co. (D. C. 1913) 206 Fed. 496.

114. Cause of action against resident defendant.—A nonresident defendant cannot remove a cause to the federal courts for diversity of citizenship, in

the absence of a showing of fraud in joining defendants, where the petition on its face states a good cause of action against both defendants. Carter Coal Co. v. Prichard's Adm'r (Ky. 1915) 179 S. W. 1038.

An action for tort brought in a state court by a citizen of the state against two defendants, one a citizen of the state and the other a nonresident, is removable by the nonresident defendant where the petition fails to state a cause of action against the resident defendant. Prince v. Illinois Cent. R. Co. (C. C. 1899) 98 Fed. 1; Floyt v. Shenango Furnace Co. (C. C. 1911) 186 Fed. 539; McAllister v. Chesapeake & O. R. Co. (D. C. 1912) 198 Fed. 660; Stratton's Independence v. Sterrett (Colo. 1911) 117 Pac. 351; Cincinnati, N. O. & T. P. Ry. Co. v. Robertson (1903) 74 S. W. 1061, 25 Ky. Law Rep. 265, 115 Ky. 858; Davis' Adm'r v. Chesapeake & O. Ry. Co. (1903) 75 S. W. 275, 116 Ky. 144, 25 Ky. Law Rep. 342, withdrawing opinion (1902) 70 S. W. 857, 24 Ky. Law Rep. 1125; Eastin & Knox v. Texas & P. Ry. Co. (1906) 92 S. W. 838, 99 Tex. 654, reversing judgment Texas & P. Ry. Co. v. Eastin & Knox (Tex. Civ. App. 1905) 89 S. W. 440.

In order to justify the removal of a suit in which some of defendants are citizens of the same state as plaintiff, on the ground that such defendants have been joined to defeat jurisdiction of the federal court, it must appear, not only that they were joined for that purpose, but that no cause of action is truthfully stated against them. Hukill v. Maysville & B. S. R. Co. (C. C. 1896) 72 Fed. 745; Broadway Coal Mining Co. v. Robinson (1912) 150 S. W. 1000, 150 Ky. 707.

Fraudulent joinder of a citizen with a noncitizen defendant to prevent a removal of the cause will be found, where on no reasonable legal ground could plaintiff recover on the cause of action alleged against the citizen defendant. Wecker v. National Enameling & Stamping Co. (1907) 27 S. Ct. 184, 204 U. S. 176, 51 L. Ed. 430; Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co. (C. C. 1902) 119 Fed. 209; Price v. Southern Power Co. (D. C. 1913) 206 Fed. 496; Rountree v. Mt. Hood R. Co. (D. C. 1916) 228 Fed. 1010; Underwood's Adm'r v. Illinois Cent. R. Co. (1907) 103 S. W. 322, 31 Ky. Law Rep. 595. Or where an attorney, when drawing a pleading, had knowledge of facts which showed that allegations of negligence made therein against a defendant were without foundation, or notice of other facts to put him on inquiry which would have led to such knowledge. Gustafson v. Chicago, R. I. & P. Ry. Co. (C. C. 1904) 128 Fed. 85.

The right of removal cannot be defeated by the joinder of a resident with a nonresident defendant, even though a joint cause of action is alleged, where the court finds as a fact that the averments on which the joint liability is asserted are palpably untrue, and were not made in good faith, but for the sole purpose of preventing a removal, and in fraud of the jurisdiction of the federal court. Crawford v. Illinois Cent. R. Co. (C. C. 1904) 130 Fed. 395.

In an action for an injury to a traveler at a railroad crossing, the conductor of the train causing the injury being made a party defendant, the petition alleging that such conductor by gross negligence so managed and operated the train that it resulted in the injury complained of, the court cannot assume that such allegation is untrue, and that the conductor was joined for the purpose of preventing the removal of the cause to the federal court. Clinger's Adm'x v. Chesapeake & O. Ry. Co. of Kentucky (1908) 109 S. W. 315, 33 Ky. Law Rep. 86, 15 L. R. A. (N. S.) 998.

115. Joinder of grantor and grantee.—In a condemnation proceeding under Rev. St. Mo. 1899, § 1264, which provides that it shall not be necessary to make any persons defendants, unless they are either in actual possession of the premises, claiming title, or have a title of record, in which two railroad companies, one a foreign, and the other a local, corporation, were made defendants, but it was not alleged that the local company was in possession, claiming title, and there was of record in the proper records of the county a deed which plaintiff's counsel examined before suit by which such company had conveyed to its codefendant all of its property, real or personal, of whatever kind and wherever situated, together with all its rights and franchises, except its franchise to be a corporation, the improper and unnecessary joinder of such company will not prevent a removal. Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co. (C. C. 1902) 119 Fed. 209.

116. Joinder of lessor and lessee.—Where a railroad company was joined in a complaint for injuries with a foreign railroad company, under a false allegation that the former company had leased its road to the foreign company, which was alone served with process, and, on a motion to remand the cause to the state court after removal to the federal court by the foreign railroad company, plaintiff's counsel in open court admitted that the allegation as to the relation between the two companies was false, and it appeared that the joinder of the two was to prevent the removal of the cause to the federal court, the motion to remand will be denied. Diday v. New York, P. & O. R. Co. (C. C. 1901) 107 Fed. 565.

In an action for injuries to plaintiff while crossing a railroad track, the petition alleged that the injuries resulted because of the negligent acts of the defendants, in that defendants con-

structed the tracks so close to each other and so near to a mill in which plaintiff was employed that persons crossing upon the public passageway were not able to see the movement of the cars, engine, or trains on the track, and in not constructing the tracks so as to leave the view open, and in failing to provide any gates, guards, or barriers to protect persons so crossing. Other acts of negligence were charged against both defendants, relating solely to the movement and operation of trains, and a failure to warn plaintiff of the approach of the train by which he was injured. It was stipulated on a motion to remand that defendant M. Company alone constructed the tracks and leased them to the defendant C. Company, and that the latter or its receivers were exclusively engaged in operating the road thereafter, and at the time plaintiff was injured; that the injury was immediately caused by the negligent movement of the cars by the C. Company or its receivers. Held, that it appeared that the M. Company did not participate in the negligent acts alleged, and was joined to prevent the C. Company from removing the cause to the federal court, and that it was therefore entitled to remove notwithstanding such joinder. Reinartson v. Chicago Great Western Ry. Co. (C. C. 1909) 174 Fed. 707.

Where an action was brought against lessor and lessee railroad corporations for injuries to a passenger by the operation of the road by the foreign lessee, there was no fraudulent misjoinder of parties or separable controversy entitling the nonresident defendant to remove the case to the federal court. Brown v. Louisiana & M. R. R. Co. (Mo. 1914) 165 S. W. 1060.

117. Joinder of parties engaged in joint enterprise.—Defendant railroad company is entitled to removal of the cause to the federal court, on the ground of fraud on the jurisdiction of the court, though an individual, a citizen of the same state as plaintiff, is joined as a defendant; it being avowed by plaintiff's counsel that one of the objects in suing defendants jointly was to prevent a removal; the action being for death of a fireman on the engine of a freight train of the railroad, occasioned by his being struck, while looking out of the cab window, by the arm of a crane, swung into position for delivery of mail to a train, which was following, while moving; the crane being operated by no agent of the railroad, but by the individual defendant, the postmaster at the place of the accident; the railroad having no sort of joint agency in the doing of any act directly or proximately bringing about the accident; and the only plausible claim that the railroad can be made liable being that nine months before the accident engines seven inches wider than formerly used were put in operation, without the crane being moved further from the track. McCormick v. Illinois Cent. R. Co. (C. C. 1900) 100 Fed. 250.

One of two defendants against whom action is brought as employers of plaintiff's intestate for his death may have the action removed on the ground of diverse citizenship, notwithstanding the other defendant is a citizen of the same state as plaintiff, the verified petition for removal alleging that deceased was never in the employ of the other defendant, and that it was fraudulently joined as a defendant solely to defeat the right of removal, and accompanying this being an affidavit of the other defendant that deceased was never in its employ, and that it had no connection with the accident, and plaintiff neither traversing the petition nor offering evidence in denial of its averments. Ross v. Erie R. Co. (C. C. 1902) 120 Fed. 703.

In an action in a state court, a railroad company of the state, a local station agent on its line, and a railroad company of another state were joined as defendants. The petition alleged that through the joint negligence of defendants a shipper was furnished an unfit car at the local station in which to ship certain goods and to transport the shipper from such station to a point on the line of the second railroad company; that both companies carried the shipper and his property in such car to a point on the line of the second company where they negligently set the car on fire, and thus caused the death of the shipper and the destruction of his property. On a motion to remand, after removal of the cause by the nonresident company on the ground of separable controversy and fraudulent joinder, treated also as a plea to the jurisdiction, it was shown that the agent who furnished the car was not the agent of, and had no connection with, the removing defendant; that the shipment was received by the local company under a written contract for its carriage only to a connection with the road of the second company, and limiting the liability of the carrier to loss or injury accruing on its own line; that the car was safely delivered to the second company, which received and forwarded it under a similar contract then made between such company and the shipper. The cause of the fire was neither alleged nor shown. Held, that the cause of action stated in the petition, construed in the light of such facts which were known to plaintiff, was not joint, and that the joinder of the defendants must be held to have been for the purpose of defeating the jurisdiction of the federal court. McGuire v. Great Northern Ry. Co. (C. C. 1907) 153 Fed. 434.

Joinder of a resident corporation with a nonresident corporation, operating the resident corporation's electric plant and lines, in a suit for death of

plaintiff's decedent, is not fraudulent, where there was no recorded transfer and no notorious transfer of the property, so as to entitle the nonresident corporation to remove the cause to a federal court. Price v. Southern Power Co. (D. C. 1913) 206 Fed. 496.

In an action for death, plaintiff joined a resident corporation and two nonresident corporations, charging that defendants, together and jointly, were engaged in the building of a bridge over the Tennessee river, and that plaintiff's intestate was employed by the three defendants to work on the bridge, and while so engaged was killed by the fall of a mortar bucket, owing to the negligence of the three defendants and to the improper, defective, and unsafe condition of the machinery in use. Held, that the petition stated a cause of action against all the defendants, which precluded a removal of the cause to the federal court by the nonresident defendants, on a petition alleging that the resident corporation was joined for the fraudulent purpose of preventing a removal, etc. White's Adm'r v. Chicago, St. L. & N. O. R. Co. (1906) 96 S. W. 911, 29 Ky. Law Rep. 1062.

118. Joinder of principal and agent.—The local manager in a state for a foreign corporation is not a necessary party to a suit by a stockholder for the appointment of a receiver and to wind up the affairs of the corporation, upon allegations that he is aiding and abetting the governing board of directors in carrying out a policy of administration which is ruinous to the corporation and detrimental to the stockholders by obeying the orders of such board in all respects; and his joinder as a defendant in such suit, brought in the state of which both he and complainant are citizens, will not prevent the removal of the cause into a federal court, since such allegations state no ground which would warrant a decree against him personally. Sidway v. Missouri Land & Live Stock Co. (C. C. 1902) 116 Fed. 381.

The resident agent of a foreign corporation, who has merely served on plaintiff a notice, signed by him as managing director, that plaintiff is wrongfully occupying certain premises, and will be held liable for trespass unless he surrenders them, cannot be made a party defendant to plaintiff's action of ejectment against the corporation, so as to prevent its removal to the federal courts, even though plaintiff denies any fraud in so making the agent a party. Carothers v. McKinley Mining & Smelting Co. (C. C. 1903) 122 Fed. 305.

In an action in a state court against a nonresident express company to recover foi a loss of money in transportation, based upon the contract of carriage, certain agents of the company, residents of the state, were joined as defendants. A further allegation that two of such defendants were also members of the company, which was a partnership or joint-stock association, was not attempted to be sustained when controverted on a motion to remand after removal and, on the contrary, was clearly disproved. Held that, since there could be no pretense that such defendants were liable on the contract, the action of plaintiff in joining them must be deemed to have been solely for the purpose of preventing a removal of the cause. Boatner v. American Exp. Co. (C. C. 1903) 122 Fed. 714.

119. Joinder of master and servant.—Where the nonresident corporations were liable solely because of the negligence of the resident defendants, and under the state law a servant whose negligent acts cause liability of the corporation may, as matter of right, be joined as defendant with the corporation, the complaint, alleging such facts, did not show a fraudulent joinder of parties authorizing the removal of the case to the federal court. Enos v. Kentucky Distilleries & Warehouse Co. (1911) 189 Fed. 342, 111 C. C. A. 74.

The joinder of a resident foreman with the nonresident master as defendants in an action for injury to a servant does not deprive the master of the right of removal, where the negligence charged was failure to provide a safe place to work, and there was no allegation that any duty in that respect rested on the foreman. Macutis v. Cudahy Packing Co. (D. C. 1913) 203 Fed. 291.

A complaint against a foreign mining company and resident defendants, alleging that plaintiff was under the immediate direction of one of the resident defendants, who was tram boss, that the tram boss was under the immediate control and direction of the other resident defendant, who was shift boss, and that the shift boss was under the immediate control of the mining company and its executive officers, and that by the joint and concurring negligence of all the defendants the place in the mine where plaintiff was employed was unsafe, in that it contained partially loosened bodies of rock, liable to fall and injure plaintiff, and that defendant for some days previous to the injury negligently permitted the condition to remain, and failed to have the place properly timbered, without alleging that the mining company had delegated to the resident defendants, or either of them, its duty to make the place safe, was insufficient to state a cause of action against the resident defendant, as against a petition by the mining company to remove the cause to a federal court. Stratton's Independence v. Sterrett (Colo. 1911) 117 Pac. 351. But, where there is an allegation charging the resident defendant with such duty, the joinder is not fraudulent. Dudley v. Illinois Cent. R. Co. (1906) 96 S. W. 835, 29 Ky. Law Rep. 1029.

Petition, in an action for servant's

wrongful death, held to state a good cause of action against both defendants so that neither was entitled to a transfer to the federal court for diversity of citizenship to avoid which the plaintiff made the alleged fraudulent joinder of parties. Carter Coal Co. v. Prichard's Adm'r (Ky. 1915) 179 S. W. 1038.

In an action against a railroad company for injuries to plaintiff by the giving way of the floor of a platform at a coal dock at a small station, plaintiff's claim that it was the duty of the station agent to inspect and repair the platform, so as to render him jointly liable with the railroad company, cannot be said to be in bad faith. Jacobson v. Chicago, R. I. & P. Ry. Co. (C. C. 1910) 176 Fed. 1004.

Where a complaint alleged that plaintiff was injured by reason of the derailment of the train of a foreign corporation, but contained nothing but a general allegation of negligence as against the engineer and conductor, joined as defendants, and the state code provided that plaintiff should set out in his complaint a plain and concise statement of the facts constituting his cause of action, the complaint was insufficient as against the engineer and conductor. Bryce v. Southern Ry. Co. (C. C. 1903) 122 Fed. 709, affirmed (C. C. 1903) 125 Fed. 958.

Where, in an action for wrongful death, plaintiff sued defendant, a foreign corporation, and its alleged resident foreman, and on petition to remove the corporation denied that the resident was its foreman, and alleged that he did not have charge as such of deceased, or right to direct his movements, and that intestate's death was not due to the joint or concurring negligence of the two defendants, the joinder was wrongful, and no bar to a removal of the cause. Shaver v. Pacific Coast Condensed Milk Co. (C. C. 1911) 185 Fed. 316.

In a suit for injuries to a brakeman by the separation of a defective brake staff, plaintiff joined the railroad company and the manufacturer of the car, who were nonresidents, and two of the railroad's car inspectors who were residents of the state. The petition alleged a cause of action against the inspectors, but a removal petition, without denying that the inspectors were such, or that they approved the car, alleged that no cause of action existed against them, that they had nothing to do with the matters alleged in the petition nor with the defective brake staff, and that they were not in any manner responsible therefor. Held, that such allegations were insufficient to show that plaintiff had no cause of action against the inspectors. Ward v. Pullman Car Corp. (Ky. 1908) 114 S. W. 754.

120. Effect of evidence or verdict.—A ruling on the merits instructing the jury to return a verdict in favor of one defendant, which is adverse to plaintiff and without his assent, when made on the trial after the right to a removal of the cause to a federal court, on the ground that such defendant had been fraudulently made a party in order to prevent removal, had been denied, cannot operate to make the cause then removable, and thereby enable the other defendants to prevent plaintiff from taking a verdict against them. Whitcomb v. Smithson (1900) 20 Sup. Ct. 248, 175 U. S. 635, 44 L. Ed. 303, affirming judgment Smithson v. Chicago G. W. Ry. Co. (1898) 73 N. W. 853, 71 Minn. 216; Flygen v. Chicago, M. & St. P. Ry. Co. (Minn. 1911) 132 N. W. 10.

The rule permitting removal to the federal court in case of a fraudulent joinder of a defendant whose presence destroys diversity of citizenship cannot be extended to authorize an inference of such fraudulent joinder from the fact only that no cause of action is found to exist against any defendant, resident or nonresident. Enos v. Kentucky Distilleries & Warehouse Co. (1911) 189 Fed. 342, 111 C. C. A. 74.

Where a petition discloses a cause of action against both a resident and a nonresident defendant, the case may not be removed to the federal court in order that that court may determine whether the joinder of the resident is fraudulent, and made to defeat the right of the nonresident to remove the cause to the federal court; but, if that fact appears on the trial in the state court, the latter court should forthwith dismiss the action as to the resident and remove the cause to the federal court as to the nonresident. Illinois Cent. R. Co. v. Coley (1905) 89 S. W. 234, 121 Ky. 385, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370; White's Adm'r v. Chicago, St. L. & N. O. R. Co. (1906) 96 S. W. 911, 29 Ky. Law Rep. 1062. But, where the evidence warranted submission to the jury of the case against the resident, the refusal to grant the petition to remove was not erroneous. Cincinnati, N. O. & T. P. Ry. Co. v. McElroy (1912) 142 S. W. 1009, 146 Ky. 668.

An order of removal to the federal court was proper, where the evidence not only failed to make out a case against the nonresident defendant, but failed to show that plaintiff could have made out a case against him at the time the action was filed. Dudley v. Illinois Cent. R. Co. (1906) 96 S. W. 835, 29 Ky. Law Rep. 1029; Clinger's Adm'x v. Chesapeake & O. Ry. Co. of Kentucky (1908) 109 S. W. 315, 33 Ky. Law Rep. 86, 15 L. R. A. (N. S.) 998; Haynes' Adm'rs v. Cincinnati, N. O. & T. P. R. Co. (1911) 140 S. W. 176, 145 Ky. 209, Ann. Cas. 1913B, 719 (rehearing denied Haynes' Adm'x v. Same [Ky. 1912] 143 S. W. 380); Byrne's Adm'r v. Chesapeake & O. R. Co. (1913) 152 S. W. 538, 151 Ky. 553; Landers v. Cincinnati, N. O. & T. P.

Ry. Co. (1913) 160 S. W. 1050, 156 Ky. 301.

A joinder of certain resident employés as defendants in a negligence case is not fraudulent, where the evidence tended to show negligence of at least one of them which may have caused the injury. Broadway Coal Mining Co. v. Robinson (1912) 150 S. W. 1000, 150 Ky. 707.

In action against railroad company and its crossing flagman for death, failure of jury to return verdict against the flagman does not show bad faith in joining him as a defendant or to entitle the railroad company to remove the cause on the ground of diverse citizenship. Illinois Cent. R. Co. v. Outland's Adm'x (1914) 170 S. W. 48, 160 Ky. 714.

While nonresident defendant's right to remove a cause to the federal court arises where plaintiff fraudulently discontinues as to the resident defendant, this rule did not apply where plaintiff submitted to a nonsuit only because the trial court intimated that he had not made a case and was insisting on his right to have the nonsuit reviewed. Lloyd v. North Carolina R. Co. (1913) 78 S. E. 489, 162 N. C. 485.

121. Pleading and proof of fraudulent purpose.—In a petition for removal on the ground of diverse citizenship, a mere general allegation of fraud in joining certain resident defendants as parties to the action is not sufficient, since it must be alleged and proved in what the fraud consists. Hough v. Southern Ry. Co. (1907) 57 S. E. 469, 144 N. C. 692.

Mere denials of liability in a petition by which nonresident railway company joined as defendant in a negligence suit with a resident employé seeks to remove the case for fraudulent joinder are insufficient. Chicago, R. I. & P. Ry. Co. v. Whiteaker (1915) 36 Sup. Ct. 152. So are mere denials coupled with a statement that the resident defendant is without means. Shane v. Butte Electric Ry. Co. (C. C. 1906) 150 Fed. 801.

Where a complaint in a state court alleges a joint cause of action against a nonresident corporation and its resident servant, the question of improper joinder cannot be raised by allegations and denials in a petition for removal filed by the corporation, but the question of removability unless fraud is shown must be determined by the complaint. Shane v. Butte Electric Ry. Co. (C. C. 1906) 150 Fed. 801.

The rule that where a removal is sought by one of two or more defendants upon the allegations of the plaintiff's pleading alone, the cause of action as therein stated is the test of removability, and if that is joint in character, and there is no showing of want of good faith on the part of the plaintiff in stating his cause of action, the question of proper joinder is not to be tried in the removal proceedings, has no application where it is alleged and shown by the nonresident defendant that the plaintiff has purposely stated a fictitious cause of action against him and another jointly to prevent a removal, but in such cases the duty of protecting the right of removal to one having such right is strictly enjoined upon the Circuit Courts. McGuire v. Great Northern Ry. Co. (C. C. 1907) 153 Fed. 434.

The question of fraud or good faith as affecting the right to remove a cause to the federal court is not presented by the plaintiff's claim that the liability of the master and servant is joint, but would arise where defendant denies the truth of the facts stated in the complaint, and so conclusively establishes that the relation of master and servant did not exist, or that the claim of the plaintiff was for other reasons false in fact, that the complaint could not have been presented in good faith. Jacobson v. Chicago, R. I. & P. Ry. Co. (C. C. 1910) 176 Fed. 1004.

An averment of fraudulent joinder in a petition for removal is without force unless proven. Willard v. Chicago, B. & Q. R. Co. (1908) 165 Fed. 181; Stotler v. Chicago & A. Ry. Co. (1906) 98 S. W. 509, 200 Mo. 107; Blackwell's Durham Tobacco Co. v. American Tobacco Co. (1907) 57 S. E. 5, 144 N. C. 352, 9 L. R. A. (N. S.) 270. But, where the fact is clear on the face of the pleadings that an improper party has been joined or an assumed cause of action injected into the case to defeat the jurisdiction of the federal court over the real controversy, the court may find the attempted fraud on its jurisdiction from the record alone and prevent its perpetration. Boatmen's Bank of St. Louis v. Fritzlen (1905) 135 Fed. 650, 68 C. C. A. 288, reversing judgment and order Weldon v. Fritzlen (C. C. 1904) 128 Fed. 608.

Where a resident defendant is joined with a nonresident in a suit otherwise removable for diversity of citizenship, the joinder, though fair on its face, may be shown to be fraudulent, providing the showing consists of a statement of facts rightly engendering such conclusion. Russell v. Champion Fibre Co. (C. C. A. 1914) 214 Fed. 963.

Where a complaint against a resident and a nonresident defendant fully states the facts which furnish no reasonable ground for contending that the resident defendant is liable, it may be inferred that he was not joined in good faith but to prevent a removal of the cause. Richardson v. Southern Idaho Water Power Co. (D. C. 1913) 209 Fed. 949.

Where fraudulent joinder of defendants to prevent removal of a cause is alleged, the burden of proof thereof is on the removing party. Doremus v. Root (C. C. 1899) 94 Fed. 760; Welch v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1908) 177 Fed. 760; Foster v.

Coos Bay Gas & Electric Co. (C. C. 1911) 185 Fed. 979.

A defendant who is legally liable together with another, and whose presence defeats the right of removal, is neither a nominal nor sham party merely because he is pecuniarily irresponsible, so that a judgment against him would be of no value. Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co. (C. C. 1898) 85 Fed. 876.

The allegation that individual defendants are men of small means, and that defendant company is solvent and of great wealth, are not facts which would support a conclusion of fraud in joining the individual defendants to prevent removal. Schwyhart v. Barrett (Mo. App. 1910) 130 S. W. 388.

Where plaintiff in an action against a railroad company for injuries joined defendant railroad company's conductor and engineer whose negligence was charged to have caused the injury, evidence that they were joined without inquiry as to their insolvency did not show that they were fraudulently joined to prevent a removal of the cause by the railroad company to the federal court; there being no proof that the facts alleged with reference to their negligence were not well founded or alleged in good faith. Welch v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1908) 177 Fed. 760.

That a resident defendant is of little means, and has no property that could be seized to satisfy a judgment rendered, does not show that his joinder with a nonresident defendant was fraudulent to prevent a removal to the federal court. Dowell v. Chicago, R. I. & P. Ry. Co. (1910) 112 Pac. 136, 83 Kan. 562.

122. Dismissal of former cause.—The mere fact that an action, since discontinued, was once brought for the same tort against one of defendants, without joining the other, is not sufficient to show that the joinder was made merely to defeat jurisdiction of the federal court. Warax v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1896) 72 Fed. 637. But fraudulent joinder will be found where, after dismissing a removed cause, plaintiff brought another in which he joined as a defendant a citizen of his own state, against whom no cause of action existed, merely for the purpose of defeating petitioner's right of removal. Arrowsmith v. Nashville & D. R. Co. (C. C. 1893) 57 Fed. 165. Or where, after the expiration of the time for removal, he voluntarily dismissed the action as to the resident defendants. Powers v. Chesapeake & O. Ry. Co. (C. C. 1895) 65 Fed. 129 (judgment affirmed [1898] 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673); Hukill v. Same (C. C. 1895) 65 Fed. 138.

The dismissal of a former action against a foreign corporation and its motorman, upon failure to obtain service upon the motorman, does not prove that the plaintiff in a subsequent action joined the conductor and motorman as defendants with the foreign corporation for the purpose of preventing a removal to the federal court. Evans v. Sioux City Service Co. (D. C. 1913) 206 Fed. 841.

A petition for removal alleged that the controversy was wholly between petitioner and plaintiff, who were citizens of different states; that codefendant was joined solely to defeat the right of removal, and to defraud petitioner of its rights; that plaintiff formerly sued petitioner and codefendant on the same cause of action, which action he dismissed as to codefendant, thereby admitting that he had no cause of action against codefendant, whereupon petitioner procured from the federal court an order of removal; and that plaintiff then dismissed that action, and brought the present one. Plaintiff denied all fraud, and any admission that petitioner alone was liable, and insisted that both defendants were jointly and severally liable. No evidence was offered to support the petition. Held, that no cause of removal was shown. Chesapeake, O. & S. W. R. Co. v. Hendricks (1890) 88 Tenn. (4 Pickle) 710, 13 S. W. 696, 14 S. W. 488.

(C) Parties entitled to remove

123. General rules.—Under Act March 3, 1875, either plaintiff or defendant could remove. Warren v. Wisconsin Val. R. Co. (C. C. 1875) Fed. Cas. No. 17,204; Mosher v. St. Louis, I. M. & S. R. Co. (C. C. 1884) 19 Fed. 849; Meissner v. Buck (C. C. 1886) 28 Fed. 161; Clews v. Mumford (1887) 78 Ga. 476, 3 S. E. 267; Phœnix Life Ins. Co. v. Saettel (1877) 33 Ohio St. 278; Gillespie v. Jamison (Pa. 1877) 34 Leg. Int. 58. But under Act March 3, 1887, as corrected by Act Aug. 13, 1888, providing for removal of causes from the state to the federal courts by defendant, plaintiff has no right to such removal, except in a suit between citizens of the same state claiming lands under grants of different states. Darton v. Sperry (1899) 41 A. 1052, 71 Conn. 339.

One not served with process need enter a special appearance only in the state court, in order to petition for removal. Hutton v. Joseph Bancroft & Sons Co. (C. C. 1896) 77 Fed. 481.

The word "defendant," as used in the earlier removal acts, having been construed by the Supreme Court to include only a party who was a defendant on the record in the state court, it must be given the same construction as used in the later acts, which limit the right of removal to the "defendant or defendants." Illinois Cent. R. Co. v. A. Waller & Co. (C. C. 1908) 164 Fed. 358.

Directors of a corporation, whose election, although disputed, was duly certified, and who were in actual control of its affairs, are entitled to represent it in proceedings for the removal of a

cause. Consolidated Interstate Callahan Mining Co. v. Callahan Mining Co. (D. C. 1915) 228 Fed. 528.

124. Who are plaintiffs and defendants.—Although the judgment in an action commenced in a state court against a nonresident by foreign attachment without personal service can bind the property only, and not the person, of the defendant, yet the latter is a party in such sense that the suit may be removed to the federal circuit court on the ground of diverse citizenship. Richmond v. Brookings (C. C. 1891) 48 Fed. 241; Martin v. Thompson (S. C. 1825) 3 McCord, 167.

A plaintiff, who has brought an action or suit in a state court, in which the defendant has pleaded a counterclaim, or filed a cross-bill is not entitled to remove by reason of such counterclaim or cross-bill. West v. Aurora City (1867) 73 U. S. (6 Wall.) 139, 18 L. Ed. 819; Waco Hardware Co. v. Michigan Stove Co. (1899) 91 Fed. 289, 33 C. C. A. 511; McKown v. Kansas & T. Coal Co. (C. C. 1901) 105 Fed. 657; Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co. (C. C. 1905) 135 Fed. 837; City of Aurora v. West (1865) 25 Ind. 148; Chappell v. Chappell (1898) 39 A. 984, 86 Md. 532; Smithers v. Smith (1904) 80 S. W. 646, 35 Tex. Civ. App. 508, rehearing granted (Sup.) 81 S. W. 283, 98 Tex. 83. Even though under the state statute the counterclaim would remain for trial, if the plaintiff should dismiss his action. Illinois Cent. R. Co. v. A. Waller & Co. (C. C. 1908) 164 Fed. 358. But see Meissner v. Buck (C. C. 1886) 28 Fed. 161; Price & Hart v. T. J. Ellis & Co. (C. C. 1904) 129 Fed. 482; Glover Mach. Works v. Cooke Jellico Coal Co. (D. C. 1915) 222 Fed. 531.

Nor does the filing of a counterclaim by a nonresident defendant change his standing as defendant in the action, so as to preclude him from removing the cause. La Montagne v. T. W. Harvey Lumber Co. (C. C. 1891) 44 Fed. 645.

Parties brought into an action in a state court by a cross-complaint alleging that they claim an interest in the property involved, and who appear and file a complaint setting up that they have succeeded to the interest of the plaintiffs, and alleging substantially the same cause of action against defendants upon which the original complaint was based, must be treated as plaintiffs, taking the place and rights of the original plaintiffs, and have no standing as defendants to remove the cause. Ayers v. Chicago (1879) 101 U. S. 184, 187, 25 L. Ed. 838; Nash v. McNamara (C. C. 1906) 145 Fed. 541.

A claimant against an assignee for benefit of creditors, who has filed claim, and reply to exceptions of assignee thereto, so that an issue is formed, is a plaintiff so far as concerns the right to removal of cause to a federal court. Hill v. Graham (1898) 53 Pac. 1060, 11 Colo. App. 536.

A landowner who appeals from an award of damages in condemnation proceedings is a defendant for the purpose of removal to a federal court, though the law of the state gives him the right on such appeal to open and close. Hudson River Railroad & Terminal Co. v. Day (C. C. 1893) 54 Fed. 545; Hagerla v. Mississippi River Power Co. (D. C. 1912) 202 Fed. 771. But, if the landowner be regarded by the state practice as plaintiff, then he has no right to remove at any time. Mt. Washington Ry. Co. v. Coe (C. C. 1892) 50 Fed. 637.

Under a statute appropriating land for park purposes and permitting the owner to claim damages therefor, the owner is not a defendant. White v. City (Pa. 1871) 8 Phila. 241.

The express declaration in Code Iowa 1897, § 2009, that, on the appeal to a district court, which either party may take from the commissioners' award in proceedings to condemn land for railway purposes, the "landowner shall be plaintiff and the corporation defendant," does not fix the status of the parties under the removal act, but the landowner must be deemed the defendant so far as the right of removal to a federal circuit court on the ground of diverse citizenship is concerned, because, under the state statutes, the institution and continuance of the proceedings depend upon the will of the railroad company. Mason City & Ft. D. R. Co. v. Boynton (1907) 27 S. Ct. 321, 204 U. S. 570, 51 L. Ed. 629. CONTRA, Myers v. Chicago N. W. Ry. Co. (1902) 91 N. W. 1076, 118 Iowa, 312. And see Kirby v. Chicago & N. W. R. Co. (C. C. 1900) 106 Fed. 551, holding that, where the landowner alone appeals from an award by the commissioner, the company is not only nominally, but in fact, the defendant.

Where a landowner, appellant in condemnation proceedings under the Iowa statute, filed a pleading in the nature of a cross-bill in equity praying for affirmative relief, the adverse party became defendant as to such pleading and entitled to remove the cause, where the requisite grounds appear. Hagerla v. Mississippi River Power Co. (D. C. 1912) 202 Fed. 771.

125. Residence of party removing cause.—In an action against individuals, only defendants who are nonresidents of the state where the action is pending can remove a cause to a federal court. Martin v. Snyder (1893) 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602; Wichita Nat. Bank v. Smith (1896) 72 Fed. 568, 19 C. C. A. 42; Juillard v. Barr (1910) 177 Fed. 921, 101 C. C. A. 201; Western Union Tel. Co. v. Brown (C. C. 1887) 32 Fed. 337; Anderson v. Appleton (C. C. 1887) 32 Fed. 855; Weller v. J. B. Pace Tobacco Co. (C. C. 1887) 32 Fed. 860; Schofield v. Demor-

est (C. C. 1889) 40 Fed. 273; Mills v. Newell (C. C. 1890) 41 Fed. 529; The Dalles & Rockland Ferry Co. v. Hendryx (C. C. 1911) 189 Fed. 266; Drovers' Deposit Nat. Bank v. Tichenor (D. C. 1913) 202 Fed. 1013; Bryan v. Richardson (1891) 26 N. E. 435, 153 Mass. 157; Long v. Quinn Bros. (1913) 102 N. E. 348, 215 Mass. 85. But a suit brought in a court of one state by a corporation of another state against an alien corporation is removable. Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. (1912) 196 Fed. 340, 116 C. C. A. 160.

Under Removal Act March 3, 1875, as amended in 1887, and corrected in 1888, an action brought in the courts of one state by a corporation of another state against an alien corporation is removable. Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. (D. C. 1913) 202 Fed. 293.

Where an alien sues a citizen in a state court in the district of the citizen's residence, the citizen may not remove the cause to the federal court, unless a federal question is presented. H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C. 1911) 189 Fed. 224.

A cause will not be removed to a federal court on the ground that certain parties in interest are not residents of Pennsylvania, where it appears that the application for removal is made by the only defendant in the case who is present, and is admittedly a resident of Pennsylvania. McFadden v. McFadden (1907) 32 Pa. Super. Ct. 534.

An alien sued in the state of his residence by a citizen of another state on an ordinary debt cannot remove the action. O'Conor v. State of Texas (1906) 26 S. Ct. 726, 202 U. S. 501, 50 L. Ed. 1120 (affirming judgment State v. O'Connor [1903] 73 S. W. 1041, 96 Tex. 484); Cudahy v. McGeoch (C. C. 1888) 37 Fed. 1; Walker v. O'Neill (C. C. 1889) 38 Fed. 374.

An action brought by an alien in a state court against a nonresident who is a citizen of another state, is removable by the defendant. Rones v. Katalla Co. (C. C. 1910) 182 Fed. 946.

126. Decisions under acts prior to act of 1887.—Gregory v. Pike (1895) 67 Fed. 837, 15 C. C. A. 33; Osgood v. Chicago, D. & V. R. Co. (C. C. 1875) Fed. Cas. No. 10,604; Goodrich v. Hunton (1877) 29 La. Ann. 372; Belt v. Montgomery (Pa. 1875) 1 Wkly. Notes Cas. 265; Dunham v. Baird (Pa. 1875) 1 Wkly. Notes Cas. 495.

127. Removal by one or more coparties.—In order to remove a cause under the judiciary act of 1789, all the defendants had to join in the petition. Beardsley v. Torrey (C. C. 1822) Fed. Cas. No. 1,190; Smith v. Rines (C. C. 1836) Fed. Cas. No. 13,100; Waggener v. Cheek (C. C. 1873) Fed. Cas. No. 17,035; Bryan v. Ponder (1857) 23 Ga. 480; Ludlow's Heirs v. Kidd's Ex'rs (1827) 3 Ohio (3 Ham.) 48.

The rule is the same under the later statutes where there is no separable controversy involved, and no prejudice or local influence shown. Miller v. Clifford (1904) 133 Fed. 880, 67 C. C. A. 52, 5 L. R. A. (N. S.) 49.

An action cannot be removed from the state to the federal court on the ground of diversity of citizenship under Act Aug. 13, 1888, c. 866, § 2, cl. 2, 25 Stat. 434, where there is no separable controversy, unless all the defendants join in the petition for removal and are nonresidents of the state in whose court the action was originally brought. Blackburn v. Blackburn (C. C. 1906) 142 Fed. 901.

Where an action against several defendants is sought to be removed to the federal court, all the defendants should join in the petition. Huntington v. Pinney (C. C. 1903) 126 Fed. 237.

Where the cause of action against two corporations was not separable, the case could not be removed on the ground of diversity of citizenship, though one of the defendants was a foreign corporation, and plaintiff was an alien. Southwestern Telegraph & Telephone Co. v. Shirley (Tex. Civ. App. 1913) 155 S. W. 663.

A proceeding for condemnation of property, under Code Civ. Proc. Cal. § 1244, against a number of defendants, held not removable by one of the defendants. West Side R. Co. v. California Pac. R. Co. (D. C. 1913) 202 Fed. 331.

A cause is not removable by one of several defendants on the ground of diversity of citizenship alone, where no separable controversy is alleged or shown. McNaul v. West Indian Securities Corporation (C. C. 1910) 178 Fed. 308.

A petition to remove an action against two defendants for a joint tort to the federal court on the ground that both defendants are nonresidents should be made on behalf of both. Baber v. Southern Ry. Co. (1907) 56 S. E. 540, 76 S. C. 4; Guarantee Co. of North America v. First Nat. Bank (1898) 28 S. E. 909, 95 Va. 480.

Where all the plaintiffs in an action originally brought against a domestic corporation are residents of the state, and, under an amendment filed by them, citizens of another state are made parties defendant, the latter are not entitled, upon the ground of "diverse citizenship," to remove the case to a federal court. Young v. Oakes (1898) 30 S. E. 423, 104 Ga. 62.

Under Act March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, 25 Stat. 433, providing for the removal of causes from the state to the federal courts where the controversy is between citizens of different states, an application by one only of two defendants of different citizenship from the

plaintiff will not entitle the petitioning party to a removal. Yarnell v. Felton (D. C. 1900) 104 Fed. 161.

Whether an action brought in the courts of this commonwealth against several defendants can be removed by part of them into the Circuit Court of the United States under St. U. S. 1867, c. 196, quære. Vannevar v. Bryant (1874) 88 U. S. (21 Wall.) 41, 22 L. Ed. 476.

Under Judicial Code, § 28, one defendant alone cannot remove a cause to the United States court, where there is no separable controversy. Casey v. Baker (D. C. 1914) 212 Fed. 247.

Where decedent, an employé of a contractor for the construction of an electric power house, was killed as the result of defective wiring, plaintiffs held properly authorized to join defendants' employers and the power company the owners of the premises as defendants, and, these being both nonresidents, one could not maintain a petition for removal in which the other did not join. Richardson v. Southern Idaho Water Co. (D. C. 1913) 209 Fed. 949.

A bill of interpleader, brought by a citizen of one state against two citizens of another state, cannot be removed, on the petition of one of the defendants, to the United States circuit court. Mutual Life Ins. Co. of New York v. Allen (1883) 134 Mass. 389.

Under Act March 3, 1875, § 2, cl. 1, all the parties on one side must unite in the petition for removal. Chicago, St. L. & N. O. R. Co. v. McComb (C. C. 1879) Fed. Cas. No. 2,670.

Under Act March 3, 1875, § 2 (18 Stat. 470), in relation to the removal of causes, in a case of diverse citizenship, all of the plaintiffs or all of the defendants must join in the petition, unless there is a separable controversy. National Union Bank v. Dodge (C. C. 1879) Fed. Cas. No. 10,053.

Where the removal of a cause is prayed for under the first clause of section 2 of the act of March 3, 1875, upon the ground that the controversy in the suit is between citizens of different states, it is necessary that all the parties on one side, plaintiffs or defendants, should join in the petition for removal. Ruckman v. Palisade Land Co. (C. C. 1880) 1 Fed. 367.

The first clause of the second section of the removal act of March 3, 1875, relates only to cases in which there is a single, indivisible controversy, and in which all the individuals upon the moving side are necessary parties to such controversy. In such case all of the individuals upon such side must unite in the petition for removal. The second clause contemplates cases in which there are persons whose presence is not necessary to the determination of the main controversy, in which case either one or more of their co-parties may petition for removal, though all be citizens of the same state. Smith v. McKay (C. C. 1880) 4 Fed. 353.

Where a removal to the federal court is prayed by a portion of defendants only, the effect is to divide the suit into two parts, one to be determined in the state, the other in the federal court, and an order for removal should not be granted. Stanbrough v. Griffin (1879) 52 Iowa, 112, 2 N. W. 1011.

Under Act 1887-88, § 2, cl. 2, the failure of one of the defendants to join in the petition for removal of a cause is fatal to the right of removal when there is no separable controversy. Thompson v. Chicago, St. P. & K. C. Ry. Co. (C. C. 1894) 60 Fed. 773. But see, CONTRA, under the act of 1887-1888, § 2, whenever a controversy is wholly between citizens of different states, one of several defendants, being actually interested therein, a nonresident, and a citizen of another state, may remove it to a federal court, irrespective of whether the suit involves separable controversies or only one. Hunter v. Conrad (C. C. 1898) 85 Fed. 803.

An action brought in a state court against a number of defendants, all of whom are citizens of other states, is removable by any one of the defendants, although it involves but a single controversy. Munford Rubber Tire Co. v. Consolidated Rubber Tire Co. (C. C. 1904) 130 Fed. 496.

An action by a citizen of one state against several defendants, all citizens of another state, may be removed by any one defendant to a federal court, though it contains but a single controversy. Mutual Life Ins. Co. v. Champlin (C. C. 1884) 21 Fed. 85; Garner v. Second Nat. Bank (C. C. 1895) 66 Fed. 369.

Where one commences an action in another state against three persons, two of whom are citizens of that state, and one a citizen of a third state, the latter may remove the case to the federal court. Boston Safe-Deposit & Trust Co. v. Mackay (C. C. 1895) 70 Fed. 801.

Any one of several qualified plaintiffs may petition alone for removal of a suit from a state to a federal court, under Act March 3, 1875. Carswell v. Schley (1877) 59 Ga. 17.

Under Act March 3, 1875 (18 Stat. 470), in relation to the removal of causes, if some of the plaintiffs and some of the defendants to a suit are citizens of the same state, the removal of the cause must be sought by all the plaintiffs or all the defendants, but if all the plaintiffs on the one hand and all the defendants on the other are citizens of different states, any one or more or either may remove the cause. Girardey v. Moore (C. C. 1877) Fed. Cas. No. 5,462.

Upon the removal of a cause from a state to a federal court, under Act March 3, 1875 (18 Stat. 470), the join-

der of codefendants in the petition is not necessary where the controversy is wholly between petitioner and complainant. Osgood v. Chicago, D. & V. R. Co. (C. C. 1875) Fed. Cas. No. 10,604.

In a case of diverse citizenship where there are several defendants, the cause may be removed as to all the defendants on the petition of one of them, under Act March 3, 1875. Stapleton v. Reynolds (D. C. 1876) Fed. Cas. No. 13,303.

Under Act March 3, 1875, c. 137 (18 Stat. 470), in regard to the removal of causes, if the requisite conditions exist, one party, where all parties on his side of the controversy have such citizenship as to authorize a removal, may have the case removed and carry all the other parties with him. Arapahoe County v. Kansas Pac. Ry. Co. (C. C. 1877) Fed. Cas. No. 502.

In an action in a state court against a firm, if, after service upon one member of such firm, application for removal to a federal court is not made within the proper time, as another member cannot take the case from the state court unless his partner join him, service subsequently upon such other member will not revive the right of removal. Fletcher v. Hamlet (1886) 6 Sup. Ct. 426, 116 U. S. 408, 29 L. Ed. 679.

Where plaintiff sued a nonresident and a resident, and service was made on the resident, and judgment taken against him by default, and afterwards the nonresident acknowledged service and set up a defense, it was error to remove the case on his motion; he having voluntarily appeared in the action. Brooks v. Clark (1886) 7 Sup. Ct. 301, 303, 119 U. S. 502, 30 L. Ed. 482.

A nonresident heir, who by leave of court intervenes in the matter of a contested claim in the court of probate, cannot, where an administrator pro tem. representing the estate is defending and does not join with him, petition for the removal of such a cause to the federal court. Mayer v. Schneider (1903) 112 Ill. App. 628, judgment affirmed (1904) 72 N. E. 436, 212 Ill. 286.

Under Civ. Code Prac. Ky. § 25, providing that "if the question involve a common or general interest of many persons, or if the parties be numerous and it is impracticable to bring all of them before the court within a reasonable time, one or more may sue or defend for the benefit of all," the treasurer of a joint-stock association defendant, who, by the laws of the state where organized, is authorized to sue or defend suits on behalf of the association, may enter his appearance as such treasurer in an action against the association, and may remove the same, where the requisite diversity of citizenship exists between him and the plaintiff. Boatner v. American Exp. Co. (C. C. 1903) 122 Fed. 714.

Where a bill is filed against a trustee in a mortgage, who is a citizen of the same state as complainant, and others who are citizens of other states, to restrain a sale under the mortgage, a subsequent resignation by the trustee does not render the cause removable by the remaining defendants. Ruohs v. Jarvis-Conklin Mortg. Trust Co. (C. C. 1898) 84 Fed. 513.

128. —— **Failure to serve with process.**—Where a suit is brought in a state court by a citizen of one state against two citizens of another state, sued jointly, but one of whom, only, is served with process, the one so served has the same right to remove the cause, that he would have had had he been sued alone. Fallis v. McArthur (C. C. 1856) Fed. Cas. No. 4,627; Wormser v. Dahlman (C. C. 1879) Fed. Cas. No. 18,048; Tremper v. Schwabacher (C. C. 1898) 84 Fed. 413; Carlisle v. Sunset Telephone & Telegraph Co. (C. C. 1902) 116 Fed. 896; Norton v. Hayes (N. Y. 1847) 4 Denio, 245; Vandevoort v. Palmer (N. Y. 1855) 11 N. Y. Super. Ct. (4 Duer) 677.

Where there are several defendants entitled, on appearance, to remove a cause, if part of them only appear, they cannot remove it. This rule, however, applies to those cases only in which, from the subject-matter of the suit, the judgment or decree must be joint. Ward v. Arredondo (C. C. 1825) Fed. Cas. No. 17,148.

Where one of two defendants is a citizen of another state, and there is no joint trust, interest, duty, or concern in the subject-matter of controversy, he may appear and defend alone, so as to enable him to remove a cause. Livingston v. Gibbons (N. Y. 1819) 4 Johns. Ch. 94.

129. —— **Effect of failure of one coparty to petition for removal in time.**—See post, § 1011, and notes.

130. —— **Joinder of coparties in petition for removal.**—See post, § 1011, and notes.

131. **Interveners.**—After a cause had long been pending in a state court, and some of the questions involved had been decided by the supreme court of the state an intervener who acquired the interest of a defendant pendente lite could not remove the cause. Ellis v. Sisson (C. C. 1882) 11 Fed. 353, 11 Biss. 187; Cable v. Ellis (1884) 4 Sup. Ct. 85, 110 U. S. 389, 28 L. Ed. 186.

Where the real cause of action is between citizens of the same state, citizens of another state cannot, by procuring themselves to be substituted for the defendant, procure the removal of the cause into the federal court, and thereby deprive the plaintiffs of their remedy against the original defendant for a trespass committed by him. Ohlquist v. Farwell (C. C. 1882) 13 Fed. 805, 4 McCrary, 401.

Where, in an action to recover the proceeds of a check, petitioners attempted to intervene and claim the proceeds after the original defendant had lost the right to remove the cause to the federal courts by filing an answer and submitting itself to the jurisdiction of the state court, such interveners were not entitled to removal for the reason that they were not defendants, and, having connected themselves with the suit at the time it was not removable by the original defendant, they had no right of removal. Kidder v. Northwestern Mut. Life Ins. Co. (C. C. 1902) 117 Fed. 997.

132. Substituted parties.—Where an action of replevin is commenced in a state court by a resident citizen, against a sheriff, for goods taken at the instance of nonresident creditors, if such creditors are, by order of the court, made sole defendants in place of the sheriff, he being wholly discharged, they are entitled, on filing the requisite petition, to have the cause removed to the federal courts. Beecher v. Gillett (C. C. 1871) Fed. Cas. No. 1,225. But see Sifford v. Beaty (1861) 12 Ohio St. 189.

Suit having been originally brought in a state court against the Adams Express Company, service of the writ was threatened by motion to quash, whereupon plaintiff successfully moved to substitute the president of the express company, as the defendant. The cause was then removed to the United States Circuit Court on the ground of diversity of citizenship. Held, that the record would not thereafter be amended, at plaintiff's instance, either as a matter of right or discretion, so as to substitute the express company as defendant for the sole purpose of defeating the federal court's jurisdiction. Taylor v. Weir (C. C. 1908) 162 Fed. 585.

(D) Allegations in pleadings

133. General rules.—The diverse citizenship which must exist both at the time an action is begun in the state court and at the time a petition for removal is filed, in order to entitle the petitioner to have the cause removed, is a diversity of citizenship existent in fact, and not one merely shown to exist from the pleadings. Day v. Oatis (1904) 37 So. 559, 85 Miss. 128.

The right of removal must be determined by the pleadings at the time the petition is filed. Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America (1894) 14 Sup. Ct. 367, 372, 151 U. S. 368, 38 L. Ed. 195; Texarkana Telephone Co. v. Bridges (1905) 86 S. W. 841, 75 Ark. 116.

In cases arising under the removal statutes it is always allowable to look into the record and see what the subject of the controversy really is, and, disregarding mere appearances, ascertain who are the actual litigants. McHenry v. New York, P. & O. R. Co. (C. C. 1885) 25 Fed. 65, 68. And to consider only the citizenship and residence of the parties whose real names are disclosed in the proceedings. Loop v. Winters' Estate (C. C. 1902) 115 Fed. 362.

It is not necessary, in order to give a right to removal on the ground of diverse citizenship, that the diversity should appear on the face of plaintiff's pleading, but it may be shown by the petition for removal. Ladd v. Tudor (C. C. 1847) Fed. Cas. No. 7,975; City of Ysleta v. Canda (C. C. 1895) 67 Fed. 6.

In determining whether a cause should be removed to the federal court on the ground of diversity of citizenship, the state court may look to the allegations of the complaint, when not in conflict with the statements of the petition for removal. St. Louis & S. F. R. Co. v. Kitchen (Ark. 1911) 136 S. W. 970; Chicago, R. I. & P. Ry. Co. v. Smith (Ark. 1913) 156 S. W. 166.

While facts necessary to give the federal court jurisdiction must affirmatively appear on removal of a cause, no precise and technical form is required; it being sufficient that the necessary facts appear in the record. Gruetter v. Cumberland Telephone & Telegraph Co. (C. C. 1909) 181 Fed. 248.

134. Particular allegations.—When a party invokes the jurisdiction of the Circuit Court on the ground of diversity of citizenship, the diversity must appear upon the face of the record; consequently a party cannot remove a cause begun in a Provisional Court during the late rebellion to the Circuit Court on the ground of diversity of citizenship, where the defendant, who was called an alien, denied his alienage, and averred that he was a citizen of the same state as plaintiff. Edwards v. Tanneret (1870) 12 Wall. 446, 450, 20 L. Ed. 415.

Defendant was a surety of the assignee in insolvency of his son, and was described in the bond as "of Reading, in the county of Middlesex," Mass. Afterwards defendant attached the goods of his insolvent son in New Orleans, and was described in the petition as "residing in the state of Massachusetts." The petition was not signed by him but by his attorney in New Orleans. Held, that these words were merely descriptive, and did not estop defendant, on a motion to remove the cause, to deny that he was a citizen of Massachusetts, where it does not appear that the party seeking the removal acted on such statements to his prejudice. Reynolds v. Adden (1890) 136 U. S. 348, 10 Sup. Ct. 843, 34 L. Ed. 360.

Where plaintiff, a citizen of Nebraska, averred that defendant was a corporation under the laws of the state of New York, and defendant in the petition for removal alleged and in its an-

swer admitted that it was a corporation organized under the laws of New York, the citizenship of the defendant in that state sufficiently appeared from the pleading. Adams Express Co. v. Adams (1908) 159 Fed. 62, 86 C. C. A. 252.

A petition alleged that the G. Railway Company was incorporated by the Georgia legislature, that it descended by various conveyances and is now in the possession of defendant, and that defendant had "taken advantage of the rights and privileges granted the G. Railway Company, and, being in the enjoyment of the same, the said Southern Railroad Company (defendant) became, as to this line of road, a domestic corporation, subject to the same liabilities as the G. Railroad Company, which it succeeded." Plaintiff did not allege by what kind of conveyances the G. Railroad Company descended and came into the possession of defendant, or "show" that defendant had possession of the road by any sort of conveyance. Defendant's petition for the removal of the cause denied the allegation that defendant was a domestic corporation as to that part of the road which runs through the county of plaintiff's residence. Held that, taking the petition as true, there were not sufficient facts to show that defendant was a Georgia corporation as to that part of its line where the damages sued for were alleged to have occurred, and hence it was error to refuse to remove the case to a federal court. Southern Ry. Co. v. Hudgins (1899) 33 S. E. 1011, 108 Ga. 524.

Although plaintiff, in his petition, states that he is a citizen of Illinois, of which state defendant is also a citizen, and defendant, relying on plaintiff's allegation, made affidavit that plaintiff was a citizen of Illinois, on motion to secure costs, still, if defendant, in his petition for a removal of the cause to the federal court, states that plaintiff is a citizen of Iowa, and a preponderance of the evidence so shows, the state court cannot refuse to allow a removal. Ohle v. Chicago & N. W. Ry. Co. (1884) 64 Iowa, 599, 21 N. W. 101.

Where, in a suit in a state court, the petition alleges that one of defendants is a resident of the state, and other defendants fail to traverse such allegation, it is error to allow them to file petitions for removal to the federal court, and accept their bonds thereon. Stephenson's Adm'r v. Illinois Cent. R. Co. (1903) 75 S. W. 260, 25 Ky. Law Rep. 442.

135. Petition for removal.—See post, § 1011, and notes.

V. SEPARABLE CONTROVERSIES

(A) Nature of controversy

136. Single or separable controversy.—If in a suit there is a separable controversy, the parties to which actually interested in the decision, are, on each side, wholly citizens of different states, then the suit may be removed. Stevens v. Richardson (C. C. 1881) 9 Fed. 191; Snow v. Smith (C. C. 1882) 88 Fed. 657.

To entitle a party to remove a cause as involving a separable controversy, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. Yulee v. Vose (1878) 99 U. S. 539, 25 L. Ed. 355; Hyde v. Ruble (1881) 104 U. S. 407, 409, 26 L. Ed. 823; Fraser v. Jennison (1882) 106 U. S. 191, 1 Sup. Ct. 171, 27 L. Ed. 131; Boatmen's Bank of St. Louis v. Fritzlen (1905) 135 Fed. 650, 68 C. C. A. 288 (reversing judgment and order Weldon v. Fritzlen [C. C. 1904] 128 Fed. 608); Moloney v. Cressler (1913) 210 Fed. 104, 126 C. C. A. 618; Connell v. Utica, U. & E. R. Co. (C. C. 1882) 13 Fed. 241; Le Mars v. Iowa Falls & S. C. R. Co. (C. C. 1882) 48 Fed. 661, 662; Snow v. Smith (C. C. 1882) 88 Fed. 657; Boyd v. Gill (C. C. 1883) 19 Fed. 145; New Jersey Zinc & Iron Co. v. Trotter (C. C. 1883) 18 Fed. 337; Gudger v. Western N. C. R. Co. (C. C. 1884) 21 Fed. 81; Capital City Bank v. Hodgin (C. C. 1884) 22 Fed. 209; Thompson v. Dixon (C. C. 1886) 28 Fed. 5; Western Union Tel. Co. v. Brown (C. C. 1887) 32 Fed. 337; Davis v. County Court of Randolph County (C. C. 1898) 88 Fed. 705; Perkins v. Lake Superior & S. E. Ry. Co. (C. C. 1905) 140 Fed. 906; Regis v. United Drug Co. (C. C. 1910) 180 Fed. 201.

But the controversy does not necessarily become separable merely because the plaintiff could have prosecuted its cause of action against the defendant seeking to remove without the joinder of any other defendant. Boyd v. Gill (C. C. 1883) 19 Fed. 145; Regis v. United Drug Co. (C. C. 1910) 180 Fed. 201; Springer v. Sheets (1894) 115 N. C. 370, 20 S. E. 469.

The word "controversy" is not identical in signification with a separable cause of action. There may be separate remedies against several parties for the same cause of action, but there is only one subject-matter involved. Separate controversies, within the meaning of the statute, are separate causes of action, either of which might be sued on alone. Gudger v. Western N. C. R. Co. (C. C. 1884) 21 Fed. 81.

Where the citizenship of complainant and all the defendants is not diverse, and the bill contains various claims, the cause is not removable if there is one claim as to which the controversy is

not separable. Coram v. Davis (C. C. 1910) 182 Fed. 939.

There can be no separable controversy which will authorize the removal, where there is a single plaintiff and a single defendant. Drovers' Deposit Nat. Bank v. Tichenor (D. C. 1913) 202 Fed. 1013.

The necessity of proving more facts to warrant a recovery against one defendant than another is not the test to determine whether the cause is divisible so that it may be removed to the federal court. Ames v. Chicago, S. F. & C. Ry. Co. (C. C. 1889) 39 Fed. 881, 884.

Where it appears that the controversy, so far as it concerned the nonresident, not only could be, but actually had been, by judicial determination, separated from that of the other defendants, he can have the cause removed. Yulee v. Vose (1878) 99 U. S. 539, 25 L. Ed. 355.

A suit in which the only controversy is between the complainant and one of the defendants may be removed by such defendant, though other persons, who have no interest in the suit, have been improperly joined as parties defendant. Collins v. Wellington (C. C. 1887) 31 Fed. 244; Chattanooga, R. & C. R. Co. v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1890) 44 Fed. 456.

The fact that defendants, in a cause pending in a Louisiana state court, have called in warranty parties who are citizens of the same state with plaintiffs, furnishes no ground against the removal of that part of the cause which concerns the original parties, notwithstanding the statute of Louisiana declares that the trial of the call in warranty cannot be separated from the trial of the main issue. Ellerman v. New Orleans, etc., R. Co. (C. C. 1875) Fed. Cas. No. 4,382; Davis v. Montgomery (1884) 36 La. Ann. 874.

In determining whether an action involves a separable controversy, the federal courts will follow the state rule as to whether a cause of action is entire. Beckwith v. Chicago, M. & St. P. Ry. Co. (D. C. 1915) 223 Fed. 858.

That the contract sued on is void under the statute of frauds does not show a separable controversy. Davis v. Rexford (N. C. 1907) 59 S. E. 1002.

137. —— Actions involving title to or possession of real property.—In a suit to recover possession of certain land brought by a citizen of New York against other citizens of the same state and citizens of Ohio and Indiana, wherein the latter claimed neither title nor possession, held that, the principal controversy being wholly between citizens of the same state, there was no ground for removal to the United States court. Corbin v. Van Brunt (1881) 105 U. S. 576, 26 L. Ed. 1176.

A citizen of Pennsylvania claiming the equitable title to land in Kentucky, sued to recover the same in the circuit court of the United States in Kentucky, against a citizen of Kentucky who also claimed the equitable title, and made the heirs of the holder of the legal title defendants. Held, that the question between the equitable claimants was within the jurisdiction of the court, if the heirs had not been parties to the suit, and, therefore, though they were joined as parties, it would not oust the jurisdiction of the court as to the parties properly before it. Boon v. Chiles (1834) 33 U. S. (8 Pet.) 532, 8 L. Ed. 1034.

A suit for assignment of dower against the nonresident grantees of plaintiff's husband, and their grantee, who was a citizen of the same state as plaintiff is not separable. Laidly v. Huntington (1887) 7 Sup. Ct. 855, 856, 121 U. S. 179, 30 L. Ed. 883.

There is not a separable controversy between plaintiffs and defendant bank where the complaint alleged that plaintiffs being minors, and owning land in common with defendant T., defendants fraudulently procured a sale to be made and ratified by the probate court of plaintiffs' interest to defendant T., to be for cash, but in which no payment was made; that defendant T. then gave defendant bank a mortgage; that defendants had ever since been in possession; that afterwards a decree was obtained adjudging the probate proceedings void, and plaintiffs owners of an undivided half,—and the prayer being for an accounting, a partition, and a lien on defendants' interest for rents and profits. German Savings & Loan Soc. v. Dormitzer (1902) 116 Fed. 471, 53 C. C. A. 639.

A plaintiff in ejectment has the right to join a lessee in possession having a leasehold estate and an equity for improvements made and the lessor, so as to conclude both by one judgment; and, having such right, one of the defendants so joined cannot make the controversy separable, nor remove the cause. City of Cleveland v. Cleveland, C., C. & St. L. Ry. Co. (1906) 147 Fed. 171, 77 C. C. A. 467, reversing judgment (C. C. 1899) 93 Fed. 113.

The substantial controversy in a suit to quiet title to lands brought against A. and the persons from whom he claimed to have derived his title is wholly between the complainant and A., and is divisible. Goodenough v. Warren (C. C. 1879) Fed. Cas. No. 5,534.

Plaintiff, in suit against H., E., and S., sought to recover land, the petition alleging that S. made a parol gift of the land to plaintiff, and put him in possession; that plaintiff remained in possession over seven years, without any claim by S.; that after the gift, and while plaintiff was in possession, S. deeded the land to E., without plaintiff's knowledge, and that thereafter E. deeded it to H., after H. had received

notice of plaintiff's claim. The petition asserted plaintiff had complete title to the land, and prayed, if he had not, that he have a decree against all the defendants for specific performance of the promise of S. to give him the land. It also prayed for decree for the land, and for cancellation of the deeds to E. and H. Held, that there was no separable controversy. Smedley v. Smedley (C. C. 1901) 110 Fed. 255.

A bill for possession and mesne profits of a homestead illegally conveyed by complainant to a corporation of the state of which complainant is a citizen, alleging that another defendant, a citizen of another state, is in possession unlawfully as to complainant, but whether in privity with the corporation, complainant does not know, shows a misjoinder of parties, and therefore presents a separable controversy, removable on motion of the nonresident defendant to the federal court. Carter v. Scott (1888) 82 Ga. 297, 8 S. E. 421.

When a citizen of North Carolina, claiming under a parol trust in an equity of redemption, sues to enjoin the trustee's sale, and to redeem from the trust deed, the trustee and beneficiaries being citizens of Virginia, but the other defendants, who deny his right, citizens of North Carolina, since plaintiff's right to an accounting depends on his proof of the trust against the North Carolina defendants, those of Virginia have no separable cause. Faison v. Hardy (1894) 114 N. C. 429, 19 S. E. 701.

A suit by a citizen of the state against a foreign and a domestic railroad company for damages for interference with his easements in streets on which his property abuts caused by the operation of trains thereon pursuant to an agreement between the companies, and for an injunction to prevent further interference, presents a controversy which is not separable. Staton v. Atlantic Coast Line R. Co. (1907) 56 S. E. 794, 144 N. C. 135.

138. —— Actions involving rights of mortgagors and mortgagees.—It being necessary to join, in a suit to foreclose a mortgage, persons against whom plaintiff desires personal judgment, there is not a separable controversy between plaintiff and the owner of the land, for the purpose of removal to the federal court. Ayres v. Wiswall (1884) 5 Sup. Ct. 90, 91, 112 U. S. 187, 28 L. Ed. 693; U. S. Mortg. Co. v. McClure (1902) 70 Pac. 543, 42 Or. 190, dismissed (1905) 25 Sup. Ct. 798, 197 U. S. 624, 49 L. Ed. 911.

A bill in equity to establish a resulting trust in land in possession of a mortgagor, upon facts occurring before the mortgage, to which the mortgagee, a citizen of another state than the plaintiff, is made a defendant, cannot be removed to the federal court on his application, where the mortgagor, being also a defendant, is a citizen of the same state with the plaintiff. Chester v. Chester (C. C. 1881) 7 Fed. 1.

Where a contract with a city to construct and maintain waterworks was assigned by the contractor, and the city sued the assignee for failure to comply with the contract, one to whom the assignee had mortgaged the contract and franchise was a necessary party, and such mortgagee, having set up as a defense against the city that it had represented at the time of executing the mortgage that the assignee had done all things required to acquire full ownership, the controversy between the city and mortgagee was separable from that between the city and assignee. Galesburg v. Galesburg Water Co. (C. C. 1886) 27 Fed. 321.

Where, in a suit to cancel a mortgage alleged to be fraudulent and to have been executed through collusion, both mortgagor and mortgagee, in their answers, assert the validity of the mortgage, and plaintiff and the mortgagor are citizens of the same state, there is no separable controversy between plaintiff and the mortgagee. Oakes v. Yonah Land & Mining Co. (C. C. 1898) 89 Fed. 243.

139. —— Owner and insurer of property.—An action by the owner and insurer of property to recover damages for its destruction by fire does not present a separable controversy. First Presbyterian Soc. of Green Bay v. Goodrich Transp. Co. (C. C. 1881) 7 Fed. 257.

Nonresident insurance companies, who had severally paid policies on property of a lumber company destroyed by fire, although not to its full value, brought a suit in equity in a state court against the lumber company, which was a domestic corporation, and a railroad company, which was a corporation of another state, through whose negligence it was alleged the fire was caused, to enforce the right by subrogation to recover pro tanto against the railroad company for the loss, the lumber company having refused to bring action therefor or to join with complainants. Held, that the lumber company was an indispensable party to the determination and adjustment of the liability of the railroad company, and the latter could not remove the cause upon the ground that there was a separable controversy. Broadway Ins. Co. v. Chicago G. W. Ry. Co. (C. C. 1900) 101 Fed. 507.

140. —— Actions against trustee and beneficiary.—An action for the assignment of dower against the holder of it in which it appeared that one defendant, a resident, held the legal title as trustee, who did not possess authority to represent the interests of the beneficiary, and the beneficiary, is not severable. Rand v. Walker (1886) 117 U. S. 340, 6 Sup. Ct. 769, 29 L. Ed. 907.

M. died leaving lands and personalty

in Alabama, managed by C., trustee under the will, with authority to pay over the net income of the share of testator's daughter to her, or to her husband if she married. She married G., a resident of New York, and died domiciled there, intestate and childless. The trust property was claimed by the brothers and sisters of G.'s wife under the will; also by R., her administrator, who claimed adversely to them. G. claimed the property under the laws of New York. C., the trustee, who resided in Alabama, filed his bill in the state court against G., R., the brothers and sisters, and others, for a settlement of the trust, and for instructions how to dispose of the trust estate. G. was the only nonresident, and he made application to have the cause removed to the federal court. Held, that there was no act of congress authorizing the removal. Ex parte Grimball (1878) 61 Ala. 598.

141. —— Actions involving claims to personal property.—A suit by the claimant of bonds against a trust company, with whom they have been deposited in escrow by the railroad company to whom they were originally delivered by an adverse claimant, and the county which issued the bonds and which intervened, claiming them to be illegal, is not a controversy which may be separated. Wilson v. Oswego Tp. (1894) 14 Sup. Ct. 259, 263, 151 U. S. 56, 38 L. Ed. 70.

A suit by a buyer of corporate stock against the nonresident seller and the copartnership with whom the stock was deposited in escrow, some of the members of which were citizens of the same state as plaintiff, for specific performance of the contract and recoupment of losses caused by seller's misrepresentations, does not involve a separable controversy which authorized its removal by the seller. Moloney v. Cressler (1913) 210 Fed. 104, 126 C. C. A. 618.

Five several attachments were sued out on five distinct claims, and were all levied at the same time upon a certain stock of goods. Held, that the controversy as to the ownership of the stock of goods was a single controversy between the claimants of the goods on one side and all the attachment creditors upon the other side. Temple v. Smith (C. C. 1880) 4 Fed. 392, 2 McCrary, 226.

In suit by plaintiff to recover possession of personal property alleged to have been obtained from him by defendant, A., by fraudulent misrepresentations, A. having suffered judgment and execution to issue in favor of another, and be levied on the goods by the sheriff, the sheriff is made a defendant, and, A. having also executed a bill of sale to B., B. is also made a defendant. Plaintiff and defendant B. are nonresidents of the state where suit is brought. Held, the ultimate question being whether plaintiff has lost title to the goods, or whether title is still in him, and defendants being all interested adversely to plaintiff, there is no separable controversy. Winnemans v. Edgington (C. C. 1886) 27 Fed. 324.

A petition showed that plaintiff was the owner of certain bonds, of which the defendant S. had wrongfully obtained possession; that S. had recovered a judgment for their amount, and collected a portion of it; that he assigned it to C., who obtained a judgment for the amount still unpaid, with an order charging it on certain lands; and that the assignment from S. to C. was made with the intent to defraud the creditors of S., and that C. recovered the judgment in trust for S.,—and prayed that the title of the second judgment might be devested out of S. and C. and vested in plaintiff, and for an accounting for the sums collected on the two judgments. Held, that the petition disclosed but a single cause of action against both defendants. Sexton v. Seelye (C. C. 1889) 39 Fed. 705.

Complainants sued to recover payment of a certain amount alleged to be due them from a trust fund in the hands of two of defendants as trustees; the bill alleging that defendant C. asserted a claim to a very large amount from the same fund. Certain of the defendants removed the cause, claiming that C.'s demand against the fund was invalid, and that there were other claimants not named in the bill who alleged other claims against the fund which might or might not be valid. Held, that there was no separable controversy. Cornue v. Coram (C. C. 1910) 182 Fed. 941.

142. —— Corporations and their officers and stockholders.—A controversy as to the right of foreign corporations to own and vote corporate stock is separable from controversies with the officers of the domestic corporations as to conduct of the election. Bernheim v. Louisville Property Co. (D. C. 1914) 221 Fed. 273.

The liability of each stockholder of an insolvent corporation is distinct and separate, and the fact that a receiver seeks recovery from a number in a single suit does not change the separable character of the controversies. Calderhead v. Downing (C. C. 1900) 103 Fed. 27; Wright v. Ankeny (D. C. 1914) 217 Fed. 985. But see Miller v. Clifford (1904) 133 Fed 880, 67 C. C. A. 52, 5 L. R. A. (N. S.) 49, holding that a suit in equity brought in a state court on behalf of all of the creditors of an insolvent bank in Colorado against a number of stockholders to enforce their double liability under the Colorado statute, by requiring them each to pay the full amount of such liability to a master, to be applied pro rata, together with such sums as may be collected

from other stockholders, on the debts of the bank—the remainder, if any, to be returned to defendants—is not separable as to a single defendant.

A bill against two railroad companies to restrain one of them from selling stock of the other owned by the former, and to restrain the collection of bonds transferred to the former, presents a separable controversy. County Court v. Baltimore & O. R. Co. (C. C. 1888) 35 Fed. 161, 165.

A separable controversy exists between plaintiffs and two corporations named as defendants in a complaint which seeks to set aside for fraud a conveyance between such corporations, and to prevent the directors of the grantor from making any further disposition of its property, and prays for a reconveyance of such property and an accounting by the grantee for the damages sustained by the transfer, and also asks that such directors, who are joined as defendants and are not all residents of different states from plaintiffs, be compelled to account as agents and trustees for their actions in the premises, and be required to make good all loss and damage caused by their wrongful conduct. Geer v. Mathieson Alkali Works (1903) 23 S. Ct. 807, 190 U. S. 428, 47 L. Ed. 1122.

A suit in a state court by a stockholder of a domestic corporation, who is a citizen of the same state, against such corporation and a foreign corporation, the purpose of which is to enjoin the latter from obtaining and exercising control over the property, business, and corporate stock of the domestic corporation, does not involve a separate controversy between complainant and the foreign corporation. MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co. (1902) 119 Fed. 96, 55 C. C. A. 648.

A suit against a corporation, resident in the state of complainant, and an individual nonresident, to compel the corporation to transfer to plaintiff stock standing in the name of the nonresident, is one against both defendants upon a single cause of action. St. Louis & S. F. R. Co. v. Wilson (1885) 114 U. S. 60, 5 Sup. Ct. 738, 29 L. Ed. 66, affirming order Wilson v. St. Louis & S. F. R. Co. (C. C. 1884) 22 Fed. 3.

The liability of officers of a corporation for damages alleged to have been sustained by the corporation by reason of their misconduct, where no conspiracy is alleged, is several, and an action against two such officers to recover damages on that ground is separable as to each defendant. Youtsey v. Hoffman (C. C. 1901) 108 Fed. 693.

A bill by a stockholder of a railroad company against the company, its resident officers, and directors, certain bondholders and the trustee in a mortgage securing a new issue of bonds to be exchanged with a large bonus of stock for the old bonds of the company, praying that such exchange be adjudged illegal and ultra vires and that the original status be restored, and alleging that such exchange was effected through a confederacy of certain of the defendants for their own benefit and to the injury of the stockholders, states a joint cause of action, and the cause is not removable by the company, a foreign corporation, on the ground of separable controversy, where the other defendants are citizens. Pollitz v. Wabash R. Co. (1910) 176 Fed. 333, 100 C. C. A. 1, reversing decree (C. C. 1909) 167 Fed. 145.

In a suit against a corporation and certain of its officers, brought by stockholders on an allegation that the corporation is under the control of such officers, the purpose of which is to require the individual defendants to account to the corporation for funds alleged to have been appropriated by them to their own use, and to prevent the holding of a meeting, called by them, for the purpose of having the property of the company conveyed to another corporation, there is no controversy between the complainants and the company which entitles the latter to remove the cause from a state court on the ground that it is a nonresident and that there is a separable controversy, although incidental relief by way of an injunction and the appointment of a receiver may be prayed for against it, such relief not being asked adversely to the corporation, but in its interest, and the only real controversy being between complainants and the individual defendants. Campbell v. Milliken (C. C. 1902) 119 Fed. 981.

A suit by stockholders of a corporation against such corporation and a second corporation, which, the bill alleges, has, through an unlawful combination, obtained a controlling interest in the first, and by virtue of such control has managed its business to the detriment of its stockholders, and for its own benefit, and where an injunction is prayed restraining the payment of dividends by the second corporation until an accounting has been made, is one in which the complainants in effect represent their corporation, and which involves a separable controversy as to the second corporation that entitles it to remove the cause where the other facts requisite to give a right of removal exist; and officers of the two corporations made defendants with a prayer for an accounting from all the defendants are merely formal parties, whose joinder does not defeat such right of removal, where no facts are alleged which entitle the complainants to relief against them as individuals. Lamm v. Parrot Silver & Copper Co. (C. C. 1901) 111 Fed. 241.

A suit in equity by stockholders against the corporation, its directors and another stockholder, who owns a majority of the stock, to enjoin the de-

fendants from making certain dispositions and uses of the property and assets of the corporation, does not involve a separable controversy between complainants and the defendant stockholder. Hanover Nat. Bank v. Credits Commutation Co. (C. C. 1902) 118 Fed. 110.

Stockholders of a railroad company, whose president had issued stock thereof to another company, brought suit against both companies, with other defendants, to have such stock declared invalid. Held, that the cause could not be removed to a United States court on the application of one of the defendants, an officer of such other company, as the controversy was solely as to the validity of the stock; there being no dispute as to its ownership if valid. Shumway v. Chicago & I. R. Co. (C. C. 1880) 4 Fed. 385.

143. —— Actions involving the rights and liabilities of principals and sureties.—In an action against a principal and his surety on a bond or other obligation, there is no separable controversy such as will entitle one defendant to remove the cause. Mutual Reserve Fund Life Ass'n v. Farmer (1896) 77 Fed. 929, 23 C. C. A. 574.

Where, in an action on a bond against several defendants, one of them being the principal obligor, and the others his sureties, the only relief sought is a money judgment against all the defendants, there is, for the purpose of removal, but a single controversy in the case. Western Union Tel. Co. v. Brown (C. C. 1887) 32 Fed. 337.

In suit by state, on behalf of depositors in insolvent bank, against surety on bond of state bank commissioner, there was a separable controversy between the surety and one of the depositors, who were the real plaintiffs, entitling it to a removal. State of Idaho v. American Surety Co. of New York (D. C. 1914) 218 Fed. 678.

144. —— Principal and agent.—A bill which seeks to enjoin the principal defendants from practicing a secret process alleged to be owned by complainant, and to have been learned by such defendants through a breach of trust, and to restrain another defendant from assisting them in carrying out their unlawful purposes by using knowledge obtained while an employé of complainant as to the construction of machinery for practicing the process, does not present a separate controversy between complainant and the latter defendant. Vulcan Detinning Co. v. American Can Co. (C. C. 1904) 130 Fed. 635.

Where, in an action against a railroad and a construction company for services under a contract made between plaintiff and the latter, the citizenship of the construction company only was diverse, and plaintiff alleged in a single cause of action that he performed services and furnished material for the railroad company, and that the construction company acted as agent of the railroad company, and sought to recover against defendants jointly, the complaint did not allege a separable cause of action. Lathrop-Shea & Henwood Co. v. Pittsburg, S. & N. R. Co. (C. C. 1905) 135 Fed. 619.

145. Creditors' bills.—A creditors' bill to subject incumbered property to the payment of his judgment by sale and distribution of the proceeds among the lienholders according to their priorities contains but a single cause of action—the equitable execution of his judgment. Fidelity Ins., Trust & Safe Deposit Co. v. Huntington (1886) 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898.

A bill by a creditor to set aside fraudulent transfers which makes parties defendant all persons claiming an interest in the property adversely to plaintiff under the transfers presents but a single controversy between plaintiff and defendants. Graves v. Corbin (1890) 10 Sup. Ct. 196, 132 U. S. 571, 33 L. Ed. 462, reversing decree Corbin v. Boies (C. C. 1888) 34 Fed. 692.

A creditors' bill to wind up the affairs of an insolvent corporation, administer its assets among its creditors, and establish a joint and several liability for its debts on the part of another corporation, which sustained to it the relation of a partner, and to sell lands in which it is alleged both corporations had equitable interests, as well as those persons represented by defendant trustees, constitutes but a single inseparable controversy. Mecke v. Valleytown Mineral Co. (1898) 29 S. E. 781, 122 N. C. 790.

Where citizens of New York, who were creditors of a New Jersey corporation, brought suit in the nature of a creditors' bill to reach real estate which they allege was fraudulently and unlawfully conveyed to a New York corporation, no relief being demanded against the New Jersey company, there was no separate controversy between citizens of different states. Moore v. North River Const. Co. (C. C. 1884) 19 Fed. 803.

A judgment creditor's suit to set aside a conveyance by the debtor, and for an accounting of rents and profits, brought in a state court against the administrator of the debtor and the present holder of the title, who were residents and third persons who took a conveyance from the debtor's grantee and later reconveyed to him, does not present a separable controversy as against the nonresidents. American Surety Co. of New York v. Conway (D. C. 1915) 222 Fed. 140.

146. —— Assignments.—In an action to set aside a general assignment, each plaintiff being a separate judgment creditor of the assignor, where no issue is raised as to the judgments, and the

only facts controverted are those tending to impeach the bona fides or validity of the assignment, and its preferences, and the only issue is whether the assignment was fraudulent, there is no separable controversy for removal on the ground of citizenship. Reineman v. Ball (C. C. 1888) 33 Fed. 692.

An action to recover the price of property sold, brought against the original purchasers and one to whom they assigned their contract, who assumed payment and to whom the property was delivered, presents a separable controversy as to the assignee. Stimson v. United Wrapping Mach Co. (C. C. 1907) 156 Fed. 298.

147. —— **Proceedings relating to estates of decedents.**—An action to establish or contest a will is not separable. Fraser v. Jennison (1882) 106 U. S. 191, 1 Sup. Ct. 171, 27 L. Ed. 131; Reed v. Reed (C. C. 1887) 31 Fed. 49; Anderson v. Appleton (C. C. 1887) 32 Fed. 855.

An action against a trustee under a will, begun in a state court by a widow and minor children of the testator, for the preservation and due administration of the estate, in which all the plaintiffs, except one of the guardians ad litem, are residents of the same state as the defendant, is not removable to a United States court, as there is no separable controversy between such guardian and the trustee. In re McClean's Estate (C. C. 1885) 26 Fed. 49.

In a suit by an administrator with the will annexed, against beneficiaries, one of whom is a nonresident, claiming different constructions of the will, for a construction of the will by the court, there is no separable controversy between such beneficiaries, or such nonresident, and the administrator. Security Co. v. Pratt (C. C. 1894) 64 Fed. 405.

A suit by a bank, for the purpose of determining to whom a deposit should be paid, against the administrator of the deceased depositor, a citizen of the state, who claims the deposit as a part of the estate of the deceased, and against a third person, a citizen of another state, who claims the deposit, is properly removed from the state court to the federal court, for the suit is wholly between citizens of different states, and can be fully determined as between them. First Nat. Bank v. Bridgeport Trust Co. (C. C. 1902) 117 Fed. 969.

Where, in a suit against several defendants, the citizenship was not diverse as to all, and the bill as framed stated a cause of action by complainant for reimbursement for disbursements made by him against all defendants, which included practically all the parties who signed an agreement for the settlement of deecdent's estate, and who were entitled to the benefit of a trust fund in the hands of defendants' trustees, there was no separable controversy justifying a removal of the cause to the federal court. Coram v. Davis (C. C. 1910) 182 Fed. 939.

148. —— **Partition.**—A suit for sale of franchise for distribution of proceeds among owners involves no separable controversy. Bloede v. Van Dyke (D. C. 1915) 222 Fed. 347.

149. —— **Condemnation and special assessment proceedings.**—The effect upon the general proceedings for widening the streets of a city, in case the circuit court should decide that said city could not widen streets in the grounds of a railroad corporation, or that the valuation of property of the corporation was too small, or assessments for benefits against it too large, furnishes no good reason to deny the corporation its right to remove such causes. Union Pac. R. Co. v. Myers (1885) 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, reversing judgment Myers v. Union Pac. Ry. Co. (C. C. 1882) 16 Fed. 292.

A proceeding under 2 Burns' Rev. St. Ind. §§ 5622–5664, for the establishment of a drain, does not present a separable controversy which will authorize a removal by some of the remonstrants who are citizens of other states. In re Jarnecke Ditch (C. C. 1895) 69 Fed. 161.

Where it appears from the record in a proceeding in a state court to condemn land that the equitable title to the land is in a defendant who is a citizen of the state, while the legal title is in another defendant who is a citizen of another state, there is no separable controversy between the plaintiff and the nonresident defendant, which entitles the latter to remove the cause. Helena Power Transmission Co. v. Spratt (C. C. 1906) 146 Fed. 310.

Since a proceeding to condemn land by Kansas City under its city charter as construed by the Supreme Court of the state presents a case of an indivisible unit, to be tried to one and the same jury, unless a jury trial is waived, and the whole finding as against all the defendants must be embraced in one judgment, so that if reversed on appeal the entire case must be tried de novo, such a proceeding as against both residents and nonresidents did not present a separable controversy as between the city and the nonresidents whose property was sought to be condemned, and was therefore not removable to the federal courts. Kansas City v. Hennegan (C. C. 1907) 152 Fed. 249.

In a proceeding in a state court by a railroad company to condemn right of way, in which the owners of different parcels of land are joined as permitted by a state Code which provides that such owners may be joined or proceeded against separately, there is a separable controversy between the petitioner and the owner or owners of each tract. Deepwater Ry. Co. v. Western Poca-

hontas Coal & Lumber Co. (C. C. 1907) 152 Fed. 824.

Under Rev. St. Mo. 1909, § 5583 et seq., providing for the establishment of drainage districts and the assessment of benefits, assessments are separable controversies. Drainage Dist. No. 19, Caldwell County, Mo., v. Chicago, M. & St. P. Ry. Co. (D. C. 1912) 198 Fed. 253.

150. —— Partnership transactions.—An action on a partnership obligation is not separable, so as to entitle one partner to remove it because of his citizenship in another state. Stone v. State (1886) 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Woodrum v. Clay (C. C. 1888) 33 Fed. 897.

In a suit to close up a partnership, where all the defendants, except two who did not answer, deny the existence of the partnership, there is no separable controversy such as would entitle the parties to a removal under the second clause. Shainwald v. Lewis (1883) 2 Sup. Ct. 385, 108 U. S. 158, 27 L. Ed. 691.

A bill by one partner against others, praying an account of the proceeds of partnership property sold by some of the partners to a corporation also a defendant, on which sale it avers that part of the purchase money is still due, and prays that defendant partners be enjoined from selling, and defendant corporation from permitting the transfer on its books of certain stocks of the corporation belonging to the firm, and the appointment of a receiver, does not present a separable controversy between the corporation and any of the parties. Yearian v. Horner (C. C. 1888) 36 Fed. 130.

A suit by a firm in one state against the members of another firm in solido, in another, presents a single controversy, removable to the federal court only when all the members on the same side concur in the application. Fusz v. Trager (1886) 38 La. Ann. 173.

151. —— Taxpayers' actions.—In an action by resident taxpayers against county officials and bondholders, one of whom is a nonresident, to restrain the collection of a tax levied for the payment of alleged illegal bonds, and to cancel the bonds, there is no separable controversy with relation to the county officials and bondholders. Anderson v. Bowers (C. C. 1889) 40 Fed. 708; Anderson v. Orient Fire Ins. Co. (1893) 88 Iowa, 579, 55 N. W. 348, following Same v. Bowers (C. C. 1889) 40 Fed. 708.

A suit by taxpayers of a county against the county court and a citizen of another state, to restrain the court from erecting a new court house, and the other defendant from executing a contract to build it, entered into with the county court, is not removable by the nonresident defendant on the ground that there is a separable controversy, as any injunction against either defendant necessarily operates upon both. Davis v. County Court of Randolph County (C. C. 1898) 88 Fed. 705.

152. Determination of controversy without all parties.—To justify the removal of a suit on the ground of a separate controversy between citizens of different states, there must be a controversy which is wholly between plaintiff and the defendant seeking to remove, and which is capable of being finally determined between them, without the presence of others originally made parties to the suit. Winchester v. Loud (1883) 2 Sup. Ct. 311, 108 U. S. 130. 27 L. Ed. 677; Torrence v. Shedd (1892) 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528; Bixby v. Couse (C. C. 1870) Fed. Cas. No. 1,451; Tyler v. Hagerty (C. C. 1878) Fed. Cas. No. 14,-308; In re Silvies River (D. C. 1912) 199 Fed. 495; Richardson v. Southern Idaho Water Power Co. (D. C. 1913) 209 Fed. 949; Darst v. Bates (1869) 51 Ill. 439; Burch v. Davenport & St. P. R. Co. (1877) 46 Iowa, 449, 26 Am. Rep. 150; Succession of Townsend v. Sykes (1886) 38 La. Ann. 410; National Docks & New Jersey Junction Connecting Ry. Co. v. Pennsylvania R. Co. (1893) 52 N. J. Eq. (7 Dick.) 58, 28 Atl. 71; Hodgkins v. Hayes (N. Y. 1869) 9 Abb. Prac. (N. S.) 87; Mecke v. Valleytown Mineral Co. (1898) 29 S. E. 781, 122 N. C. 790.

A removal of a cause from the state to the federal court will only be allowed when the controversy is so completely a controversy between residents or citizens of different states, that its termination will settle the whole suit. Carraher v. Brennan (C. C. 1877) Fed. Cas. No. 2,441, affirmed Gage v. Carraher (1880) 25 L. Ed. 989.

A nonresident joined as defendant with a citizen is entitled to have the cause removed to the federal court in case his codefendant is not a necessary party in the federal court. Stewart v. Mordecai (1869) 40 Ga. 1, 2 Am. Rep. 55.

A severance and removal is not authorized unless the suit is such that the controversy may be finally determined in the federal court as to the defendant electing to go there, and that too in the absence of his codefendant. Crane v. Seitz (1874) 30 Mich. 453; Crane v. Gerloff (1875) 31 Mich. 454.

In the case of the removal of a cause from a state to a federal court, the jurisdiction of the latter court cannot be defeated because plaintiff cannot obtain full relief by the suit brought as to all parties against whom relief may be needed, but only when it cannot be had against a nonresident defendant without the presence of some resident defendant, whose presence is indispensable. Chester v. Wellford (C. C. 1879) Fed. Cas. No. 2,602.

Several marine insurance companies, which had paid insurance money to the owners of cotton destroyed while in the

possession of a carrier for transportation, filed a bill against the carrier to enforce, by way of subrogation, the owners' rights against it; and, as insurance had been obtained from a number of fire insurance companies, expressly for the benefit of the carrier, by a compress company acting under contract with it, the compress company and fire companies were made defendants, in order to reach the insurance money due the carrier. Held, that the primary controversy was between the complainants and the carrier, but the compress company was an indispensable party, and therefore no right of removal could exist on the ground of a separable controversy between the fire insurance companies and the compress company. Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America (1894) 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195, affirming Insurance Co. of North America v. Delaware Mut. Safety Ins. Co. (1892) 91 Tenn. (7 Pickle) 537, 19 S. W. 755. CONTRA, Insurance Co. of North America v. Delaware Mut. Ins. Co. (C. C. 1892) 50 Fed. 243.

An action by a divorced woman against the heirs of her former husband, to subject lands of which he died seised to the payment of her alimony, does not present a separable controversy as to any of the defendants. Chapman v. Chapman (C. C. 1886) 28 Fed. 1.

Action was brought by a nonresident assignee of an insolvent debtor to compel the assignment, by a corporation, of stock belonging to the debtor. Purchasers at a sale on execution levied on the stock after the debtor's assignment, intervened, were made parties defendant, and asked for a removal as to them. Held that, the cause of interveners was inseparable from that of the corporation. Weller v. J. B. Pace Tobacco Co. (C. C. 1887) 32 Fed. 860.

A citizen of Massachusetts sued in a state court of New York three corporations, citizens of New York, Connecticut, and Massachusetts, respectively, for the restoration of stock, and other property conveyed by plaintiff's intestate to the Connecticut company, under a mutual mistake of fact, and, as alleged, now in possession of the Massachusetts company, which received it with full knowledge of plaintiff's equities. Held, that both the Massachusetts and Connecticut companies are necessary parties, and there is no separate controversy with the latter. Vinal v. Continental Const. & Imp. Co. (C. C. 1888) 35 Fed. 673.

In a suit to cancel county bonds which were not all owned by the nonresident defendant, but by several, one or more of whom were residents, where the record did not show that the bonds owned by the nonresident belonged to a different issue or series from those owned by resident bondholders, there was not a separable controversy. Anderson v. Bowers (C. C. 1889) 40 Fed. 708.

A proceeding before the state board of control under Oregon Laws 1909, p. 319, to determine water rights in a certain river does not involve a separable controversy between petitioners and a noncitizen claimant. In re Silvies River (D. C. 1912) 199 Fed. 495.

153. —— Suits involving title or right to lands.—A suit to quiet title to real property against several defendants, who, as alleged in the bill, claim to be the owners of the same as tenants in common, "is one in which there can be a final determination of the controversy" as to each defendant, without the presence of the other. Field v. Lownsdale (C. C. 1867) Fed. Cas. No. 4,769.

It would be impracticable in case of an ejectment against the actual occupant and another merely incidental party who has been joined as a defendant under our statute, by reason of his privity in estate with such occupant, to work out any final and effectual determination of the controversy as to such incidental party by pursuing him separately in a distinct jurisdiction. Crane v. Seitz (1874) 30 Mich. 453; Crane v. Gerloff (1875) 31 Mich. 454.

154. —— Suits involving rights and liabilities under mortgages and trust deeds.—A trustee under a trust deed to secure a debt is a necessary party in any foreclosure proceedings, though by the statute of the state he may have been required to give bond, before entering on the discharge of his duties, for the faithful discharge thereof. Gardner v. Brown (1874) 88 U. S. (21 Wall.) 36, 22 L. Ed. 527.

Complainant's bill, alleging that three of the five defendants hold property in trust to secure a debt due from himself and one of the two remaining defendants to the other one, and asking for an accounting, the removal of two trustees, and the appointment of others, and that, after paying the debt, the trust property be conveyed in accordance with the terms of the trust, presents but a single controversy. Winchester v. Loud (1883) 108 U. S. 130, 2 Sup. Ct. 311, 27 L. Ed. 677.

After the execution of a mortgage to secure a joint debt of the mortgagors, W., one of the mortgagors, sold his interest in the mortgaged property, and the purchaser assumed the mortgage debt. In an action to foreclose the mortgage and for a personal decree for any deficiency that might result, some of the defendants denied that the amount due was as great as alleged. W. admitted the execution of the mortgage and the debt which it was given to secure, and prayed that his grantee might be decreed to be first personally liable. Held, that the only controversy was as to the amount due, to which W. was a necessary party, and, where W. was a citizen of the same state as plaintiffs, the cause is not removable.

Ayres v. Wiswall (1884) 112 U. S. 187, 5 Sup. Ct. 90, 28 L. Ed. 693.

Where the sheriff has made distribution of the proceeds of sale under mortgage foreclosure, the controversy in an action by the owner of the equity of redemption against the sheriff and the purchaser to set aside the sale for fraud and collusion, is not separable, so as to entitle the purchaser, as a citizen of a different state, to a removal of the cause to the federal court. Barth v. Coler (1894) 60 Fed. 466, 9 C. C. A. 81, 19 U. S. App. 646.

In a suit brought in a state court by the plaintiff corporation to set aside a deed of trust, made by its officers and another corporation of the same state, a removal of the cause to the United States court was sought by the surviving trustee in the deed of trust and one of the bondholders under it. Held that, the latter corporation being a necessary party, and no final or effectual determination of the case made by the bill being possible without its presence, the petitioners could not have the cause removed. Cape Girardeau & St. L. R. R. v. Winston (C. C. 1877) Fed. Cas. No. 2,390.

Where a citizen of California files a bill to foreclose a mortgage against a citizen of California and a subsequent incumbrancer, a citizen of New York, there can be no final determination of the controversy between the complainant and the nonresident without the presence of the resident defendant. Donohoe v. Mariposa Land & Mining Co. (C. C. 1878) Fed. Cas. No. 3,989.

A railroad company which had given a mortgage to two trustees, one of which was a corporation of another state, brought suit to have such trustee removed, and also to restrain it from foreclosing the mortgage against the wishes of the other trustee and of a majority of the bondholders. Held, that the controversy between the railroad company and the former trustee was a separable one, to which the other trustee and the bondholders were not necessary parties. Lake St. El. R. Co. v. Farmers' Loan & Trust Co. (C. C. 1896) 72 Fed. 804.

A citizen of New Jersey brought a suit in a state court to have a domestic railway company declared insolvent. About the same time a citizen of New York, and trustee under a mortgage of the railroad, took possession of the road. He was made a party to the suit. Held, that there was no separable controversy. Watson v. Asbury Park & B. St. R. Co. (C. C. 1896) 73 Fed. 1.

When complete relief cannot be granted without the presence of all the defendants to an action by a mortgagor against his junior and senior mortgagees for an adjustment of their rights, there is not a separable controversy, though separate suits for the desired relief might be brought against the different mortgagees. Springer v. Sheets (1894) 115 N. C. 370, 20 S. E. 469.

155. —— Suits involving estates of decedents.—Although, in New York, the heirs of a deceased debtor are respectively liable to the extent of the estate descended to them, all such heirs are necessary parties to a suit by a creditor to compel payment of his debt; and a bill filed for that purpose by a creditor residing in New York against heirs, some of whom reside in that and others in another state, does not present a separable controversy which can be determined, as between the removing defendants and the complainant, without the presence of the resident defendants. Lyddy v. Gano (C. C. 1886) 26 Fed. 177.

A bill was filed in a state court by the administrator of one partner against the administrator de bonis non of another partner, to obtain a settlement of the partnership accounts, and of certain land transactions between the partners, and also to compel an adjustment of the accounts of the complainant's intestate as executor of his partner's will. Both these parties were residents of the same state. The sole legatee under the will of the deceased partner, who was also a resident, and the heirs at law of such partner, who were all nonresidents, were also made defendants. The nonresident heirs at law removed the case to the federal court, upon the ground that it involved one controversy between them and the resident legatee, and another between them and the resident complainant. Held, that the complainant was a necessary party to the controversy between the nonresident heirs and the resident legatee, and that the other resident defendants were also necessary parties to the controversy between the nonresident heirs and the complainant, and that the cause should be remanded. Perrin v. Lepper (C. C. 1886) 26 Fed. 545.

G., as administrator of J., deceased, brought suit in an Indiana court against W., a citizen of New York, and C., a citizen of Indiana, for an accounting of a partnership composed of J. and W., whose assets included land. It was averred that such land was conveyed to C., who held it for the firm for a time, and then conveyed it to her mother, who held it for the firm until she died, intestate, leaving C., J., and W. as heirs, and that after her death, C. and J. conveyed their interests to W. for the firm, but that both C. and W., respectively, claimed the land as their individual property, C. claiming that the deeds made by her were procured by the fraud of W. Held, that C. was a necessary party to the suit, and there was no separable controversy between the plaintiff and W. which could be removed to the federal court. Golden v. Bruning (C. C. 1896) 72 Fed. 2.

This section does not authorize re-

moval of a bill by an administrator against numerous legatees and creditors for direction in the administration of an estate, where the rights of the moving codefendant cannot be finally determined unless all the other parties claiming prior liens upon the funds of the estate are before the court. Peters v. Peters (1870) 41 Ga. 242.

A citizen of New York, with a citizen of Georgia filed a bill in equity in the courts of Georgia, against a citizen of that state, charging defendant with maladministration as administrator of an estate. Held, that there could be no removal of the cause on the petition of the nonresident plaintiff. Bliss v. Rawson (1871) 43 Ga. 181, 9 Am. Rep. 164.

156. —— Suits involving rights and liabilities of corporations, their officers and stockholders.—A bill by a stockholder in a domestic corporation against the corporation, its officers and agents, some of whom were nonresidents, and another corporation, to recover from the individual defendants dividends received from the latter corporation, presents no controversy with the nonresidents of which there could be a final determination without the presence of the others. Burke v. Flood (C. C. 1880) 1 Fed. 541, 6 Sawy. 220.

A stockholder's complaint for an accounting by the trustees of the profits of sales by them of stock issued as paid up for property of less value, and then assigned to the trustees and sold by them, charged no joint account or community of interest in the sales or profits on stock sold, and that in respect thereto the controversy was severable, as a trustee, if accountable, could not be held for the profits of the others, and the profits of each could be determined without the presence of the others; and that the cause was therefore removable. Langdon v. Fogg (C. C. 1883) 18 Fed. 5.

To an action claiming the rightful ownership of certain shares of stock in a resident corporation, which are in the name of nonresident stockholders, the corporation is an essential party, and there is no separable controversy. Rogers v. Van Nortwick (C. C. 1891) 45 Fed. 513.

Some of the stockholders and creditors of a New Jersey corporation, part of whom were citizens of Virginia, sued in a Virginia state court the corporation and its promoters, who owned the majority of its stock, alleging that the latter had defrauded the corporation in the payment of their subscriptions, and had wasted the funds of the New Jersey corporation in acquiring the stock of various Virginia corporations, contrary to complainants' rights. The Virginia corporations were also joined as defendants on the theory that complainants had the right to have the entire assets of the New Jersey corporation brought into court, and that the various Virginia corporations, which had secured its funds, should also be wound up. Held, that incidental averments of indebtedness of the New Jersey corporation to the creditors who had joined as complainants in the bill did not constitute a separate controversy between them and the New Jersey corporation, so as to entitle the latter to remove the cause into a federal court on the ground that such complainants were citizens of a state different from that of the corporation. Wilder v. Virginia, T. & C. Steel & Iron Co. (C. C. 1891) 46 Fed. 676.

In a suit by stockholders in a domestic corporation to have a foreign corporation account for property of the domestic corporation and to have the stock and bonds held by the foreign corporation surrendered the domestic corporation was a necessary party defendant. Douglas v. Richmond & D. R. Co. (1890) 106 N. C. 65, 10 S. E. 1048.

157. —— Creditors' bills.—In a suit in the nature of a creditors' bill brought in a state court by citizens of the state against a railroad company, also a citizen of the state, in which the trustee, under a mortgage on the railroad, who was a citizen of another state, intervened, there was no separable controversy. In re San Antonio & A. P. R. Co. (C. C. 1890) 44 Fed. 145.

158. Determination or dismissal as to some defendants.—Nor does an involuntary nonsuit as to the resident defendant. Southern Ry. Co. v. Lloyd (1916) 36 S. Ct. 210; American Car & Foundry Co. v. Kettelhake (1915) 35 S. Ct. 355, 236 U. S. 311, 59 L. Ed. 594 (affirming judgment Kettelhake v. American Car & Foundry Co. [1913] 153 S. W. 552, 171 Mo. App. 528); Moeller v. Southern Pac. Co. (D. C. 1913) 211 Fed. 239; Southern Ry. Co. v. Nichols (Ga. 1910) 68 S. E. 789; Illinois Cent. R. Co. v. Harris (1905) 38 So. 225, 85 Miss. 15.

The dismissal against the contention of plaintiff after the expiration of the time prescribed by statute for the removal of causes of an action which was brought against a resident and a nonresident, so far as it affects the former, does not deprive the state court of jurisdiction to proceed with the cause against the latter, or entitle him to remove the cause to the federal court. Lathrop, Shea & Henwood Co. v. Interior Construction & Improvement Co. (1909) 30 Sup. Ct. 76, 215 U. S. 246, 54 L. Ed. 177 (reversing judgment [C. C. 1907] 150 Fed. 666); Howe v. Northern Pac. Ry. Co. (1902) 70 Pac. 1100, 30 Wash. 569, 60 L. R. A. 949.

Where the resident disclaims interest in the land in controversy, thereby retiring from the suit, the nonresident may procure the removal of the cause to the federal court. Day v. Oatis (1904) 37 So. 559, 85 Miss. 128; Reed v. Hardeman County (1890) 77 Tex. 165, 13 S. W. 1024. But see Latham v. Barney (C. C. 1877) Fed. Cas. No. 8,102, reversed Barney v. Latham (1880) 103 U. S. 205, 26 L. Ed. 514, and New Jersey Zinc Co. v. Trotter (C. C. 1877) Fed. Cas. No. 10,167, holding that the disclaimer does not make the controversy with the nonresident separable, since that question must be determined upon the case made in the complaint, and not by the answers.

A nonresident defendant sued with others is entitled to a removal after all parts of the case had been disposed except that which related to him alone. Yulee v. Vose (1878) 99 U. S. 539, 544, 25 L. Ed. 355, reversing Vose v. Yulee (1876) 64 N. Y. 449, which affirmed (1875) 4 Hun, 628.

A recovery against one only of several defendants charged with joint and concurring negligence does not deprive such defendant of any federal right, because, if it had been sued alone, the diversity of citizenship existing between it and the plaintiff would have authorized the removal of the cause from the state court to a federal circuit court. Southern Ry. Co. v. Carson (1904) 24 S. Ct. 609, 194 U. S. 136, 48 L. Ed. 907, affirming judgment Carson v. Southern Ry. Co. (1903) 46 S. E. 525, 68 S. C. 55.

The restoration of the jurisdiction of a state court after one of the original defendants had filed its petition and bond for the removal of a separable controversy to a federal Circuit Court was effected by action and conduct equivalent to a formal waiver of new process and new pleadings or any formal remainder by the federal court, where the plaintiff, before any order was made in the state court, or the record filed in the federal court, had an order entered in the state court, dismissing his action against the removing defendant and certain others having a like ground of removal, the order reciting that, in consideration of such dismissal, the petition for removal was withdrawn, and thereafter the case was proceeded with against the remaining defendants to verdict and judgment without any objection by either the plaintiff or the remaining defendants. Anderson v. United Realty Co. (1911) 32 S. Ct. 50, 222 U. S. 164, 56 L. Ed. 144, affirming judgment (1908) 86 N. E. 644, 79 Ohio St. 23, 51 L. R. A. (N. S.) 477.

To constitute nonseparable controversy, recovery need not be had against all those charged with joint negligence. Beckwith v. Chicago, M. & St. P. Ry. Co. (D. C. 1915) 223 Fed. 858.

Where all the defendants who are citizens of the same state with plaintiff have defaulted, the cause as against the remaining defendant, as to whom there is a diversity of citizenship, is removable. Akerly v. Vilas (C. C. 1869) Fed. Cas. No. 119.

The complaint, in an action in a state court, stated a joint cause of action against two defendants, one a domestic, and the other a foreign, corporation. The latter, which was brought in by substituted service, made default, and a judgment was entered against it thereon. On a trial of the case against the domestic corporation, a judgment was rendered in its favor, from which plaintiff appealed. Held that, until final disposition of the appeal, it was not established that a separable controversy existed between plaintiff and the foreign corporation which entitled the latter to remove the cause. Lathrop, Shea & Henwood Co. v. Interior Const. & Imp. Co. (C. C. 1906) 143 Fed. 687.

Where verdict was erroneously directed for the resident defendant, the case will be treated thereafter as though the ruling were not made, and the nonresident defendant cannot remove to the federal court for diversity of citizenship. Carter Coal Co. v. Prichard's Adm'r (Ky. 1915) 179 S. W. 1038.

Where verdict was properly directed for the resident defendant, he is still in the case until the appeal taken is decided, so that until then the case cannot be removed to the federal court for diversity of citizenship between the remaining defendant and the plaintiff. Carter Coal Co. v. Prichard's Adm'r (Ky. 1915) 179 S. W. 1038.

Where an action was brought against a railroad company, which, if sued alone, would have been entitled to remove the cause, and a resident not entitled to remove, and a verdict was rendered in favor of the resident and against the corporation, on which a judgment was entered, which was reversed on the railroad company's appeal, that plaintiff did not appeal from the judgment in favor of the resident defendant did not entitle the railroad company, after reversal, to remove the cause on the theory that the action then involved a controversy only between plaintiffs and itself. Huber v. Texas & P. Ry. Co. (Tex. Civ. App. 1908) 113 S. W. 984.

159. Removal of whole suit.—Prior to Act March 3, 1875, the nonresident defendant could remove the cause, not wholly, but as to himself, where there could be a final determination of the controversy without the presence of a resident codefendant. Allen v. Ryerson (C. C. 1873) Fed. Cas. No. 235; Jones v. Foreman (1881) 66 Ga. 371. But the provision for partial removal was repealed by that act. Le Mars v. Iowa Falls & S. C. R. Co. (C. C.

1882) 48 Fed. 661; Atlantic & V. Fertilizing Co. v. Carter (C. C. 1882) 88 Fed. 707. And now the whole suit can be and must be removed. Barney v. Latham (1880) 103 U. S. 205, 26 L. Ed. 514; Hervey v. Illinois Midland Ry. Co. (C. C. 1876) Fed. Cas. No. 6,434; Girardey v. Moore (C. C. 1877) Fed. Cas. No. 5,462; Carraher v. Brennan, Id. 2,441; Farmers' Loan & Trust Co. v. Chicago, P. & S. W. R. Co. (C. C. 1879) Fed. Cas. No. 4,665; Sheldon v. Keokuk Northern Line Packet Co. (C. C. 1880) 1 Fed. 789; Snow v. Texas Trunk R. R. (C. C. 1882) 16 Fed. 1, 3; Le Mars v. Iowa Falls & S. C. R. Co. (C. C. 1882) 48 Fed. 661, 662; Corbin v. Boies (C. C. 1883) 18 Fed. 3; Crane v. Seitz (1874) 30 Mich. 453; Crane v. Gerloff (1875) 31 Mich. 454; Swan v. Mansfield, C. & L. M. R. Co. (1879) 7 Ohio Dec. 669, 4 Wkly. Law Bul. 898; Feibleman v. Edmunds (1887) 69 Tex. 334, 6 S. W. 417.

There is a clear distinction between controversies which are merely "separable," within the meaning of the removal statute, and those which are wholly separate and distinct, and only joined in one suit by express statutory permission, as in case of proceedings for condemnation of a railroad right of way in which as permitted by statute owners of different tracts of land are joined in the same proceeding, and in such a case a removal of the cause by the owner or owners of one tract does not carry with it the proceedings as against other owners. Deepwater Ry. Co. v. Western Pocahontas Coal & Lumber Co. (C. C. 1907) 152 Fed. 824. But see Hoge v. Canton Ins. Office of Hong Kong (C. C. 1900) 103 Fed. 513, holding that, where a complaint states four distinct causes of action agreeably to the rules of pleading in the state, and one of such causes of action is within the jurisdiction of the circuit court of the United States, the cause is removable to the latter court in its entirety, although the record fails to show that the remaining causes of action would have been within its jurisdiction if sued upon separately.

Where plaintiff took assignments of ten causes of action against defendant, an alien corporation, and some of plaintiff's assignors were aliens and some were citizens, a single suit on all the claims was removable as a whole. Patterson v. Bucknall S. S. Lines (D. C. 1913) 203 Fed. 1021.

A. and B. were sued in the state court. The controversy was a separable one, and B. removed the case to the federal court, so far as he was concerned. A. went to trial, judgment was rendered against him, and his motion for a new trial overruled. Held, that he could not then claim that the whole case was removable to the federal court, and that the state court had no jurisdiction over his branch thereof. St. Louis, W. & W. R. Co. v. Ransom (1883) 29 Kan. 298.

(B) Joint or joint and several causes of action

160. General rules.—Whether separable controversies are presented does not depend on whether the cause of action is a joint one against the defendants. Painter v. Chicago, B. & Q. R. Co. (C. C. 1909) 177 Fed. 517.

Where the cause of action is joint or several, and plaintiff elects to treat it as joint, no one of defendants can treat the suit as against him as severable for the purpose of removal. Chicago, R. I. & P. R. Co. v. Dowell (1913) 33 Sup. Ct. 684, 229 U. S. 102, 57 L. Ed. 1090, affirming judgment Dowell v. Chicago, R. I. & P. Ry. Co. (1910) 112 Pac. 136, 83 Kan. 562; Brown v. Coxe Bros. & Co. (C. C. 1896) 75 Fed. 689; Kane v. City of Indianapolis, Ind. (C. C. 1897) 82 Fed. 770; Moore v. Los Angeles Iron & Steel Co. (C. C. 1898) 89 Fed. 73; State of Missouri ex rel. Barker v. Chicago & A. R. Co. (D. C.) 216 Fed. 562; German-American Mercantile Bank v. Gas Service Corp. of America (D. C. 1915) 228 Fed. 827; Wabash R. Co. v. Keeler (1906) 127 Ill. App. 265; Same v. Humphrey, Id. 334; Sears v. Atchison, T. & S. F. Ry. Co. (1912) 147 S. W. 860, 163 Mo. App. 711; Davis v. Rexford (N. C. 1907) 59 S. E. 1002.

Where the right to remove a cause from a state court depends upon whether the declaration states a joint cause of action against the defendants, that question should be determined by the law of the state. Morris v. Louisville & N. R. Co. (C. C. 1910) 175 Fed. 491; McAllister v. Chesapeake & O. Ry. Co. (D. C. 1912) 198 Fed. 660.

If a complaint states a joint cause of action against two defendants, the motive which prompted the joinder is immaterial on the question whether the cause is removable by one of the defendants, in the absence of a showing of fraudulent and merely colorable joinder of the nonresident defendant. Buchanan v. W. M. Ritter Lumber Co. (1913) 210 Fed. 144, 126 C. C. A. 658; Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co. (C. C. 1898) 85 Fed. 876; Foster v. Coos Bay Gas & Electric Co. (C. C. 1911) 185 Fed. 979; Jones v. Casey-Hedges Co. (D. C. 1913) 213 Fed. 43; Whiteaker v. Chicago, R. I. & P. R. Co. (1913) 160 S. W. 1009, 252 Mo. 438.

Where a complaint against a nonresident and resident defendants stated a cause of action against them jointly, it was conclusive against the nonresident defendant's right to remove the cause in the absence of a petition for removal containing a statement of facts from which the court could find that the joinder was not only in bad faith, but without right. Russell v. Cham-

pion Fibre Co. (C. C. A. 1914) 214 Fed. 963.

When the separate causes of action could both be pursued against different defendants, and settled independently of each other, the suit, even though it contain a joint cause of action also, involves separate controversies, and falls within the term of the act. Boyd v. Gill (C. C. 1883) 19 Fed. 145, 21 Blatchf. 543.

Where two persons, one a resident of the state and one a resident of another state, were joint receivers of a corporation, and acted jointly in receiving and holding what they have received from their predecessor, so that they were both indispensable parties to an action concerned with their receivership, or with their conduct as receivers, there was no separable controversy between the nonresident receiver and plaintiff suing for relief from certain transactions of the receivers' predecessor relating to the receivership, which would entitle the nonresident receiver to remove the cause to the federal court. Wrightsville Hardware Co. v. Hardware & Woodenware Mfg. Co. (C. C. 1910) 180 Fed. 586.

Part of stockholders of depositary bank jointly and severally liable for its deposit of county funds, in suit by county treasurer under Acts Ark. 1905, p. 301, could not remove the cause to the federal court, as the controversy was not separable. Steed v. Henry (Ark. 1915) 180 S. W. 508.

A suit having, without objection, been removed to the federal court by one of two defendants sued upon a joint and several obligation, plaintiff, by proceeding to trial without protest, and taking judgment against the defendant on whose petition the removal was made, consented to a severance of the joint action into two several actions, as he had a right to do. Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co. (1896) 80 Fed. 766, 26 C. C. A. 146, petition for rehearing overruled (1897) 82 Fed. 545, 27 C. C. A. 373.

161. Contracts.—One of two defendants sued in a state court on a joint bond cannot remove the cause into a federal court on the ground of diversity of citizenship between himself and plaintiff, without showing that the controversy is separable. Folsom v. Continental Nat. Bank (C. C. 1882) 14 Fed. 497, 4 Woods, 521. Nor can a defendant in a suit on a joint and several bond. Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co. (1896) 80 Fed. 766, 26 C. C. A. 146, petition for rehearing overruled (1897) 82 Fed. 545, 27 C. C. A. 373.

Where a cause of action is founded on an alleged breach of an agreement, the undertaking expressed in which is not joint on the part of the two defendants, but several and distinct by each, and in which there is nothing implying that they are to be sureties for each other or answerable for each other's default, the controversy between the plaintiff and each defendant cannot be converted into a controversy between plaintiff and both defendants by treating it as joint in a prayer for a joint accounting. Chicago & A. R. Co. v. New York, L. E. & W. R. Co. (C. C. 1885) 24 Fed. 516.

The contracts and liability of the maker of a promissory note and of the several indorsers thereon are each separate and distinct from the others and their joinder as defendants in the same action, as permitted by a state statute, does not render the cause of action joint, or joint and several; but such an action is severable. Manufacturers' Commercial Co. v. Brown Alaska Co. (D. C. 1906) 148 Fed. 308. But an action under a state statute giving plaintiff the right to sue in one action all parties severally liable on the same obligation against maker of note and guarantor of payment by separate instrument is not removable. German-American Mercantile Bank v. Gas Service Corp. of America (D. C. 1915) 228 Fed. 827.

Plaintiffs, furnishing materials to contractors of a building, sued, claiming the privilege on the building, making the contractors, the owners of the building, and a surety company, which had executed a bond for faithful performance of the contract, defendants. The complaint charged that the owners of the building had become personally liable by not having required the contractors to furnish a bond to secure the payment of workmen and materialmen. The surety was a party on the ground that the contractors, having defaulted, had assigned the contract to the company with all its rights and all the materials belonging to them. The plaintiff was a Missouri corporation, the contractors were citizens of Texas, the surety company was a citizen of Maryland, and the owner of the building was a Louisiana corporation. Held, that an application by the contractors and the surety company to have the case removed to the federal court was properly denied, the action being joint and several, arising ex contractu so as not to present a separable controversy between plaintiffs and petitioners for removal. Union Iron & Foundry Co. v. Sonnefield & Emmins (1904) 37 So. 20, 113 La. 436.

An action against three railroads for breach of contract entered into by them jointly is not transferable to a federal court; one of the defendants being a citizen of the state where the action was brought. O'Kelly v. Richmond & D. R. Co. (1883) 89 N. C. 58.

Plaintiff, in his complaint for breach of contract, stated a cause of action against one resident and two nonresident defendants, disclosing a joint liability and defeating a removal of the

cause, where he set up a joint agreement with defendants, whereby the nonresident defendants agreed to furnish the money for a joint venture, the resident defendant was to pass upon the titles to land purchased, and plaintiff was to give his service in making purchases, it being intended that the mutual contributions to the venture should result in the common benefit of all the parties, and the promises being mutual, and where it is alleged that defendants and each of them refused to carry out the agreement, and that one of the nonresidents notified him to discontinue work under the contract, and that defendants would not further comply with it. Davis v. Rexford (N. C. 1907) 59 S. E. 1002.

162. Torts.—An action against defendants jointly for a tort is not severable for the purpose of removal, although judgment may be rendered against part of them only. Plaintiff having elected to proceed against all jointly, defendants are not permitted to object. Pirie v. Tvedt (1885) 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; Core v. Vinal (1886) 117 U. S. 347, 6 Sup. Ct. 767, 29 L. Ed. 912; Sloane v. Anderson (1886) 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899; Southworth v. Reid (C. C. 1888) 36 Fed. 451; Tuedt v. Carson (C. C. 1882) 13 Fed. 353, 4 McCrary, 426; Kaitel v. Wylie (C. C. 1889) 38 Fed. 865; Dow v. Bradstreet Co. (C. C. 1891) 46 Fed. 824; O'Harrow v. Henderson (C. C. 1892) 52 Fed. 769; Arrowsmith v. Nashville & D. R. Co. (C. C. 1893) 57 Fed. 165, 168; Heffelfinger v. Choctaw, O. & G. R. Co. (C. C. 1905) 140 Fed. 75; Ex parte Andrews (1867) 40 Ala. 639; Western Union Tel. Co. v. Griffith (1898) 30 S. E. 420, 104 Ga. 56; Central Union Telephone Co. v. Riggs (Ind. App. 1910) 91 N. E. 834. CONTRA, see Clark v. Chicago, M. & St. P. Ry. Co. (C. C. 1882) 11 Fed. 355, 3 McCrary, 591; Kerling v. Cotzhausen (C. C. 1883) 16 Fed. 705, 11 Biss. 582.

A plaintiff may sue tort-feasors jointly or severally, and, if he elects to sue them jointly, he has the right to have the case tried as for a joint tort, and no separable controversy is presented. Blunt v. Southern Ry. Co. (C. C. 1907) 155 Fed. 499; Foster v. Coos Bay Gas & Electric Co. (C. C. 1911) 185 Fed. 979; Bradshaw v. Bowden (D. C. 1914) 226 Fed. 323; Western Union Tel. Co. v. Griffith (1898) 30 S. E. 420, 104 Ga. 56; White v. Southern Ry. Co. (N. C. 1907) 59 S. E. 1042.

But see Boyd v. Gill (C. C. 1883) 19 Fed. 145, 21 Blatchf. 548, holding that a cause of action against several trustees for the fraudulent misappropriation of trust funds, being ex delicto, and involving, therefore, no right of contribution between the defendants, may in equity, as well as at law, be pursued either jointly or severally; and a bill in equity founded upon such a claim, and demanding a joint and several accounting by the trustees, involves such a separate controversy with each defendant that if one of the defendants is a nonresident the cause is removable.

An action in which the petition charges concurrent acts of negligence against each of two defendants does not present a separable controversy. Hoye v. Great Northern Ry. Co. (C. C. 1903) 120 Fed. 712; Weaver v. Northern Pac. Ry. Co. (C. C. 1903) 125 Fed. 155; Goede v. City of Colorado Springs (D. C. 1912) 200 Fed. 99. But, if there be also a distinct charge of negligence against the nonresident alone, sufficient in and of itself to give rise to a cause of action, the case is one involving a separable controversy between citizens of different states, and therefore removable to a federal court. McIntyre v. Southern Ry. Co. (C. C. 1904) 131 Fed. 985; Southern Ry. Co. v. Edwards (1902) 42 S. E. 375, 115 Ga. 1022.

When the complaint shows, as the sole cause of action, the wrongful seizure of the property of the plaintiff by the united efforts of all the defendants acting in common, such defendants being citizens, some of the state of plaintiff and some of other states, the cause may not be removed on the ground that the action is severable. Sloane v. Anderson (1886) 6 Sup. Ct. 730, 732, 117 U. S. 275, 29 L. Ed. 899.

An action to recover damages for a libel alleged to have been written and published by certain of the defendants, acting as agents of their co-defendant, contains no separable controversy which will enable such co-defendant to remove the case. Creagh v. Equitable Life Assur. Soc. (C. C. 1898) 88 Fed. 1.

An action against a number of defendants to recover damages for assault and false imprisonment, charged in the complaint to have been committed by certain of the defendants at the instigation of another defendant, through her agent, is one to enforce a joint liability for the tort, and is not removable by the last-named defendant, on the ground that as to her it involves a separable controversy. Ward v. Franklin (C. C. 1901) 110 Fed. 794.

Where in an action for injuries a joint liability was alleged against a railroad company and receivers thereof, who had been appointed by the United States court, and the citizenship of the railroad company was the same as that of the plaintiff, there was no separable controversy, and the receivers were not entitled to remove the cause to the federal courts, either alone or with the railway company. Rupp v. Wheeling & L. E. R. Co. (1903) 121 Fed. 825, 58 C. C. A. 161.

A complaint in an action by an employé of a railroad company against such company and others to recover for

a personal injury, which alleges that such injury was caused by the negligence of defendant company in failing to maintain its tracks and cars in a safe condition, and to the negligent operation of a car by all of the defendants, without showing what, if any, relation existed between defendants, states a cause of action for a joint tort, which is not separable. Fogarty v. Southern Pac. Co. (C. C. 1903) 123 Fed. 973.

In a suit to enjoin the destruction of a water privilege by diverting water from a stream, the complainant may properly join as defendants the persons who are undertaking such diversion, and one with whom they have contracted to do the work, and ask for a common injunction against all, and in such case there is no separable controversy. McMillan v. Noyes (C. C. 1906) 146 Fed. 926.

Plaintiff alleged the death of her decedent while working in the mill of defendant box company, a foreign corporation, owing to the latter's failure to provide a reasonably safe place for decedent to work, in that such company was required, but failed, to provide a guarded platform over its shaving pit, where decedent was required to go to open the pipes leading into it, and that while performing such work, and using a defective stick provided by defendant, deceased fell from the platform by reason of its unguarded condition, and lost his life. The petition alleged, also, that another defendant, a resident of the same state as plaintiff, was negligent in failing to inspect the place and appliances, and discover and report any defects found therein to defendant company. Held, that defendants were not jointly liable, but that there was a separable controversy between plaintiff and the box company, which was removable to the federal court. Marach v. Columbia Box Co. (C. C. 1910) 179 Fed. 412.

A nonresident defendant, sued together with several resident defendants for trespass on land, may have the cause removed, so far as he is concerned, to the United States circuit court, leaving the trial to proceed in the state court against the other defendants. Simmons v. Taylor (1880) 83 N. C. 148, 35 Am. Rep. 56.

A suit to abate a nuisance caused by the pollution of a stream by the operation of mills in mining owned and operated independently by several persons does not, when brought against them, embrace separable controversies. State ex rel. Federal Lead Co. v. Dearing (Mo. 1912) 148 S. W. 618.

163. Joint operation of railroad.—Where plaintiff alleged that defendant railroad company and defendant palace car company were engaged in running a passenger train, on which plaintiff was accepted as a passenger; that the palace car was operated and controlled jointly by both defendants, and that the servants of the car company were also the servants of the railroad company; and that these servants so operated the train and palace car in which plaintiff was riding, that, by the violent movement of the cars, and the negligence of the employés of the defendant in putting plaintiff in a place of danger, he was thrown from the train and injured, the complaint alleged a joint cause of action against both defendants, and the palace car company was not entitled to remove the cause. Dougherty v. Yazoo & M. V. R. Co. (1903) 122 Fed. 205, 58 C. C. A. 651.

A petition, alleging that a resident defendant, a sawmill corporation, was using by permission the tracks of a railroad defendant to haul logs, that the railroad ran through a certain city, and that it was the duty of both defendants in approaching the crossings of a street to signal, that plaintiff was driving at such crossing and by attempting to cross was damaged by the negligence of both defendants in failing to signal or ring the bell of the engine, and that the drawgates were not down, and it was negligence in both defendants not to lower the drawgates, and that it was the custom and duty of defendants to cause the gates to be lowered, states a cause of action against both defendants, so that the nonresident defendants could not remove the case as a separable controversy. Atlantic Coast Line R. Co. v. Bryant (1910) 67 S. E. 1049, 7 Ga. App. 703; Id., 67 S. E. 1051, 7 Ga. App. 707.

A complaint in an action against a foreign railway corporation and a domestic corporation and individuals, citizens and residents of Kentucky, brought by a resident and citizen of the state, which alleges that the foreign corporation was the owner of a railroad and its equipments, that the domestic corporation and the individuals were its agents to keep the same in safe condition, and had undertaken to perform such duty, and had assured plaintiff, an engineer, that they had put an engine in good repair, when they knew that it was out of repair, thereby causing injury to plaintiff, states a cause of action jointly against the foreign and domestic corporations and the individuals, and the foreign corporation cannot remove the cause to the federal courts on the ground of diversity of citizenship. Ayles v. Southern Ry. Co. (1905) 88 S. W. 1048, 121 Ky. 59, 28 Ky. Law Rep. 29.

Plaintiff, a brakeman in the employ of defendant G. Railroad Company, alleged that it had an agreement with defendant I. Railroad Company for the use of the latter's switches and yard, subject to the control of the latter company's yardmaster; that, on the occasion of plaintiff's injury, his conductor and such yardmaster negligently ordered the caboose of plaintiff's train

to be placed on a specified track; and that, in so placing it, it encountered the corner of a freight car belonging to the I. Company, negligently protruding over the way, but invisible to plaintiff, causing a collision, in which plaintiff was hurt. Held, that such declaration did not allege a separable controversy between plaintiff and the defendant companies. Illinois Cent. R. Co. v. Harris (1905) 38 South. 225, 85 Miss. 15.

An action by a widow, under Rev. St. Mo. 1899, § 2864 (Ann. St. 1906, p. 1037), to recover the statutory penalty for the death of her husband, against a foreign railroad corporation and against a domestic terminal railroad company, in which the complaint alleged that a train belonging to the foreign corporation, while running over the tracks of the domestic corporation, ran over decedent, the train having been running at an unlawful rate of speed, and the operatives having failed to give the warning signals required by law, and that, under the traffic agreement between the corporations, the operatives of the train were, though in the employ of the foreign corporation, subject to the orders and directions of the domestic corporation, was not separable. Johnson v. St. Joseph Terminal Ry. Co. (1907) 101 S. W. 641, 203 Mo. 381.

164. —— Lessor and lessee.—A case in which plaintiff has elected, in conformity with the settled law of the state, to sue jointly in tort a nonresident lessee railway company, exclusively operating, controlling, and managing the road, and its resident corporate lessor, upon a cause of action arising in the state, out of the negligent operation of the road, cannot be removed as presenting a separable controversy between the plaintiff and the lessee, although the lessor may have been joined for the purpose of excluding the federal jurisdiction. Chicago, B. & Q. Ry. Co. v. Willard (1911) 31 Sup. Ct. 460, 220 U. S. 413, 55 L. Ed. 521, affirming judgment Willard v. Chicago, B. & Q. R. Co. (1908) 165 Fed. 181, 91 C. C. A. 215; Person v. Illinois Cent. R. Co. (C. C. 1902) 118 Fed. 342; Fleming v. Louisiana & M. R. R. Co. (Mo. 1914) 172 S. W. 355. But see the following cases, which held that such an action was separable. Spangler v. Atchison, T. & S. F. R. Co. (C. C. 1890) 42 Fed. 305; Kelly v. Chicago & A. Ry. Co. (C. C. 1903) 122 Fed. 286; Williard v. Spartanburg, U. & C. R. Co. (C. C. 1903) 124 Fed. 796; Yeates v. Illinois Cent. R. Co. (C. C. 1905) 137 Fed. 943; Curtis v. Cleveland, C., C. & St. L. Ry. Co. (C. C. 1905) 140 Fed. 777.

Under Rev. St. Ohio, § 3305. declaring that, notwithstanding an Ohio corporation leases its railroad, it shall remain liable as if it operated the road, and "both the lessor and lessee shall be jointly liable" to any person for negligence, and "may be jointly sued" in the state courts, an action by a citizen of the state, brought in the state courts, for a joint tort, against the lessor of a railroad, a state corporation, and the receivers of the lessee, citizens of another state, was not removable. Central Ohio R. Co. v. Mahoney (1902) 114 Fed. 732, 52 C. C. A. 364.

165. —— Master and servant.—An action in tort against two defendants to charge them with liability on the ground of the negligence of servants employed by them jointly, does not involve a separable controversy. Marrs v. Felton (C. C. 1900) 102 Fed. 775.

An action in tort, brought in a state court against a nonresident employer and a resident employé whose concurrent negligence is alleged to have caused the injury complained of, does not present a separable controversy for the purpose of removal to a federal court, though plaintiff might have sued defendants separately. Chesapeake & O. Ry. Co. v. Dixon (1900) 21 S. Ct. 67, 179 U. S. 131, 45 L. Ed. 121 (affirming judgment Same v. Dixon's Adm'x [1898] 47 S. W. 615, 104 Ky. 608, 20 Ky. Law Rep. 792); Chicago, R. I. & P. R. Co. v. Dowell (1913) 33 Sup. Ct. 684, 229 U. S. 102, 57 L. Ed. 1090 (affirming judgment Dowell v. Chicago, R. I. & P. Ry. Co. [1910] 112 P. 136, 83 Kan. 562); Roberts v. Shelby Steel Tube Co. (1904) 131 Fed. 729, 65 C. C. A. 589; Davenport v. Southern Ry. Co. (1905) 135 Fed. 960, 68 C. C. A. 444 (reversing judgment [C. C. 1903] 124 Fed. 983); Riser v. Southern Ry. Co. (C. C. 1902) 116 Fed. 215; Galeotti v. Diamond Match Co. (C. C. 1910) 178 Fed. 127; Lewis v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1910) 192 Fed. 654; Evans v. Sioux City Service Co. (D. C. 1913) 206 Fed. 841; Southern Ry. Co. v. Miller (1907) 57 S. E. 1090, 1 Ga. App. 616; Louisville & N. R. Co. v. Roberts (1911) 71 S. E. 425, 136 Ga. 270; Chesapeake & O. Ry. Co. v. Banks' Adm'r (1911) 137 S. W. 1066, 144 Ky. 137; State ex rel. Iba v. Mosman (Mo. 1910) 133 S. W. 38, 231 Mo. 474; Rea v. Standard Mirror Co. (N. C. 1911) 73 S. E. 116; Smith v. Harris Granite Quarries Co. (1913) 80 S. E. 388, 164 N. C. 338; Louisville & N. R. Co. v. Vincent (1906) 95 S. W. 179, 116 Tenn. 317; W. P. Carmichael Co. v. Miller (Tex. Civ. App. 1915) 178 S. W. 976.

It is immaterial that plaintiff joined the resident defendants for the purpose of avoiding federal jurisdiction. Louisville & N. R. Co. v. Vincent (1906) 95 S. W. 179, 116 Tenn. 317; Louisville & N. R. Co. v. Gollihur (1907) 82 N. E. 492, 40 Ind. App. 480. Or that another servant participating in the alleged negligence is not a party. Vanzant v. Southern Ry. Co. (1910) 69 S. E. 721.

And where the employer and employé are joined in good faith, a separable controversy is not presented, though no concurrent act of negligence is expressly charged. Trivette v. Chesapeake & O. R. Co. (1914) 212 Fed. 641, 129 C. C. A. 177; Welch v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1908) 177 Fed. 760. But see Helms v. Northern Pac. Ry. Co. (C. C. 1903) 120 Fed. 389.

An action in tort in which plaintiff has, in good faith, exercised his right under the state laws to proceed jointly against an employer and its employé whose negligence caused the accident cannot be converted into a separable controversy for the purpose of removal. Cincinnati, N. O. & T. P. Ry. Co. v. Bohon (1906) 26 S. Ct. 166, 200 U. S. 221, 50 L. Ed. 448, affirming judgment Same v. Cook's Adm'r (Ky. 1904) 83 S. W. 580; Southern Ry. Co. v. Miller (1910) 30 S. Ct. 450, 217 U. S. 209, 54 L. Ed. 732, affirming judgment (1908) 59 S. E. 1115, 3 Ga. App. 410; Buchanan v. W. M. Ritter Lumber Co. (1913) 210 Fed. 144, 126 C. C. A. 658; Charman v. Lake Erie & W. R. Co. (C. C. 1900) 105 Fed. 449; Armstrong v. Kansas City Southern Ry. Co. (C. C. 1911) 192 Fed. 608; Lanning v. Chicago Great Western Ry. Co. (1906) 94 S. W. 491, 196 Mo. 647; Whiteaker v. Chicago, R. I. & P. R. Co. (1913) 160 S. W. 1009, 252 Mo. 438. But see Beuttel v. Chicago, M. & St. P. Ry. Co. (C. C. 1885) 26 Fed. 50; Sessions v. Southern Pac. Co. (C. C. 1904) 134 Fed. 313; Atlantic Coast Line R. Co. v. Bailey (C. C. 1907) 151 Fed. 891.

If the joinder is in good faith the controversy is not severable though the joinder may have been improper. Alabama Great Southern Ry. Co. v. Thompson (1906) 26 S. Ct. 161, 200 U. S. 206, 50 L. Ed. 441, 4 Ann. Cas. 1147; Stevenson v. Illinois Cent. R. Co. (C. C. 1911) 192 Fed. 956.

But, where the state law does not permit the master and servant to be sued jointly for the latter's negligence, a complaint against both states a separable controversy. Veariel v. United Engineering & Foundry Co. (D. C. 1912) 197 Fed. 877.

Where, in an action for wrongful death of plaintiff's intestate, the complaint joined the coemployé by whose alleged negligence plaintiff's intestate was killed, whose citizenship was the same as that of plaintiff, with decedent's employer, which was a foreign corporation, and alleged that such corporation was negligent in supplying an electric crane which was not equipped with good and sufficient brakes or other appliances by which it might be controlled, in consequence of which an iron beam being carried by the crane came in contact with other beams on the shop floor, causing them to fall on deceased, and that the corporation was also negligent in causing the crane to be operated by a young, inexperienced, and unskillful boy who was alleged to have operated the crane so negligently as to permit the beam being carried to swing against the other beams and cause them to fall, etc., the complaint alleged a joint, and not a separable, controversy against such defendants. American Bridge Co. v. Hunt (1904) 130 Fed. 302, 64 C. C. A. 548.

An action against a railroad company and certain of its servants to recover for the death of a person, alleged to have been caused by the reckless, wanton, willful, and malicious acts of such servants while engaged in the duties of their employment, where the complaint alleges no facts to charge the company with participation in such acts of its servants, involves a separable controversy; the causes of action and the measure of damages recoverable against the company and its codefendants being different, and the cause is removable by the company, where the requisite diversity of citizenship exists. Davenport v. Southern Ry. Co. (C. C. 1903) 124 Fed. 983, reversed (1905) 135 Fed. 960, 68 C. C. A. 444.

Where a nonresident railroad company was charged with negligence in failing to provide a sufficient approach to a depot and platform, and defendant resident engineer was charged with negligence in operating train which struck decedent, but such acts were not charged to have concurred to cause the injury, the railroad company's negligence presented a separable controversy, removable to the federal courts. Trivette v. Chesapeake & O. R. Co. (1914) 212 Fed. 641, 129 C. C. A. 177.

An action for damages against a railroad company incorporated by another state, and one of its section foremen, who is a citizen of the same state with plaintiff, charging them jointly with setting out a fire on the railroad right of way to clear it of dry grass and weeds, and negligently permitting it to spread to plaintiff's premises, does not disclose a separable controversy. Deere, Wells & Co. v. Chicago, M. & St. P. Ry. Co. (C. C. 1898) 85 Fed. 876.

There can be no joint liability of a railroad company and its employés for an injury alleged to have resulted from the failure of the company and of such employés to perform a duty imposed on the company alone by statute; and in an action to recover for such injury, commenced in a state court against both the company and such employés, the controversy is separable as to the defendants, and the cause may be removed by the railroad company, where it is a citizen of another state, and the other requisites for removal exist. Prince v. Illinois Cent. R. Co. (C. C. 1899) 98 Fed. 1.

Where, in an action for injuries to a passenger against the railroad company and the conductor of the train, the plaintiff and the conductor were citizens of the same state, but the citizenship

of the railroad was diverse, and the complaint charged the railroad company with negligence in accepting and carrying an insane person as a passenger without effective protection, and charged the conductor with negligence in failing to restrain such person so as to prevent assaults which he committed on plaintiff, the negligence of both defendants was concurrent, and the complaint did not present a separable controversy. Dougherty v. Atchison, T. & S. F. R. Co. (C. C. 1903) 126 Fed. 239.

A complaint against a nonresident railway company and certain of its employés in charge of the train by which deceased was killed, who were of the same citizenship as plaintiff, alleged that, in violation of the rules of the railway company, "defendants negligently, willfully, and maliciously, by their joint, concurrent acts," gave certain box cars a high, unusual, and dangerous rate of speed, uncoupled them from the engine, turned a switch, and permitted them to roll down a steep grade over a crossing, by which plaintiff's intestate was knocked down and killed. The complaint also charged defendants jointly with negligence in maintaining such steep grade and closely adjoining switch at such place, in not providing a switchman at the crossing, in not providing a brakeman in charge of the cars, and in that the railway company's employés were incompetent, and that they were retained in its employ with knowledge that they were accustomed to violate its rules. Held, that such acts of negligence were not joint, but that the complaint alleged a separable controversy, entitling the railway company to remove the cause to the federal courts. McIntyre v. Southern Ry. Co. (C. C. 1904) 131 Fed. 985.

Where the petition in an action against a railroad company and an engineer of one of its trains for negligently causing the death of plaintiff's intestate is based on the Iowa statute giving a right of action for wrongful death, which has never been construed by the courts of the state to create a joint liability in such cases, and alleges acts of negligence on the part of the railroad company with which its codefendant had no concern, and which are essential to make out a cause of action under the state law, a separable controversy is disclosed, and the cause is removable on petition of the railroad company showing diversity of citizenship, and alleging that the joinder of defendants was for the fraudulent purpose of preventing a removal. Henry v. Illinois Cent. R. Co. (C. C. 1903) 132 Fed. 715.

An action to recover damages for the negligent injury of a person while a passenger on a street car is one ex delicto, and not on the contract of carriage, and the plaintiff may join as defendants the street railroad company and an employé, where their joint negligence is alleged to have been the cause of the injury; and in such case the cause of action is not separable. Knuth v. Butte Electric Ry. Co. (C. C. 1906) 148 Fed. 73.

In an action for injuries to a servant, plaintiff sued defendant company, a nonresident, and its resident superintendent. The corporation's liability, if any, was based on its negligence in providing a defective appliance, or because of the superintendent's negligence. Held that the liability was not joint, and that the cause was removable. Evansberg v. Insurance Stove, Range & Foundry Co. (C. C. 1908) 168 Fed. 1001.

Under the rule of decision in Georgia that, while an agent is not liable to third persons for mere nonfeasance, he is so liable for misfeasance, and that misfeasance may involve to some extent the idea of not doing that which he has undertaken to do for his principal, whether or not a declaration in an action by an employé against railroad companies to recover for an injury resulting from the defective condition of a car, which also joins as defendants the car inspectors of the companies on an allegation that it was their duty to inspect all cars, but that they failed to inspect such car, states a joint cause of action against the companies and such inspectors, which would prevent a removal of the cause by the companies, is a question of such doubt that the federal court should not take jurisdiction on removal. Morris v. Louisville & N. R. Co. (C. C. 1910) 175 Fed. 491.

A declaration which alleged several joint and concurrent acts of negligence between the railroad company, a nonresident corporation, and the conductor and engineer, joined as codefendants, and then charged that the engineer was incompetent, stating several acts of negligent operation on his part, and charging that the railroad company employed him, knowing that he was incompetent, raised a separable controversy between plaintiff and the railroad company, authorizing a removal of the cause. Adderson v. Southern Ry. Co. (C. C. 1910) 177 Fed. 571.

Plaintiff, a railroad bridge hand, was injured while at work on one of its bridges by an alleged defective scaffold on which he was directed to work. He joined the railroad company, a citizen and resident of another state, and his foreman, who was a resident and citizen of the same state as plaintiff, in which an action for his injuries was brought, alleging that while he was absent from work the foreman had placed a plank on the side of the bridge below the tracks to be used as a scaffold without nailing it to the sills of the bridge, and that after his return he

was directed by the foreman to tie a rope to the plank so that it might be lifted to the trestle, and while attempting to do so the plank tilted over the end of the sills, throwing plaintiff to the ground below. Held, that the complaint stated a cause of action against the railroad company for failing to furnish a safe place and an action against the foreman for misfeasance, and that the cause was, therefore, not removable. Taylor v. Southern Ry. Co. (C. C. 1910) 178 Fed. 380.

Plaintiff corporation instituted suit against defendant railroad company, a noncitizen, and against the railroad company's engineer, a citizen of the same state as plaintiff, alleging the burning of plaintiff's warehouse by the joint negligence of the railroad company and the engineer, and that the fire was caused by the engineer's operation of an engine equipped with an improper spark arrester, also alleging that the engineer was negligent in handling the engine at the time and place alleged, so as to cause a great and unnecessary amount of sparks to be emitted. Held, that the engineer was not a necessary party to the determination of the controversy between plaintiff and the railroad company, the substantial defendant, since, if the locomotive had been equipped with a proper spark arrester, no conduct of the engineer could have caused the emission of sufficient sparks to cause a fire; and hence the controversy between plaintiff and the railroad company was severable. Bainbridge Grocery Co. v. Atlantic Coast Line R. Co. (C. C. 1910) 182 Fed. 276.

Plaintiff sued defendant corporation, a nonresident, and joined S., a resident of the state, in an action for the death of plaintiff's son, alleging that the corporation unlawfully employed deceased to operate an elevator and that the elevator was not properly constructed and guarded, and also alleging that defendant S. was foreman of defendant corporation and had ordered deceased to operate the elevator. Held that, in the absence of an allegation that S. acted by the direction or in the presence of a superior representing the corporation, the complaint did not allege a joint cause of action or liability so as to deprive the corporation of its right to remove. Shaver v. Pacific Coast Condensed Milk Co. (C. C. 1911) 185 Fed. 316.

A declaration against a railroad company and a conductor and operator, employed by the company, for injury to a passenger, alleging negligence of the company in running the train at a high rate of speed without proper lookout, and charging defendant employés with negligence in placing freight cars on the main line, where they collided with the passenger train, shows a separable controversy, entitling the company to remove the cause. Cayce v. Southern Ry. Co. (D. C. 1912) 195 Fed. 786.

Where a nonresident mining corporation and its local foreman in charge were joined as defendants in an action by a miner for personal injuries, and the complaint alleged that the foreman knew of the unsafe condition of the stope where plaintiff was injured, and negligently permitted such condition to exist, and also charged that the stope was by negligence in mining rendered unsafe, and was negligently maintained in such condition under the direction of the corporation's superintending officers and with its knowledge and consent, the complaint charged concurrent acts of negligence against defendants, and did not present a separable controversy, so as to entitle the corporation to remove the cause to the federal court. Stratton Cripple Creek Mining & Development Co. v. Ellison (1908) 94 Pac. 303, 42 Colo. 498.

In an action against a foreign mining company and the resident shift boss and tram boss, where the complaint shows a cause of action against the company for failure to properly timber the mine, allegations that the plaintiff was very inexperienced and called the attention of the shift boss to the condition of the mine, and asked if the place was safe to work in, and was assured that it was safe, and the shift boss positively ordered him to continue to work there, and plaintiff, relying on the greater experience of the shift boss, continued to work, and was relying on this assurance when he was injured, if sufficient to state a cause of action against the shift boss, does not show, as against a petition to remove the cause to the federal court, a joint liability of the mining company and the shift boss, in the absence of allegations that he had any authority by virtue of his employment to determine whether the place where plaintiff worked was safe, or that it was his duty to keep it in that condition. Stratton's Independence v. Sterrett (Colo. 1911) 117 Pac. 351.

Where local citizens, employed as day-laborers by a foreign railroad company, commit a trespass under its direction, and are joined as defendants with the company in an action for the trespass, there is not a separable action against the company. Illinois Cent. R. Co. v. Le Blanc (1897) 21 So. 748, 74 Miss. 626.

A petition against a railroad company and its conductor for negligence in leaving a truck close to the track and in signaling the train to start while plaintiff's decedent was attempting to board it, and then trying to pull him off, whereby he was knocked under the train and killed, states a joint cause of action for death under Rev. St. Mo. 1909, §§ 2865, 2866, not a separable action against the company for the penalty imposed on a passenger carrier by Rev. St. Mo. 1909, § 2864. State ex

rel. Iba v. Mosman (1910) 133 S. W. 38, 231 Mo. 474.

166. Failure to join or serve process on parties.—The fact that plaintiff sues less than all of several tort-feasors does not render the controversy separable. Fox v. Mackay (C. C. 1894) 60 Fed. 4; Vanzant v. Southern Ry. Co. (Ga. 1910) 69 S. E. 721.

That the resident defendant in a joint suit is not served does not entitle the nonresident defendant to removal. Central Ohio R. Co. v. Mahoney (1902) 114 Fed. 732, 52 C. C. A. 364; Patchin v. Hunter (C. C. 1889) 38 Fed. 51; Ames v. Chicago, S. F. & C. Ry. Co. (C. C. 1889) 39 Fed. 881; Armstrong v. Kansas City Southern Ry. Co. (C. C. 1911) 192 Fed. 608.

Nor is the jurisdiction of the federal court in such case aided by R. S. § 737, post, § 1032. Patchin v. Hunter (C. C. 1889) 38 Fed. 51.

In an action against a firm in Louisiana, service was had on one member, which in that state was sufficient to make a judgment rendered in the action binding on him personally, and on all the assets of the firm and of the individual partners in the jurisdiction. Subsequently, but after the right of removal was lost by delay, another member of the firm was served. Held, on a petition for removal, that the cause of action was joint, and there was no separable controversy, and that the petitioner partook of the disability incurred by his partner. Fletcher v. Hamlet (1886) 116 U. S. 408, 6 Sup. Ct. 426, 29 L. Ed. 679, affirming order Hamlet v. Fletcher (C. C. 1885) 24 Fed. 305.

Plaintiff, a resident of New York, sued in a court of that state three defendants, of whom one was also a resident of the state, while the other two were residents of other states. The action was on a joint indebtedness, and on service of summons on the resident defendant alone plaintiff obtained judgment against all, and afterwards served the other defendants with summons to show cause why they should not be bound by the judgment. Held, that the defendants so served were not entitled to have the cause removed into a federal court on the ground of their residence; such proceeding being not a new action against the nonresidents only, but a further proceeding in the old action. Fairchild v. Durand (N. Y. 1859) 8 Abb. Prac. 305.

A suit against a nonresident and a resident becomes a separate controversy as to the nonresident and removable to the federal court on plaintiff failing to summon or procure appearance by the fellow servant and announcing ready to proceed against the nonresident defendant alone. Murphy v. Stone & Webster Engineering Corporation (Mont. 1911) 119 Pac. 717.

Plaintiff sued two defendants on a joint and several liability, one residing in the same state, and the other a nonresident. No process was served on the resident defendant, and, the cause being called for trial, the nonresident defendant appeared, and moved that plaintiff be required to elect whether she would dismiss as to the resident defendant or continue the cause for service. She declined to do either, but requested that the cause proceed to trial as to the nonresident defendant; whereupon such defendant presented its petition and bond for removal to the federal court. Held, that plaintiff's election to proceed to trial against the nonresident defendant alone operated as a severance of the controversy, and entitled the nonresident defendant to remove the cause. Berry v. St. Louis & S. F. R. Co. (C. C. 1902) 118 Fed. 911.

Plaintiff's announcement that he was ready for trial in an action against two defendants one of whom had not then been served, which was known to the other defendant, amounted to notice to the defendant served that plaintiff would proceed against it alone, and was a severance of the action as to such defendant, rendering the defendant served the sole defendant within the statutes relating to removal to the federal courts of controversies wholly between citizens of different states. Golden v. Northern Pac. Ry. Co. (1909) 104 Pac. 549, 39 Mont. 435.

167. Failure of one or more coparties to defend.—The fact that one of several defendants, jointly liable on the same cause of action, is in default, does not make the controversy separable, as between the other parties, for the purpose of removal. Putnam v. Ingraham (1885) 114 U. S. 57, 5 Sup. Ct. 746, 29 L. Ed. 65; Wilson v. Oswego Tp. (1894) 14 Sup. Ct. 259, 151 U. S. 56, 38 L. Ed. 70; Hax v. Caspar (C. C. 1887) 31 Fed. 499; Faison v. Hardy (1894) 114 N. C. 429, 19 S. E. 701.

Nor does a disclaimer of title to the land in controversy give a right of removal to the contesting defendant, who is a citizen of a state other than that of the plaintiffs. Hax v. Caspar (C. C. 1887) 31 Fed. 499.

(C) Separate liability or defense

168. Liabilities on different grounds.—Where a complaint seeks to establish an indebtedness against a corporation defendant alleged to be insolvent, and also asks judgment therefor against a second defendant on the ground that it had assumed all the indebtedness of the first corporation, there is a separable controversy shown between plaintiff and such second defendant. Mecke v. Valleytown Mineral Co. (1899) 93 Fed. 697, 35 C. C. A. 151; Id. (C. C. 1898) 89 Fed. 209.

In a proceeding to foreclose a mortgage, a defendant, who is alleged to be personally liable for the deficit, cannot

remove the cause from the state court on the ground that the controversy as to his personal liability is a separable one. Lewis v. Weidenfeld (C. C. 1896) 76 Fed. 145.

The right of a sole defendant sued in a court of another state by a citizen of such state on a cause of action existing in favor of the plaintiff to remove the cause is not defeated because the plaintiff, as permitted by a state statute, has joined in his complaint a separate cause of action held by him as assignee of a third person, whose citizenship does not appear, and of which the federal court would not have jurisdiction. Sharkey v. Port Blakely Mill Co. (C. C. 1899) 92 Fed. 425.

Where the declaration in an action in a state court against two defendants to recover damages for a personal injury alleges a separate and distinct cause of action against each defendant, based upon separate contracts with each, the facts specifically alleged against one constituting no cause of action against the other, the cause, as against one defendant which is a citizen of another state, is removable. Batey v. Nashville, C. & St. L. Ry. (C. C. 1898) 95 Fed. 368.

In a suit to cancel a note, where one defendant is alleged to have obtained it by fraud, and there is no allegation that his indorsee, who is another defendant, was cognizant of the fraud, the controversies are separable so as to give the second defendant the right of removal to a federal court. New York Construction Co. v. Simon (C. C. 1891) 53 Fed. 1.

Where plaintiff, an alien, sued defendant guaranty company, a nonresident corporation, on a fidelity bond, in which the only obligation of the principal was to hold the guaranty company harmless from any liability on the bond, and in the same action plaintiff sought to hold the principal liable for the embezzlement for which action was brought on the bond, the controversy between plaintiff and the guaranty company was separable from that between it and the principal on the bond, and removable to the federal courts, regardless of the citizenship of the principal, who was a resident of the state where the action was brought. Iowa Lillooet Gold Min. Co. v. Bliss (C. C. 1906) 144 Fed. 446.

A cause of action ex delicto for death, and against one subsequently assuming claims against the wrongdoer, was improperly joined because not arising from the same transaction and was separable. Trana v. Chicago, M. & P. S. Ry. Co. (D. C. 1915) 228 Fed. 824.

Where the petition, in an action against several carriers, alleged a breach by one carrier, a nonresident, of a parol contract, and averred facts showing a violation by the carriers of their common-law liability, the nonresident carrier was not entitled to a removal of the action to the federal court, on the ground that the controversy was separable. St. Louis, I. M. & S. Ry. Co. v. West Bros. (Tex. Civ. App. 1913) 159 S. W. 142.

A joint action in a state court against two defendants for a tort, which is governed as to the two defendants by different statutes, fixing different grounds of liability and admitting of different defenses, is separable. Jackson v. Chicago, R. I. & P. Ry. Co. (1910) 178 Fed. 432, 102 C. C. A. 159. But an action for personal injuries against a corporation and its employés for the latters' negligence is not removable by the company as a severable action, though its liability exists, if at all, by virtue of a statute, while the liability of the individual defendants rests on the common law. Painter v. Chicago, B. & Q. R. Co. (C. C. 1909) 177 Fed. 517; Dowell v. Chicago, R. I. & P. Ry. Co. (1910) 112 Pac. 136, 83 Kan. 562; Schwyhart v. Barrett (Mo. 1910) 130 S. W. 388.

A cause is removable as presenting a separable controversy where the petition stated two causes of action, one against two defendants jointly and the other against the removing defendant alone. Nichols v. Chesapeake & O. Ry. Co. (1912) 195 Fed. 913, 115 C. C. A. 601.

Under a state code providing for but one form of action, distinctions between actions in case and trespass do not determine the question whether a cause of action for death presents a separable controversy within the statutes relating to removal of causes to the federal court. Painter v. Chicago, B. & Q. R. Co. (C. C. 1909) 177 Fed. 517.

In an action against a railroad company, an engineer, and a yardmaster, for injuries to a switchman, where the complaint alleges negligence of the company in furnishing a defective engine, and of the other defendants in that they did not keep a proper lookout, separable causes of action are presented. Fergason v. Chicago, M. & St. P. Ry. Co. (C. C. 1894) 63 Fed. 177.

An action by a railroad employé against the company and a contractor who had allowed a part of his construction to project near the track, whereby plaintiff was injured, is severable, and therefore removable, where one of the defendants is a citizen of a different state. Hartshorn v. Atchison, T. & S. F. R. Co. (C. C. 1896) 77 Fed. 9.

A complaint in an action in a state court to recover for the death of plaintiff's intestate made two corporations defendants. It alleged that the first corporation was the owner of a building into which it invited the deceased, where he fell down an unguarded elevator shaft, of which he was given no warning, and was killed. It alleged that the second corporation had erected the building under a contract with the first which bound it to complete the same in a proper manner, and that it failed

to perform such contract, by negligently leaving the elevator shaft unguarded. Held, that the action involved a separable controversy as to each defendant, and was removable by one of the defendants which was a citizen of a different state from plaintiff. Coker v. Monaghan Mills (C. C. 1901) 110 Fed. 803.

Under the statutes of Montana, an action by insured under fire policies in which he was joined by nonresident insurers who were subrogated pro tanto to his rights to recover against a railroad through whose negligence the insured property was destroyed does not state a separable controversy on the theory of legal and equitable nature of action. Gaugler v. Chicago, M. & P. S. Ry. Co. (D. C. 1912) 197 Fed. 79.

A complaint for interrupting a long distance telephone conversation before the expiration of the time for which plaintiff had paid the nonresident defendant, and for abusive language by the employés of both defendants, states separable causes of action. Murray v. Southern Bell Telephone & Telegraph Co. (D. C. 1914) 210 Fed. 925.

169. Principal and subordinate or incidental controversies or issues.—In proceedings for the settlement of a partnership, where the principal issue is as to the existence of the relation, the other issues necessarily depend upon that, and it cannot be regarded as a separable controversy. Shainwald v. Lewis (1883) 108 U. S. 158, 2 Sup. Ct. 385, 27 L. Ed. 691, affirming order (D. C. 1880) 5 Fed. 510, 6 Sawy. 585.

In a bill for the partition of lands, having for its main object the assignment of several shares to tenants in common, and in which the determination of conflicting or controverted title is merely incidental, a dispute as to the title claimed in an undivided share is not such a separable controversy as would justify removal. Torrence v. Shedd (1892) 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528.

Where the relief sought against one of several defendants is merely incidental to the principal purpose of the suit, the fact that such incidental relief pertains to one only of the defendants does not make it a separable controversy so as to give such defendant the right of removal. MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co. (1902) 119 Fed. 96, 55 C. C. A. 648.

A railway company sued for negligently setting a fire had a separable controversy removable to the federal court, where the required diversity of citizenship existed, unaffected by the joinder as defendants of insurance companies, which raised no issue with the railway company, being present merely to claim by subrogation a share of any recovery. Ireton v. Pennsylvania Co. (1911) 185 Fed. 84, 107 C. C. A. 304.

It is immaterial whether the separable controversy is considered the main or principal one in the suit or not, or what other controversies or parties are incidentally or otherwise involved in it. Bybee v. Hawkett (C. C. 1880) 5 Fed. 1, 6 Sawy. 593; Langdon v. Fogg (C. C. 1883) 18 Fed. 5, 21 Blatchf. 392. But see Republic Fire Ins. Co. v. Keogh (N. Y. 1881) 23 Hun, 644.

Removal of a cause will not be sustained upon the ground that there is more than one controversy, because the complaint demands an "account of the moneys received by the defendants, or any of them, from operating a ferry without license," when the object of the suit was to obtain a perpetual injunction forbidding the defendants from operating such ferry without a license. The petition for an account is only an incident to the principal relief sought. City of New York v. New Jersey Steamboat Transp. Co. (C. C. 1885) 24 Fed. 817.

A prayer for the reformation of a mortgage deed, in a suit to foreclose the mortgage, is merely incidental to the main object of the complaint, viz., a foreclosure, and does not create a separable controversy, within the meaning of the act of 1875. Winchell v. Coney (C. C. 1886) 27 Fed. 482.

An action was brought in the district court of Kansas, by a bank, located in Kansas, claiming to be the assignee of a certain mortgage, against a corporation which was a citizen of Kansas, and also against a citizen of Ohio, and also against four other defendants, who were citizens of Kansas. It appeared from the pleadings that the only defendants who retained an interest in the suit were the defendant corporation and the nonresident defendant, whose interest consisted in the fact that he was a mortgagee of the defendant corporation, and also the assignee of the mortgages of several of his codefendants, and that, subsequently to the execution of these mortgages, he had purchased the entire property of the defendant corporation. Held, that the main controversy was between the plaintiff and the defendant corporation, and the controversy between the plaintiff and the nonresident defendant was but incidental to the main controversy, and therefore that the cause was not subject to removal. First Nat. Bank of Manhattan v. King Wrought Iron Bridge Co. (D. C. 1875) Fed. Cas. No. 4,803.

Where a petition for an accident at a crossing sought to recover on the ground that the engineer had failed to comply with the requirements of the blow-post law, and the averments as to the negligent location of a warehouse by the railroad near the crossing were matters of inducement, and not a ground of recovery, these allegations did not make a separable controversy between the railroad and the plaintiff. Southern Ry. Co. v. Grizzle (1906) 53

S. E. 244, 124 Ga. 735, 110 Am. St. Rep. 191.

The relief sought in a petition for the sale of a decedent's realty praying that the defendants be required to set up their several claims is merely incidental to the main purpose of the proceeding; and the fact that such incident relates alone to a nonresident holder of a mortgage against the estate does not separate that part from the rest of the controversy, so as to entitle him to a removal of the cause into the federal court. State of Connecticut v. Adams (1859) 9 Ohio Cir. Ct. R. 21, 6 O. C. D. 46.

In an action against a railway company to recover the value of certain cotton destroyed by fire while in the possession of a storage company, and for which defendant had issued to the owners bills of lading, certain insurance companies who had insured the cotton for defendant were made defendants. Held, that the court below properly refused the petition of the insurance companies for a removal of the cause as a separable action to the federal court, as the real controversy was between plaintiffs and the railway company, and as the liability of the insurance companies was incidental to that of the railway company. Insurance Co. of North America v. Delaware Mut. Safety Ins. Co. (1892) 91 Tenn. (7 Pickle) 537, 19 S. W. 755.

170. Separate interests or claims in subject-matter.—An assignee brought suit in the state court to disincumber a fund in his possession of alleged liens, and each defendant set up a separate defense, and asked payment out of the fund. The trial court decided against the assignee, who appealed; but, pending the appeal, paid all the defendants but one, but did not dismiss them from his suit. The appellate court reversed the judgment of the lower court, and remanded the case for further proceedings. Held, there was no separable controversy between the assignee and the defendant not paid. Rosenthal v. Coates (1893) 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399.

Where the question to be decided in a cause is the right of a plaintiff to carry passengers into a certain park owned by one of the defendants, the other defendants being the lessees of such park, a separate controversy exists between the lessor and plaintiff. Sharp v. Whiteside (C. C. 1883) 19 Fed. 150.

A proceeding in mandamus on the relation of a city to compel several railroads to lower a street crossing jointly used by them is not a separable controversy as between the state and one of the roads which uses the track over the crossing by virtue of a lease from another road. Ohio v. Columbus & X. R. Co. (C. C. 1891) 48 Fed. 626.

Where a part of the relief asked is that undue notes, alleged to have been given by certain of defendants in consideration of a fraudulent conveyance, and transferred by the payee to the other defendants as collateral security for an indebtedness, be surrendered to the makers, the makers have no separable controversy from the holders of the notes; nor has one holder a separable controversy from the other holders, all being jointly interested in the notes as collateral security. Burgunder v. Browne (C. C. 1893) 59 Fed. 497.

171. —— Title to real property.—A suit against tenants in common or persons claiming to be such, concerning the title to or possession of land, is separable. Field v. Lownsdale (C. C. 1867) Fed. Cas. No. 4,769; Goodenough v. Warren (C. C. 1879) Fed. Cas. No. 5,534.

A suit to remove a cloud from title, brought against the person in possession, whose title was attacked, and the trustee and cestui in a deed of trust given by him to secure a debt involves no separable controversy. Steinkuhl v. York (C. C. 1879) Fed. Cas. No. 13,-356.

A bill to quiet title, requiring each of several defendants to set up any claim or right he may have, or be forever barred from so doing, and seeking an accounting for rents and profits, does not present a single controversy. Stanbrough v. Cook (C. C. 1889) 38 Fed. 369, 3 L. R. A. 400; Bacon v. Felt (C. C. 1889) 38 Fed. 870; Bates v. Carpentier (C. C. 1899) 98 Fed. 452; Carothers v. McKinley Mining & Smelting Co. (C. C. 1902) 116 Fed. 947.

In a proceeding for the determination of the question whether the property of a deceased person was separate or community property, there cannot be any separable controversy between any of the persons claiming rights to share in the distribution of the property. In re Foley (C. C. 1897) 80 Fed. 949.

In a suit for an undivided half interest in a single tract of land alleged to be wrongfully withheld by the two defendants, there is no separable controversy, so as to allow removal to the federal Circuit Court, though the citizenship of plaintiffs and of only one of defendants is diverse. Knight v. Lutcher & Moore Lumber Co. (1905) 136 Fed. 404, 69 C. C. A. 248, rehearing denied (1905) 139 Fed. 1007, 71 C. C. A. 684.

In a suit by a purchaser to enforce specific performance of a contract for the sale of land against the vendor and a grantee to whom he conveyed the land subsequent to the contract with complainant, but before it was recorded, there is a separate controversy with such grantee involving his right to hold the land as against the complainant, which gives him the right to remove the cause where he is a nonresident and the requisite amount is involved. Elkins v. Howell (C. C. 1905)

140 Fed. 157; Wheeling Creek Gas Coal & Coke Co. v. Elder (C. C. 1909) 170 Fed. 215.

An action of trespass to try title brought in a Texas court under the statute of that state, in which, as permitted by the state statutes, different persons each claiming title to the same tract of land are made parties and answer setting up their respective claims, some of said defendants as well as the plaintiff being citizens of the state, while others are citizens of another state, does not involve a separable controversy between citizens of different states which render it removable by a nonresident defendant. Lomax v. Foster Lumber Co. (1909) 174 Fed. 959.

An action to quiet title to a water right against a number of defendants all claiming rights in a stream, but not otherwise connected with each other, presents a separable controversy between complainant and a nonresident defendant. McMullen v. Halleck Cattle Co. (C. C. 1910) 193 Fed. 282. But see Davey v. Yolo Water & Power Co. (D. C. 1913) 211 Fed. 345, holding that, where plaintiff sued to quiet title to certain water rights as against defendants, each of whom was alleged to claim some rights in the waters, plaintiff was authorized by Code Civ. Proc. Cal. § 379, to join all the defendants, and hence one of them, who was a nonresident, could not remove the cause as involving a separable controversy as to it.

In judgment creditors' suit to set aside fraudulent transfer, in which fraudulent grantor's trustee in bankruptcy intervened, there was no separable controversy. Casey v. Baker (D. C. 1914) 212 Fed. 247.

172. —— Foreclosure of mortgage.—On a bill of foreclosure filed by a bondholder of a railroad company, the cause may be removed on petition of the company, its officers, and the mortgage trustees, without joining the codefendants; and the existence of judgment creditors and the fact that one of them has filed a cross-bill, does not affect the right of removal. Osgood v. Chicago, D. & V. R. Co. (C. C. 1875) Fed. Cas. No. 10,604.

In an action to foreclose mortgages on land in Nebraska by the assignee of the mortgages, a citizen of Wisconsin, the mortgagors and persons holding judgment liens on the property were made defendants. One of the latter, a citizen of Illinois, answered, alleging that the mortgagors were insolvent, and that the mortgages were given, and two of the judgments confessed, for the purpose of defrauding him, and prayed that they be canceled. Held, that the answer gave rise to a separable controversy, wholly between citizens of different states. Rich v. Gross (1890) 29 Neb. 337, 45 N. W. 468.

173. —— Condemnation proceedings.—A proceeding to condemn certain lands, in which a citizen of the same state with plaintiff owns the fee, while a citizen of a different state holds a perpetual lease, is not a separable controversy when the main question is as to the right to condemn. City of Bellaire v. Baltimore & O. R. Co. (1892) 146 U. S. 117, 13 Sup. Ct. 16, 36 L. Ed. 910; City of Le Mars v. Iowa Falls & S. C. R. Co. (C. C. 1882) 48 Fed. 661; City of Washington v. Columbus & C. M. R. Co. (C. C. 1893) 53 Fed. 673. But, where the property is held by defendants as tenants in common, there is a separable controversy. Northern Pac. Terminal Co. v. Lowenberg (C. C. 1883) 18 Fed. 339, 9 Sawy. 348.

An action in a state court to condemn right of way over a tract of land, the fee of which is owned by a defendant who is a citizen of the same state as plaintiff, does not involve a separable controversy between plaintiff and a nonresident defendant, joined as having a leasehold interest in all or a part of the tract, which entitles the latter to remove the cause into a federal court, although he may be entitled to a separate award of compensation covering his interest. Oroville & N. R. Co. v. Leggett (C. C. 1908) 162 Fed. 571.

Under the statutes of New Jersey, which provide for making a mortgagee a party to a proceeding for the condemnation of land for public use, both owner and mortgagee are indispensable parties and interested in the same questions, and the cause is not removable. Fishblatt v. Atlantic City (C. C. 1909) 174 Fed. 196.

A proceeding for condemnation of property, under Code Civ. Proc. Cal. § 1244, against a number of defendants, is not removable, on the ground of a separable controversy, where the claims of the defendants are to the same property. West Side R. Co. v. California Pac. R. Co. (D. C. 1913) 202 Fed. 331.

174. Interests in separate parts of subject-matter.—In a suit by a bank of Boston, Mass., to foreclose the equity of redemption of defendant, a citizen of New Hampshire, in five shares of trust property held by plaintiff as collateral security for payment of defendant's bond, defendant averred in his answer that he had sold one of the shares to C., of Boston. Plaintiff thereupon amended its bill, and made C. a party defendant, who subsequently entered an appearance. Held, that such cause could not be removed. Merchants' Nat. Bank v. Thompson (C. C. 1880) 4 Fed. 876.

Plaintiff, claiming that, by a contract with him, defendants became lessees of a plantation of which he became owner, sued them for rent, and asserted his lessor's lien upon all effects found upon the premises. The parties all lived in the same state. A citizen of a different state intervened, claiming to be the owner of a part of

the effects in question, and praying, as essential to his relief, that the contract between plaintiff and defendants be decreed to be a mere mortgage, giving plaintiff no rights of ownership. Held, that there was no separable controversy wholly between the intervener on one side, and the other parties upon the other, such as to give him the right to remove the cause into a federal court. Freidler v. Chotard (C. C. 1883) 19 Fed. 227.

There is not a separable controversy in assessment for municipal improvements, where the court determines the district in which the assessment shall be laid, and the parties thereto, and in a single judgment each piece of property is assessed. In re City of Chicago (C. C. 1894) 64 Fed. 897.

Where, after sustaining the Missouri maximum freight rate law as amended and the two-cent passenger rate law by the Supreme Court, the state sued certain railroad companies for overcharges in the interim for the benefit of shippers, such suits were not removable to the federal court as involving a separable controversy. State of Missouri ex rel. Barker v. Chicago & A. R. Co. (D. C.) 216 Fed. 562.

175. —— Condemnation proceedings.—A proceeding by a railroad company to condemn right of way under the statutes of South Dakota against a number of defendants owning land in severalty presents a separable controversy with respect to each owner, and is removable by a defendant, who is a citizen of another state, where the requisite amount is involved to give the federal court jurisdiction. South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co. (1905) 141 Fed. 578, 73 C. C. A. 176.

In a suit brought by a city against known and unknown owners, for the condemnation of land for the opening of a street, the only controversy being as to the value of the land, where a nonresident voluntarily appears as one of the unknown owners, as to him it is a controversy wholly between himself and the city, and he has the right to remove the cause into the federal court. City of Chicago v. Hutchinson (C. C. 1882) 15 Fed. 129, 11 Biss. 484.

A petition for removal, filed by a railroad company, one of the defendants, averring that petitioner was a corporation created under the laws of Wisconsin; that complainants were citizens of Massachusetts; that the other defendants were citizens of states other than Massachusetts; that petitioner was the sole owner of a part of the land in dispute, and was in sole possession thereof; and that none of the other defendants had or claimed any interest therein,—shows a separable controversy between complainants and the petitioner, and entitles the latter to a removal. Bacon v. Felt (C. C. 1889) 38 Fed. 870.

Where a petition filed by a railroad company with the state railroad commissioners, for the purpose of obtaining their consent to the taking of certain land by condemnation proceedings, is sought to be removed, the controversy between the railroad company and the owners of the land sought to be taken is separable from that between the company and the town in which the land lies, though part of the land is sought for the purpose of making a highway in lieu of another highway wanted for railroad purposes. New York, N. H. & H. R. Co. v. Cockcroft (C. C. 1891) 46 Fed. 881.

Where an application is made, under state laws, to condemn a portion of a large tract of land, the whole of which is owned in fee by a defendant, who is a citizen of another state than the applicant's, and a small part of which, including some of the land sought to be condemned, has been leased by him to another defendant, who is a citizen of the same state as the applicant, there is a separable controversy between the applicant and such first-named defendant as to the land not leased. Sugar Creek, P. B. & P. C. R. Co. v. McKell (C. C. 1896) 75 Fed. 34; Deepwater Ry. Co. v. Western Pocahontas Coal & Lumber Co. (C. C. 1907) 152 Fed. 824.

In a condemnation proceeding instituted by a railroad company, under Rev. St. Wis. 1898, § 1845 et seq., by the filing of a petition in a circuit court of the state against numerous property owners, upon which the statute provides for a hearing as to petitioner's right to condemn, and, if such right is sustained, for the appointment of a commission, which, on request of the company or the owner, shall appraise any piece of the property described, from which appraisal an appeal may be taken to the court, and tried to a jury as in ordinary law actions, there is a single controversy only presented as to the right to condemn, to be determined between the petitioner, on one side, and all of the parties joined as defendants, on the other; and the mere fact that a defendant is the owner of part of the lands sought to be taken in severalty does not create a separable controversy between him and the petitioner. Perkins v. Lake Superior & S. E. Ry. Co. (C. C. 1905) 140 Fed. 906.

176. Parties joined as claiming interest in subject-matter.—A bill by a creditor of an alleged insolvent partnership to have set aside certain alleged fraudulent confessions of judgment and transfers of assets, and to have the assets distributed among all creditors of the partnership ratably, which makes parties defendant all persons claiming an interest in the partnership property adversely to plaintiff under the alleged

fraudulent judgments and transfers, presents but a single controversy between plaintiff and all the defendants, as they are all necessary parties. Graves v. Corbin (1890) 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 462, reversing decree Corbin v. Boies (C. C. 1888) 34 Fed. 692.

Complainant purchased land from K., giving her his notes for deferred payments, and afterwards sold the land to M., making a deed therefor, which, together with M.'s notes and mortgage for the purchase money, was placed in the hands of one T., as trustee, to collect certain of the notes when due, and thereupon record the deed, and to deliver the proceeds of the notes collected and the remaining notes and the mortgage to complainant, on the latter's furnishing an abstract showing perfect title in himself. After the notes and mortgages had been placed in T.'s hands, a tripartite agreement was made between complainant, K., and M., whereby, among other things, complainant was to assign M.'s notes and mortgage to K., in discharge of his debt to her, and T. was to hold and collect the same for her benefit. Afterwards complainant brought a suit for specific performance against M. and T., also making K. and her husband parties defendant, on the ground that they refused to join as complainants, but not alleging any default on their part. Held, that the cause was not removable to the federal court on the ground of a separable controversy. Scoutt v. Keck (1896) 73 Fed. 900, 20 C. C. A. 103, 36 U. S. App. 586.

In an action brought by an administratrix against an insurance company upon a policy of insurance on the life of her intestate, in which one claiming the policy as assignee is made a party defendant, the controversy between the administratrix and the assignee on the one side, and the company on the other, is single. McNulty v. Connecticut Mut. Life Ins. Co. (C. C. 1891) 46 Fed. 305.

A suit to enforce a mechanic's lien against a railroad, under Laws S. D. 1893, c. 116, § 4, which requires all lien holders to be made parties, and their claims and priorities adjudicated, is not removable on the ground that there is a controversy between plaintiff and the railroad company which is separable from the matters affecting other lien holders who are defendants, and citizens of the same state with plaintiff. Sweeney v. Grand Island & W. C. R. Co. (C. C. 1894) 61 Fed. 3.

In a foreclosure suit brought in a state court a third person was made a party as claiming some interest unknown to complainant. He, being a nonresident, voluntarily appeared, and removed the cause to a federal court on the ground of a separable controversy, setting up a claim which was independent of and paramount to the mortgage. Held, that such a claim could not be litigated in the foreclosure suit; and as, if the federal court retained the cause, it would dismiss as to the removing party, leaving the case to proceed between parties who had not invoked the federal jurisdiction, the cause would be remanded without any action whatever. California Safe Deposit & Trust Co. v. Cheney Electric Light, Telephone & Power Co. (D. C. 1893) 56 Fed. 257.

Where, to a controversy between citizens of the same state, a citizen of another state is made a party only for the purpose of cutting off a junior lien, he cannot have the cause removed, for there is no separable controversy as to him. Flynn v. Des Moines & St. L. Ry. Co. (1884) 63 Iowa, 490, 19 N. W. 312.

177. Priorities of liens or rights in subject-matter.—A separable controversy exists, removable to a federal court by a foreign corporation, joined as a party defendant to a suit to foreclose a mortgage, where both mortgagor and mortgagee, who are citizens of the state, unite in attacking the validity of a prior mortgage in favor of such corporation on the ground that it was doing business without complying with state laws, and that the secured note embraced charges exacted because of an illegal combination in restraint of trade. Fritzlen v. Boatmen's Bank (1909) 29 S. Ct. 366, 212 U. S. 364, 53 L. Ed. 551, affirming decree Boatmen's Bank of St. Louis v. Fritzlen (1907) 89 P. 915, 75 Kan. 479, 22 L. R. A. (N. S.) 1235; Boatmen's Bank v. Same (1905) 135 Fed. 650, 68 C. C. A. 288, reversing Weldon v. Fritzlen (C. C. 1904) 128 Fed. 608.

A creditor, made a defendant in a foreclosure suit, who sets up a claim of priority over the plaintiff's mortgage, does not thereby make a separable controversy between plaintiff and himself. Thurber v. Miller (1895) 67 Fed. 371, 14 C. C. A. 432, 32 U. S. App. 209.

In proceedings to foreclose a mortgage securing railroad bonds issued to a construction company, a controversy between the construction company and a county which had transferred property to the company on conditions which had not been fulfilled as to the priority of their respective claims is separable. Foster v. Chesapeake & N. Ry. Co. (C. C. 1891) 47 Fed. 369, distinguishing Fidelity Ins. Trust & Safe Deposit Co. v. Huntington (1886) 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898.

In a suit in equity in Illinois to foreclose a trust deed, the controversy is not severable, as between the trustee, the owner of the equity of redemption, and subsequent incumbrancers or lienors. Maher v. Tower Hotel Co. (C. C. 1899) 94 Fed. 225.

In an action to foreclose a mortgage, there is no such separable controversy as will entitle the mortgagor to a removal to the federal court, the complaint representing that the other defendants claim some interest in the land, and alleging that it is subsequent to the mortgage. Northwestern & Pacific Hypotheek Bank v. Suksdorf (1896) 46 Pac. 1027, 15 Wash. 475.

On a creditors' bill to subject incumbered property to the payment of the creditors' judgment by a sale and distribution of the proceeds among lienholders according to their respective priorities, the cause of action is not divisible. Fidelity Ins., Trust & Safe Deposit Co. v. Huntington (1886) 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898.

A creditors' suit, the purpose of which is to obtain the administration of the property of an insolvent corporation, and incidentally to exclude certain of the defendants from participating in the distribution of such property, on the ground of the invalidity of a contract made by the corporation, on which their rights as creditors depend, is indivisible, and no one of such defendants can remove the cause on the ground that there is a separable controversy as to him, although their interests may be several, and their defenses different. Colburn v. Hill (1900) 101 Fed. 500, 41 C. C. A. 467.

A bill by a creditor to enjoin an execution sale of the insolvent debtor's property, set aside the levies, and subject the property to the claims of all the creditors pro rata, is not a separable action which can be removed by creditors claiming a lien prior to all others. Turnbull Wagon Co. v. Linthicum Carriage Co. (C. C. 1897) 80 Fed. 4.

In a suit by a judgment creditor against the debtor and a lien creditor, a prayer for the subjection of the property of the defendant debtor to plaintiffs' judgment does not make a separable controversy between plaintiffs and the nonresident creditor defendant, so as to authorize removal to the United States court on the ground of diverse citizenship. Palmer v. Inman (1905) 50 S. E. 86, 122 Ga. 226.

In a condemnation proceeding, where the parties defendant are a domestic corporation and also a foreign corporation acting as trustee for the holders of bonds secured by a mortgage on the premises sought to be condemned, the controversy as to the foreign corporation is not separate, so as to give it a right to remove the cause to a federal court. Colorado Fuel & Iron Co. v. Four Mile Ry. Co. (1901) 66 Pac. 902, 29 Colo. 90.

A junior mortgagee of goods under a chattel mortgage, which were claimed by a prior mortgagee, who was a citizen of a different state from that of the junior mortgagee and mortgagor, filed a petition in the state court alleging that the prior mortgage was fraudulent, and asking for a specific attachment against the goods, and that his mortgage be declared paramount to the other. The writ of attachment was issued, and the goods seized and redelivered to the prior mortgagee upon his giving a forthcoming bond. The mortgagor and prior mortgagee answered, alleging the validity of the first mortgage, and that it was a lien superior and paramount to complainant's. Held, that the cause was separable. Capital City Bank v. Hodgin (C. C. 1884) 22 Fed. 209.

To an action against a railroad company by one asserting an indebtedness claimed to be a first lien on the defendant's track, a mechanic's lien claimant and the mortgagee of the company were made parties. The mechanic's lien claimant filed a cross-petition, asserting his lien, to which the mortgagee was made a party. The mortgagee, in his petition for removal, claimed that his lien was prior to each of the lien claimants, and that the mechanic's lien claimant was estopped to assert a lien superior to that of the mortgage. Held, that the controversy presented was simply the question of priority of liens, and that the petition failed to show a separable controversy. Bissell v. Canada & St. L. R. Co. (C. C. 1889) 39 Fed. 225.

In a suit brought in a state court by a citizen of the state against a railroad company, also a citizen of the state, setting up certain claims and liens, a trustee, representing the bondholders, was made a party defendant. Being a citizen of another state, the trustee removed the cause on the ground of a separate controversy between it and plaintiff. Held that, as any judgment determining the rights and fixing the priority of liens of plaintiff and the trustee would of necessity be against the railroad company, there was no separate controversy between the former two. Marsh v. Atlanta & F. R. Co. (C. C. 1892) 53 Fed. 168.

That in a suit to enforce a mechanic's lien a controversy may arise over priorities or that different defendants may have different defenses does not make separable controversies. Sweeney v. Grand Island & W. C. R. Co. (C. C. 1894) 61 Fed. 3, 6.

In a suit in a state court to enforce a mechanic's lien, other lien claimants were made defendants, and filed cross petitions for the enforcement of their liens. The principal defendant filed an answer and cross petition bringing in as defendants a mortgagee alleged to hold a lien on the property by virtue of an after-acquired property clause in its mortgage, and also a subsequent grantee of the property, whose deed the defendant asked to have canceled or reformed. Such mortgagee and grantee were citizens of the same state. Held,

that each of such cross defendants was adversely interested in the controversy of the other, so that neither could remove the cause on the ground of a separable controversy as to which a diversity of citizenship existed. Gates Iron Works v. James E. Pepper & Co. (C. C. 1900) 98 Fed. 449.

178. Separate relief against different defendants.—In order to show the existence of a controversy, facts must be alleged which present a question for the determination of the court, and a prayer, inter alia, for relief against one of several defendants, does not create a separate controversy with such defendant, where there are no averments in the bill upon which such relief could be based. MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co. (1902) 119 Fed. 96, 55 C. C. A. 648.

Where a bill against numerous defendants for the foreclosure of a mortgage alleged that certain property nominally owned by a defendant other than the mortgagor was within complainant's mortgage, under a clause covering after-acquired property, in which claim some, but not all, of the defendants were interested, such claim created a separable controversy, which rendered the cause removable by the defendant claiming ownership of the property. New England Water Works Co. v. Farmers' Loan & Trust Co. (1905) 136 Fed. 521, 69 C. C. A. 297.

Where a complaint against a domestic corporation and a foreign corporation averred a cause of action, and prayed for damages and an accounting as against the foreign corporation alone, for failure to perform a contract, that corporation was entitled to a removal. Vinal v. Continental Const. & Imp. Co. (C. C. 1888) 34 Fed. 228.

When the contractors are made parties in a suit to enforce a mechanic's lien against a railroad under the Missouri statute, the controversy between the plaintiff and the railroad company is not a separable one, although, in order to obtain a lien against the property of the company, the plaintiff is required to show that he filed a notice of his lien in the proper county in the proper time, in addition to showing that he is entitled to a judgment against the contractor. Ames v. Chicago, S. F. & C. Ry. Co. (C. C. 1889) 39 Fed. 881.

A prayer in the complaint that "defendants may account for all the wrongs alleged, and on such accounting repay all sums realized by said defendants, or any of them," is not a prayer for a several account, and the controversy is not separable on that ground. Fox v. Mackay (C. C. 1894) 60 Fed. 4.

Defendant J. received under the will of her husband certain real estate and personal property for life, remainder to plaintiffs. Defendant J. insured the property with defendant insurance company for $2,875, the policy providing that in case of loss the insurer should be bound for three-fourths of the actual cash value of the property. After loss a settlement was made between defendant J. and insurer, fixing the loss at $1,500. Thereafter plaintiffs, who were remaindermen, brought suit against J. and the insurance company, claiming, as against the insurance company, to recover the entire face value of the policy, and, as against J., that the insurance covered the interest of the remaindermen, and that J. was a trustee of the fund to hold for herself for life, remainder to plaintiffs. Plaintiffs and J. were citizens of the same state, but defendant insurance company was not. Held, that the controversies between plaintiffs and each defendant were different and separable. Harley v. Home Ins. Co. (C. C. 1903) 125 Fed. 792.

Complainants, residents of Massachusetts, filed a bill to restrain infringement of a trade-mark against a New Jersey corporation and defendant L., an individual resident of Massachusetts, whom the bill charged was defendant's president and general manager. The bill also alleged that L. had personally directed and procured to be carried on the wrongful acts of the corporation complained of, and prayed for an injunction against both defendants, for a conveyance by defendant corporation of all rights secured by any registration by defendants' alleged infringing trade-mark, and for an accounting of profits. Held, that the bill did not show that a separable controversy existed between complainants and defendant corporation. Regis v. United Drug Co. (C. C. 1910) 180 Fed. 201.

Cause of action against register of United States land office for an injunction restraining him from entering cancellation of lieu land selections by a state is separable from that against surveyor general of the state to compel the latter to issue patents. State Improvement-Development Co. v. Leininger (D. C. 1914) 226 Fed. 884.

179. Separate defenses.—A separate defense by one defendant in a joint suit against him and others upon a joint, or a joint and several, cause of action does not create a separate controversy, so as to entitle that defendant, if the necessary citizenship exists as to him, to a removal of the cause under Act March 3, 1875, c. 137, § 2, cl. 2. Louisville & N. R. Co. v. Ide (1885) 5 Sup. Ct. 735, 114 U. S. 52, 29 L. Ed. 63; St. Louis & S. F. R. Co. v. Wilson (1885) 114 U. S. 60, 5 Sup. Ct. 738, 29 L. Ed. 66 (affirming order Wilson v. St. Louis & S. F. R. Co. [C. C. 1884] 22 Fed. 3); Putnam v. Ingraham (1885) 114 U. S. 57, 5 Sup. Ct. 746, 29 L. Ed. 65; Pirie v. Tvedt (1885) 115 U. S. 41, 5 Sup. Ct. 1034, 1061, 29 L. Ed. 331; Starin v. City of New York (1885) 115 U. S. 248, 6 Sup. Ct. 28, 29 L. Ed. 388 (affirming order

City of New York v. Independent Steamboat Co. [C. C. 1884] 21 Fed. 593, and [C. C. 1885] 22 Fed. 801); Fidelity Ins. Trust & Safe Deposit Co. v. Huntington (1886) 6 Sup. Ct. 733, 117 U. S. 280, 29 L. Ed. 898; Core v. Vinal (1886) 117 U. S. 347, 6 Sup. Ct. 767, 29 L. Ed. 912; Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co. (1886) 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232; Torrence v. Shedd (1892) 12 Sup. Ct. 726, 727, 144 U. S. 527, 36 L. Ed. 528; Thurber v. Miller (1895) 67 Fed. 371, 14 C. C. A. 432, 32 U. S. App. 209; Robbins v. Ellenbogen (1895) 71 Fed. 4, 6, 18 C. C. A. 83; Thompson v. Dixon (C. C. 1884) 28 Fed. 5; Hax v. Caspar (C. C. 1887) 31 Fed. 499; Patchin v. Hunter (C. C. 1889) 38 Fed. 51; In re San Antonio & A. P. Ry. Co. (C. C. 1890) 44 Fed. 145; O'Harrow v. Henderson (C. C. 1892) 52 Fed. 769; In re The Jarnecke Ditch (C. C. 1895) 69 Fed. 161.

For the purpose of determining whether a controversy is separable so as to give one of several joint defendants the right of removal to a federal court, the allegations of the plaintiff's pleadings must be taken as true, and such defendants, on a joint cause of action in tort, cannot, by filing separate defenses, tendering distinct issues, render the suit separable for the purpose of removal. Little v. Giles (1886) 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269, reversing decree Giles v. Little (C. C. 1881) 13 Fed. 100, 2 McCrary, 370; Arrowsmith v. Nashville & D. R. Co. (C. C. 1893) 57 Fed. 165.

An action for trespass against two corporations jointly, brought in a state court, cannot be removed upon the ground of a separable controversy, though defendants plead severally, on the mere allegation that the resident defendant was not in existence at the time of the alleged trespass, as this affects the merits, and not the jurisdiction. Louisville & N. R. Co. v. Wangelin (1890) 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473.

Where a complaint in an action by a carrier alleges a joint cause of action against two defendants, one of whom was of the same citizenship as plaintiff, whether separate defenses alleged by such defendants will defeat plaintiff's cause of action, as alleged, is a question involving the merits of the action, and cannot be considered in determining whether the cause was removable to the federal court. Dougherty v. Yazoo & M. V. R. Co. (1903) 122 Fed. 205, 58 C. C. A. 651.

Where plaintiff, in an action for death, pleaded a cause of action against several defendants, some of whom were of the same citizenship as plaintiff, the test of plaintiff's right to join such defendants, and thereby preclude a removal of the cause to the federal courts by defendants whose citizenship was diverse, depended on whether there was a legal concert or identity of the defendants in the same tortious act, or in the concurring acts of negligence contributing to the same injury, and not whether such defendants might present separate and different defenses to the action. American Bridge Co. v. Hunt (1904) 130 Fed. 302, 64 C. C. A. 548.

180. Set-offs, counterclaims, and cross-actions.—The assignee of a contractor for work on a railroad, alleging that by arrangement between the contractor and a trustee, certain township bonds issued to the company had been placed in possession of a bank to be delivered to the contractor or his assigns when he should complete his contract, and that it had been completed, brought suit against the bank for possession of the bonds, making the company and the trustee parties. The township intervened, asking for cancellation of the bonds, and with the trustee moved for removal to a federal court. Held that, as plaintiff's petition embraced only a single cause of action, a removal could not be sustained on the ground of a separable controversy between plaintiff and the removing parties. Wilson v. Oswego Tp. (1894) 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70.

In a suit to foreclose a mortgage against the mortgagors and the purchaser of the equity of redemption, the second mortgagee was, on his request, made a party, and he filed a cross complaint asking for a foreclosure of his mortgage, and to this the mortgagors filed an answer. The only question litigated was whether this second mortgage was based on a legal consideration. Held, that it was error to remove the case to the federal court upon the application of the owner of the equity of redemption, a resident of another state. Robbins v. Ellenbogen (1895) 71 Fed. 4, 18 C. C. A. 83, 36 U. S. App. 672.

A cross-bill by a nonresident defendant, merely setting up matters put in issue by the original bill and answers, cannot change the character of the case, for the purpose of a removal from a state to a federal court, or affect the question of jurisdiction. Donohoe v. Mariposa Land & Mining Co. (C. C. 1878) Fed. Cas. No. 3,989.

An action to foreclose a mortgage, where plaintiff and mortgagor are residents of the same state, in which another defendant sets up in his answer a claim against the mortgaged property adverse to that of plaintiff, as well as the mortgagor, does not present a separable controversy which will give the federal courts jurisdiction. Maish v. Bird (C. C. 1882) 48 Fed. 607; Thompson v. Dixon (C. C. 1886) 28 Fed. 5.

A counterclaim interposed by one of two defendants, in a suit in equity in the state court, does not survive a removal of the cause to the federal court;

and no cross-bill having been filed, such counterclaim cannot be recognized as presenting a separable controversy between two of the parties to the suit, authorizing a removal under the act of 1875. Brande v. Gilchrist (C. C. 1883) 18 Fed. 465.

In a suit to quiet title brought by two tenants in common against three defendants, in which two of the defendants disclaim, and the remaining one defends, and seeks, by cross-petition, to have his title quieted against plaintiffs, alleging that they claim under a tax deed and a sheriff's deed, the controversy between such defendant and plaintiffs is not a separable one, and no part thereof can be properly removed. Rumsey v. Call (C. C. 1886) 28 Fed. 769.

A suit by a citizen of Missouri against a banking corporation of that state, with which certain railroad aid bonds, sought to be recovered, were placed on joint deposit by two residents of Kansas, also defendants, is a suit involving a separable controversy between citizens of different states, and, as such, removable from the state to the federal courts, where the bank denies all interest in the bonds save a lien for storage and counsel fees, where one of the defendants depositing the bonds denies that his co-depositor has so performed his contract for payment of which the bonds were given him as to vest in him any right which could be assigned to the plaintiff, as set out in the bill, and the township, which appeared voluntarily, sets up the same defense, and avers that the bonds were issued without authority, and are absolutely void. Wilson v. Union Sav. Ass'n (C. C. 1887) 30 Fed. 521.

S., a citizen of Iowa, filed a petition in an Iowa court against H. & Sons, one of whom was a citizen of Iowa, and the sheriff, to enjoin foreclosure of a chattel mortgage. The sale having been enjoined, H. & Sons filed a cross-petition for the foreclosure of the mortgage, making defendant the Iowa corporation that had executed the mortgage, and an Indiana corporation, and an Illinois company that had garnished the mortgagee. The Indiana and Illinois companies removed the case to the United States court. Held that, the real subject of litigation being the right to foreclose the mortgage, no separable controversy existed. Shaver v. Hardin (C. C. 1887) 30 Fed. 801.

Equitable defenses set up by defendants between themselves will not prevent the removal of a cause from a state to a federal court; complainant being a resident of another state. Tarver v. Ficklin (1878) 60 Ga. 373.

Where M. sues E., both being residents of the state, and by cross-action E. asks judgment over against T., a citizen of another state, in case M. recovers judgment against E., the cross-action is so dependent on the main action that there is no such separable controversy between E. and T. as to entitle T. to removal to the federal court. Cleburne Electric & Gas Co. v. McCoy (Tex. Civ. App. 1912) 149 S. W. 534.

(D) Parties

181. Parties entitled to remove.—The right to remove a suit on the ground of a separable controversy is confined to the parties "actually interested in the controversy." Rand v. Walker (1886) 117 U. S. 340, 6 Sup. Ct. 769, 29 L. Ed. 907.

Either one or more actually interested may remove the whole controversy. Field v. Lownsdale (C. C. 1867) Fed. Cas. No. 4,769; Fields v. Lamb (C. C. 1868) Fed. Cas. No. 4,775; Lewis v. White (C. C. 1874) Fed. Cas. No. 8,335; McGinnity v. Same, Id. 8,802; Wormser v. Dahlman (C. C. 1879) Fed. Cas. No. 18,048, 57 How. Prac. 286; Greene v. Klinger (C. C. 1882) 10 Fed. 689; Maine v. Gilman (C. C. 1882) 11 Fed. 214; Grindrod v. Crine (C. C. 1884) 22 Fed. 257.

Under the act of 1875, either party to the separable controversy could remove it. Greene v. Klinger (C. C. 1882) 10 Fed. 689; Grindrod v. Crine (C. C. 1884) 22 Fed. 257; Wabash, St. L. & P. R. Co. v. Central Trust Co. (C. C. 1885) 23 Fed. 513. But subsequent to the act of 1887 the right of removal in the cases last mentioned is limited to one or more of the defendants actually interested in such separable controversy, and does not extend to the plaintiffs therein. Western Union Tel. Co. v. Brown (C. C. 1887) 32 Fed. 337.

Where a resident of the state in which suit is brought is made a defendant, he cannot remove on the ground of diversity of citizenship, though there may be a separable controversy, between plaintiff and another defendant. Whitaker v. Coudon (D. C. 1914) 217 Fed. 139.

One who was not sued by the plaintiff, but was brought in by the defendant, has the right to remove. Greene v. Klinger (C. C. 1882) 10 Fed. 689.

The real ground supporting the right of a receiver appointed by a federal court for a state corporation to remove a suit commenced against him in a state court appears to be the ancillary nature of such suit, and not that it is one arising under the constitution or laws of the United States, and the jurisdiction of the federal court rests ultimately upon the diversity of citizenship between the parties to the suit in which the receiver was appointed. Such being the case, where such a receiver is properly joined in the state court with a codefendant who has no right of removal, and the suit does not involve a separable controversy, it cannot be removed by the receiver.

Marrs v. Felton (C. C. 1900) 102 Fed. 775.

Under a joint petition by two defendants, the application may be granted as to one defendant and denied as to the other. Dart v. Walker (N. Y. 1871) 4 Daly, 188.

The removal of a cause to the United States district court is not authorized in an action for a joint indebtedness, where the application is not made by all the defendants to the record, nor by any one against whom a separate judgment can be rendered, without the presence of the other defendants. Merwin v. Wexel (N. Y. 1874) 49 How. Prac. 115.

Where a foreign corporation had a separable controversy with complainant, which it was entitled to remove, its right to remove was not affected by the fact that it was a stockholder in one of the other defendants and indirectly interested in its controversy with defendant. Buck v. Felder (D. C. 1911) 196 Fed. 419.

182. —— **Alien.**—An alien has no right to the removal of a cause on the ground of a separable controversy. Deakin v. Lea (C. C. 1879) Fed. Cas. No. 3,695; Woodrum v. Clay (C. C. 1888) 33 Fed. 897; Tracy v. Morel (C. C. 1898) 88 Fed. 801; Guarantee Co. of North America v. First Nat. Bank (1898) 28 S. E. 909, 95 Va. 480.

To authorize a removal on the ground that there is a separable controversy which is "wholly between citizens of different states," it must appear from the petition that each party to the controversy is a citizen of some state. Laden v. Meck (1904) 130 Fed. 877, 65 C. C. A. 361.

One of several defendants, who is a citizen of one of the United States, cannot remove the cause on the ground of a separable controversy between himself and an alien plaintiff. Creagh v. Equitable Life Assur. Soc. (C. C. 1898) 88 Fed. 1. But see Iowa Lillooet Gold Min. Co. v. Bliss (C. C. 1906) 144 Fed. 446, holding that a suit in which there is a separable controversy between an alien corporation plaintiff and a nonresident corporation defendant is removable on petition of the latter.

183. **Residence of party removing cause.**—A defendant cannot remove a separable controversy between the plaintiff and himself, unless he is a nonresident of the state where the suit is brought. Thurber v. Miller (1895) 67 Fed. 371, 14 C. C. A. 432, 32 U. S. App. 209; Drovers' Deposit Nat. Bank v. Tichenor (D. C. 1913) 202 Fed. 1013. But see Stanbrough v. Cook (C. C. 1889) 38 Fed. 369, 3 L. R. A. 400, holding that the right of removal is given to defendants interested in the separable controversy, irrespective of their residence in the state where suit is brought. National Bank of Battle Creek v. Howard (1907) 103 N. Y. S. 814, 54 Misc. Rep. 81.

(E) Allegations in pleadings

184. **Petition for removal.**—See, post, § 1011, and notes.

185. **General rules.**—The question of separable controversy depends upon the state of the pleadings and the record at the time of application for removal. Barney v. Latham (1880) 103 U. S. 205, 215, 216, 26 L. Ed. 514; Alabama G. S. Ry. Co. v. Thompson (1905) 26 Sup. Ct. 161, 164, 200 U. S. 206, 50 L. Ed. 441, 4 Ann. Cas. 1147.

Right to remove held dependent on case made by petition at time of petition for removal, without regard to subsequent amendment. Bernheim v. Louisville Property Co. (D. C. 1914) 221 Fed. 273.

The right of removal to the federal court, under Acts March 3, 1887, c. 373, 24 Stat. 552, and Aug. 13, 1888, c. 866, 25 Stat. 433, depends upon the state of the pleadings and the record at the time of the application for removal, and if upon the face of the declaration—the only pleading filed in the case—the action is joint, for the purpose of determining the right of removal, the cause of action must be deemed to be joint. Southern Ry. Co. v. Miller (1907) 57 S. E. 1090, 1 Ga. App. 616.

On petition to remove a cause to the federal court on the ground of diverse citizenship, the question of separable controversy must be determined by the state of the record in the state court at the time of filing the petition, independently of the allegations in the petition or affidavit, unless the fact that the defendants were wrongfully made joint defendants for the purpose of preventing a removal of the cause is both alleged and proved. Hough v. Southern Ry. Co. (1907) 57 S. E. 469, 144 N. C. 692.

A petition to remove a cause must be decided upon the pleadings and record as they are when the petition is filed. Davis v. Rexford (N. C. 1907) 59 S. E. 1002.

In determining whether there is a separable controversy, the allegations in plaintiff's original pleading, if made in good faith, and not the petition for removal or subsequent pleadings, are to be considered, and such allegations are to be taken as confessed. Wilson v. Oswego Tp. (1894) 14 Sup. Ct. 259, 263, 151 U. S. 56, 38 L. Ed. 70; Gableman v. Peoria, D. & E. R. Co. (1900) 21 Sup. Ct. 171, 172, 179 U. S. 335, 45 L. Ed. 220; Cincinnati, N. O. & T. P. Ry. Co. v. Bohon (1905) 26 Sup. Ct. 166, 168, 200 U. S. 221, 50 L. Ed. 448, 4 Ann. Cas. 1152; Laden v. Meck (1904) 130 Fed. 877, 65 C. C. A. 361; Thomas v. Great Northern Ry. Co. (1906) 147 Fed. 83, 77 C. C. A. 255; City of Cleveland v. Cleveland, C. C. & St. L. Ry. Co. (1906) 147 Fed. 171, 77 C. C. A.

467, reversing judgment (C. C. 1899) 93 Fed. 113; Hazard v. Robinson (C. C. 1884) 21 Fed. 193; Kaitel v. Wylie (C. C. 1889) 38 Fed. 865; Sexton v. Seeyle (C. C. 1889) 39 Fed. 705; Ames v. Chicago, S. F. & C. Ry. Co. (C. C. 1889) 39 Fed. 881; Dow v. Bradstreet Co. (C. C. 1891) 46 Fed. 824, 825; Seattle & M. R. Co. v. State (C. C. 1892) 52 Fed. 594; Fergason v. Chicago, M. & St. P. Ry. Co. (C. C. 1894) 63 Fed. 177, 178; Riser v. Southern Ry. Co. (C. C. 1902) 116 Fed. 215; Union Terminal Ry. Co. v. Chicago, B. & Q. R. Co. (C. C. 1902) 119 Fed. 209; Fogarty v. Southern Pac. Co. (C. C. 1903) 123 Fed. 973; Harley v. Home Ins. Co. (C. C. 1903) 125 Fed. 792; Bryce v. Southern Ry. Co. (C. C. 1903) 122 Fed. 709, affirmed (C. C. 1903) 125 Fed. 958; Elkins v. Howell (C. C. 1905) 140 Fed. 157; Blunt v. Southern Ry. Co. (C. C. 1907) 155 Fed. 499; Oroville & N. R. Co. v. Leggett (C. C. 1908) 162 Fed. 571; Carp v. Queen Ins. Co. (C. C. 1909) 168 Fed. 782; Reinartson v. Chicago Great Western Ry. Co. (C. C. 1909) 174 Fed. 707; Jacobson v. Chicago, R. I. & P. Ry. Co. (C. C. 1910) 176 Fed. 1004; Galeotti v. Diamond Match Co. (C. C. 1910) 178 Fed. 127; Foster v. Coos Gas & Electric Co. (C. C. 1911) 185 Fed. 979; Davey v. Yolo Water & Power Co. (D. C. 1913) 211 Fed. 345; Wright v. Ankeny (D. C. 1914) 217 Fed. 985; Trana v. Chicago, M. & P. S. Ry. Co. (D. C. 1915) 228 Fed. 824; Southern Ry. Co. v. Arnold (Ala. 1909) 50 So. 293; St. Louis Southwestern Ry. Co. v. Adams (Ark. 1908) 112 S. W. 186; Stratton Cripple Creek Mining & Development Co. v. Ellison (1908) 94 Pac. 303, 42 Colo. 498; Atlantic Coast Line R. Co. v. Bremer (Ga. App. 1911) 72 S. E. 43; Southern Ry. Co. v. Sittasen (Ind. App. 1905) 74 N. E. 898, reversed (Ind. Sup. 1906) 76 N. E. 973, 166 Ind. 257; Dowell v. Chicago, R. I. & P. Ry. Co. (1910) 112 Pac. 136, 83 Kan. 562; Illinois Cent. R. Co. v. Harris (1905) 38 So. 225, 85 Miss. 15; State ex rel. Iba v. Mosman (1910) 133 S. W. 38, 231 Mo. 474; Whiteaker v. Chicago, R. I. & P. R. Co. (1913) 160 S. W. 1009, 252 Mo. 438; National Docks & N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co. (1889) 52 N. J. Eq. 58, 28 Atl. 71; Staton v. Atlantic Coast Line R. Co. (N. C. 1907) 56 S. E. 794, 144 N. C. 135.

Where the removal petition is filed before the declaration is filed or due under the state practice, whether the suit involves a separable controversy is to be determined from plaintiff's sworn plea to the petition for removal. Welch v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1908) 177 Fed. 760.

The jurisdiction of the federal court cannot be defeated by plaintiff's fraud in stating a case of joint liability against two or more defendants for that sole purpose. St. Louis Southwestern Ry. Co. v. Adams (Ark. 1908) 112 S. W. 186. And, where plaintiff, suing several defendants, does not allege with reasonable particularity the facts relied on to sustain a joint cause of action, but charges negligence generally against all, such allegation is indicative of an attempt to so frame a petition that will prevent a defendant entitled to do so from removing the cause to a federal court. Reinartson v. Chicago Great Western Ry. Co. (C. C. 1909) 174 Fed. 707.

Where plaintiff joined a resident and nonresident defendant, his averments of joint liability are not conclusive as against the nonresident defendant's alleged right to remove, where the petition for removal alleges that the resident defendant was joined in bad faith solely to prevent removal. Jones v. Casey-Hedges Co. (D. C. 1913) 213 Fed. 43. But see Rea v. Standard Mirror Co. (N. C. 1911) 73 S. E. 116.

Where a complaint in an action in a state court set up a joint tort, the denial thereof in an answer and in a petition to remove to the federal court could not affect the question of the separability of the controversy. Hough v. Southern Ry. Co. (1907) 57 S. E. 469, 144 N. C. 692.

Where the original petition, in an action against several defendants was abandoned, and amended pleadings were filed after the filing by one defendant of an application for removal to the federal court on the ground that the controversy was separable, and he filed a second application for removal on the filing of the amended petition, the application must be considered in the light of the amended petition. St. Louis, I. M. & S. Ry. Co. v. West Bros. (Tex. Civ. App. 1913) 159 S. W. 142.

186. Particular allegations.—Where a petition in a state court alleges a joint cause of action against a resident and a nonresident defendant, it is not sufficient that the petition for removal avers that the resident defendant has no interest in the controversy, nor that the answers raise a separable controversy or show that one of the defendants is not liable. Sloane v. Anderson (1886) 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899; Union Terminal R. Co. v. Chicago, B. & Q. R. Co. (C. C. 1902) 119 Fed. 209; Illinois Cent. R. Co. v. Coley (1905) 89 S. W. 234, 121 Ky. 385, 28 Ky. Law Rep. 336, 1 L. R. A. (N. S.) 370.

In an action of tort, in which the plaintiffs' declaration charges all the defendants as jointly liable, there is no separable controversy, and it is immaterial that plaintiffs may not be able to prove such joint liability. Kaitel v. Wylie (C. C. 1889) 38 Fed. 865; Galeotti v. Diamond Match Co. (C. C. 1910) 178 Fed. 127.

Where a declaration in a state court in form charges a joint tort against two or more defendants the cause is

not removable by one defendant as involving a separable controversy on the ground that the facts stated do not constitute a cause of action against him, that being a matter for the determination of the state court. Evans v. Felton (C. C. 1899) 96 Fed. 176.

The unsupported allegation of an unverified petition, that the resident operators of a nonresident telegraph company were jointly liable for a delay in delivering a message, was insufficient to prevent a removal, where the verified petition for removal was supported by the affidavits of such operators that neither of them were on duty nor had anything to do with either receiving or delaying the message; that the only message received from the alleged sender was addressed, not to plaintiff, but to another party; and that that message was received by another operator. Free v. Western Union Tel. Co. (C. C. 1903) 122 Fed. 309.

Where the petition against a railroad company and an individual for death of an employé of the company and the petition of the company for removal of the cause show that the individual defendant, a resident of the state, is a mere employé of the company, against whom no recovery can be had under the statute on which the action is based, so that there is no joint liability, the mere subsequent allegation in plaintiff's petition that "defendants" negligently did certain things, is ineffective to prevent the company, a nonresident, from removing the cause to the federal court. Chicago, R. I. & P. Ry. Co. v. Stepp (C. C. 1907) 151 Fed. 908.

Kirby's Dig. Ark. § 6607, which makes it the duty of persons running trains to keep a constant lookout for persons or property on the track, and provides that "if any persons or property shall be killed or injured by the neglect of any employés of any railroad to keep such lookout the company owning and operating any such railroad" shall be liable in damages, gives a right of action against the company alone and not against the negligent employé; and, since no right of action for failure to keep a lookout exists at common law, the complaint in an action against a railroad company and its engineer to recover for killing one on the track, the alleged negligence being the failure of the engineer to keep such lookout, does not state a cause of action against the engineer, although it may in terms allege the joint negligence of both defendants, and the cause is removable from a state to the federal court by the railroad company if a citizen of another state. Lockard v. St. Louis & S. F. R. Co. (C. C. 1909) 167 Fed. 675.

A complaint which, after charging negligent acts by a railroad, its engineer, and the driver of the automobile in which plaintiff's decedent was riding, alleged that "by reason of all of said negligent acts" deceased was killed, sufficiently charged joint negligence to prevent removal by the railroad on the ground of separable controversy. Beckwith v. Chicago, M. & St. P. Ry. Co. (D. C. 1915) 223 Fed. 858.

Since the effect of a judgment in ejectment, under the Michigan statute is different from that of such a judgment at common law, and this difference in many cases would make a severance impracticable, and the pleadings are not required to disclose the conditions and relations which go to make up this distinction, the pleadings in an ejectment suit in the ordinary general form would not show whether the case was one in which a severance was admissible. Crane v. Seitz (1874) 30 Mich. 453; Crane v. Gerloff (1875) 31 Mich. 454.

Where a complaint in a negligence action against a nonresident railroad company and resident defendants alleged that defendants negligently caused a car that injured plaintiff to be or remain in the position where it caused the injury, it could not be said as matter of law on the face of the pleading that it was impossible for all the defendants to have participated in the single act charged in a manner to have constituted it in law the joint act of all, carrying with it a joint and several liability, so as to warrant a removal of the case against the railroad to the federal court. Southern Ry. Co. v. Arnold (Ala. 1909) 50 South. 293.

Whether a suit involves but a single controversy is not to be determined merely by the fact that the bill prays an injunction. Upton v. New Jersey Southern R. Co. (1874) 25 N. J. Eq. (10 C. E. Green) 372.

On a petition by a nonresident defendant joined with resident defendants for removal, allegations of the complaint charging all the defendants with operating and maintaining a line of wire which caused intestate's death, stated a joint cause of action. Pruitt v. Charlotte Power Co. (1914) 81 S. E. 624, 165 N. C. 416.

VI. REMOVAL ON GROUND OF PREJUDICE AND LOCAL INFLUENCE

(A) Right of removal

187. Nature of prejudice or influence.—In an action on a contract not otherwise removable to the federal courts, the attorney for plaintiff applied for an order of removal, based on his affidavit that, by reason of prejudice and local influence, justice could not be obtained in the courts of the state which would refuse to enforce the contract as it was made. The sole ground for this charge was the fact that the courts of Nebraska hold that a stipulation for attorney's fees in case of action on a contract, such as there was in this case, was void since the repeal of Act June 1, 1879, which allowed such fees. Held,

that this was not "local prejudice." In re Breckinridge (1891) 31 Neb. 489, 48 N. W. 142. But the fact that the state court has decided adversely to petitioner's contention does not show prejudice or local influence, though the federal courts have decided favorably to him. Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co. (C. C. 1891) 47 Fed. 836.

The right of removal to a federal court on the ground of local prejudice extends not only to cases where such prejudice would affect the jury, but also to those in which the decisions of the judge as to questions of law or fact may be affected thereby, and is not affected by the character or ability of the judge. City of Detroit v. Detroit City R. Co. (C. C. 1893) 54 Fed. 1; Montgomery County v. Cochran (C. C. 1902) 116 Fed. 985.

188. Existence and evidence of prejudice or local influence.—Where prejudice and local influence are relied on as ground for removal they must be proved to the satisfaction of the federal court. City of Bellaire v. Baltimore & O. R. Co. (1892) 146 U. S. 117, 13 Sup. Ct. 16, 36 L. Ed. 910. But it is only necessary to prove legally that prejudice does exist which would naturally operate to the disadvantage of the defendant. City of Tacoma v. Wright (C. C. 1898) 84 Fed. 836.

An affidavit that defendant has no acquaintance in the county in which the trial in the state court will be had, and that plaintiff is well known there as a lawyer and politician, having lived and practiced law at the county seat many years, and having been a candidate for the office of attorney general of the state, does not make a case for removal. Dennison v. Brown (C. C. 1889) 38 Fed. 535.

An affidavit signed by several citizens of the county in which defendant resided, stating in general terms that from prejudice and local influence the plaintiff could not obtain a fair trial in that county, or in the judicial district, and that defendant had a large and influential business connection in the county and district, and that the counties had had more or less litigation in their corporate capacity, which had excited a prejudice against nonresident corporations, which was controverted by one signed by numerous citizens of the vicinity does not establish local prejudice. Carson & Rand Lumber Co. v. Holtzclaw (C. C. 1889) 39 Fed. 885.

Where it appears that defendant is a foreign corporation, that plaintiff and his father live in the county in which the suit was brought, that the father is a very influential man in the county; and that there is in the county a great prejudice against defendant, and a general desire that plaintiff may win his case, the action is removable on the ground of local prejudice. Smith v. Crosby Lumber Co. (C. C. 1891) 46 Fed. 819, judgment affirmed Crosby Lumber Co. v. Smith (1892) 51 Fed. 63, 2 C. C. A. 97, 3 U. S. App. 125.

An affidavit alleging that the corporation of which defendants were stockholders was formed in Tennessee to purchase the property of a manufacturing corporation in Ohio, which purchase was made; that the defendants, as trustees for citizens of Ohio, owned a majority of the stock; that many stockholders in Tennessee were refusing to pay their subscriptions, on the ground that they had been defrauded in the purchase by the Ohio people, and that much talk of this kind had been indulged in, thus creating a local prejudice against the Ohio stockholders; that in suits against the Tennessee stockholders the defendants had set up the alleged fraud, and, in order to appeal to the local prejudice, had demanded juries to try the issues; and that affiant is informed and believes that a jury will be demanded in this cause—was sufficient to warrant a removal, especially when the allegations of the bill itself disclosed a disposition to appeal to local prejudice. Hall v. Chattanooga Agricultural Works (C. C. 1891) 48 Fed. 599.

The fact that a decision by state judges adversely to a party would expose them to local criticism and ill will, and endanger their chances of re-election, is sufficient to show that such party will not be able to obtain justice in such court, irrespective of the fact that the state judges would probably rise above such local prejudice, and render an entirely disinterested decision. City of Detroit v. Detroit City R. Co. (C. C. 1893) 54 Fed. 1.

An affidavit stating that there was prejudice and local influence; that a riot against the defendant company had received much public sympathy; that the city authorities had refused to protect the employés and property of the company against the rioters; that a public meeting, attended by citizens of all classes and by the municipal officers, had advised the bringing of the suit; and that the judges who would try the case in the state court were shortly to stand for re-election—showed sufficient ground for removal. Id.

Affidavits showing that a few years previously there was a bitterly contested litigation between its predecessor in the possession of the road and the city in which the cause was to be tried; that during this litigation there was almost a riot; that several of the servants of such predecessor were arrested in consequence of the litigation, and that litigation still existed between itself and said city, and a number of respectable and disinterested witnesses testified that defendant could not obtain justice in that county, and that a prejudice against corporations existed there—are sufficient to warrant removal,

though a number of witnesses testified that defendant could obtain justice in that locality. Herndon v. Southern R. Co. (C. C. 1896) 76 Fed. 398.

Local prejudice justifying the removal of a suit to enjoin an execution sale of the property of an insolvent company, and subject it to the claims of all the creditors, is not shown by an affidavit alleging that the newspapers of the county have denounced the company for alleged fraudulent dealings with its property; that the common pleas judge, on hearing a motion for the appointment of a receiver, stated that he "would see" that defendants did not take the property out of the county; and that the opposing lawyers referred to them in abusive terms. Turnbull Wagon Co. v. Linthicum Carriage Co. (C. C. 1897) 80 Fed. 4.

Prejudice and local influence authorizing removal of cause to federal court is shown, the action being by a county on the bond of its treasurer, whose surety was a nonresident surety company, for loss of a large sum obtained by sale of bonds for improvement of roads and building of bridges, there being a question whether the responsibility for the loss was on the treasurer or the board of revenue, composed of prominent citizens of the county, who control its local affairs, there being a prejudice against the treasurer and the bank in which the money was deposited, and there being a widespread feeling that the surety should not defend. Montgomery County v. Cochran (C. C. 1902) 116 Fed. 985.

Irrespective of any moral justification for a widespread or practically unanimous public sentiment in favor of or against a litigant, such a sentiment is ground for removal. Bartlett v. Gates (C. C. 1902) 117 Fed. 362.

189. Remedy by removal to other state court.—Where the state statute authorizes a change of venue for local prejudice to some other court of competent jurisdiction in some other convenient county, to which there is no valid objection, the existence of prejudice was not sufficiently shown to justify removal to the federal court by an affidavit showing that the prejudice was confined mainly, if not entirely, to Cook county. Robison v. Hardy (C. C. 1889) 38 Fed. 49.

A federal court will not grant a petition for removal of a suit, in which a municipal corporation is plaintiff, on the ground of local prejudice, based solely on an apprehension of the effect of such prejudice on the jury in case of a jury trial, where the judge of the state court has power, if justice requires it, to transfer the cause to another county. Board of Water Com'rs of City of New London v. Robbins & Potter (C. C. 1903) 125 Fed. 656.

Where the petitioners might remove the case to any one of seven counties adjoining that in which it was brought, an averment in general terms that, on account of local prejudice, they will not be able to obtain justice in such courts, is insufficient. Rike v. Floyd (C. C. 1890) 42 Fed. 247. But a state law which merely authorizes a change of venue, in the discretion of the court, on the ground of local prejudice, without giving to a defendant the right to remove the cause, does not affect in any way his right to remove it into the circuit court. City of Tacoma v. Wright (C. C. 1898) 84 Fed. 836; Parker v. Vanderbilt (C. C. 1905) 136 Fed. 246. Especially where the judge of the state court has stated that no grounds for removing the case exist. Smith v. Crosby Lumber Co. (C. C. 1891) 46 Fed. 819, judgment affirmed Crosby Lumber Co. v. Smith (1892) 51 Fed. 63, 2 C. C. A. 97, 3 U. S. App. 125.

The right of removal to a federal court on the ground of local prejudice exists, although the applicant, if defeated in the trial court, has the right of appeal to a state supreme court, as to which no local prejudice is alleged. City of Detroit v. Detroit City R. Co. (C. C. 1893) 54 Fed. 1.

190. Citizenship of parties.—The existence of prejudice and local influence does not furnish a separate and independent ground for the removal of a cause, but only operates to extend the time within which a case may be removed when the requisite diversity of citizenship exists. City of Cleveland v. Cleveland, C., C. & St. L. Ry. Co. (1906) 147 Fed. 171, 77 C. C. A. 467, reversing judgment (C. C. 1899) 93 Fed. 113.

In order to remove a cause for local prejudice, the controversy must be between a citizen of the state in which suit is brought and a citizen of another state. Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399.

A citizen of the state in which suit is brought cannot make the application to remove the cause, but only the citizen of another state. Hurst v. Western & A. R. Co. (1876) 93 U. S. 71, 23 L. Ed. 805; Aldrich v. Crouch (C. C. 1882) 10 Fed. 305, 11 Biss. 180; Belt v. Montgomery (Pa. 1875) 1 Wkly. Notes Cas. 265.

Where a nonresident is entitled to remove the cause from the state court on the ground of prejudice and local influence, but fails to exercise that right, and subsequently removes into and becomes a citizen of the state where suit is brought, the right of removal is lost. Goodnow v. Grayson (C. C. 1883) 15 Fed. 1, 5 McCrary, 16; Dart v. Walker (N. Y. 1871) 4 Daly, 188.

The resident executor or administrator of a nonresident party substituted for him in the suit cannot remove it into the federal court. Goodnow v.

Grayson (C. C. 1883) 15 Fed. 1, 5 McCrary, 16.

The restriction as to jurisdiction over suits by assignees does not apply to cases removed for local prejudice. Lexington v. Butler (1871) 14 Wall. 282, 293, 20 L. Ed. 809.

191. —— Parties adverse to parties removing cause.—A party is not entitled to the removal of a suit from a state court into the circuit court on account of prejudice or local influence, unless the adverse party is a citizen of the state in which the suit was brought. American Bible Soc. v. Grove (1879) 101 U. S. 610, 25 L. Ed. 847; Hancock v. Holbrook (C. C. 1886) 27 Fed. 403, 404 (affirmed [1887] 7 Sup. Ct. 341, 119 U. S. 586, 30 L. Ed. 538).

A suit cannot be removed from a state to a federal court on the ground of local prejudice, when plaintiffs are not all citizens of the state in which the suit is brought, and are yet jointly interested in the cause of action against the nonresident defendant who applies for removal. Rike v. Floyd (C. C. 1890) 42 Fed. 247; Niblock v. Alexander (C. C. 1890) 44 Fed. 306; Wilder v. Virginia, T. & C. Steel & Iron Co. (C. C. 1891) 46 Fed. 676; Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co. (C. C. 1891) 47 Fed. 836; Gann v. Northeastern R. Co. (C. C. 1891) 57 Fed. 417; Bryant v. Scott (1872) 67 N. C. 391.

All the plaintiffs must be shown to be citizens of the state in which the suit is brought, while the removing defendants are citizens of another state. Hanrick v. Hanrick (1894) 153 U. S. 192, 14 Sup. Ct. 835, 38 L. Ed. 685; Case v. Douglas (C. C. 1870) Fed. Cas. No. 2,491; George v. Pilcher (Va. 1877) 28 Grat. 299, 26 Am. Rep. 350.

Where plaintiff in good faith removed to and became a citizen of the state in which defendant was incorporated before the petition for removal was filed the petition must be denied. Laird v. Connecticut & P. R. R. R. (1875) 55 N. H. 375, 20 Am. Rep. 215.

In a suit by a corporation in a state court against several railroad companies, their trustees and mortgagees, on certain equipment bonds, the lien whereof was denied by answer, in which many other holders of the same series of bonds were permitted, with plaintiff's consent, to become parties defendant, and by cross-bills to set up the lien of their bonds, all the parties asserting the lien of the bonds should be considered as parties plaintiff. Adelbert College of Western Reserve University v. Toledo, W. & W. R. Co. (C. C. 1891) 47 Fed. 836.

(B) Parties

192. Parties entitled to remove for prejudice or local influence.—Under the Act of 1867, and R. S. § 639, subd. 3, regulating the removal of causes from state to federal courts, plaintiff had the right of removal, in case he was a citizen of a state other than that in which the suit in the state court is brought. Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399; Sands v. Smith (C. C. 1870) Fed. Cas. No. 12,305. But since the Act of 1887 he cannot. Campbell v. Collins (C. C. 1894) 62 Fed. 849; Meyer Bros. Drug Co. v. Malm (1892) 47 Kan. 762, 28 Pac. 1011.

The removing parties must be citizens of a state other than the one in which the suit is brought when the suit is commenced as well as when the petition for removal is filed. Young v. Ewart (1889) 10 Sup. Ct. 75, 132 U. S. 267, 33 L. Ed. 352; Tapley v. Martin (1874) 116 Mass. 275. But see Cook v. Whitney (C. C. 1877) Fed. Cas. No. 3,166; Hammond v. Buchanan (1882) 68 Ga. 728.

Interveners may remove the cause on the ground of local prejudice. In re Iowa & M. Const. Co. (C. C. 1882) 10 Fed. 401, 3 McCrary, 310.

A nonresident plaintiff, suing in a state court, against whom a counterclaim is brought, is a "defendant" within the provision of the local prejudice clause of Act 1887–88. Carson & Rand Lumber Co. v. Holtzclaw (C. C. 1889) 39 Fed. 578; Walcott v. Watson (C. C. 1891) 46 Fed. 529.

Where, after judgment in favor of a nonresident plaintiff was affirmed as to the original cause of action, but was reversed as to a counterclaim, defendant obtained leave to amend the counterclaim by increasing the amount demanded, such amended counterclaim did not change the status of the parties so that the defendant became the plaintiff in the action and the plaintiff became the defendant, and entitle plaintiff to remove the cause on the ground of prejudice or local influence. Indian Mountain Jellico Coal Co. v. Asheville Ice & Coal Co. (C. C. 1905) 135 Fed. 837.

On appeal by a taxpayer to the district court from an allowance of a claim by the county supervisors, the appellee, being the party who is bound to establish his claim, must be regarded as plaintiff, and, as such, has no right of removal to the federal court on account of local prejudice. Tullock v. Webster County (C. C. 1889) 40 Fed. 706.

Provision that federal courts shall not have cognizance of any suit to recover the contents of any note or other chose in action in favor of an assignee, unless suit might have been prosecuted in such court to recover said contents, if no assignment had been made does not prevent removal by an assignee for local prejudice. That provision was merely intended to prevent fraudulent assignments of choses in action, made for the purpose of giving the court jurisdiction, and was not founded on any constitutional principle. Barclay v. Levee Com'rs (C. C. 1872) Fed. Cas. No. 977; Hobby v. Allison (C. C. 1882) 13 Fed. 401.

193. Removal by one or more coparties.—Under the Act of March 2, 1867, and R. S. § 639, subd. 3, a removal for local prejudice could only be had where all the parties to the suit on one side were citizens of different states from those on the other. In re Sewing Mach. Co. (1873) 18 Wall. 553, 21 L. Ed. 914; Myers v. Swann (1882) 107 U. S. 546, 2 Sup. Ct. 685, 27 L. Ed. 583; American Bible Soc. v. Price (1884) 110 U. S. 61, 3 Sup. Ct. 440, 28 L. Ed. 70; Jefferson v. Driver (1886) 117 U. S. 272, 6 Sup. Ct. 729, 29 L. Ed. 897; Cambria Iron Co. v. Ashburn (1886) 118 U. S. 54, 6 Sup. Ct. 929, 30 L. Ed. 60; Hancock v. Holbrook (1887) 119 U. S. 586, 7 Sup. Ct. 341, 30 L. Ed. 538 (affirming order [C. C. 1886] 27 Fed. 401); Young v. Ewart (1889) 132 U. S. 267, 10 Sup. Ct. 75, 33 L. Ed. 352; Rosenthal v. Coates (1893) 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399; Bixby v. Couse (C. C. 1870) Fed. Cas. No. 1,451; Case v. Douglas, Id. 2,491; New Jersey Zinc Co. v. Trotter (C. C. 1877) Fed. Cas. No. 10,167; Miller v. Chicago, B. & Q. R. Co. (C. C. 1881) 17 Fed. 97, 3 McCrary, 460; Frelinghuysen v. Baldwin (C. C. 1883) 19 Fed. 49; Schnadig v. Flescher (C. C. 1887) 29 Fed. 465; Thouron v. East Tennessee, V. & G. R. Co. (C. C. 1889) 38 Fed. 673; Ex parte Andrews (1867) 40 Ala. 639; Burch v. Davenport & St. P. R. Co. (1877) 46 Iowa, 449, 26 Am. Rep. 150; Stafford v. Twitchell (1881) 33 La. Ann. 520; Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co. (1872) 110 Mass. 70, 14 Am. Rep. 579; Berry v. Irick (Va. 1872) 22 Grat. 484, 12 Am. Rep. 539; George v. Pilcher (Va. 1877) 28 Grat. 299, 26 Am. Rep. 350. CONTRA, Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co. (C. C. 1873) Fed. Cas. No. 4,883; Hone v. Dillon (C. C. 1886) 29 Fed. 465.

A suit against several defendants residing in another state cannot be removed by one of such defendants, unless the other defendants are improper, formal, or unnecessary parties; but all must unite in the application. Bixby v. Couse (C. C. 1870) Fed. Cas. No. 1,451; Cooke v. State Nat. Bank of Boston (N. Y. 1870) 1 Lans. 494; Same v. State Nat. Bank (1873) 52 N. Y. 96, 11 Am. Rep. 667; Merwin v. Wexel (N. Y. 1874) 49 How. Prac. 115; Beery v. Irick (Va. 1872) 22 Grat. 484, 12 Am. Rep. 539.

The application for the removal of a cause on the ground of prejudice or local influence, when made by one of several defendants, must be made in a cause which may be effectually proceeded in against one defendant, separately from the other. Miller v. Finn (1871) 1 Neb. 254.

The following cases held that Act March 3, 1887, c. 373, § 2, cl. 4, 24 Stat. 553, repealed R. S. § 639, subd. 3, and that under the act of 1887 any defendant being a citizen of another state, between whom and the resident plaintiff in a local suit there is a controversy, may remove the suit, although another defendant may be a citizen of the state in which the suit is brought. Boatmen's Bank v. Fritzlen (1905) 135 Fed. 650, 68 C. C. A. 288 (reversing Weldon v. Same [C. C. 1904] 128 Fed. 608); Whelan v. New York, L. E. & W. R. Co. (C. C. 1888) 35 Fed. 849, 1 L. R. A. 65; Hall v. Chattanooga Agricultural Works (C. C. 1891) 48 Fed. 599; Haire v. Rome R. Co. (C. C. 1891) 57 Fed. 321; Gann v. Northeastern R. Co., Id. 417, 420; Jackson & Sharp Co. v. Pearson (C. C. 1892) 60 Fed. 113; City of Detroit v. Detroit City Ry. Co. (C. C 1893) 54 Fed. 1; Bonner v. Meikle (C. C. 1896) 77 Fed. 485; Holmes v. Southern Ry. Co. (C. C. 1903) 125 Fed. 301; Parker v. Vanderbilt (C. C. 1905) 136 Fed. 246.

Where the suit is against several defendants, some of whom are nonresidents, the nonresident defendants may remove the suit. Bartlett v. Gates (C. C. 1902) 117 Fed. 362; Seaboard Air Line Ry. v. North Carolina R. Co. (C. C. 1903) 123 Fed. 629. But in Cochran v. Montgomery County (1905) 26 Sup. Ct. 58, 199 U. S. 260, 50 L. Ed. 182, reversing (C. C. 1903) 116 Fed. 985, and (1904) 128 Fed. 1019, 62 C. C. A. 680, it was held that a suit in which one of two defendants is a citizen of the same state as the plaintiff cannot be removed by the other defendant for prejudice or local influence, since to hold otherwise would bring this provision into conflict with the rule that suits, to be removable, must be within the original jurisdiction of the circuit court.

The same rule was laid down in the following cases: Southern Ry. Co. v. Thomason (1906) 146 Fed. 972, 77 C. C. A. 170; Anderson v. Bowers (C. C. 1890) 43 Fed. 321; City of Terre Haute v. Evansville & T. H. R. Co. (C. C. 1901) 106 Fed. 545; Campbell v. Milliken (C. C. 1902) 119 Fed. 982; Armstrong v. Kansas City Southern Ry. Co. (C. C. 1911) 192 Fed. 608.

194. Aliens and residents of territories or District of Columbia.—There can be no removal for local prejudice when one party is an alien. Grand Trunk R. Co. v. Twitchell (1894) 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; Cohn v. Louisville, N. O. & T. R. Co. (C. C. 1889) 39 Fed. 227; Dahlonega Co. v. Frank W. Hall Merchandise Co. (1891) 14 S. E. 473, 88 Ga. 339; New Orleans, Ft. J. & G. I. R. Co. v. Rabasse (1892) 44 La. Ann. 178, 10 South. 708; Crane v. Reeder (1874) 28 Mich. 527, 15 Am. Rep. 223; Same v. Seitz (1874) 30 Mich. 453; Same v. Gerloff (1875) 31 Mich. 454; Stinson v. St. Paul, S. & T. F. R. Co. (1874) 20 Minn. 492 (Gil. 446).

Nor can a defendant who is a resi-

dent of a territory or the District of Columbia remove a cause on that ground. Dahlonega Co. v. Frank W. Hall Merchandise Co. (1891) 88 Ga. 339, 14 S. E. 473.

195. Corporations.—Corporations are within the provision for removal on the ground of local prejudice on a petition, and the making by the proper officer of the corporation of the required affidavit. Farmers' Loan & Trust Co. v. Maquillan (C. C. 1874) Fed. Cas. No. 4,668; Quigley v. Central Pac. R. Co. (1876) 11 Nev. 350, 21 Am. Rep. 757. CONTRA, Mix v. Andes Ins. Co. (N. Y. 1876) 9 Hun, 397, reversed (1878) 74 N. Y. 53.

The right of a foreign corporation to remove for prejudice or local influence is not defeated because such corporation has complied with the provisions of the state statute authorizing it to do business in the state. Southern Ry. Co. v. Allison (1903) 23 Sup. Ct. 713, 190 U. S. 326, 47 L. Ed. 1078, reversing judgment Allison v. Southern Ry. Co. (1901) 40 S. E. 91, 129 N. C. 336. CONTRA, Rose v. Commercial Ins. Co. of Chicago (C. C. 1871) 2 Mich. N. P. 104.

A corporation created by the consolidation of several corporations existing in different states, by an act of the legislature, which provided that such corporation should be treated as a corporation created by the laws of the state authorizing the consolidation, is, as concerns a suit against it by an alien, a citizen of that state, and not entitled to a removal of such suit under the local prejudice clause of the act of March 3, 1887, c. 373, 24 Stat. 552. Cohn v. Louisville, N. O. & T. R. Co. (C. C. 1889) 39 Fed. 227.

A suit against a county may be removed into the United States court on the ground of prejudice or local influence, when brought by a citizen of another state. Floyd County Com'rs of Roads and Revenues v. Hurd (1873) 49 Ga. 462, 15 Am. Rep. 682.

(U) Procedure for removal on ground of prejudice and local influence

196. Procedure for removal in general.—See post, § 1011, and notes.

197. Decisions construing "final trial or hearing" under Acts 1866–67, R. S. § 639, subd. 3.—Home Life Ins. Co. v. Dunn (1873) 19 Wall. 214, 22 L. Ed. 68; Ayers v. Watson (1885) 5 Sup. Ct. 641, 113 U. S. 594, 28 L. Ed. 1093; Schraeder Min. & Mfg. Co. v. Packer (1889) 129 U. S. 688, 9 Sup. Ct. 385, 32 L. Ed. 760; Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399; Cooke v. Ford (C. C. 1877) Fed. Cas. No. 3,173; Osborn v. Osborn (C. C. 1881) 5 Fed. 389; Field v. Williams (C. C. 1885) 24 Fed. 513; Hammond v. Buchanan (1882) 68 Ga. 728; Burson v. National Park Bank (1872) 40 Ind. 173, 13 Am. Rep. 285; Sharp v. Gutcher (1881) 74 Ind. 357; Barber v. St. Louis, K. C. & N. R. Co. (1876) 43 Iowa, 223, 22 Am. Rep. 243; Galpin v. Critchlow (1873) 112 Mass. 339, 17 Am. Rep. 176; Crane v. Reeder (1874) 28 Mich. 527, 15 Am. Rep. 223; Same v. Gerloff (1875) 31 Mich. 454; Miller v. Finn (1871) 1 Neb. 254; Bates v. Baltimore & O. R. Co. (1883) 39 Ohio St. 157 (reversed Baltimore & O. R. Co. v. Bates [1886] 119 U. S. 464, 7 Sup. Ct. 285, 30 L. Ed. 436); Whitehouse v. Bank (Pa. 1880) 1 Leg. Rec. Rep. 249; Clark v. Delaware & H. Canal Co. (1874) 11 R. I. 36; Beery v. Irick (Va. 1872) 22 Grat. 484, 12 Am. Rep. 539; Rathbone Oil Tract Co. v. Rauch (1871) 5 W. Va. 79; Akerly v. Vilas (1869) 24 Wis. 165, 1 Am. Rep. 166; Jones v. Foster (1884) 61 Wis. 25, 20 N. W. 785.

198. —— Effect of motion for new trial or appeal.—Stevenson v. Williams (1873) 19 Wall. 572, 22 L. Ed. 162; Vannevar v. Bryant (1874) 21 Wall. 41, 22 L. Ed. 476; Baltimore & O. R. Co. v. Bates (1886) 7 Sup. Ct. 285, 119 U. S. 464, 30 L. Ed. 436; Boggs v. Willard (C. C. 1872) Fed. Cas. No. 1,603; Dart v. McKinney, Id. 3,583; Waggener v. Cheek (C. C. 1873) Fed. Cas. No. 17,035; Kellogg v. Hughes (C. C. 1874) Fed. Cas. No. 7,662; Minnett v. Milwaukee & St. P. Ry. Co. (C. C. 1875) Fed. Cas. No. 9,636; Brice v. Somers (C. C. 1876) Fed. Cas. No. 1,856; Sims v. Sims (C. C. 1879) Fed. Cas. No. 12,894; Darst v. City of Peoria (C. C. 1882) 13 Fed. 561; Melendy v. Currier (C. C. 1884) 22 Fed. 129, 22 Blatchf. 503; Brayley v. Hedges (1880) 53 Iowa, 582, 5 N. W. 748; Hall v. Ricketts (1873) 72 Ky. (9 Bush) 366; Williams v. Succession of Williams (1872) 24 La. Ann. 55; Bryant v. Rich (1870) 106 Mass. 180, 8 Am. Rep. 311; Miller v. Finn (1871) 1 Neb. 254; Whittier v. Hartford Fire Ins. Co. (1875) 55 N. H. 141, 20 Am. Rep. 185; Chandler v. Coe (1875) 56 N. H. 184, 22 Am. Rep. 437; Dart v. Walker (N. Y. 1871) 4 Daly, 188; Douglas v. Caldwell (1871) 65 N. C. 248; Home Life Ins. Co. v. Dunn (1870) 20 Ohio St. 175, 5 Am. Rep. 642 (reversed [1873] 19 Wall. 214, 22 L. Ed. 68); Rosenfield v. Condict (1876) 44 Tex. 464; Beery v. Irick (Va. 1872) 22 Grat. 484, 12 Am. Rep. 539; Continental Ins. Co. v. Kasey (Va. 1876) 27 Grat. 216; Akerly v. Vilas (1869) 24 Wis. 165, 1 Am. Rep. 166.

199. Time for taking proceedings—Construction of provision in general.—The omission in the Act 1887–1888 and this section of the qualifying word "final" found in the earlier acts indicates an intention to require the application for removal to be made before the first trial, not merely before the final trial. Fisk v. Henarie (1892) 12

Sup. Ct. 207, 142 U. S. 459, 35 L. Ed. 1080.

It is only where a suit is removed on account of prejudice or local influence that a removal may be had at any time before trial. Johnson v. Johnson (C. C. 1882) 13 Fed. 193.

The application may be made at any time before final hearing in the state court. Huskins v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1889) 37 Fed. 504, 3 L. R. A. 545 (writ of error dismissed [1894] 154 U. S. 506, 14 Sup. Ct. 1147, 38 L. Ed. 1076); Sharp v. Gutcher (1881) 74 Ind. 357. It may be made at a term of the court prior to that to which such suit is returnable. Floyd County Com'rs of Roads and Revenues v. Hurd (1873) 49 Ga. 462, 15 Am. Rep. 682. Or at any time before the first trial thereof is actually held, although such trial might have been held before the date of the application for removal. Fisk v. Henarie (1892) 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080; City of Detroit v. Detroit City Ry. Co. (C. C. 1893) 54 Fed. 1; Parker v. Vanderbilt (C. C. 1905) 136 Fed. 246; Cox v. East Tennessee, V. & G. R. Co. (1878) 62 Ga. 163; Nye v. Northern Cent. R. Co. (N. Y. 1881) 24 Hun, 556.

200. **"Before trial."**—The application must be made before the first step in the trial is taken. Adams' Exp. Co. v. Trego (1872) 35 Md. 47; Strong v. Black (N. Y. 1872) 5 Alb. Law J. 214.

But, while the defendant still has the right to challenge the array of jurors, it is not too late. Brodhead v. Shoemaker (C. C. 1890) 44 Fed. 518, 525, 11 L. R. A. 567.

The court is under no obligation to delay the trial of a cause, in order to enable a party to prepare an application for removal. United States Sav. Inst. v. Brockschmidt (1874) 72 Ill. 370.

An application for removal to the federal court is too late after defendant's motion for a continuance has been argued and overruled, the jury stricken, and trial ordered to proceed, and a half-hour's indulgence granted defendant to enable it to procure counsel. Fleming v. Fire Ass'n of Philadelphia (1886) 76 Ga. 678. And where the offer constituted an interruption of plaintiff's counsel's statement to the court that plaintiff was ready for trial, but desired to reduce the amount claimed to $2,000, in response to the trial judge's inquiry as to whether the parties were ready. Domitrovich v. Stone & Webster Engineering Corporation (Mont. 1911) 118 Pac. 760.

An action at law at issue in a state court was called for trial therein, and might, in the ordinary course, have been tried. The defendant applied for a postponement. This was refused by the court, except on terms of defendant's consenting to a reference. This he refused to do; but afterwards, and before the trial was actually commenced, he consented to a reference of the same for trial, to a person named. The order was made accordingly, and the immediate trial, which otherwise must have taken place, was thus avoided. The defendant then took proceedings to remove the cause. Held, that the application was too late. Hanover Nat. Bank v. Smith (C. C. 1876) Fed. Cas. No. 6,035.

After a cause has been tried in a state court and a mistrial entered, it cannot be removed on account of local prejudice. McDonnell v. Jordan (1900) 20 Sup. Ct. 886, 178 U. S. 229, 44 L. Ed. 1048; Farmers' & Merchants' Nat. Bank v. Schuster (1898) 86 Fed. 161, 29 C. C. A. 649; Davis v. Chicago & N. W. Ry. Co. (C. C. 1891) 46 Fed. 307.

A petition for removal after a final judgment was rendered was properly overruled. Fashnacht v. Frank (1874) 23 Wall. 416, 419, 23 L. Ed. 81.

The fact that plaintiff amends his declaration after the commencement of the trial by inserting a special count therein does not make a new issue, and it cannot, therefore, be claimed that, as to that part of the case, the trial did not in fact commence until after pleas filed to the amended declaration, and issues joined thereon, and that as the affidavit for removal was filed before the amended declaration was pleaded to, it should be regarded as made in due time. Adams' Exp. Co. v. Trego (1872) 35 Md. 47.

When a demurrer to a petition, setting up a cause of action based on defendant's alleged negligence, has been filed and sustained, the filing of an amended petition, pursuant to leave, which sets up, and bases the right of action upon, a statute of the state where the accident happened, does not make the case a new action, so as to avoid the effect of the rule that a cause cannot be removed to a federal court on the ground of local prejudice after a trial on demurrer or otherwise. Hobart v. Illinois Cent. R. Co. (C. C. 1897) 81 Fed. 5.

The report of commissioners to whom a claim has been referred by a probate court, under the statutes of Michigan, is not a trial. Hess v. Reynolds (1885) 113 U. S. 73, 5 Sup. Ct. 377, 28 L. Ed. 927.

Under Rev. St. Ind. §§ 5758–5761, 5777, requiring claims against a county to be filed with the county auditor, to be by him presented to the board of commissioners who are to pass upon them, and granting an appeal from their decision to the circuit court of the county, where it shall be tried "as an original cause," the latter trial is the one before which, if at all, the cause must be removed. Delaware County Com'rs v. Diebold Safe & Lock

Co. (1890) 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674.

201. Effect of ruling on demurrer.—The submission of a demurrer to the petition, based upon the ground that the petition fails to show a cause of action, and the ruling of the court thereon, constitute a trial of the case, such as to prevent the removal. Lookout Mountain R. Co. v. Houston & Co. (C. C. 1887) 32 Fed. 711; Hobart v. Illinois Cent. R. Co. (C. C. 1897) 81 Fed. 5.

202. Effect of granting new trial.—Under Act 1887–88, § 2, providing for the removal of causes upon the ground of local prejudice "at any time before the trial thereof," the right of removal is restricted to the first trial; and, after one or more trials and reversals, the right is lost. Fisk v. Henarie (1892) 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080, reversing (C. C. 1887) 32 Fed. 417, and (C. C. 1888) 35 Fed. 230.

203. Trial de novo on appeal.—The petition is not too late if the case, though it has been once decided, is yet to be tried de novo in the appellate tribunal before a jury. Brodhead v. Shoemaker (C. C. 1890) 44 Fed. 518, 11 L. R. A. 567.

204. Waiver of objection to delay in application.—When a case has been removed, an objection that the act has not been complied with in respect of time and other particulars will not be heard in the supreme court, the point not having been made in the court below until three years after the removal made, and when the testimony was all taken and the case ready for hearing; nor ought it under such circumstances to have been entertained in the circuit court. It came too late, and must be held to have been conclusively waived. French v. Hay (1874) 22 Wall. 238, 22 L. Ed. 854.

205. Notice.—Notice to the adverse party of a motion for the removal of a cause is not jurisdictional, and such motion may be made upon ex parte hearing, though it is the better practice to give notice. Whelan v. New York, L. E. & W. R. Co. (C. C. 1888) 35 Fed. 849, 1 L. R. A. 65; Adelbert College of Western Reserve University v. Toledo, W. & W. Ry. Co. (C. C. 1891) 47 Fed. 836; Reeves v. Corning (C. C. 1892) 51 Fed. 774; Herndon v. Southern R. Co. (C. C. 1896) 73 Fed. 307; Crotts v. Southern Ry. Co. (C. C. 1898) 90 Fed. 1.

The better practice, upon applications for removal of cases from state to federal courts, on the ground of prejudice or local influence, is to give notice to the opposite party, specifying the proofs to be used, and afford him an opportunity to present counter affidavits, if desired; and when this course is pursued, if not also when the application is ex parte, the sufficiency, as well as the truth or falsity, of the facts alleged, should be determined at a single hearing. Bonner v. Meikle (C. C. 1896) 77 Fed. 485.

Three days' notice is not a reasonable time to allow defendant an opportunity to contest the allegation of local prejudice before an order of removal is made. Carson & Rand Lumber Co. v. Holtzclaw (C. C. 1889) 39 Fed. 578.

206. Petition, affidavits, and other proof of prejudice or local influence.—A petition for the removal of a case from a state to a federal court, on the ground of prejudice or local influence, must be made to the federal court. Southworth v. Reid (C. C. 1888) 36 Fed. 451; Kaitel v. Wylie (C. C. 1889) 38 Fed. 865; Carson & Rand Lumber Co. v. Holtzclaw (C. C. 1889) 39 Fed. 885, 886; Bonner v. Meikle (C. C. 1896) 77 Fed. 485; Rome & C. Const. Co. v. Smith (1890) 84 Ga. 238, 10 S. E. 728; Mason v. Interstate Consol. St. Ry. Co. (1898) 49 N. E. 645, 170 Mass. 382; Blackwell v. Lynchburg & D. R. Co. (1890) 107 N. C. 217, 12 S. E. 133; Williams v. Southern Bell Telephone & Telegraph Co. (1895) 116 N. C. 558, 21 S. E. 298.

But the affidavit may be filed in the state court and a certified copy of it in the circuit court. Short v. Chicago, M. & St. P. Ry. Co. (C. C. 1888) 34 Fed. 225, 227.

A petition for removal of a cause to the United States court, which merely alleges in the alternative that, "from prejudice or local influence," the petitioner will not be able to obtain justice in the state court, is insufficient. Pennsylvania Co. v. Versten (1892) 140 Ill. 637, 30 N. E. 540, 15 L. R. A. 798.

The petition for removal must be verified by affidavit. Sweeney v. Coffin (C. C. 1870) Fed. Cas. No. 13,686.

Where a case is removed, and no affidavit of prejudice or local influence is filed, although the petition contains the allegation that the petitioner "has reason to believe and does believe that, from local prejudice or local influence, he will not be able to secure justice," and to such petition is appended the affidavit of the petitioner that "he has read the petition and knows its contents, and that the facts therein stated are true," the circuit court acquires no jurisdiction of the case, and it will be remanded to the state court. Sutherland v. Jersey City & B. R. Co. (C. C. 1884) 22 Fed. 356.

In an application for the removal of a cause to the federal court, the petition and accompanying affidavits are to be taken as part of the same instrument, so that it is error to deny the application because the proper showing has not been made, when it is contained in the affidavit. Bixby v. Blair (1881) 56 Iowa, 416, 9 N. W. 318.

To authorize the removal of a cause

to the federal court upon the ground of local prejudice, it is not sufficient for the litigant to state in his application that he cannot get justice in the state court in which the action is pending; he must also state that he cannot get justice in any state court to which, under the law, he is entitled, by reason of such prejudice to remove the cause. Southworth v. Reid (C. C. 1888) 36 Fed. 451; Postal Telegraph Co. v. Cofer (1893) 14 Ky. Law Rep. (abstract) 574.

A petition for removal, sworn to before a notary public authorized to administer oaths, is an affidavit within this section. Gutwillig v. Zuberbier (C. C. 1886) 28 Fed. 721.

The affidavit may be taken before any commissioner for Louisiana in another state. Tunstall v. Parish of Madison (1878) 30 La. Ann. 471.

The affidavit must, at least in the absence of any controlling statutes of the United States, be taken and certified in such manner as may be required by the state law in respect to the taking and certifying of affidavits to be used in the courts of such state. Bowen v. Chase (C. C. 1870) Fed. Cas. No. 1,720. Where it omits a recital as to the official character of the officer before whom it is made, and the state law requires such recital to render it valid, the omission is fatal. Sutherland v. Jersey City & B. R. Co. (C. C. 1884) 22 Fed. 356.

A suit was commenced in a state court, November 4th, as No. 4,414. A petition by the plaintiff to remove it into the federal court was filed the next day, entitled in the suit as No. 4,414, signed by his attorneys, referring to the suit as commenced, and accompanied by an affidavit, made by the plaintiff October 25th, stating that "he is the plaintiff" in the suit, as No. 4,414, and giving its title, and the name of the court, and alleging "that he has reason to believe, and does believe, that, from prejudice and local influence, he will not be able to obtain justice in said state court." Held, the affidavit sufficiently identified the suit, and was as effective as if made after suit brought. Canal & C. Sts. R. Co. v. Hart (1885) 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226.

A petition for the removal of a cause under the local prejudice clause, which alleges that petitioner cannot obtain justice in the trial court, nor in any other court in the state to which the case could be removed, is insufficient in not alleging prejudice against the party seeking removal, or influence exerted by the adverse party, and the affidavit accompanying it should state the facts supporting such averments. Goldworthy v. Chicago, M. & St. P. R. Co. (C. C. 1889) 38 Fed. 769.

207. —— Decisions under Act of 1867 and R. S. § 639, subd. 3, authorizing removal where party makes affidavit to belief of local prejudice.—Minnett v. Milwaukee & St. P. Ry. Co. (C. C. 1875) Fed. Cas. No. 9,636; Dennis v. Alachua County (C. C. 1877) Fed. Cas. No. 3,791; Ex parte Wells (C. C. 1878) Fed. Cas. No. 17,386; Hart v. City of New Orleans (C. C. 1882) 14 Fed. 180, 4 Woods, 165; Duff v. Duff (C. C. 1887) 31 Fed. 772, 12 Sawy. 502; Stewart v. Mordecai (1869) 40 Ga. 1, 2 Am. Rep. 55; Cooper v. Condon (1875) 15 Kan. 572; Tunstall v. Parish of Madison (1878) 30 La. Ann. 471; Mahone v. Manchester & L. Corp. (1872) 111 Mass. 72, 15 Am. Rep. 9; Dodge v. Northwestern Union Packet Co. (1868) 13 Minn. 458 (Gil. 427); Miller v. Finn (1871) 1 Neb. 254; Quigley v. Central Pac. R. Co. (1876) 11 Nev. 350, 21 Am. Rep. 757; Mix v. Andes Ins. Co. (1878) 74 N. Y. 53, 30 Am. Rep. 260; Best v. New York Life Ins. Co. (Ohio, 1872) 2 Cin. Super. Ct. Rep'r, 329; Rathbone Oil Tract Co. v. Rauch (1871) 5 W. Va. 79.

208. —— Averments as to citizenship of parties.—Before an action can be removed it must affirmatively appear that the controversy or action is between a citizen of the state in which the action is brought and a citizen of another state. Amory v. Amory (1873) 36 N. Y. Super. Ct. (4 Jones & S.) 520. The application must show that fact unless it appears in the record. Hartford Fire Ins. Co. v. Green (1876) 52 Miss. 332. But, if the averment of citizenship appears in the pleadings, it need not be in the affidavit. Tunstall v. Parish of Madison (1878) 30 La. Ann. 471.

The applicant must show that he is a citizen of another state than that in which the suit is pending; showing that he is a resident of such other state merely is not sufficient. Darst v. Bates (1869) 51 Ill. 439.

To entitle a defendant corporation to have a cause removed, the petition should show that all the corporators are nonresidents of the state. Northern Line Packet Co. v. Binninger (1873) 70 Ill. 571.

An application by an intervener for removal must show affirmatively that he and the plaintiffs were both residents of another state than that of defendant at the time suit was brought. Martin v. Coons (1872) 24 La. Ann. 169.

A petition alleging that defendant was at the time of the commencement of the suit, and still is, a citizen of a state other than that in which the suit was begun, and of no other state, was sufficient to show that he was a nonresident of the state where sued. Parker v. Vanderbilt (C. C. 1905) 136 Fed. 246.

In a petition filed in a United States circuit court for the removal of a cause from a state court on the ground of local prejudice, the defendant corporation alleged that it "is, and was at

the commencement of this suit, a nonresident of the state of North Carolina, * * * and is not a citizen of North Carolina." On the facts admitted, the supreme court of the state had previously held that the defendant was a domestic corporation. Held that, in view of these previous decisions, the allegation in the petition would be construed as merely a denial of the propriety of the supreme court's former ruling and not as an allegation of fact. Beach v. Southern Ry. Co. (1902) 42 S. E. 856, 131 N. C. 399, reversed Southern R. Co. v. Beach (1904) 24 Sup. Ct. 854, 193 U. S. 667, 48 L. Ed. 839.

209. —— Persons who may make petition or affidavit.—A petition for the removal of a cause on the ground of local prejudice should be sworn to by at least one of the petitioners, or by some agent or attorney authorized by them. Hall v. Chattanooga Agricultural Works (C. C. 1891) 48 Fed. 599.

It is not necessary that the petition should be verified by the petitioner in person. Bonner v. Meikle (C. C. 1896) 77 Fed. 485.

Where a removal petition on the ground of prejudice or local influence was supported by affidavits of parties who averred that they were thoroughly conversant with the facts alleged in the petition, it was immaterial that the petition was not verified by petitioner, but by his duly authorized agent. Parker v. Vanderbilt (C. C. 1905) 136 Fed. 246.

210. —— Sufficiency of affidavit.—Under the act of 1867 and R. S. § 639, subd. 3, the affidavit required by R. S. § 639, subd. 3, need not state the grounds of affiant's belief, nor in what the prejudice or local influence consists, but must state that he fears the court will not give him justice. Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399; Bowen v. Chase (C. C. 1870) Fed. Cas. No. 1,720; Sutherland v. Jersey City & B. R. Co. (C. C. 1884) 22 Fed. 356; Meadow Valley Min. Co. v. Dodds (1871) 7 Nev. 143, 8 Am. Rep. 709; Geiger v. Union Mut. Life Ins. Co. (N. Y. 1880) 1 City Ct. R. 237; Thatcher v. Rankin (N. Y. 1885) 2 How. Prac. (N. S.) 459.

But in Act 1887–88, § 2, subd. 4, and this section, the words, "when it shall be made to appear to said circuit court that from prejudice," etc., require legal proof of the fact of such prejudice; and an affidavit that such prejudice exists, without any statement of facts showing how or why it exists, is not sufficient. Ex parte Pennsylvania Co. (1890) 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; P. Schwenk & Co. v. Strang (1893) 59 Fed. 209, 8 C. C. A. 92, 19 U. S. App. 300; Short v. Chicago, M. & St. P. R. Co. (C. C. 1887) 33 Fed. 114; Id. (C. C. 1888) 34 Fed. 225; Malone v. Richmond & D. R. Co. (C. C. 1888) 35 Fed. 625; Amy v. Manning (C. C. 1889) 38 Fed. 536, 868; Hakes v. Burns (C. C. 1889) 40 Fed. 33; Minnick v. Union Ins. Co., Id. 369; Niblock v. Alexander (C. C. 1890) 44 Fed. 306; Hall v. Chattanooga Agricultural Works (C. C. 1891) 48 Fed. 599; Collins v. Campbell (C. C. 1894) 62 Fed. 850.

The application must be supported by such proof as to satisfy the court of the truth of such allegations. Southworth v. Reid (C. C. 1888) 36 Fed. 451. At least by the affidavit of one credible person. Hall v. Chattanooga Agricultural Works (C. C. 1891) 48 Fed. 599. But an affidavit stating directly and unequivocally that the applicant cannot get justice in the state courts, because of local prejudice and undue influence of the adverse party, is sufficient to justify a removal. Whelan v. New York, L. E. & W. R. Co. (C. C. 1888) 35 Fed. 849, 1 L. R. A. 65; Cooper v. Richmond & D. R. Co. (C. C. 1890) 42 Fed. 697, 8 L. R. A. 366; Franz v. Wahl (D. C. 1897) 81 Fed. 9.

The affidavit in support of the petition need not state that the facts are sworn to of the personal knowledge of the affiant, but it is sufficient that they are of his opinion and belief, if he is a credible person, and the facts on which such belief is based are given. City of Detroit v. Detroit City R. Co. (C. C. 1893) 54 Fed. 1.

Though the existence of prejudice and local influence must be made to appear in such a way that the court will be legally satisfied of the truth of the allegation, yet, where the affidavits in support of the petition state the facts upon which affiant's belief is founded, and, when considered in connection with opposing affidavits, show that there did exist such "prejudice and local influence" as would prevent petitioner from obtaining justice in the state court, the order of removal should be granted. Walcott v. Watson (C. C. 1891) 46 Fed. 529.

211. Traverse of prejudice or local influence.—Where an order of removal was obtained by a defendant without notice to plaintiff, it was error for the federal court to refuse to permit plaintiff to seasonably thereafter contest the allegations of the petition on which the order was made, and to show that no prejudice or local influence existed. Ellison v. Louisville & N. R. Co. (1902) 112 Fed. 805, 50 C. C. A. 530; Malone v. Richmond & D. R. Co. (C. C. 1888) 35 Fed. 625.

The better practice, upon applications for removal on the ground of prejudice or local influence, is to give notice to the opposite party, specifying the proofs to be used, and afford him an opportunity to present counter affidavits, if desired; and when this course is pursued, if not also when the application is ex parte, the sufficiency, as well as the truth or falsity, of the facts alleged, should be determined at a single hearing. Bonner v. Meikle (C. C. 1896) 77

Fed. 485; Maher v. Tower Hotel Co. (C. C. 1899) 94 Fed. 225. Though an order for removal is made ex parte, plaintiff may afterwards traverse the petition for removal, and be heard as to the grounds for removal. Montgomery County v. Cochran (C. C. 1902) 116 Fed. 985. But see Whelan v. New York, L. E. & W. R. Co. (C. C. 1888) 35 Fed. 849, 1 L. R. A. 65; Cooper v. Richmond & D. R. Co. (C. C. 1890) 42 Fed. 697, 8 L. R. A. 366; Brodhead v. Shoemaker (C. C. 1890) 44 Fed. 518, 11 L. R. A. 567; holding that on an application for removal of a cause on the ground of local prejudice, where an affidavit is presented, made by a person authorized to make it, stating of his own knowledge the existence of prejudice and local influence, the court will not permit the adverse party to traverse it and will not hear evidence on the subject; and Huskins v. Cincinnati, N. O. & T. P. R. Co. (C. C. 1889) 37 Fed. 504, 3 L. R. A. 545, holding that the existence of "local prejudice or influence" is not a jurisdictional fact, so as to entitle the adverse party to put it in issue for formal trial, and it is sufficient if it is made to appear to the federal court by petition and affidavit.

A plea by plaintiffs simply denying defendant's belief in the existence of prejudice or local influence is insufficient, and raises no issue on that question, as the plea should affirm that it does not exist. County Court v. Baltimore & O. R. Co. (C. C. 1888) 35 Fed. 161, 166.

212. Bond.—See post, § 1011, and notes.

213. —— Decisions under Act 1867 and R. S. § 639, subd. 3, requiring a special form of bond for removal on ground of prejudice.—Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399; Torrey v. Grant Locomotive Works (C. C. 1877) Fed. Cas. No. 14,105; Farmers' Loan & Trust Co. v. Chicago, P. & S. W. R. Co. (C. C. 1879) Fed. Cas. No. 4,665; Webber v. Bishop (C. C. 1882) 13 Fed. 49; Sutherland v. Jersey City & B. R. Co. (C. C. 1884) 22 Fed. 356; Gutwillig v. Zuberbier (C. C. 1886) 28 Fed. 721; Weed Sewing Mach. Co. v. Smith (1873) 71 Ill. 204; Tunstall v. Parish of Madison (1878) 30 La. Ann. 471; St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co. (1876) 23 Minn. 186, 23 Am. Rep. 682; Clippinger v. Missouri Val. Life Ins. Co. (1875) 26 Ohio St. 404; Bates v. Baltimore & O. R. Co. (1883) 39 Ohio St. 157 (reversed Baltimore & O. R. Co. v. Bates [1886] 119 U. S. 464, 7 Sup. Ct. 285, 30 L. Ed. 436); Henen v. Baltimore & O. R. Co. (1881) 17 W. Va. 881.

214. Determination by United States court as to removal on ground of prejudice or local influence.—The statute contemplates a judicial inquiry into the alleged local prejudice, and the court must take the responsibility of determining and adjudging judicially that prejudice exists before it can order a removal. P. Schwenk & Co. v. Strang (1893) 59 Fed. 209, 211, 8 C. C. A. 92; Short v. Chicago, M. & St. P. Ry. Co. (C. C. 1888) 34 Fed. 225; Malone v. Richmond & D. R. Co. (C. C. 1888) 35 Fed. 625; Carson & Rand Lumber Co. v. Holtzclaw (C. C. 1889) 39 Fed. 885, 886. CONTRA, Fisk v. Henarie (C. C. 1887) 32 Fed. 417, 13 Sawy. 38; Hills v. Richmond & D. R. Co. (C. C. 1887) 33 Fed. 81; Fisk v. Henarie (C. C. 1888) 35 Fed. 230, 13 Sawy. 318.

It should hear evidence pro and con, if necessary, and decide thereon as to the existence of such prejudice or influence, before entertaining jurisdiction on the merits. Carson & Rand Lumber Co. v. Holtzclaw (C. C. 1889) 39 Fed. 885, 886. Such evidence may be by affidavits which state facts, or by depositions, or by oral examination of witnesses. P. Schwenk & Co. v. Strang (1893) 59 Fed. 209, 211, 8 C. C. A. 92.

The amount and manner of proof required must be left to the discretion of the court passing on the application. Crotts v. Southern Ry. Co. (C. C. 1898) 90 Fed. 1.

A removal is not effected by a mere entry in a federal court finding the petition, affidavit, and bond for removal sufficient. The proper procedure is to obtain an order of removal from the federal court, file that order in the state court, and take a transcript therefrom, and file it in the federal court. Pennsylvania Co. v. Bender (1893) 148 U. S. 255, 13 Sup. Ct. 591, 37 L. Ed. 441.

While the law does not require it, proper respect for state courts demands that a certified copy of an order of removal be filed in the state court from which the cause is removed. Bartlett v. Gates (C. C. 1902) 117 Fed. 362.

Plaintiff being a resident of the state and judicial district, defendant, a nonresident corporation, obtained from the United States circuit court a writ of certiorari to remove the cause from the state court on the ground of prejudice and local influence, filed a certified copy of its petition and affidavit in the state court, and there moved for an order adjudging that the court would proceed no further in the cause, and that the clerk should certify the record to the United States circuit court. The judge declined to sign the order or permit the removal. Held that, the record showing on its face good ground for removal, defendant's procedure was correct, and the court should have granted an order for removal. Baird v. Richmond & D. R. Co. (1893) 113 N. C. 603, 18 S. E. 698.

The filing of a petition and affidavit setting out, almost in the language of the act, "that from prejudice and local influence said defendant will not be able to obtain justice in said court of com-

mon pleas, or in any other state court to which it has, under the laws of the state of Ohio, a right, on account of such prejudice or local influence, to remove said cause," is sufficient. Whelan v. New York, L. E. & W. R. Co. (C. C. 1888) 35 Fed. 849, 1 L. R. A. 65.

Where a petition for removal on account of local prejudice is presented to the federal court, the opposite party should have reasonable notice and opportunity to contest the allegation of local prejudice before an order of removal is made. Carson & Rand Lumber Co. v. Holtzclaw (C. C. 1889) 39 Fed. 578, 580.

A showing of local prejudice which was not presented to the court nor action invoked on it for more than a year had lost its force; it being necessary that it and the motion thereon should be substantially contemporaneous. Metropolitan Life Ins. Co. v. Ethier (1880) 44 Mich. 144, 6 N. W. 201.

An entry in the record on an application for removal for local prejudice, which is in form merely a finding of the right to removal, without an order that the cause be removed, does not effect the removal. Tod v. Cleveland & M. V. Ry. Co. (1894) 65 Fed. 145, 12 C. C. A. 521.

The dismissal of a petition for removal on the ground of local prejudice is not a final judgment from which a writ of error will lie. Patten v. Cilley (C. C. 1894) 62 Fed. 497, following Ex parte Pennsylvania Co. (1890) 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738, and In re Coe (1892) 49 Fed. 481, 1 C. C. A. 326, 5 U. S. App. 6.

An order setting aside another order remanding a cause to the state court, from which it had been removed on the ground of local prejudice, is not a final order, and the cause remains pending, and the provision of the act of March 3, 1887, for an inquiry into the question of local prejudice, applied to a cause at such a stage when the act was passed. Birdseye v. Shaeffer (C. C. 1888) 37 Fed. 821, writ of error dismissed (1891) 11 Sup. Ct. 885, 140 U. S. 117, 35 L. Ed. 403.

215. —— Waiver of objection to insufficient showing.—A plaintiff whose cause has been removed because of local prejudice, by failure to prosecute a motion to remand, thereby waives the objection that the showing was not sufficient. Tod v. Cleveland & M. V. R. Co. (1894) 65 Fed. 145, 12 C. C. A. 521.

216. Transfer of jurisdiction.—Where a cause has been removed from a state to the federal court on the ground of prejudice and local influence, and afterwards, the petition for removal not being before the state court, counsel for defendant admit that the petition set forth that defendant was an alien, the state court may proceed with the trial of the case, notwithstanding the order of removal to the federal court, since a cause cannot be removed on such ground by other than a citizen of another "state," and the order of removal was a nullity. Dahlonega Co. v. Frank W. Hall Merchandise Co. (1891) 88 Ga. 339, 14 S. E. 473.

Defendant, at Georgetown, S. C., on June 17th, had mailed removal papers to the circuit court at Charleston, S. C. On June 19th, when the case was called in the Georgetown county court, he moved that the case be withdrawn, and that the state court entertain no further jurisdiction thereof in consequence of such removal, basing the motion on an affidavit on information and belief that the removal papers had been filed, such belief being a mere expectation or presumption that the papers had been filed. Held, it was not error for the state court to deny the motion. Sparkman v. Supreme Council American Legion of Honor (1900) 35 S. E. 391, 57 S. C. 16.

217. Motion to remand.—The provision that the court shall remand a cause removed on the ground of local influence and prejudice when on application it has examined the affidavit and its grounds, and not become satisfied that the removing party will not be able to obtain justice in the state court, is not, as regards pending causes, unconstitutional. Birdseye v. Shaeffer (C. C. 1888) 37 Fed. 821, writ of error dismissed (1891) 11 Sup. Ct. 885, 140 U. S. 117, 35 L. Ed. 403.

The question whether there is prejudice, etc., is open to inquiry, and may be determined from the evidence produced by both parties on motion to remand. Dennison v. Brown (C. C. 1889) 38 Fed. 535.

When a petition for removal on the ground of local prejudice has been granted on an insufficient affidavit, on motion to remand to the state court the circuit court will reconsider the sufficiency of the affidavit, and remand the case if not satisfied of the existence of prejudice. Amy v. Manning (C. C. 1889) 38 Fed. 868. But the burden of proof is on plaintiff to show that such local prejudice did not exist. Parker v. Vanderbilt (C. C. 1905) 136 Fed. 246.

After the expiration of the term at which an order for removal was made by the circuit court on the ground of local prejudice, such order cannot be reviewed on a motion to remand on the ground that the evidence on which it was based was insufficient. Crotts v. Southern Ry. Co. (C. C. 1898) 90 Fed. 1, Parks v. Same, Id. 3.

Where a petition, supported by affidavits, for the removal of a cause from a state to the federal court on the ground of local prejudice, has been granted, the filing of the transcript in the federal court under the order of removal does not give plaintiff a right to file affidavits, denying the existence of

local prejudice, in support of a motion to remand, and compel the court to reexamine the question; but, before such issue can be made, leave of the court must be first obtained. Carpenter v. Chicago, M. & St. P. Ry. Co. (C. C. 1891) 47 Fed. 535.

When a cause has been removed to the circuit court by an order which recites that, "it appearing to the court from the petitions filed in this cause, and the affidavits thereto attached, that from prejudice or local influence" the petitioners will not "be able to obtain justice" in the state court, the circuit court will not afterwards receive counter affidavits denying the existence of prejudice, etc., and consider the question of fact anew on a motion to remand. Adelbert College of Western Reserve University v. Toledo, W. & W. Ry. Co. (C. C. 1891) 47 Fed. 836.

Where a petition supported by affidavits for the removal of a cause from a state to a federal court has been legally granted under the "prejudice and local influence" clause, plaintiff will not be allowed to file counter affidavits denying the existence of local prejudice in support of a motion to remand, when it is not shown that the court was misled or imposed upon in granting the order of removal. Reeves v. Corning (C. C. 1892) 51 Fed. 774.

Where plaintiff, in an action in a state court to set aside alleged fraudulent conveyances and subject the land conveyed to the satisfaction of judgments owned by him, removed the cause to a federal court on the grounds of diverse citizenship and local prejudice, filing an affidavit in support of the latter, and issue being joined, and reference made to a master, testimony was taken, and the cause was awaiting final argument before the master, the court would not consider an application to remand on the grounds of the falsity of plaintiff's affidavit; the question raised being indelicate and inexpedient to pass on, the application too late, and the ground of diverse citizenship sufficient to support the removal. Neale v. Foster (C. C. 1887) 31 Fed. 53, 12 Sawy. 424.

The burden of proving nonexistence of local prejudice held to be on plaintiff. Parker v. Vanderbilt (C. C. 1905) 136 Fed. 246.

218. Separable controversy as to parties not affected by prejudice or local influence.—An action against a construction company, whose employés negligently managed the train which caused plaintiff's injury, wherein the owner of the engine and cars composing said train and the owner of the tracks where the injury was done are joined as defendants, does not contain any separable controversy as to the parties so joined, giving them the right to a remand after removal to a federal court by the construction company on the ground of local prejudice. Haire v. Rome R. Co. (C. C. 1891) 57 Fed. 321.

VII. AMOUNT IN CONTROVERSY

219. Amount in controversy necessary to give jurisdiction to the federal courts.—See ante, § 991, and notes.

220. Cases subject to pecuniary limitation.—That defendants had procured the dismissal of a former suit begun by plaintiff in the federal court on the ground that the amount actually due was less than the jurisdictional amount did not prevent them from removing a suit begun in the state court in which more than the jurisdictional amount was involved. Held that, by suing to recover $3,500, plaintiff is estopped from raising any objection to the jurisdiction of the circuit court based on the amount claimed. Henderson v. Cabell (C. C. 1890) 43 Fed. 257.

That a circuit court might have had original jurisdiction of a case, under R. S. § 629, providing that circuit courts shall have original jurisdiction of all suits at law or in equity arising under any act providing for revenue, did not give the right to remove such a case, where involving less than the jurisdictional amount, to the circuit court, under the Act 1887-88, which gave only the right to remove suits of which the circuit courts are given original jurisdiction "by the preceding section," which section required at least $2,000 to be involved. Johnson v. Wells Fargo & Co. (C. C. 1899) 91 Fed. 1.

Under Judicial Code, § 299, post, § 1276, raising the jurisdictional amount of the federal courts, and this section, an action brought January 25, 1912, on a cause of action which arose November 14, 1911, is governed by the prior law as to the jurisdictional amount. Taylor v. Midland Valley R. Co. (D. C. 1912) 197 Fed. 323.

In an action by a national bank on a note executed to it by defendant, in which the defendant alleged that he had paid usury and sought to recover under the United States law double the amount so paid, he cannot compel the plaintiff to accept a sum he tenders, which he admits is usury, in order to increase the sum in dispute, that he may be entitled to a removal of the cause from the state court. Silva v. First Nat. Bank (1888) 10 Ky. Law Rep. (abstract) 365.

Action for damages to interstate shipment of cattle, though arising under a federal statute, is not removable to a United States court, where amount involved as shown by petition, was less than the jurisdictional amount. Missouri, K. & T. Ry. Co. of Texas v. Smith (Tex. Civ. App. 1914) 164 S. W. 885.

221. —— Cases of prejudice or local influence.—In order that defendant may remove a cause from a state to a fed-

eral court on account of prejudice or local influence, the matter in dispute must exceed the jurisdictional amount. Ex parte Pennsylvania Co. (1890) 137 U. S. 451, 11 Sup. Ct. 141, 34 L. Ed. 738; Id. (1890) 137 U. S. 457, 11 Sup. Ct. 143, 34 L. Ed. 741; Tod v. Cleveland & M. V. R. Co. (1894) 65 Fed. 145, 12 C. C. A. 521, 22 U. S. App. 707; Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399; Malone v. Richmond & D. R. Co. (C. C. 1888) 35 Fed. 625; Carson & Rand Lumber Co. v. Holtzclaw (C. C. 1889) 39 Fed. 578, 579; Roraback v. Pennsylvania Co. (C. C. 1890) 42 Fed. 420; Adams Exp. Co. v. Milton (1875) 74 Ky. (11 Bush) 49; Bierbower v. Miller (1890) 30 Neb. 161, 46 N. W. 431, 47 N. W. 1, 9 L. R. A. 228. CONTRA, McDermott v. Chicago & N. W. R. Co. (C. C. 1889) 38 Fed. 529, 3 L. R. A. 455.

222. Amount or value claimed or involved.—In order that a cause may be removed, the sum in dispute, exclusive of costs, must exceed the jurisdictional amount at the time of the commencement of the action in the state courts. Roberts v. Nelson (C. C. 1870) Fed. Cas. No. 11,907; Carrick v. Landman (C. C. 1884) 20 Fed. 209.

The claim of the plaintiff, and not the counterclaim of the defendant, should fix the amount in dispute, in determining the right to remove a cause from the state court under the act of March 3, 1875. Falls Wire Mfg. Co. v. Broderick (C. C. 1881) 6 Fed. 654; La Montagne v. T. W. Harvey Lumber Co. (C. C. 1891) 44 Fed. 645; Bennett v. Devine (C. C. 1891) 45 Fed. 705; McKown v. Kansas & T. Coal Co. (C. C. 1901) 105 Fed. 657; Trotier v. St. Louis, B. & S. Ry. Co. (1899) 54 N. E. 487, 180 Ill. 471. CONTRA, Clarkson v. Manson (C. C. 1880) 4 Fed. 257.

The holder of two insurance policies issued by the same company, on each of which he has a cause of action, has the right to bring separate actions thereon; and where he does so in a state court, the amount sued for in each case being less than $2,000, the actions are not removable, although the aggregate amount sued for exceeds such sum, and the fact that two of the actions were consolidated on motion of the defendant for "taking proof and hearing" does not render the consolidated cause removable as a single action. E. A. Holmes & Co. v. United States Fire Ins. Co. (C. C. 1906) 142 Fed. 863.

223. Allegations and prayers in pleadings.—The amount of damages laid by plaintiff is prima facie the amount in dispute. Postal Tel. Cable Co. v. Southern Ry. Co. (C. C. 1898) 88 Fed. 803; Sturgeon River Boom Co. v. W. H. Sawyer Lumber Co. (C. C. 1898) 89 Fed. 113; People v. Judges of New York Common Pleas (N. Y. 1846) 2 Denio, 197; Texas & P. Ry. Co. v. Good (Tex. Civ. App. 1912) 151 S. W. 617.

The amount in controversy is determined by the pleadings and the state of the record at the time the petition and bond for removal are filed. Munnss v. American Agricultural Chemical Co. (1914) 103 N. E. 859, 216 Mass. 423.

The amount prayed for is the amount in controversy, regardless of the allegations of the complaint, even though a less sum than warranted by the complaint was demanded to prevent removal. Swann v. Mutual Reserve Fund Life Ass'n (C. C. 1902) 116 Fed. 232; Lake Erie & W. R. Co. v. Juday (1898) 49 N. E. 843, 19 Ind. App. 436.

In general, plaintiff in his prayer may waive a part of the recovery to which according to the averments of the complaint he is entitled, and thus avoid a removal of the cause. Collins v. Twin Falls North Side Land & Water Co. (D. C. 1913) 204 Fed. 134.

Where the amount in controversy appears affirmatively from the pleadings to be less than the jurisdictional amount, the cause is not removable, though the petition for removal asserts that the amount in controversy exceeds that sum. Middleton v. Middleton (1893) 87 Iowa, 292, 54 N. W. 143; Bacon v. Iowa Cent. Ry. Co. (Iowa, 1912) 137 N. W. 1011. But, where the amount in controversy is not shown by the pleadings for the purposes of removal of the cause, it may be shown in the petition for removal. Zinkeisen v. Hufschmidt (C. C. 1874) Fed. Cas. No. 18,214; Banigan v. City of Worcester (C. C. 1887) 30 Fed. 392; Order of R. R. Telegraphers v. Louisville & N. R. Co. (C. C. 1906) 148 Fed. 437.

To an action to restrain the prosecution of a suit in a state court because of the removal to the federal court of a previous suit based upon the same cause of action, which was still pending, defendant answered that, while in the writ filed in the first action his demand was placed at $2,500, it was his intention to claim only $1,500; that he paid the writ tax required by the laws of the state upon that sum only; and the first action was dismissed, and the second suit brought, because of a mistake in the form of the action. Held that, no declaration having been filed in the first action, the amount in controversy must be determined from defendant's answer herein, and, it appearing that this was but $1,500, the federal court was without jurisdiction thereof, and the same should be remanded to the state court, and the injunction restraining the second action dissolved. Western Union Tel. Co. v. White (C. C. 1900) 102 Fed. 705.

224. Increase or reduction by amendment.—The right to a removal cannot be defeated by an amendment reducing the amount claimed, after the petition

and bond for removal have been filed. Kanouse v. Martin (1853) 15 How. 198, 14 L. Ed. 660; Wright v. Wells (C. C. 1816) Fed. Cas. No. 18,101; Ladd v. Tudor (C. C. 1847) Fed. Cas. No. 7,-975; Roberts v. Nelson (C. C. 1870) Fed. Cas. No. 11,907, 40 How. Prac. 387; Johnson v. Computing Scale Co. (C. C. 1905) 139 Fed. 339; Donovan v. Dixieland Amusement Co. (C. C. 1907) 152 Fed. 661; Cumberland Gap Building & Loan Ass'n v. Wells (1896) 25 S. E. 246, 99 Ga. 228; Louisville & N. R. Co. v. Roehling (1882) 11 Ill. App. (11 Bradw.) 264; Chicago, R. I. & P. Ry. Co. v. Stone & Bronnenberg (1905) 79 Pac. 655, 70 Kan. 708; Geiger v. Union Mut. Life Ins. Co. (N. Y. 1880) 1 City Ct. R. 237; Ray v. Southern Ry. Co. (1907) 57 S. E. 636, 77 S. C. 103. CONTRA, People v. Judges of New York Common Pleas (N. Y. 1846) 2 Denio, 197; Spiers v. Halsted (1876) 74 N. C. 620. But plaintiff may amend his complaint before a petition and bond for removal are filed, so as to demand $3,000 or a less sum, and thereby defeat a removal; his purpose in doing so being immaterial. McGinnity v. White (C. C. 1874) Fed. Cas. No. 8,802; Maine v. Gilman (C. C. 1882) 11 Fed. 214; Anderson v. Western Union Telegraph Co. (D. C. 1914) 218 Fed. 78; Lake Erie & W. R. Co. v. Huffman (Ind. 1912) 97 N. E. 434; Munnss v. American Agricultural Chemical Co. (1914) 103 N. E. 859, 216 Mass. 423; McCulloch v. Southern Ry. Co. (1908) 62 S. E. 1096, 149 N. C. 305. Even after notice of intention to remove a cause had been given. Anderson v. Western Union Telegraph Co. (D. C. 1914) 218 Fed. 78.

Where defendant petitioned for a removal before the filing of the declaration, and on the same day plaintiff amended his summons so as to reduce his demand below the federal jurisdictional amount, defendant's right of removal will depend on whether his petition was presented before the amendment, and this question the federal court will try before deciding the motion to remand. Waite v. Phœnix Ins. Co. (C. C. 1894) 62 Fed. 769.

Where the amendment reducing the demand and the petition to remove were filed the same day, but the amendment appeared first in the docket entries, the cause was not removable. Munnss v. American Agricultural Chemical Co. (1914) 103 N. E. 859, 216 Mass. 423.

Counsel for defendant stated to the court that he had a petition for removal to the United States circuit court, but that plaintiffs' attorney would appear presently with an amendment to the narr. Plaintiffs' attorney then appeared, and offered an amendment reducing his demand to $1,950. Held that, no papers having been filed depriving the court of jurisdiction, it was proper to allow the amendment. Mullin v. Blumenthal (Del. Super. 1898) 39 A. 991, 1 Pennewill, 182.

Where, in an action for injuries, the complaint alleged damages exceeding the jurisdictional amount but prayed for judgment for less than that amount, it was not an abuse of the trial court's discretion, after the filing of a petition for the removal of the cause to the federal courts, to permit plaintiff to amend his complaint so as to conform the allegations to the demand for damages. Stark v. Port Blakely Mill Co. (Wash. 1906) 87 Pac. 339.

The removal cannot be prevented by the mere filing of an amended petition, but it is essential that the amendment shall have been allowed. Chattanooga Boiler & Tank Co. v. Robinson (Ga. App. 1913) 80 S. E. 299.

An amendment of the writ without an amendment of the declaration is sufficient to make the cause nonremovable to the federal court. Munnss v. American Agricultural Chemical Co. (1914) 103 N. E. 859, 216 Mass. 423.

An amendment before the term of court to which the summons was returnable, which was not authorized by statute, nor was notice of its filing served on defendant as required when an amendment was properly filed in vacation, was ineffectual. Peterson v. Chicago, M. & St. P. Ry. Co. (C. C. 1901) 108 Fed. 561.

An amended petition filed in vacation and without notice reducing the amount deprived defendant of his right to remove. Western Union Telegraph Co. v. Campbell (1906) 91 S. W. 312, 41 Tex. Civ. App. 204.

Where plaintiff amends his petition, increasing the damages so as to create a removable cause, defendant by due application can remove it. Ft. Smith & W. R. Co. v. Blevins (1913) 130 Pac. 525, 35 Okl. 378. But, where the action might have been removed to the circuit court of the United States had the amount of damages claimed been sufficient, the allowance of an amendment to make the complaint correspond with the evidence, which brings the damages claimed within the jurisdictional amount, cannot be objected to on proceedings in error, on the ground that it forced defendant to submit to a trial in the state court when he was entitled to a removal, where no application for removal was made when the amendment was allowed. Northern Pac. R. Co. v. Austin (1890) 135 U. S. 315, 10 Sup. Ct. 758, 34 L. Ed. 218.

VIII. EFFECT OF REMAND AND REVIEW THEREOF

(A) Effect of remand

225. Jurisdiction of state court after remand.—The state court, after remand of a cause removed to a federal court, must proceed to exercise jurisdiction over the cause as a pending action. Birdseye v. Shaeffer (C. C. 1888) 37

Fed. 821 (writ of error dismissed Same v. Nickerson [1891] 140 U. S. 672, 11 Sup. Ct. 1017, 35 L. Ed. 403); Queen Ins. Co. v. Peters (Ga. App. 1912) 73 S. E. 536; Cœur D'Alene Ry. & Nav. Co. v. Spalding (1898) 53 Pac. 107, 6 Idaho, 97; Stommel v. Timbrel (1892) 84 Iowa, 336, 51 N. W. 159; Jackson v. Alabama Great Southern R. Co. (1881) 58 Miss. 648; Feeney v. Wabash R. Co. (1907) 99 S. W. 477, 123 Mo. App. 420; Johnson v. Gelston (1810) 3 N. J. Law (2 Penning.) 668; Kleiber v. McManus (1886) 66 Tex. 48, 17 S. W. 249; Seeligson's Ex'rs v. Texas Transp. Co. (1888) 70 Tex. 198, 7 S. W. 708; Wright v. Giles (Tex. Civ. App. 1910) 129 S. W. 1163.

The acceptance of jurisdiction by the state court does not deprive the defendant of any of its constitutional rights. Walker v. Wabash R. Co. (1906) 92 S. W. 83, 193 Mo. 453. Nor does the refusal of the state court to permit defendant to amend his petition for removal after the cause has been remanded by the federal court. Carr v. Nichols (1895) 157 U. S. 370, 15 Sup. Ct. 640, 39 L. Ed. 736, affirming Nichols v. Stevens (1894) 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514.

Where a prosecution attempted to be removed to a federal court was dismissed by the federal court on the ground of want of jurisdiction, the state court had jurisdiction to declare a forfeiture of a recognizance. Hunter v. Colquitt (1884) 73 Ga. 44.

The Texas supreme court has jurisdiction to issue an order compelling a district judge to proceed with the trial of a cause remanded to it. Kleiber v. McManus (1886) 66 Tex. 48, 17 S. W. 249.

226. Proceedings in state court.—No formal order of the federal court is necessary to enable the state court to resume its proceedings. A certified copy of the mandate of the supreme court to the circuit court affirming its dismissal of a cause is sufficient. Seeligson's Ex'rs v. Texas Transp. Co. (1888) 70 Tex. 198, 7 S. W. 708.

It is not error for the state court to proceed to trial and judgment, though defendant claims that it has injected a federal question into its answer with a view to having the same determined by the federal Supreme Court. Des Moines & Mississippi Levee Dist. No. 1 v. Chicago, B. & Q. R. Co. (Mo. 1912) 145 S. W. 35, 39 L. R. A. (N. S.) 543.

Plaintiff procured an order for the removal of his case from the state to the United States court, where it remained for 3½ years, when under a decision in the case by the supreme court of the United States it was remanded to the state court. Held, that this did not operate as a discontinuance of the suit in the state circuit court, and plaintiff might proceed with his case as if there had never been a removal. Germania Fire Ins. Co. v. Francis (1876) 52 Miss. 457, 24 Am. Rep. 674.

Defendant may not complain of the chancellor's refusal to remove the cause to the United States Circuit Court, it appearing that defendant had the full benefit of the petition to remove by filing a certified copy of the record in the federal court; that action operating as a removal of the cause to the federal court, whence it was remanded. Stockley v. Cissna (Tenn. 1907) 104 S. W. 792.

Where a case is removed to the federal court and thereafter on motion is remanded to the state court and the clerk enters default on failure of defendant to appear or answer, the court has jurisdiction to hear proofs submitted by plaintiff and make findings and enter judgment thereon. Morbeck v. Bradford-Kennedy Co. (Idaho, 1910) 113 Pac. 89.

Where litigation as to the ownership of certain funds in the hands of a receiver is begun in a state court, transferred to the federal court, and then remanded to the state court, after a decision by the supreme court that the federal court is without jurisdiction, and the title to the fund has not yet been determined in the state court, it is error to order a certain sum to be paid to the solicitors of one of the parties. Doane v. Corbin (1892) 44 Ill. App. 463.

Where defendant, after a substituted service of the summons and complaint, files his petition and bond for the removal of the cause to a federal court, and avers in his petition, as required by the removal act, that there is an action pending in the state court, and that he is a party to it, he submits to the jurisdiction of the state court, and, on the cause being remanded to such court by the federal court, he cannot object that there was not a valid service on him of the summons and complaint; and it is immaterial that his attorney declared, while engaged in effecting the removal, that his appearance was special, and only for the purpose of removing the cause to the federal court. Farmer v. National Life Ass'n of Hartford (1893) 138 N. Y. 265, 33 N. E. 1075.

Where a cause was removed from a state to a federal court, and in the latter court a receiver of rents and profits was appointed, who gave a bond, with sureties, the bond could not be made the basis of proceedings in the state court after remand. Early v. Beecher (1881) 75 Tenn. (7 Lea) 256.

A plaintiff, by procuring remand by showing that the claim is for less than $3,000, is bound thereby in further proceedings in the state court. Mull v. Parrott Bros. Co. (D. C. 1914) 218 Fed. 713.

Where plaintiff in a cause removed to the federal court attempted to try his whole case, but because of defendant's objections waived the special counts for a part of his claim, and based his claim

to recover therefor on the general count, and the court on appeal, on defendant's appeal required plaintiff to remit that part of his recovery on the general count as a condition of affirmance of the balance, defendant could not complain of the jurisdiction of the state court of a subsequent action based on the claims waived, on the ground that he had been tricked out of his rights to remove to the federal court; the claims in the new suit being for a sum too small to permit a removal. Holbrook v. J. J. Quinlan & Co. (Vt. 1911) 80 A. 339.

227. Revocation of order of remand.—After a federal court had entered an order remanding a cause forthwith, but during the same term, it set aside such order on its own motion and refused the motion to remand. Meantime plaintiff had filed a copy of the first order with the state court, which resumed jurisdiction, and subsequently rendered a judgment, which was affirmed on appeal by the supreme court of the state, on the ground that the order of remand became immediately effective, and deprived the federal court of further jurisdiction, and its subsequent order was therefore void. Held, that a motion by plaintiff in the federal court, based on the same ground, to strike the cause from its docket, would not be passed on until defendant had opportunity to remove the judgment of the state court into the supreme court of the United States for review, that the question of jurisdiction might be finally determined by the only court having authority to enforce its decision. Empire Min. Co. v. Propeller Tow-Boat Co. (C. C. 1901) 108 Fed. 900.

An attempt was made to remove a case from a state court to the United States court and judgment was rendered in favor of plaintiff in the latter court. The United States Court of Appeals remanded the case to the state court without trial; in the meantime the action had been tried by the state court in opposition to the wishes of defendant, and a judgment rendered February 19, 1905, and an appeal taken April 17, 1905. The order remanding the case to the state court was filed in the state court March 20, 1907, after which transcript on appeal was filed. Held, that the party undertaking the removal must take the consequences of the same, and his failure to file a transcript on appeal from the judgment of the state court within the time required by statute renders dismissal of the appeal necessary. Finney v. American Bonding Co. (1907) 90 Pac. 859, 13 Idaho, 534, rehearing denied (1907) 91 Pac. 318, 13 Idaho, 534.

Where a case commenced in a state court is transferred to a United States court, which afterwards makes an order remanding the case forthwith to the state court, and a certified copy of the order of remand is filed in the state court on the same day, the jurisdiction of the state court is not devested by a subsequent order of the United States court revoking such remand, and a subsequent judgment by the state court is not invalid, since the United States court cannot modify such order, after its execution, by being certified to the state court. Chisolm v. Propeller Tow-Boat Co. of Savannah (1901) 38 S. E. 156, 59 S. C. 549.

228. Removal after remand.—Where, on the first removal, the federal court declines to proceed, and remands the cause because of the failure to file the copy of the record within due time, the same party is not entitled to file in the state court a second petition for removal upon the same ground. St. Paul & C. R. Co. v. McLean (1883) 108 U. S. 212, 2 Sup. Ct. 498, 27 L. Ed. 703, affirming McLean v. St. Paul & C. Ry. Co. (C. C. 1879) Fed. Cas. No. 8,893.

When a cause has once been removed, and remanded because the petition for removal does not sufficiently allege diverse citizenship, a second removal on the same ground is not allowable. Johnston v. Donvan (C. C. 1887) 30 Fed. 395; Smith v. Travelers' Ins. Co. (C. C. 1896) 73 Fed. 513; Nichols v. Stevens (1894) 123 Mo. 96, 27 S. W. 613, 45 Am. St. Rep. 514 (affirming [1894] 123 Mo. 96, 25 S. W. 578, 45 Am. St. Rep. 514); Michigan Stove Co. v. Waco Hardware Co. (1899) 54 S. W. 357, 22 Tex. Civ. App. 293. But see Freeman v. Butler (C. C. 1889) 39 Fed. 1, holding that, where the petition is so defective that the federal court obtains no jurisdiction, its order remanding the cause is no bar to a subsequent removal on the same transcript.

Where a party procures the removal of a cause, as presenting an issue, under the laws of the United States, and the circuit court determines that question against the petitioner, and remands the cause, which decision is acquiesced in and unreversed, the question so determined is res judicata. Bodley v. Emporia Nat. Bank (1887) 38 Kan. 59, 16 Pac. 88.

An order remanding a cause to the state court whence it was removed does not prevent a second application for removal if the subsequent pleadings or conduct of the parties make the cause removable. Fritzlen v. Boatmen's Bank (1909) 29 Sup. Ct. 366, 212 U. S. 364, 53 L. Ed. 551, affirming decree Boatmen's Bank of St. Louis v. Fritzlen (1907) 89 Pac. 915, 75 Kan. 479, 22 L. R. A. (N. S.) 1235. But a petition for removal, upon which a cause was removed, but was subsequently remanded, is functus officio, and has no effect upon an amended complaint subsequently filed, even if such complaint renders the cause removable. Jones v. Mosher (1901) 107 Fed. 561, 46 C. C. A. 471.

Where an action against two joint defendants after removal on the ground of fraudulent joinder of the local defend-

ant was remanded, a directed verdict for such local defendant on a trial on the merits in the state court, on his motion, does not entitle the nonresident defendant to again remove the cause. Springer v. American Tobacco Co. (D. C. 1913) 208 Fed. 199.

An agreement between the parties that a case should be remanded from a federal court to which it was removed to the state district court was binding, so as to preclude one of the parties after remand from claiming that the case should be removed to the federal court. Southwestern Telegraph & Telephone Co. v. Shirley (Tex. Civ. App. 1913) 155 S. W. 663.

(B) Review of order remanding cause

229. Review of order denying remand.—See post, § 1019, and notes.

230. Decisions under prior statutes not prohibiting review of order remanding cause.—Chicago & A. R. Co. v. Wiswall (1874) 23 Wall. 507, 23 L. Ed. 103; Hoadley v. City & County of San Francisco (1876) 94 U. S. 4, 24 L. Ed. 34; Ayers v. Chicago (1879) 101 U. S. 184, 187, 25 L. Ed. 838; St. Paul & C. R. Co. v. McLean (1883) 108 U. S. 212, 2 Sup. Ct. 498, 27 L. Ed. 703; In re Sherman (1888) 124 U. S. 364, 8 Sup. Ct. 505, 31 L. Ed. 423; Richmond & D. R. Co. v. Thouron (1890) 134 U. S. 45, 10 Sup. Ct. 517, 33 L. Ed. 871; Gurnee v. Patrick County (1890) 137 U. S. 141, 11 Sup. Ct. 34, 34 L. Ed. 601; Texas Land & Cattle Co. v. Scott (1890) 137 U. S. 436, 11 Sup. Ct. 140, 34 L. Ed. 730; Birdseye v. Shaeffer (1891) 140 U. S. 117, 11 Sup. Ct. 885, 35 L. Ed. 402; Joy v. Adelbert College of Western Reserve University (1892) 146 U. S. 355, 13 Sup. Ct. 186, 36 L. Ed. 1003; Illinois Cent. R. Co. v. Brown (1895) 156 U. S. 386, 15 Sup. Ct. 656, 39 L. Ed. 461 (following Chicago, St. P., M. & O. R. Co. v. Roberts [1891] 141 U. S. 690, 12 Sup. Ct. 123, 35 L. Ed. 902); Johnston v. Donvan (C. C. 1887) 30 Fed. 395; Ex parte State Ins. Co. (1874) 50 Ala. 464.

231. Prohibition of appeal or writ of error.—Under this section the decision of a federal court remanding a cause to the state court is final. Morey v. Lockhart (1887) 123 U. S. 56, 8 Sup. Ct. 65, 31 L. Ed. 68; Missouri Pac. R. Co. v. Fitzgerald (1896) 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536; Powers v. Chesapeake & O. Ry. Co. (1898) 18 Sup. Ct. 264, 169 U. S. 92, 42 L. Ed. 673 (affirming judgment [C. C. 1895] 65 Fed. 129); May v. State Nat. Bank (1894) 59 Ark. 614, 28 S. W. 431; Smithson v. Chicago G. W. Ry. Co. (1898) 73 N. W. 853, 71 Minn. 216, affirmed Whitcomb v. Smithson (1900) 20 Sup. Ct. 248, 175 U. S. 635, 44 L. Ed. 303.

A decision of the circuit court of appeals reserving a decree of the circuit court which denied a motion to remand a case to the state court, and ordering the circuit court to remand the case, is not appealable to the Supreme Court of the United States. German Nat. Bank v. Speckert (1901) 21 Sup. Ct. 688, 181 U. S. 405, 45 L. Ed. 926.

When the federal court remands a cause, and the state court thereupon proceeds to final judgment, the action of the federal court is not reviewable on writ of error to such judgment. Missouri Pac. R. Co. v. Fitzgerald (1896) 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536. But see Cole v. Garland (1901) 107 Fed. 759, 46 C. C. A. 626.

This section took away the right of review in a case where suit was begun, and a petition for removal was filed, before its passage. Wilkinson v. Nebraska (1887) 123 U. S. 286, 8 Sup. Ct. 120, 31 L. Ed. 152; Sherman v. Grinnell (1887) 123 U. S. 679, 8 Sup. Ct. 260, 31 L. Ed. 278; Gurnee v. Patrick County (1890) 11 Sup. Ct. 34, 35, 137 U. S. 141, 34 L. Ed. 601. Even if the remanding order was made before the act was passed, but the appeal or writ of error not taken till afterward. Chicago, B. & Q. R. Co. v. Gray (1889) 131 U. S. 396, 9 Sup. Ct. 793, 33 L. Ed. 212.

The provision that no appeal shall lie from an order remanding a cause was not repealed by the act of March 3, 1891, creating the circuit courts of appeals. Chicago, St. P., M. & O. R. Co. v. Roberts (1891) 12 Sup. Ct. 123, 124, 141 U. S. 690, 35 L. Ed. 905; In re Coe (1892) 49 Fed. 481, 1 C. C. A. 326; In re Aspinwall's Estate (1898) 90 Fed. 675, 33 C. C. A. 217.

The prohibition of an appeal or writ of error applies, not only to removals on account of prejudice or local influence, but to cases removed on other grounds. Morey v. Lockhart (1887) 8 Sup. Ct. 65, 123 U. S. 56, 31 L. Ed. 68 (dismissing appeal Lockhart v. Morey [C. C. 1887] 31 Fed. 497). And takes away also the remedy of mandamus to compel the circuit court to take jurisdiction of the cause. Ex parte Pennsylvania Co. (1890) 11 Sup. Ct. 141, 142, 137 U. S. 451, 34 L. Ed. 738. Nor can an order remanding a cause be reviewed by the supreme court on a certificate of division of opinion between the judges. Morey v. Lockhart (1887) 123 U. S. 56, 8 Sup. Ct. 65, 31 L. Ed. 68.

Since an order remanding the cause is not reviewable, it ought not to be made without careful consideration nor without regard to the fact that, if wrong, the petitioner is without remedy. Boatmen's Bank of St. Louis v. Fritzlen (1905) 135 Fed. 650, 68 C. C. A. 288 (reversing judgment and order Weldon v. Fritzlen [C. C. 1904] 128 Fed. 608); Sweeney v. Grand Island & W. C. R. Co. (C. C. 1894) 61 Fed. 3, 4.

232. Review by state court.—The action of the federal courts in remanding a case to the state courts cannot be reviewed in the latter. Queen Ins. Co. v.

Peters (Ga. App. 1912) 73 S. E. 536; Cœur D'Alene Ry. & Nav. Co. v. Spalding (1898) 53 Pac. 107, 6 Idaho, 97; Tilley v. Cobb (1894) 57 N. W. 799, 56 Minn. 295; Feeney v. Wabash R. Co. (1907) 99 S. W. 477, 123 Mo. App. 420; Fitzgerald v. Fitzgerald & Mallory Const. Co. (1895) 44 Neb. 463, 62 N. W. 899; Gerner v. Mosher (1899) 78 N. W. 384, 58 Neb. 135, 46 L. R. A. 244; Michigan Stove Co. v. Waco Hardware Co. (1899) 54 S. W. 357, 22 Tex. Civ. App. 293; Texas & P. Ry. Co. v. Conway (Tex. Civ. App. 1916) 182 S. W. 52.

The order of remand of a cause removed from a chancery court is conclusive on the state Supreme Court on appeal from a judgment thereafter rendered in the state court. St. Louis, I. M. & S. Ry. Co. v. Neal (Ark. 1906) 98 S. W. 958; Lewis v. Weidenfeld (1897) 72 N. W. 604, 114 Mich. 581, 4 Detroit Leg. N. 709; Jifkins v. Sweetzer (Pa. 1883) 33 Leg. Int. 282, 2 Wkly. Notes Cas. 591; Stockley v. Cissna (Tenn. 1907) 104 S. W. 792; Pioneer Savings & Loan Co. v. Peck (1898) 49 S. W. 160, 20 Tex. Civ. App. 111; Rio Grande W. Ry. Co. v. Telluride Power Transmission Co. (1900) 63 Pac. 995, 23 Utah, 22. Even though plaintiff's petition was amended after the remand, where the amendment did materially change the allegations as to the federal question. St. Louis, I. M. & S. Ry. Co. v. Neal (Ark. 1906) 98 S. W. 958.

The federal court remanded a cause which had been removed from said state court. A judgment was rendered in the latter court, and an appeal was taken on a record silent as to any question of the propriety of the remand or of the jurisdiction of the state court. Six years after the making of the order remanding the cause, and after the supreme court had affirmed the judgment of the lower court, a petition was filed for a writ of review, on the ground that the state court did not acquire jurisdiction after the remand. Held, that the writ should be denied, since the petitioner was estopped to deny the jurisdiction of the state court. Cœur D'Alene Ry. & Nav. Co. v. Spalding (1898) 53 Pac. 107, 6 Idaho, 97.

IX. PROCEEDINGS IN STATE COURT AFTER DISMISSAL IN FEDERAL COURT

233. Right to sue again on same cause of action.—Where an action is removed to a federal court and is there dismissed without trial or determination of the merits, plaintiff's right to sue is not affected, and he may institute a new suit on the same cause of action in the state court, as though the prior suit had not been brought. Gassman v. Jarvis (C. C. 1899) 100 Fed. 146; Wall v. Chesapeake & O. Ry. Co. (1902) 101 Ill. App. 431 (judgment reversed [1902] 65 N. E. 632, 200 Ill. 66); Rodman v. Missouri Pac. Ry. Co. (1902) 70 Pac. 642, 65 Kan. 645, 59 L. R. A. 704; Behan v. Metropolitan Street Ry. Co. (1911) 118 Pac. 73, 85 Kan. 491; Swift & Co. v. Hoblawetz (1900) 61 Pac. 969, 10 Kan. App. 48; McPherson v. Swift (S. D. 1911) 130 N. W. 768. Even though the sum declared on in the new suit is so small that the suit cannot be removed. Holbrook v. J. J. Quinlan & Co. (Vt. 1911) 80 A. 339.

Where a defendant in a state court filed a petition for removal to the federal court, but did not call the state court's attention thereto, and caused a transcript of the record to be filed in the federal court which never ruled on jurisdiction, a dismissal by the federal court was not a bar to the prosecution of another action. Bacon v. Iowa Cent. Ry. Co. (Iowa, 1912) 137 N. W. 1011.

The voluntary dismissal of an action which has been removed from a state court to a federal Circuit Court does not preclude a subsequent suit on the same cause of action in the state court. Southern Ry. Co. v. Miller (1910) 30 Sup. Ct. 450, 217 U. S. 209, 54 L. Ed. 732 (affirming judgment [1908] 59 S. E. 1115, 3 Ga. App. 410); Texas Cotton Products Co. v. Starnes (1905) 133 Fed. 1022, 66 C. C. A. 673 (affirming decree [C. C. 1904] 128 Fed. 183); McIver v. Florida Cent. & P. R. Co. (1900) 36 S. E. 775, 110 Ga. 223, 65 L. R. A. 437; De Witt v. Chesapeake & O. R. Co. (1904) 79 S. W. 275, 25 Ky. Law Rep. 2019; Stevenson's Adm'r v. Illinois Cent. R. Co. (1904) 79 S. W. 767, 117 Ky. 855, 25 Ky. Law Rep. 2011; Nipp's Adm'x v. Chesapeake & O. Ry. Co. (1904) 80 S. W. 796, 25 Ky. Law Rep. 2335; S. F. Dana & Co. v. Blackburn (1906) 90 S. W. 237, 121 Ky. 706, 28 Ky. Law Rep. 695; Krueger v. Chicago & A. Ry. Co. (1900) 84 Mo. App. 358; Baltimore & O. R. Co. v. Larwill (1910) 93 N. E. 619, 83 Ohio St. 108. Even though the damages in the second suit were laid in an amount which would prevent another removal to the federal court. Southern Ry. Co. v. Rowe (1907) 59 S. E. 462, 2 Ga. App. 557; Cleveland, C., C. & St. L. Ry. Co. v. Lawler (1901) 94 Ill. App. 36; Fox v. Jacob Dold Packing Co. (1902) 70 S. W. 164, 96 Mo. App. 173; Young v. Southern Bell Telephone & Telegraph Co. (1906) 55 S. E. 765, 75 S. C. 326, 7 L. R. A. (N. S.) 501; Hooper v. Atlanta, K. & N. Ry. Co. (1900) 60 S. W. 607, 106 Tenn. 28, 53 L. R. A. 931; Pacific Exp. Co. v. Needham (1904) 83 S. W. 22, 37 Tex. Civ. App. 129.

It is not material that the action was not dismissed in the federal court until after the second one was instituted in the state court; it being sufficient that the dismissal occurred before the trial of the second action. S. F. Dana & Co.

v. Blackburn (1906) 90 S. W. 237, 121 Ky. 706, 28 Ky. Law Rep. 695.

But an action begun in a state court and voluntarily dismissed after being docketed in the federal court cannot be proceeded with in the state court. Goodwin v. Chesapeake & O. Ry. Co. (1912) 149 S. W. 1125, 149 Ky. 806.

CITED WITHOUT DEFINITE APPLICATION

Gordon v. Longest (1842) 16 Pet. 97, 101, 10 L. Ed. 900; Stockton v. Ford (1850) 11 How. 232, 242, 13 L. Ed. 676; Perkins v. Fourniquet (1852) 14 How. 313, 322, 14 L. Ed. 435; Nashville v. Cooper (1867) 6 Wall. 247, 254, 18 L. Ed. 851; In re State Ins. Co. (1873) 18 Wall. 417, 418, 21 L. Ed. 904; French v. Stewart (1874) 22 Wall. 238, 239, 247, 22 L. Ed. 854; Phœnix Ins. Co. v. Pechner (1877) 95 U. S. 183, 185, 24 L. Ed. 427; Hinckley v. Gilman C. & S. R. Co. (1879) 100 U. S. 153, 154, 25 L. Ed. 591; American Bible Soc. v. Grove (1879) 101 U. S. 610, 611, 25 L. Ed. 847; Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Jifkins v. Sweetze (1880) 102 U. S. 177, 178, 26 L. Ed. 129 (see note under § 639, subd. 2); King v. Cornell (1882) 1 Sup. Ct. 312, 313, 315, 106 U. S. 395, 27 L. Ed. 60; Krippendorf v. Hyde (1884) 4 Sup. Ct. 27, 32, 110 U. S. 276, 28 L. Ed. 145; Ames v. Kansas ex rel. Johnston (1884) 4 Sup. Ct. 437, 441, 111 U. S. 449, 28 L. Ed. 482; Cambria Iron Co. v. Ashburn (1886) 6 Sup. Ct. 929, 930, 118 U. S. 54, 30 L. Ed. 60; Des Moines Nav. & R. Co. v. Iowa Homestead Co. (1887) 8 Sup. Ct. 217, 219, 123 U. S. 552, 31 L. Ed. 202; Ex parte Pennsylvania Co. (1890) 11 Sup. Ct. 141, 142, 137 U. S. 451, 34 L. Ed. 738; Chicot County v. Sherwood (1893) 13 Sup. Ct. 695, 697, 148 U. S. 529, 37 L. Ed. 546; Cates v. Allen (1893) 13 Sup. Ct. 977, 978, 149 U. S. 451, 37 L. Ed. 804; Tennessee v. Union & Planters' Bank (1894) 14 Sup. Ct. 654, 657, 152 U. S. 454, 38 L. Ed. 511; California v. Southern Pac. Co. (1895) 15 Sup. Ct. 591, 603, 157 U. S. 229, 39 L. Ed. 683; Chicago, R. I. & P. R. Co. v. Martin (1900) 20 Sup. Ct. 854, 855, 178 U. S. 245, 44 L. Ed. 1055; Cochran v. Montgomery County (1905) 26 Sup. Ct. 58, 62, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451; Kentucky v. Powers (1906) 26 Sup. Ct. 387, 397, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 692; St. Louis S. W. R. Co. v. Alexander (1913) 33 Sup. Ct. 245, 227 U. S. 218, 57 L. Ed. 486; P. Schwenk & Co. v. Strang (1893) 59 Fed. 209, 210, 8 C. C. A. 92; Grand Trunk Ry. Co. v. Twitchell (1894) 59 Fed. 727, 729, 8 C. C. A. 237; Thurber v. Miller (1895) 67 Fed. 371, 375, 14 C. C. A. 432; North American Transportation & Trading Co. v. Howells (1903) 121 Fed. 694, 58 C. C. A. 442; Roberts v. Pacific & A. Ry. & Nav. Co. (1903) 121 Fed. 785, 58 C. C. A. 61; Wirgman v. Persons (1903) 126 Fed. 449, 453, 62 C. C. A. 63 (appeal dismissed [1905] 25 Sup. Ct. 795, 196 U. S. 636, 49 L. Ed. 629); Knight v. Lutcher & Moore Lumber Co. (1905) 136 Fed. 404, 405, 69 C. C. A. 248 (rehearing denied [1905] 139 Fed. 1007, 71 C. C. A. 684); Hendecker v. Rosenbaum (C. C. 1881) 6 Fed. 97, 98; Phœnix Mut. Life Ins. Co. v. Walrath (C. C. 1883) 16 Fed. 161, 162 (affirmed [1886] 6 Sup. Ct. 768, 117 U. S. 365, 29 L. Ed. 924); Wooster v. Handy (C. C. 1885) 23 Fed. 49, 53; Fisk v. Henarie (C. C. 1888) 35 Fed. 230 (reversed [1892] 12 Sup. Ct. 207, 142 U. S. 459, 35 L. Ed. 1080); Anderson v. Bowers (C. C. 1890) 43 Fed. 321, 322; Brodhead v. Shoemaker (C. C. 1890) 44 Fed. 518, 523, 11 L. R. A. 567; Gann v. Northeastern R. Co. (C. C. 1891) 57 Fed. 417, 422; Sweeney v. Grand Island & W. C. R. Co. (C. C. 1894) 61 Fed. 3; Louisville Trust Co. v. Cincinnati (C. C. 1896) 73 Fed. 716, 734 (reversed [1896] 76 Fed. 296, 22 C. C. A. 334); La Page v. Day (C. C. 1896) 74 Fed. 977, 978; Duncan v. Associated Press (C. C. 1897) 81 Fed. 417, 421; California Oil & Gas Co. v. Miller (C. C. 1899) 96 Fed. 12, 17; Wange v. Public Service R. Co. (C. C. 1908) 159 Fed. 189; Walton v. Southern Ry. Co. (C. C. 1910) 179 Fed. 175; Ladew v. Tennessee Copper Co. (C. C. 1910) 179 Fed. 245 (affirmed [1910] 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069, and [1910] 31 Sup. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073); Lawrence v. Southern Pac. Co. (C. C. 1910) 180 Fed. 822 (dismissed [1913] 33 Sup. Ct. 497, 228 U. S. 137, 57 L. Ed. 768); Buck v. Felder (D. C. 1911) 196 Fed. 419; In re Silvies River (D. C. 1912) 199 Fed. 495; Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1912) 201 Fed. 932; Thomas v. Chicago & N. W. R. Co. (D. C. 1913) 202 Fed. 766.

§ 1011. (Jud. Code, § 29.) Procedure for removal.

Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the

district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court.

Act March 3, 1875, c. 137, § 3, 18 Stat. 470. Act March 3, 1887, c. 373, § 1, 24 Stat. 552. Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 434. Act March 3, 1911, c. 231, § 29, 36 Stat. 1095.

Provisions for amendment of defective allegations in removed cases, so as to show jurisdiction because of diverse citizenship, were made by Jud. Code, § 274c, post, § 1251c.

Notes of Decisions

I. Validity and construction in general

1. Constitutionality.
2. Purpose and construction.
3. "Proper district" to which cause may be removed.

II. Proceedings for removal

(A) Parties

4. Parties entitled to remove.
5. Parties to cause for purpose of removal.
6. Parties to petition.

(B) Time for taking proceedings

7. Decisions under Act of 1789, requiring proceedings to be taken at time of entering appearance.
8. Decisions under Act March 3, 1875, requiring proceedings to be taken at or before term at which cause could first be tried, and before trial.
9. —— Terms of state court.
10. —— Condition of cause.
11. —— Effect of amendment of pleadings or bringing in new parties.
12. —— Effect of change of venue.
13. —— Effect of continuance or stay of proceedings.
14. —— Diligence of parties.
15. —— Effect of order that bill be taken pro confesso or of judgment by default.
16. —— Trial of cause in general and final judgment or decree.
17. —— Trial or hearing on demurrer.
18. —— Effect of motion for new trial or appeal.
19. —— Effect of order for new trial or reversal on appeal.
20. Nature and operation of limitations in general.
21. —— Amended petition.
22. Time for defense in general.
23. —— Void service of summons.
24. Time to plead under statutes or rules of particular states—Connecticut.
25. —— Georgia.
26. —— Illinois.
27. —— Indiana.
28. —— Kansas.
29. —— Kentucky.
30. —— Massachusetts.
31. —— Missouri.
32. —— New Hampshire.
33. —— New York.
34. —— North Dakota.
35. —— Pennsylvania.
36. —— South Carolina.
37. —— Tennessee.
38. —— Vermont.
39. Effect of entering appearance or filing pleading.
40. Time to plead in abatement or other dilatory plea.
41. Time to demur.
42. Time to amend answer or plea.
43. Extension of time to answer or plead.
44. Effect of plaintiff's failure to take default.
45. Effect of plea in abatement or other dilatory proceeding.
46. Effect of demurrer.
47. Effect of amendment of declaration or complaint.
48. Time for proceedings in cause not originally removable.
49. Time for proceedings by party brought in after the institution of the suit.
50. Time for filing bond.

(C) Effect of delay and objections thereto

51. Effect of delay in general.
52. Effect of delay by one coparty.
53. —— Right of one coparty to remove.
54. Excuses for delay.
55. Waiver of objections to delay.

(D) Notice

56. Decisions prior to the Judicial Code which first required notice to be given.
57. Necessity for notice.
58. Sufficiency of notice.

(E) Petition

59. Averments in general.
60. —— Grounds for removal.
61. —— Prayer.
62. Matters apparent of record.
63. Existence and description of controversy.
64. Subject-matter as ground for removal.

II. Proceedings for removal—Cont'd.

(E) *Petition—Cont'd.*

65. Citizenship of parties in general.
66. —— Citizenship of plaintiff.
67. —— Citizenship of assignors.
68. —— Citizenship of corporations.
69. Residence of parties.
70. —— Residence of corporations.
71. Citizenship at time of bringing suit.
72. Residence at time of bringing suit.
73. Fraudulent joinder to prevent removal.
74. Separable controversies.
75. Amount in controversy.
76. Time of removal.
77. Court to which removal is sought.
78. Signature.
79. Verification.
80. —— Decisions under prior statutes which did not require verification.
81. Counter affidavits or reply and proof.

(F) *Bond*

82. Necessity.
83. Form.
84. Condition.
85. Penalty.
86. Parties and execution.
87. Sufficiency of surety.
88. Breach and actions therefor.
89. Discharge of bail and surrender of principal.

(G) *Filing petition and bond*

90. Filing in state court.

(H) *Order for removal*

91. Necessity.
92. Effect of refusal.
93. Requisites and entry of order.
94. Vacation of order for or denying removal.

(I) *Filing copy of record in United States court*

95. Duty and necessity for filing copy of record and effect of filing.
96. Form and contents of transcript to be filed.
97. Time and place for filing.
98. Excuses for delay.
99. Effect of defect in transcript or of delay in filing.
100. Motions to docket cause.

(J) *Defects in proceedings, objections, amendments and waiver*

101. Compliance with requirements.
102. Amendment of petition.
103. Amendment of bond or new bond.
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III. Determination of right to remove and transfer of jurisdiction

(A) *Determination of right to remove*

105. Jurisdiction of state and United States courts in general.
106. Determination of issues of law.
107. Determination of issues of fact.
108. Hearing by state court.
109. Review of determination as to right of removal.
110. Review by state court.
111. Review by federal trial court.
112. Review by United States supreme court.
113. Mandamus to compel transfer of cause.

(B) *Transfer of jurisdiction*

114. Essentials to transfer of jurisdiction.
115. Duty of state court to transfer cause.
116. Removal on consent.
117. Proceedings in state court pending proceedings for removal.

(C) *Effect of removal*

118. In general.
119. Proceedings in state court after removal.
120. Stay of proceedings in state court.
121. Unauthorized or improper removal.

I. VALIDITY AND CONSTRUCTION IN GENERAL

1. Constitutionality.—This section is constitutional. Goodman v. City of Oshkosh (1878) 45 Wis. 355.

2. Purpose and construction.—Its purpose was to abridge the right of removal previously existing, and must be so construed as to effectuate that purpose. Lantz v. Fretts (C. C. 1909) 173 Fed. 1007. And the tendency of the courts is to construe it strictly against the right of removal. Heller v. Ilwaco Mill & Lumber Co. (C. C. 1910) 178 Fed. 111.

The provision in section 1012 requiring notice of application for removal did not apply to an order for removal made December 16, 1911. Cayce v. Southern Ry. Co. (D. C. 1912) 195 Fed. 786.

The language of this section strengthens the construction of the preceding section as allowing removal only by defendant, not by plaintiff, though defendant files a counterclaim for more than $3,000. Glover Mach. Works v. Cooke Jellico Coal Co. (D. C. 1915) 222 Fed. 531.

3. "Proper district" to which cause may be removed.—Under the preceding section and this section a suit can only be removed to the District Court for the district in which it is pending. St. John v. United States Fidelity & Guaranty Co. (D. C. 1914) 213 Fed. 685; St. John v. Taintor (D. C. 1915) 220 Fed. 457; Eddy v. Chicago & N. W. Ry. Co. (D. C. 1915) 226 Fed. 120.

Where an assignee brings a suit on an assigned claim in a state court of the federal district of his residence and defendant removes the cause to the federal court of that district, such court has jurisdiction though the assignor did not reside there. Cincinnati, H. & D. Ry. Co. v. Orr (D. C. 1914) 215 Fed. 261. Not that where, under section 51, post, § 1033, it could have been brought originally. Pavick v. Chicago, M. & St. P. Ry. Co. (D. C. 1914) 225 Fed. 395.

See, also, ante, § 1010, and notes.

II. PROCEEDINGS FOR REMOVAL

(A) *Parties*

4. Parties entitled to remove.—See ante, § 1010, and notes.

5. Parties to cause for purpose of removal.—One who is not a party to a cause is not entitled to a removal there-

of, though he may be interested in the controversy. Bertha Zinc & Mineral Co. v. Carico (C. C. 1893) 61 Fed. 132.

An action against a railroad company to recover damages for a personal injury will not be removed to the federal court upon the petition of one against whom no relief is sought, though he alleges that he was at the time of the injury, and still is, the owner of the railroad in the operation of which the injury was inflicted. Chesapeake & N. R. Co. v. Venable (1901) 111 Ky. 41, 63 S. W. 35, 23 Ky. Law Rep. 427.

A party defendant to an action is one who is named as such, and appears in the record as a defendant, at the time the right of removal exists. Walker v. Richards (C. C. 1893) 55 Fed. 129.

One who has not been allowed to intervene in an action, and who has made no application therefor, has no standing to petition for the removal of the cause to a federal court. State v. Barnes (1895) 5 N. D. 350, 65 N. W. 688. But, if one who is a necessary party to a cause in a state court is wrongfully excluded, and denied leave to file a proper cross-bill and answer, and to present a motion and bond for removal of the cause to the federal court, he will be treated by the latter court as if a party, and the motion for removal determined accordingly. Hack v. Chicago & G. S. Ry. Co. (C. C. 1885) 23 Fed. 356.

In a suit pending in a state court of Texas between parties who were all citizens of that state, certain citizens of other states holding liens which entitled them, under the laws of Texas, to intervene, applied for leave to intervene and litigate their rights, which was refused by the state court. The next day, without leave, they filed their petition asserting their claims and contesting the lien, and alleged priority of plaintiffs in the suit, and then removed the suit to the United States court. Held, on motion to remand, that an order of the state court was no necessary in order to make them parties to the suit, and it was properly removed. Snow v. Texas Trunk R. R. (C. C. 1882) 16 Fed. 1, 4 Woods, 394.

The receiver for a dissolved corporation, appointed under the Wisconsin statute, filed an intervening petition in an action in Colorado against a trustee of the corporation, and an order was entered admitting him as defendant. Held, that a subsequent vacation of that order did not destroy his standing to apply to remove the case to the federal court, since by his petition in intervention he acquired rights of which he could not be deprived without his consent. American Nat. Bank v. National Benefit & Casualty Co. (C. C. 1895) 70 Fed. 420.

If it is irregular to file an affidavit and bond for removal the day before taking a formal order making movant a party and removing the cause, such irregularity is cured by an order the next day making him a party and reciting the fact as to the filing of the bond and removal of the cause. First Nat. Bank v. Merchants' Bank (C. C. 1888) 37 Fed. 657, 2 L. R. A. 469.

Where the real controversy is between a city and one of its citizens, a citizen of another state, claiming to be interested in the subject-matter of the litigation, has not the right to remove the suit from the state into the federal court. City of Chicago v. Gage (C. C. 1875) Fed. Cas. No. 2,664, affirmed Ayers v. City of Chicago (1879) 101 U. S. 184, 25 L. Ed. 838.

In a suit to assert the lien of certain railroad equipment bonds, the trustees under mortgages to secure subsequent issues of bonds have no interest in the controversy as parties defendant, such as will give them a right to remove, when their mortgages have all been foreclosed, and a property sold to a new corporation, under a valid decree of a court of competent jurisdiction. Adelbert College of Western Reserve University v. Toledo, W. & W. Ry. Co. (C. C. 1891) 47 Fed. 836.

In an action to vacate the charter of a railroad company because a majority interest therein had been purchased by a competing line engaged in interstate commerce, which purchase was alleged to be ultra vires, it cannot be objected to the right of removal that the purchasing corporation is not a party to the suit, and that its right cannot be affected by its decision, for the defendant corporation represents every stockholder in it, and, if the suit be successful, every share of stock, including that held by the purchaser becomes valueless and nonexistent. South Carolina v. Port Royal & A. R. Co. (C. C. 1893) 56 Fed. 333.

A corporation which had conveyed the legal title to certain lands to trustees by a mortgage which had been foreclosed and an order of sale entered, and which after such decree sold its equity of redemption to another, had no interest in the lands after such sale which made it a necessary party to proceedings for the condemnation of a right of way over such lands, even though a formal conveyance to the purchaser had not been executed at the time the proceedings were instituted, and a conveyance subsequently executed did not make the grantee a purchaser pendente lite and without standing to remove the cause. Deepwater Ry. Co. v. Western Pocahontas Coal & Lumber Co. (C. C. 1907) 152 Fed. 824.

6. Parties to petition.—All the defendants must unite in a petition for the removal to a federal court of a cause arising under the constitution and laws of the United States or one between citizens of different states, where a joint cause of action is alleged against all the defendants. Chicago, R. I. & P.

Ry. Co. v. Martin (1900) 20 S. Ct. 854, 178 U. S. 245, 44 L. Ed. 1055, affirming judgment (1898) 53 Pac. 461, 59 Kan. 437; German Savings & Loan Soc. v. Dormitzer (1902) 116 Fed. 471, 53 C. C. A. 639; Yarnell v. Felton (C. C. 1900) 104 Fed. 161; Miller v. Le Mars Nat. Bank (C. C. 1902) 116 Fed. 551; Heffelfinger v. Choctaw, O. & G. R. Co. (C. C. 1905) 140 Fed. 75; Bowles v. H. J. Heinz Co. (C. C. 1911) 188 Fed. 937; St. Louis, A. & T. Ry. Co. v. Trigg (1897) 40 S. W. 579, 63 Ark. 536. But see Field v. Lownsdale (C. C. 1867) Fed. Cas. No. 4,769, holding that an application to a state court for removal of a cause need not be made at the same time by all the defendants, though under the construction given to section 12 of the judiciary act (1 Stat. 79) all the defendants must have been entitled to such removal.

It is not necessary that merely nominal or formal defendants should join in a petition for removal. Shattuck v. North British & Mercantile Ins. Co. (1893) 58 Fed. 609, 7 C. C. A. 386; Cooke v. Seligman (C. C. 1880) 7 Fed. 263, 17 Blatchf. 452; Henderson v. Cabell (C. C. 1890) 43 Fed. 257.

Where plaintiff, a resident of New York, sued defendants, residents of Pennsylvania, for malicious prosecution, but only served the corporation defendant, it was no objection to the corporation's right to remove, that the individual defendant not served did not join in the petition. Bowles v. H. J. Heinz Co. (C. C. 1911) 188 Fed. 937.

Where a noncitizen defendant was joined with a citizen defendant, and both were jointly and severally liable on the cause of action alleged, the fact that the citizen defendant joined in the petition by his codefendant to remove the cause to the federal court did not confer federal jurisdiction on the ground of diverse citizenship. Eastin & Knox v. Texas & P. Ry. Co. (1906) 92 S. W. 838, 99 Tex. 654, reversing judgment Texas & P. Ry. Co. v. Eastin & Knox (Civ. App. 1905) 89 S. W. 440.

Where there is a separable controversy between two of the parties, who have a right to the removal thereof, the unnecessary joinder in the petition for removal of a trustee who has no right of removal will be treated as a nullity, and the suit will not be remanded. Snow v. Smith (C. C. 1882) 88 Fed. 657.

A suit by a bank was instituted for the purpose of determining to whom a deposit should be paid against the administrator of the deceased depositor, a citizen of the state, who claimed the deposit as a part of the estate of the deceased, and against a third person, a citizen of another state, who claimed the deposit. Held, that the failure of the husband of such third person to join in a petition for removal was immaterial. First Nat. Bank v. Bridgeport Trust Co. (C. C. 1902) 117 Fed. 969.

In an action by husband and wife to recover property which belonged to the wife when the marriage took place, and not yet reduced to possession, the husband has such an interest in enforcing his marital rights as to entitle him to join in an application for removal to the federal court. Carswell v. Schley (1899) 59 Ga. 17.

A petition to remove need not be filed in propria persona, but may be made by the attorney of a defendant. Cooke v. Seligman (C. C. 1880) 7 Fed. 263, 17 Blatchf. 452; Fisk v. Fisk (La. 1826) 4 Mart. (N. S.) 676.

Under a New Jersey statute (P. L. 1896, p. 295, § 53) continuing the existence of a dissolved corporation to prosecute or defend suits by or against it, a defendant corporation can remove a cause to the federal court notwithstanding dissolution. Groom v. Mortimer Land Co. (1912) 192 Fed. 849, 113 C. C. A. 173, writ of error denied (1912) 32 S. Ct. 835, 225 U. S. 700, 56 L. Ed. 1264.

Where a certain railroad company was the party sued, and the action was properly entitled against it, and the corporation so brought into court filed a petition for removal, the record sufficiently identified the defendant and the petitioner as the same party. Wisecarver & Reynard v. Chicago, R. I. & P. Ry. Co. (Iowa, 1908) 117 N. W. 961.

(B) Time for taking proceedings

7. Decisions under Act of 1789, requiring proceedings to be taken at time of entering appearance.—Ward v. Arredondo (C. C. 1825) Fed. Cas. No. 17,148; Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399; Kingsbury v. Kingsbury (C. C. 1871) Fed. Cas. No. 7,817; Beatty v. Ross (1847) 1 Fla. (Branch) 198; Scott v. Hull (1860) 14 Ind. 136; Eastin v. Rucker (1829) 24 Ky. (1 J. J. Marsh.) 232; Duncan v. Hampton (La. 1822) 12 Mart. (O. S.) 92; Richardson v. Packwood (La. 1823) 1 Mart. (N. S.) 299; Johnston's Ex'r v. Wall, Id. 542; Fisk v. Fisk (La. 1826) 4 Mart. (N. S.) 676; Crane v. Reeder (1874) 28 Mich. 527, 15 Am. Rep. 223; Same v. Seitz (1874) 30 Mich. 453; Same v. Reeder (1874) 30 Mich. 459; Same v. Gerloff (1875) 31 Mich. 454; Robinson v. Potter (1861) 43 N. H. 188; Gelston v. Johnson (1810) 3 N. J. Law (2 Penning.) 625; Bird v. Murray (N. Y. 1798) Colem. Cas. 58; Arjo v. Monteiro (N. Y. 1803) 1 Caines, 248; Jackson v. Stiles (N. Y. 1809) 4 Johns. 493; Redmond v. Russell (N. Y. 1815) 12 Johns. 153; Livingston v. Gibbons (N. Y. 1819) 4 Johns. Ch. 94; Suydam v. Smith (N. Y. 1845) 1 Denio, 263; Norton v. Hayes (N. Y. 1847) 4 Denio, 245; Durand v. Hollins (N. Y. 1854) 10 N. Y. Super. Ct.

(3 Duer) 686; Cooley v. Lawrence (N. Y. 1855) 12 N. Y. Super. Ct. (5 Duer) 605; Carpenter v. New York & N. H. R. Co. (N. Y. 1855) 11 How. Prac. 481; Disbrow v. Driggs (N. Y. 1858) 8 Abb. Prac. 305; Id. (N. Y. 1859) 16 How. Prac. 346; Dart v. Arnis (N. Y. 1860) 19 How. Prac. 429; Bragelman v. Berding (N. Y. 1873) 15 Abb. Prac. (N. S.) 22; Kerille v. Phœnix Life Ins. Co. (N. Y. 1874) 3 Thomp. & C. 788; Eby v. Railroad Co. (Pa. 1879) 36 Leg. Int. 164, 7 Wkly. Notes Cas. 145, 13 Phila. 161; Pugsley v. Freedman's Savings & Trust Co. (1873) 2 Tenn. Ch. 130; Bell v. Bell (1869) 3 W. Va. 183.

8. Decisions under Act March 3, 1875, requiring proceedings to be taken at or before term at which cause could first be tried and before trial.—Meyer v. Delaware R. R. Const. Co. (1879) 100 U. S. 457, 25 L. Ed. 593; Removal Cases (1879) 100 U. S. 457, 473, 25 L. Ed. 593; King v. Worthington (1881) 104 U. S. 44, 26 L. Ed. 652; Myers v. Swann (1882) 107 U. S. 546, 2 Sup. Ct. 685, 27 L. Ed. 583; Pullman's Palace Car Co. v. Speck (1885) 5 Sup. Ct. 374, 375, 113 U. S. 84, 28 L. Ed. 925; Andrews' Ex'rs v. Garett (C. C. 1875) Fed. Cas. No. 375; Merchants' & Manufacturers' Nat. Bank v. Wheeler (C. C. 1875) Fed. Cas. No. 9,439; Baker v. Peterson (C. C. 1877) Fed. Cas. No. 776; Cooke v. Ford (C. C. 1877) Fed. Cas. No. 3,173; Wilcox & Gibbs Sewing Mach. Co. v. Follett (C. C. 1878) Fed. Cas. No. 17,643; La Mothe Mfg. Co. v. National Tube Works Co. (C. C. 1879) Fed. Cas. No. 8,033; Missouri v. Merritt (C. C. 1880) 1 Fed. 283, 1 McCrary, 65; Hendecker v. Rosenbaum (C. C. 1881) 6 Fed. 97, 19 Blatchf. 35; Johnson v. Johnson (C. C. 1882) 13 Fed. 193; Lantz v. Fretts (C. C. 1909) 173 Fed. 1007; Livingston v. Frick (1886) 76 Ga. 839; Crane v. Reeder (1876) 35 Mich. 146.

9. —— Terms of state court.—Myers v. Swann (1882) 107 U. S. 546, 2 Sup. Ct. 685, 27 L. Ed. 583; Holland v. Chambers (1884) 3 Sup. Ct. 427, 110 U. S. 59, 28 L. Ed. 70, affirming (C. C. 1882) 11 Fed. 209; Cable v. Ellis (1884) 4 S. Ct. 85, 110 U. S. 389, 28 L. Ed. 186; Houston & T. C. Ry. Co. v. Shirley (1884) 4 Sup. Ct. 472, 473, 111 U. S. 358, 28 L. Ed. 455; Carson v. Hyatt (1886) 6 Sup. Ct. 1050, 1054, 118 U. S. 279, 30 L. Ed. 167; Knowlton v. Congress & Empire Spring Co. (C. C. 1875) Fed. Cas. No. 7,902; Gurnee v. Brunswick County (C. C. 1876) Fed. Cas. No. 5,872; Scott v. Clinton & S. R. Co. (C. C. 1876) Fed. Cas. No. 12,527; Ames v. Colorado Cent. R. Co. (C. C. 1877) Fed. Cas. No. 325; Palmer v. Call (C. C. 1877) Fed. Cas. No. 10,686; McLean v. St. Paul & C. Ry. Co. (C. C. 1879) Fed. Cas. No. 8,893 (affirmed St. Paul & C. R. Co. v. McLean [1883] 108 U. S. 212, 2 Sup. Ct. 498, 27 L. Ed. 703); Stough v. Hatch (C. C. 1879) Fed. Cas. No. 13,499; Forrest v. Edwin Forrest Home (C. C. 1880) 1 Fed. 459, 17 Blatchf. 522; Traders' Bank v. Tallmadge (C. C. 1881) 9 Fed. 363, 20 Blatchf. 39; Meyer v. Norton (C. C. 1881) 9 Fed. 433; Kerting v. American Oleograph Co. (C. C. 1881) 10 Fed. 17, 11 Biss. 81; McNaughton v. South Pac. C. R. Co. (C. C. 1884) 19 Fed. 881; Wilkinson v. Delaware, L. & W. R. Co. (C. C. 1884) 22 Fed. 353; Field v. Williams (C. C. 1885) 24 Fed. 513, 515; Stafford v. Hightower (1882) 68 Ga. 394; Steiner v. Mathewson (1886) 77 Ga. 657; Danville Banking & Trust Co. v. Parks (1878) 88 Ill. 170; Flagg v. Walker (1884) 109 Ill. 494; Continental Life Ins. Co. v. Kessler (1882) 84 Ind. 310; Barber v. St. Louis, K. C. & N. R. Co. (1876) 43 Iowa, 223, 22 Am. Rep. 243; Chicago, B. & Q. R. Co. v. Welch (1876) 44 Iowa, 665; Sperry v. Ethridge (1886) 30 N. W. 4, 70 Iowa, 27; Cole v. La Chambre (1879) 31 La. Ann. 41; Hebert v. Lefevre (1879) 31 La. Ann. 363; Inhabitants of School Dist. No. 6 in Dresden v. Ætna Ins. Co. (1877) 66 Me. 370; New York Warehouse & Security Co. v. Loomis (1877) 122 Mass. 431, 23 Am. Rep. 372; Clark v. Child (1884) 136 Mass. 344; Whittemore v. Stephens (1882) 12 N. W. 858, 48 Mich. 573; Preston v. Travelers' Ins. Co. (1877) 58 N. H. 76; Stebbins v. Lancashire Ins. Co. (1879) 59 N. H. 414; Wheeler v. Liverpool, L. & G. Ins. Co. (1881) 60 N. H. 456; Wanner v. Sisson (1877) 28 N. J. Eq. (1 Stew.) 117; Warner v. Pennsylvania R. Co. (N. Y. 1875) 6 Hun, 197; Phœnix Life Ins. Co. v. Saettel (1877) 33 Ohio St. 278; Huddy v. Havens (Pa. 1877) 3 Wkly. Notes Cas. 432; Whitehouse v. Continental Ins. Co. (Pa. 1880) 1 Leg. Rec. Rep. 167; Meyer v. Schining (1881) 55 Tex. 430; White v. Holt (1882) 20 W. Va. 792; Lynch v. Andrews (1885) 25 W. Va. 751; Eldred v. Becker (1884) 60 Wis. 43, 18 N. W. 642.

10. —— Condition of cause.—Carson v. Hyatt (1886) 118 U. S. 279, 6 Sup. Ct. 1050, 30 L. Ed. 167; Michigan Cent. R. Co. v. Andes Ins. Co. (C. C. 1876) Fed. Cas. No. 9,526; Atlee v. Potter (C. C. 1877) Fed. Cas. No. 636; Hunter v. Royal Canadian Ins. Co. (C. C. 1878) Fed. Cas. No. 6,909; Farmers' Loan & Trust Co. v. Chicago, P. & S. W. R. Co. (C. C. 1879) Fed. Cas. No. 4,665; Whitehouse v. Continental Fire Ins. Co. (C. C. 1880) 2 Fed. 498; Murray v. Holden (C. C. 1880) 2 Fed. 740, 1 McCrary, 341; Van Allen v. Atchison, C. & P. R. Co. (C. C. 1880) 3 Fed. 545, 1 McCrary, 598; Ketchum v. Black River Lumber Co. (C. C. 1880) 4 Fed. 139, 143; Stevens v. Richardson (C. C. 1881) 9 Fed. 191, 20 Blatchf. 53; Aldrich v. Crouch (C. C. 1882) 10 Fed. 305, 11 Biss. 180; Thorne

v. Towanda Tanning Co. (C. C. 1882) 15 Fed. 289; National Bank v. Dorset Pipe & Paving Co. (C. C. 1884) 20 Fed. 707; Wilkinson v. Delaware, L. & W. Ry. Co. (C. C. 1885) 23 Fed. 561; Maloy v. Duden (C. C. 1885) 25 Fed. 673; Winberg v. Berkeley Co. Railway & Lumber Co. (C. C. 1887) 29 Fed. 721; Dunton v. Muth (C. C. 1891) 45 Fed. 390; Blackwell v. Braun (D. C. 1880) 1 Fed. 351, 4 Hughes, 203; Garrett v. Bonner (1878) 30 La. Ann. 1305; Stone v. Sargent (1880) 129 Mass. 503; Amy v. Manning (1887) 144 Mass. 153, 10 N. E. 737; Whitehouse v. Bank (Pa. 1880) 1 Leg. Rec. Rep. 249; Same v. Continental Fire Ins. Co. (Pa. 1880) 14 Phila. 431; Friese v. Homeopathic Mut. Life Ins. Co. (1884) 107 Pa. 134.

11. —— Effect of amendment of pleadings or bringing in new parties.—Harter Twp. v. Kernochan (1880) 103 U. S. 562, 567, 26 L. Ed. 411; Edrington v. Jefferson (1884) 111 U. S. 770, 4 Sup. Ct. 683, 28 L. Ed. 594; Phœnix Mut. Life Ins. Co. v. Walrath (1886) 117 U. S. 365, 6 Sup. Ct. 768, 29 L. Ed. 924, affirming judgment Id. (C. C. 1883) 16 Fed. 161, 11 Biss. 432; Greene v. Klingler (C. C. 1879) Fed. Cas. No. 5,767; Wehl v. Wald (C. C. 1879) Fed. Cas. No. 17,356; Cramer v. Mack (C. C. 1882) 12 Fed. 803, 20 Blatchf. 479; Goodnow v. Dolliver (C. C. 1886) 26 Fed. 469.

12. —— Effect of change of venue.—Baltimore & O. R. Co. v. Burns (1888) 124 U. S. 165, 8 Sup. Ct. 421, 31 L. Ed. 333; First Nat. Bank of Wausau v. Conway (1886) 67 Wis. 210, 30 N. W. 215.

13. —— Effect of continuance or stay of proceedings.—American Bible Soc. v. Grove (1879) 101 U. S. 610, 612, 25 L. Ed. 847; Babbitt v. Clark (1880) 103 U. S. 606, 26 L. Ed. 507; Manning v. Amy (1891) 140 U. S. 137, 11 Sup. Ct. 707, 35 L. Ed. 386, affirming Amy v. Manning (1887) 144 Mass. 153, 10 N. E. 737; Warner v. Pennsylvania R. Co. (C. C. 1876) Fed. Cas. No. 17,-186, affirming (N. Y. 1875) 6 Hun, 197; McCullough v. Sterling School Furniture Co. (C. C. 1877) Fed. Cas. No. 8,741; Stough v. Hatch (C. C. 1879) Fed. Cas. No. 13,499; Wheeler v. Liverpool, London & Globe Ins. Co. (C. C. 1881) 8 Fed. 196; Johnson v. Johnson (C. C. 1882) 13 Fed. 193; Badger v. Mulville (C. C. 1884) 22 Fed. 257; Chrissenger v. Democrat (C. C. 1884) 22 Fed. 753; Davies v. Marine Nat. Bank (C. C. 1885) 24 Fed. 194; Feibleman v. Edmonds (1887) 69 Tex. 334, 6 S. W. 417.

14. —— Diligence of parties.—Pullman Palace Car Co. v. Speck (1885) 113 U. S. 84, 5 Sup. Ct. 374, 28 L. Ed. 925; Gregory v. Hartley (1885) 113 U. S. 742, 5 Sup. Ct. 743, 28 L. Ed. 1150; Huddy v. Havens (C. C. 1877) Fed. Cas. No. 6,826; Fulton v. Golden (C. C. 1879) Fed. Cas. No. 5,155; City of Chicago v. Hutchinson (C. C. 1882) 15 Fed. 129, 11 Biss. 484; Public Grain & Stock Exchange v. Western Union Tel. Co. (C. C. 1883) 16 Fed. 289, 11 Biss. 568; National Bank of Clinton v. Dorset Pipe & Paving Co. (C. C. 1884) 20 Fed. 707; Malley v. Firemen's Fund Ins. Co. (1883) 51 Conn. 486; Bright v. Milwaukee & St. P. R. Co. (N. Y. 1876) 1 Abb. N. C. 14; Chapman v. Pittsburg & S. R. Co. (1885) 26 W. Va. 299.

15. —— Effect of order that bill be taken pro confesso or of judgment by default.—Harter Tp. v. Kernochan (1880) 103 U. S. 562, 26 L. Ed. 411; McCallon v. Waterman (C. C. 1877) Fed. Cas. No. 8,675; Chester v. Wellford (C. C. 1879) Fed. Cas. No. 2,662; Deford v. Mehaffy (C. C. 1882) 13 Fed. 481; McHenry v. New York, P. & O. R. Co. (C. C. 1885) 25 Fed. 65; City of Detroit v. Detroit City Ry. Co. (C. C. 1893) 54 Fed. 1; Rice v. West (1875) 42 Md. 614; Smith v. Life Ass'n of America (1882) 76 Va. 380; Kennedy v. Ehlen (1888) 31 W. Va. 540, 8 S. E. 398.

16. —— Trial of cause in general and final judgment or decree.—Lowe v. Williams (1876) 94 U. S. 650, 651, 24 L. Ed. 216; Meyer v. Delaware R. R. Const. Co. (1879) 100 U. S. 457, 25 L. Ed. 593; Union Pac. Ry. Co. v. Myers (1885) 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319 (reversing judgment Myers v. Union Pac. Ry. Co. [C. C. 1882] 16 Fed. 292, 3 McCrary, 578); Bank of Maysville v. Claypool (1887) 120 U. S. 268, 7 Sup. Ct. 545, 30 L. Ed. 632; Lewis v. Smythe (C. C. 1875) Fed. Cas. No. 8,333; Lehigh Coal & Nav. Co. v. Central R. Co. (C. C. 1877) Fed. Cas. No. 8,213; In re Frazer (C. C. 1878) Fed. Cas. No. 5,068; Pratt v. Albright (C. C. 1881) 9 Fed. 634, 10 Biss. 511; Thorne v. Towanda Tanning Co. (C. C. 1882) 15 Fed. 289; Miller v. Tobin (C. C. 1883) 18 Fed. 609, 9 Sawy. 401; Maloy v. Duden (C. C. 1885) 25 Fed. 673, 674; Kalamazoo Wagon Co. v. Snavely (C. C. 1888) 34 Fed. 823; Franklin v. Wolf (1887) 78 Ga. 446, 3 S. E. 696; Meaux v. Pittman (1880) 32 La. Ann. 405; Anglo-American Provision Co. v. Evans (1892) 34 Neb. 44, 51 N. W. 310; Hodgson v. Millward (Pa. 1863) 3 Grant, Cas. 412; Watt v. White (1876) 46 Tex. 338; Continental Ins. Co. v. Kasey (Va. 1876) 27 Grat. 216.

17. —— Trial or hearing on demurrer.—Alley v. Nott (1884) 111 U. S. 472, 4 Sup. Ct. 495, 496, 28 L. Ed. 491; Scharff v. Levy (1884) 5 Sup. Ct. 360, 112 U. S. 711, 28 L. Ed. 825; Gregory v. Hartley (1885) 113 U. S. 742, 5 Sup. Ct. 743, 28 L. Ed. 1150; Laidly v. Huntington (1887) 121 U. S. 179, 7 Sup. Ct. 855, 30 L. Ed. 883; Meyer v. Norton (C. C. 1881) 9 Fed. 433; Miller v. Tobin (C. C. 1883) 18 Fed. 609, 9 Sawy. 401;

Boyd v. Gill (C. C. 1883) 19 Fed. 145, 21 Blatchf. 543; Wilson v. Rock Island Paper Co. (C. C. 1884) 20 Fed. 705; Hone v. Dillon (C. C. 1886) 29 Fed. 465; Lookout Mountain R. Co. v. Houston & Co. (C. C. 1887) 32 Fed. 711; Whelan v. New York, L. E. & W. R. Co. (C. C. 1888) 35 Fed. 849, 1 L. R. A. 65; St. Louis & S. F. Ry. Co. v. Weaver (1886) 35 Kan. 412, 11 Pac. 408, 57 Am. Rep. 176; Bright v. Milwaukee & St. P. Ry. Co. (N. Y. 1876) 1 Abb. N. C. 14; Miller v. Kent (N. Y. 1881) 60 How. Prac. 451.

18. —— Effect of motion for new trial or appeal.—Lowe v. Williams (1876) 94 U. S. 650, 24 L. Ed. 216; Chicago & N. W. R. Co. v. McKinley (1878) 99 U. S. 147, 25 L. Ed. 272 (affirming McKinley v. Chicago & N. W. R. Co. [1876] 44 Iowa, 314, 24 Am. Rep. 748); Craigie v. McArthur (C. C. 1877) Fed. Cas. No. 3,341.

19. —— Effect of order for new trial or reversal on appeal.—Chicago & N. W. R. Co. v. McKinley (1878) 99 U. S. 147, 148, 25 L. Ed. 272; Jifkins v. Sweetser (1880) 102 U. S. 177, 178, 26 L. Ed. 129; Hewitt v. Phelps (1881) 105 U. S. 393, 26 L. Ed. 1072; Holland v. Chambers (1884) 110 U. S. 59, 3 Sup. Ct. 427, 28 L. Ed. 70 (affirming order Chambers v. Holland [C. C. 1882] 11 Fed. 209, 3 McCrary, 538); Rosenthal v. Coates (1893) 148 U. S. 142, 13 Sup. Ct. 576, 37 L. Ed. 399; Andrews' Ex'rs v. Garett (C. C. 1875) Fed. Cas. No. 375; Hoadley v. City and County of San Francisco (C. C. 1875) Fed. Cas. No. 6,544; Young v. Andes Ins. Co. (C. C. 1876) Fed. Cas. No. 18,151; Crane v. Reeder (C. C. 1877) Fed. Cas. No. 3,-356; Pettilon v. Noble (C. C. 1877) Fed. Cas. No. 11,044; Gaffney v. Gillette (C. C. 1878) Fed. Cas. No. 5,168; Evans v. Smith (C. C. 1884) 21 Fed. 1; Sutherland v. Jersey City & B. R. Co. (C. C. 1884) 22 Fed. 356; Hakes v. Burns (C. C. 1889) 40 Fed. 33; Boggs v. Willard (1873) 70 Ill. 315, 22 Am. Rep. 77; Kaufman v. McNutt (1876) 7 Ohio Dec. 60, 1 Wkly. Law Bul. 94.

20. Nature and operation of limitations in general.—The act of 1887 limiting the time to file a petition for removal applied to pending acts. Simonson v. Jordan (C. C. 1887) 30 Fed. 721.

A case removable, under Act March 3, 1875, in which defendant pleaded to the declaration before Act March 3, 1887, c. 373, was passed, could not be removed on a petition filed after that act was passed. Manley v. Olney (C. C. 1887) 32 Fed. 708.

Parties desiring to remove their cases from the state courts must act promptly, and comply strictly with the provisions of the statute relative thereto. Courts have not the authority to, and will not, by doubtful construction, enlarge, change, or modify the clear terms of the statute. Delbanco v. Singletary (C. C. 1889) 40 Fed. 177, 178; Daugherty v. Western Union Telegraph Co. (C. C. 1894) 61 Fed. 138, 139.

The limitation cannot be regulated by stipulation. Daugherty v. Western Union Telegraph Co. (C. C. 1894) 61 Fed. 138, 139.

A federal court cannot acquire jurisdiction of a cause by removal, on a petition filed several months after the removing defendant had voluntarily appeared in the state court both by demurrer and answer, and after the cause had been set for trial by that court without objection. American Bonding Co. of Baltimore v. Mills (1906) 152 Fed. 107, 81 C. C. A. 325.

The right to removal is not lost where the petition was filed within the time allowed, though it was not presented for hearing until some time afterwards. Texas & P. Ry. Co. v. Bloom (1892) 85 Tex. 279, 20 S. W. 133.

A petition for removal filed after it has been reversed on appeal, is too late. Yazoo & M. V. R. Co. v. Adams (1900) 28 So. 956, 77 Miss. 194, 60 L. R. A. 33, affirmed (1901) 21 S. Ct. 240, 180 U. S. 1, 45 L. Ed. 395. So is one filed after a term of the superior court had been held at which the action could have been tried. Mason v. Interstate Consol. St. Ry. Co. (1898) 170 Mass. 382, 49 N. E. 645.

21. —— Amended petition.—When the original petition for removal shows no case for removal, a substantial amendment cannot be filed after the time for filing the original petition has expired. Security Co. v. Pratt (1894) 65 Conn. 161, 32 Atl. 396; Kansas City Southern Ry. Co. v. McGinty (1905) 88 S. W. 1001, 76 Ark. 356.

The amended petition does not relate back to the filing of the original petition so as to bring the application within the limitation. Brigham v. C. C. Thompson Lumber Co. (C. C. 1893) 55 Fed. 881; Frisbie v. Chesapeake & O. R. Co. (C. C. 1894) 59 Fed. 369. CONTRA, Freeman v. Butler (C. C. 1889) 39 Fed. 1.

22. Time for defense in general.—In order to divest a state court of jurisdiction by removal proceedings and to vest it in the federal court, a sufficient petition must be filed within the statutory time for filing answer and making defense. Kansas City, Ft. S. & M. R. Co. v. Daughtry (1891) 11 Sup. Ct. 306, 138 U. S. 298, 34 L. Ed. 963 (affirming [1890] 88 Tenn. [4 Pickle] 721, 13 S. W. 698); Gregory v. Boston Safe Deposit & Trust Co. (C. C. 1898) 88 Fed. 3; Johnson v. Butte Alex Scott Copper Co. (D. C. 1914) 213 Fed. 910; Midland Valley R. Co. v. Hoffman Coal Co. (Ark. 1909) 120 S. W. 380; Font v. Gulf State Land & Improvement Co. (1895) 47 La. Ann. 272, 16 South. 828; Nichols v. Stevens (1894) 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514.

The petition for removal must be

filed as soon as the defendant is called upon by the local law to make any defense either to the jurisdiction or merits. Atlanta, K. & N. Ry. Co. v. Southern Ry. Co. (1904) 131 Fed. 657, 660, 66 C. C. A. 601 (certiorari denied [1904] 25 Sup. Ct. 791, 195 U. S. 634, 49 L. Ed. 354); Fidelity & Casualty Co. v. Hubbard (C. C. 1902) 117 Fed. 949; Heller v. Ilwaco Mill & Lumber Co. (C. C. 1910) 178 Fed. 111.

The fact that a petition and bond for removal were filed during the vacation of the state court, and acted upon by the judge in chambers, does not affect the validity of the proceeding, but is proper where the time for the defendant to plead expires during the vacation. Mecke v. Valleytown Mineral Co. (1899) 93 Fed. 697, 35 C. C. A. 151.

Where a summons served on September 16th required defendant to appear and plead within 20 days, exclusive of the day of service, a petition for removal filed on October 6th was in time. South Dakota Cent. Ry. Co. v. Chicago, M. & St. P. Ry. Co. (1905) 141 Fed. 578, 73 C. C. A. 176.

The fact that it was the practice to permit a defense to be filed on the day the case was called for trial did not entitle defendant to file his defense at that time as of right, and thus extend the time for removal of the cause beyond the 20 days fixed by the state statute for answering. Fidelity Trust & Safety Vault Co. v. Newport News & M. V. Co. (C. C. 1895) 70 Fed. 403.

23. —— **Void service of summons.**—Where the service of summons is void, the time limited by the state statute for the defendant to appear and plead, and within which it may file a petition for removal, does not begin to run from such service, and it may appear for the purpose of filing such petition at any time, even after judgment has been rendered against it by default. Tortat v. Hardin Min. & Mfg. Co. (C. C. 1901) 111 Fed. 426; Sullivan v. Lloyd (D. C. 1914) 213 Fed. 275. CONTRA, State v. Barnes (1895) 5 N. D. 350, 65 N. W. 688.

Where a state statute requires the answer to be filed within 20 days from date of service of summons, and there is no service of answer, but defendant appears specially to object to the jurisdiction, he has, at most, but 20 days from the time of such appearance in which to ask a removal. Fidelity Trust & Safety Vault Co. v. Newport News & M. V. Co. (C. C. 1895) 70 Fed. 403.

24. **Time to plead under statutes or rules of particular states—Connecticut.**—Under the decisions of the Supreme Court that the time for filing a petition for removal is limited by the time for filing dilatory pleas to the jurisdiction of the court or in suspension or abatement of the particular suit, and the rule of the Connecticut state courts that all pleas in abatement must be filed on or before the opening of the court on the day following the return day of the writ, it is the settled rule in that district that a petition for removal must ordinarily be filed by that day. But Gen. St. Conn. § 1251, provides that in cases of foreign attachment, where the defendant is a nonresident of the state and does not appear, the cause shall be continued for three months from the return day, unless the court shall find that defendant or his agent or attorney had actual knowledge of the suit 12 days before the return day, subject, however, to the further limitation that the continuance shall terminate 12 days after such actual notice is received, as found by the court. Held, that in such case, conceding that a defendant would have the right to file a plea in abatement or a petition for removal after the return day, such right terminates 12 days after he has actual notice of the suit, and that, where the record shows such notice or knowledge more than 12 days before the filing of his petition, the cause cannot be removed. Head v. Selleck (C. C. 1901) 110 Fed. 786.

25. —— **Georgia.**—Code Ga. § 3310, allowing defendant to plead at any time before final judgment, where the case is one commenced by attachment, an application made to remove a case commenced by attachment at any time before final judgment is not too late where defendant has filed no plea. And a stipulation by which plaintiff in attachment agrees to dispense with a bond as a condition to dissolving the attachment, and defendant agrees to be bound by any judgment rendered in the state court as if he were within the jurisdiction of said court, and had been personally served, does not change the case, so that it ceases to be an attachment case, and becomes on the same footing as an ordinary action, so as to change the time for applying for removal. Southern Pac. Co. v. Stewart (1891) 88 Ga. 13, 13 S. E. 824.

26. —— **Illinois.**—Where one of the heirs of a decedent appeared in probate court and filed objections to the allowance of a claim against the estate, he had no right afterwards to file a petition for the removal of the cause. Mayer v. Schneider (1904) 72 N. E. 436, 212 Ill. 286, affirming judgment (1903) 112 Ill. App. 628.

Eminent Domain Act (Hurd's Rev. St. Ill. 1908, c. 47) § 4, provides that service of summons and publication of notice to nonresidents shall be made as in cases in chancery. Chancery Act (Hurd's Rev. St. Ill. 1908, c. 22) § 16, provides that one summoned by publication shall be deemed to plead on the return day of the summons. Held, that the day on which the notice in eminent domain proceedings, served on a nonresident, is returnable, is the day for

answering, though the law does not require the filing of a written pleading. South Park Com'rs v. Ayer (1908) 86 N. E. 704, 237 Ill. 211.

Where the summons in an action was served 28 days before the first day of the term at which it was returnable and the declaration was filed nearly a year before such return day, a petition to remove the cause to the federal court filed on the seventeenth day of the term is not in apt time, since, although the statutes providing for a continuance where the summons is not served and the declaration filed ten days before the first day of the term do not expressly provide that the defendant must appear and plead on the return day of the summons where the summons is so served and the declaration so filed, such is their clear intent and meaning. Orzolek v. Schenck (1914) 185 Ill. App. 169.

27. —— **Indiana.**—Plaintiff filed his complaint in the state court at the January term, 1888, and by the summons fixed March 5th, the first day of the next term, as the day for defendant's appearance, but without indorsement on the complaint, as required by Rev. St. Ind. 1881, § 401. Held, that docketing the cause for March 5th was irregular, as under section 400 the cause could not be called for issue until the second day of the term, and such docketing, though under a rule of court, could not have the effect of a rule to answer, so as to preclude defendant's motion to remove it at a subsequent day of the same term. McKeen v. Ives (C. C. 1888) 35 Fed. 801.

Under Rev. St. Ind. 1881, § 516, which enables the plaintiff to fix the day of defendant's appearance by indorsement thereof on the complaint in cases where the summons is returnable in term time, but which nowhere prescribes a time for answering or pleading, defendant's application for a removal, made after the appearance day so fixed, is in time, provided it is made at or before the time when an answer or plea is required to be filed by a rule of the court, whether the rule be general or special. Amsden v. Norwich Union Fire Ins. Soc. (C. C. 1890) 44 Fed. 515.

Burns' Rev. St. Ind. 1901, § 403, provides that on the second and each succeeding day of the term the court shall call as many of the causes which stand for trial at such term, for issues, as the business of the court will permit, and shall compel the parties to file their respective pleadings at such time as the court shall deem just, and that the pleadings shall be completed at an early day. Section 524 provides that every action shall stand for trial at the first term after it is commenced, when the summons has been served on the defendants 10 days, or publication has been made for 30 days, before the first day of the term; and a proviso authorizes the making of the cause returnable specially upon a day in term by indorsement upon the complaint, and that in that event, upon the completion of service, the action shall stand for trial at such term. Section 1375 of said statute authorizes the circuit court to adopt rules, etc. A defendant took a change of venue, and filed a dilatory plea. Trial was had thereon, and defendant was then ruled to answer an amended complaint. He then petitioned for a removal. Held that the record being silent as to whether there was a general rule respecting the filing of answers, and it appearing that the Code contemplates the prompt making up of issues, it would be presumed that the time when appeallant was required to answer the complaint had expired when it tendered its application for removal. Pennsylvania Co. v. Leeman (1903) 66 N. E. 48, 160 Ind. 16.

28. —— **Kansas.**—A petition for such removal from a state court of Kansas, filed 75 days after the summons was made returnable, is too late; Gen. St. Kan. 1889 requiring a declaration to be answered within 20 days from the day the summons is made returnable. Burnham v. First Nat. Bank (1892) 53 Fed. 163, 3 C. C. A. 486, 10 U. S. App. 485.

29. —— **Kentucky.**—The time for removing a proceeding for the taking of land by eminent domain, begun in a Kentucky county court, under the authority of Ky. St. §§ 835–839, is not postponed until after the case has been taken by appeal to a state circuit court, where it can be tried de novo, inasmuch as under the state statute the condemning party is entitled, even after such appeal, to pay into court the damages assessed in the county court, and, before the case is concluded in the higher court, to take possession of the land and oust the owner. Madisonville Traction Co. v. St. Bernard Min. Co. (1905) 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed. 462, affirming decree St. Bernard Min. Co. v. Madisonville Traction Co. (C. C. 1904) 130 Fed. 794.

Under Ky. St. §§ 1003, 1004, a petition for removal not offered until after the 20 days fixed thereby for answering was too late. Lilienthal v. Carpenter, Baggott & Co. (1912) 146 S. W. 2, 148 Ky. 50.

Under Practice Act (Civ. Code Prac. Ky. § 367a, subsec. 3), allowing defendant ten days after his appearance in which to answer or plead, defendant, filing his petition therefor within three days after his appearance and answer, is entitled to a removal to the federal courts. Fearon Lumber & Veneer Co. v. Lawson (1915) 178 S. W. 1121, 166 Ky. 123.

30. —— **Massachusetts.**—The rule of the superior court of Massachusetts requiring demurrers, answers, and pleas

in abatement, and motions to dismiss to be filed within the time allowed by law for entering an appearance is a general rule of practice, so as to require that a petition for removal to a federal court shall be filed within the same period; nor is it material that the rule permits the court to enlarge the time on special cause shown. Frink v. Blackinton (C. C. 1897) 80 Fed. 306.

Where a case is properly removed from the superior court to the supreme judicial court under the Massachusetts statute, to be proceeded with "as if originally brought in that court," it is in "the state court in which such suit is brought." American Finance Co. v. Bostwick (1890) 151 Mass. 19, 23 N. E. 656.

31. —— **Missouri.**—Under the first provisions of section 597 of the Missouri practice act, as amended by Laws 1901, pp. 85, 86, which applies to counties having over 40,000 population, and declares that every defendant who shall be summoned or notified according to law shall demur to or answer the petition on or before the third day of the term at which he is bound to appear, unless longer time be granted by the court, a defendant sued in such a county may file a petition for removal at any time not later than the third day of the term. Kelly v. Chicago & A. Ry. Co. (C. C. 1903) 122 Fed. 286.

Where a petition to remove a proceeding for the establishment of a drainage district to the federal court was not filed until after commissioners had filed their report, assessing damages and benefits against the various tracts of land within the district, it was too late under Rev. St. Mo. 1909, § 1799, requiring defendant to plead on or before the third day of the term of the court to which the proceeding was brought. Chicago, B. & Q. R. Co. v. Little Tarkio Drainage Dist. No. 1 (Mo. 1911) 139 S. W. 572.

32. —— **New Hampshire.**—The rule of the New Hampshire supreme court, requiring special pleas in proceedings at law to be filed within 90 days from the commencement of the term at which the action is entered, is applicable to railroad condemnation proceedings. Mt. Washington R. Co. v. Coe (C. C. 1892) 50 Fed. 637.

33. —— **New York.**—Code Civ. Proc. N. Y. § 487, declares that the only pleading on the part of the defendant is either a demurrer (to the complaint or reply) or an answer. Held, that where defendant filed a removal petition in a state court before expiration of the time within which it was entitled to file either a demurrer or answer it was in time, though the time prescribed by N. Y. Sup. Ct. Gen. Prac. Rule 22, within which he could have attacked plaintiff's pleading by motion, etc., had expired. Groton Bridge & Manufacturing Co. v. American Bridge Co. (C. C. 1905) 137 Fed. 284.

Judgment having been entered against defendant by default on December 12, 1906, more than 20 days after service, defendant on April 2, 1907, applied for an order opening his default, and vacating the judgment, tendering a proposed answer, which motion was brought on for hearing on April 13th, and the court ordered that the motion be granted, and that the answer tendered stand as defendant's answer in the action as served on the date of the service of the motion papers, on condition that defendant pay certain costs and disbursements within 15 days from the date of the order. Held, that the time to answer under such order within the removal act expired on April 2, 1907, and that defendant after having complied with the conditions of the order was not then entitled to remove the cause. Quilhot v. Hamer (C. C. 1907) 158 Fed. 188.

34. —— **North Dakota.**—Under Code Civ. Proc. N. D. § 3000, providing that in railroad comdemnation proceedings either party may demand a jury trial within 30 days from the filing of the commissioner's report, but requiring no further pleadings for such trial, the demand for a trial by jury is equivalent to the filing of an answer in ordinary suits. Minneapolis, St. P. & S. S. M. R. Co. v. Nestor (C. C. 1892) 50 Fed. 1.

35. —— **Pennsylvania.**—A petition for removal must be filed by the time an affidavit of defense is required by the Pennsylvania practice, which, under the rules of the court, is an answer to plaintiff's claim and frames the issues to be tried. A. Overholt & Co. v. German-American Ins. Co. (C. C. 1907) 155 Fed. 488; Muir v. Preferred Acc. Ins. Co. (1902) 53 A. 158, 203 Pa. 338.

A petition for the removal of a cause from a court of common pleas of Philadelphia county, Pa., in which, by rule of court, the defendant is given four days from service of statement on him to file any dilatory plea, and by the procedure act fifteen days within which to file affidavit of defense, must be filed within the four days, which is the time when he is required to "answer or plead," within the meaning of the removal statute. First Nat. Bank v. A. E. Appleyard & Co. (C. C. 1905) 138 Fed. 939.

36. —— **South Carolina.**—Under Code S. C. § 156, requiring notice to a nonresident defendant to be published "at least once a week for six weeks," the service is not completed, for the purpose of determining the time when the defendant is required to answer, until the expiration of six weeks from the date of first publication, although the

last publication is prior to that time. Tenney v. American Pipe Mfg. Co. (C. C. 1899) 96 Fed. 919.

37. —— **Tennessee.**—If an order of publication be issued under the attachment laws of Tennessee, instead of under the sections of the Code regulating chancery proceedings, it can have no effect to foreclose the time of removal, if the suit be of an equitable nature, and the attachment has issued on the fiat of the chancellor. Gavin v. Vance (C. C. 1887) 33 Fed. 84.

By the rules of court in Tennessee judgment pro confesso might be entered if defendant did not plead, answer, or demur by the June rules. Prior thereto, defendant's counsel filed a motion to take the bill from the files, and at the next term, in September, filed a demurrer. Held, that an application, filed after the motion had been disallowed and the demurrer overruled, was filed after the time in which the defendant was required to plead or answer, and was too late. Tennessee Coal, Lumber & Tan-Bark Co. v. Waller (C. C. 1889) 37 Fed. 545.

Under Mill. & V. Code Tenn. §§ 5010, 5011, which require the plaintiff to file his declaration within the first three days of the term to which the writ is returnable, and the defendant to appear and plead or demur within the first two days thereafter, the plea or demurrer is due, in the absence of a rule of the court, on or before the fifth day of the term, and applications to remove after that day, in the absence of an order or rule of court extending the time, are too late. Turner v. Illinois Cent. R. Co. (C. C. 1893) 55 Fed. 689.

Under Code Tenn. 1858, §§ 4238–4240 (Shannon's Code, §§ 6076–6078), a petition for removal filed within the time fixed for answering after the filing of the declaration was in time, though the declaration was not filed until after the time it was due. Lewis v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1910) 192 Fed. 654.

38. —— **Vermont.**—A rule of the chancery court provided that the subpœna should require defendant's appearance on the first day of a stated term, and that he should answer within 40 days from the return day, or the day fixed for entering appearance. A subpœna required the defendant to answer on the first day of the April term, but the suit was not entered until the last day of court. The next stated term began on the second Tuesday in September. Held, that a petition for removal filed before the September term began was in apt time. Sowles v. Witters (C. C. 1890) 43 Fed. 700.

39. **Effect of entering appearance or filing pleading.**—The time to remove a cause is not shortened by defendant's pleading before the time therefor has expired. Gavin v. Vance (C. C. 1887) 33 Fed. 84; Conner v. Skagit Cumberland Coal Co. (C. C. 1891) 45 Fed. 802; Duncan v. Associated Press (C. C. 1897) 81 Fed. 417; Fearon Lumber & Veneer Co. v. Lawson (1915) 178 S. W. 1121, 166 Ky. 123. But see Howard v. Southern Ry. Co. (1898) 29 S. E. 778, 122 N. C. 944, holding that the statutory time for answering expires when the answer is actually filed, in so far as defendant's right to remove a case to the federal court is concerned.

A motion by defendant for the dissolution of an injunction is not a plea or answer, within the meaning of this section. Garrard v. Silver Peak Mines (C. C. 1896) 76 Fed. 1.

The filing of an answer in a state court before the time required, for the purpose of enabling the defendant, under the rules of the court, to move for the dissolution of a preliminary injunction, does not affect his right to file a petition for removal within the time allowed by the state laws or rules of court for answering. Champlain Const. Co. v. O'Brien (C. C. 1900) 104 Fed. 930.

The fact that a nonresident defendant corporation appeared and resisted an application for the appointment of a receiver for its property pendente lite, made to the judge of a state court in vacation, as permitted by statute, does not affect its right to remove the cause where petition and bond therefor are filed on or before the time it is required by the laws of the state or rule of the state court to answer or plead to the complaint; nor is the right of removal barred by the taking of an appeal from an order appointing such receiver, though it would seem that the removal operates to vacate such appeal, since under the statute the controversy in its entirety passes into the jurisdiction of the federal court. Sidway v. Missouri Land & Live Stock Co. (C. C. 1902) 116 Fed. 381.

The fact that one petitioning for removal files his answer in the state court on the same day with his petition does not constitute a waiver of the right to remove. Brisenden v. Chamberlain (C. C. 1892) 53 Fed. 307.

40. **Time to plead in abatement or other dilatory plea.**—A petition filed before the time at which defendant is required by the laws of the state to plead to the merits, but after the time at which he is required to plead to the jurisdiction or in abatement of the writ, is too late. Gerling v. Baltimore & O. R. Co. (1894) 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311 (dismissing writ of error Martin v. Baltimore & O. R. Co. [C. C. 1889] 41 Fed. 125); First Littleton Bridge Corp. v. Connecticut River Lumber Co. (C. C. 1895) 71 Fed. 225; Heller v. Ilwaco Mill & Lumber Co. (C. C. 1910) 178 Fed. 111; Pennsylvania Co. v. Leeman (1903) 66 N. E. 48, 160 Ind. 16; Olds v. City Trust, Safe Deposit & Surety Co. (1901) 180

Mass. 1, 61 N. E. 223. CONTRA, Mahoney v. New South Building & Loan Ass'n (C. C. 1895) 70 Fed. 513; Wilson v. Winchester & P. R. Co. (C. C. 1897) 82 Fed. 15, affirmed Id. (1900) 99 Fed. 642, 41 C. C. A. 215; Groton Bridge & Manufacturing Co. v. American Bridge Co. (C. C. 1905) 137 Fed. 284.

41. Time to demur.—The time allowed for filing a demurrer marks the limit of the time within which the defendant is required to "answer or plead" to the declaration or complaint under the terms of the removal act, and a defendant cannot remove a cause after his demurrer has been overruled and a rule entered against him to plead over. Maher v. Tower Hotel Co. (C. C. 1899) 94 Fed. 225.

42. Time to amend answer or plea.—A defendant must file his petition within the time in which, by the laws of the state or the rules of the state court, he is required to file his original answer or plea, and not within the time when he is required or may elect to file an amended answer. Woolf v. Chisolm (C. C. 1887) 30 Fed. 881; Doyle v. Beaupre (C. C. 1889) 39 Fed. 289.

43. Extension of time to answer or plead.—When the time within which defendant is required by the state statute to answer or plead is extended by order of court, a removal may be had within the extended period. Rycroft v. Green (C. C. 1892) 49 Fed. 177; Wilcox & Gibbs Guano Co. v. Phœnix Ins. Co. of Brooklyn (C. C. 1894) 60 Fed. 929; Lord v. Lehigh Val. R. Co. (C. C. 1900) 104 Fed. 929; Dancel v. Goodyear Shoe Machinery Co. of Portland, Me. (C. C. 1900) 106 Fed. 551; Higson v. North River Ins. Co. (C. C. 1911) 184 Fed. 165; Hyder v. Southern Ry. Co. (1914) 83 S. E. 689, 167 N. C. 584. CONTRA, Austin v. Gagan (C. C. 1889) 39 Fed. 626, 5 L. R. A. 476; Velie v. Manufacturers' Acc. Indemnity Co. (C. C. 1889) 40 Fed. 545; Spangler v. Atchison, T. & S. F. R. Co. (C. C. 1890) 42 Fed. 305; Brigham v. C. C. Thompson Lumber Co. (C. C. 1893) 55 Fed. 881, 883; Ruby Canyon Gold Min. Co. v. Hunter (C. C. 1894) 60 Fed. 305; First National Bank v. A. E. Appleyard & Co. (C. C. 1905) 138 Fed. 939, 940; Wayt v. Standard Nitrogen Co. (C. C. 1911) 189 Fed. 231; Midland Valley R. Co. v. Hoffman Coal Co. (Ark. 1909) 120 S. W. 380; Markey v. Chicago, M. & St. P. Ry. Co. (Iowa, 1915) 153 N. W. 1053.

A petition and bond for removal served and filed before the defendant's time to answer as extended by stipulation had expired was in time. Simonson v. Jordon (C. C. 1887) 30 Fed. 721; Allmark v. Platte S. S. Co. (C. C. 1896) 76 Fed. 614; Chiatovich v. Hanchett (C. C. 1897) 78 Fed. 193; Tracy v. Morel (C. C. 1898) 88 Fed. 801; Mayer v. Ft. Worth & D. C. R. Co. (C. C. 1899) 93 Fed. 601; Groton Bridge & Manufacturing Co. v. American Bridge Co. (C. C. 1905) 137 Fed. 284; Sanderlin v. People's Bank of Buffalo (C. C. 1905) 140 Fed. 191; Tevis v. Palatine Ins. Co., Limited, of London, Eng. (C. C. 1906) 149 Fed. 560; Hansford v. Stone-Ordean-Wells Co. (D. C. 1912) 201 Fed. 185. CONTRA, Dixon v. Western Union Tel. Co. (C. C. 1889) 38 Fed. 377; Austin v. Gagan (C. C. 1889) 39 Fed. 626, 5 L. R. A. 476; Martin v. Carter (C. C. 1891) 48 Fed. 596; Brigham v. C. C. Thompson Lumber Co. (C. C. 1893) 55 Fed. 881, 883; Ruby Canyon Gold Min. Co. v. Hunter (C. C. 1894) 60 Fed. 305; Daugherty v. Western Union Telegraph Co. (C. C. 1894) 61 Fed. 138, 139; Schipper v. Consumer Cordage Co. (C. C. 1895) 72 Fed. 803 (distinguishing Rycroft v. Green [C. C. 1892] 49 Fed. 177); Fox v. Southern Ry. Co. (C. C. 1897) 80 Fed. 945; First National Bank v. A. E. Appleyard & Co. (C. C. 1905) 138 Fed. 939, 940; Williams v. Wilson Fruit Co. (D. C. 1915) 222 Fed. 467; Markey v. Chicago, M. & St. P. Ry. Co. (Iowa, 1915) 153 N. W. 1053.

The removal act of 1888, relating to the removal of causes from a state to a federal court, and providing that defendant must file his petition for removal before the time required to plead by the state law, is mandatory; and the time in which to plead cannot be extended by stipulation of the parties, so as to evade the statute. Howard v. Southern Ry. Co. (1898) 29 S. E. 778, 122 N. C. 944; Mecke v. Valleytown Mineral Co. (1898) 29 S. E. 781, 122 N. C. 790.

Under Code Civ. Proc. S. C. §§ 164, 195, 405, and by rule 14 of the state circuit court, a defendant must demur or answer a complaint within 20 days after the service thereof, unless such time has been extended by an order of court or judge, or by an agreement of plaintiff, reduced to the form of an order by consent entered, or by a writing signed by plaintiff or his attorney; and a petition and bond for removal to a federal court are in time if filed within the time thus extended. People's Bank v. Ætna Ins. Co. (C. C. 1892) 53 Fed. 161, judgment reversed Ætna Ins. Co. v. People's Bank of Greenville (1894) 62 Fed. 222, 10 C. C. A. 342, 8 U. S. App. 554.

A written stipulation by the parties to a suit in the Supreme Court of New York, signed the day after it was brought, providing that no steps should be taken in the cause by either party before a stated time pending a provisional agreement for settlement, that no advantage should be taken of the time that might elapse by reason of the agreement, and in case it should not become effective defendant should have

twenty days thereafter in which to make proper defense, estopped plaintiffs from objecting that a petition for removal filed within such 20 days was not in time, stipulations being recognized by Gen. Prac. Rule 24 of the state court as a proper and effective method of extending the time to plead. Russel v. Harriman Land Co. (C. C. 1906) 145 Fed. 745.

Under Code Civ. Proc. N. C. (Revisal 1905) §§ 473, 512, requiring a defendant to plead on or before the last day of the term to which the summons is returned, "unless the time therefor be extended by the judge," an order made by the court on the last day of the term, extending the time for a defendant to answer, operates to extend the time within which he may file a petition for removal. Avent v. Deep River Lumber Co. (C. C. 1909) 174 Fed. 298.

Where defendant in an injunction suit, after an order extending the time to make return and providing he should have the same rights as if the extended date was the return day, on that day proceeded for removal, the action was taken in time. State Improvement-Development Co. v. Leininger (D. C. 1914) 226 Fed. 884.

Where a defendant, after the time to answer has expired, procures an ex parte order extending his time, contrary to the practice in the state court, and then files an application for removal, the application is too late. Hurd v. Gere (C. C. 1889) 38 Fed. 537. So is one filed within the time allowed for answering by order of court, where such order is based on a stipulation entered into after expiration of the statutory period. Rock Island Nat. Bank v. J. S. Keator Lumber Co. (C. C. 1892) 52 Fed. 897.

A state court cannot, without plaintiff's consent, by an order extending defendant's time to answer or plead, enlarge the time for removing a cause to the federal court. Williams v. Wilson Fruit Co. (D. C. 1915) 222 Fed. 467.

The rule of court referred to is not a special order granted on application or stipulation of the parties, but a general rule fixing the date at which all defendants are required to appear in order to avoid being in default. Spangler v. Atchison, T. & S. F. R. Co. (C. C. 1890) 42 Fed. 305; Wilson v. Big Joe Block Coal Co. (1907) 113 N. W. 348, 135 Iowa, 531, 14 Ann. Cas. 266; Mecke v. Valleytown Mineral Co. (1898) 29 S. E. 781, 122 N. C. 790.

An order extending the time to plead, on condition that the action might be placed on calendar and tried, though no answer was filed, does not extend time for removing the cause, under Judicial Code, § 29. Williams v. Wilson Fruit Co. (D. C. 1915) 222 Fed. 467.

Where a defendant takes no exceptions to an order extending the time within which to file the complaint and answer, it becomes a consent order, and a voluntary submission by defendant to the jurisdiction of the court, and a waiver of a right to remove the cause to the United States court. Ford v. Pigeon River Lumber Co. (1911) 71 S. E. 439, 155 N. C. 352.

A stipulation for an extension of time to answer, approved by the trial judge, is a general appearance and waives the party's right to remove the cause, though providing that the stipulation be made an order of court. Pruitt v. Charlotte Power Co. (1914) 81 S. E. 624, 165 N. C. 416.

An oral agreement between the parties to the effect that the suit, which was only brought as a stalking-horse to beguile third persons, was not to be pushed and that no answer would be required, was not such an extension as was provided for by either the law of the state or the rules of the state court, and a petition for removal filed after the 20 days were up came too late. Dwyer v. Peshall (C. C. 1887) 32 Fed. 497.

Where a default was set aside, and defendant's time to plead or otherwise move extended for 20 days, an application to remove the cause to the federal court, filed within such extended period, was in time. Gail v. Atlantic Coast Line R. Co. (1913) 143 N. Y. S. 707, 82 Misc. Rep. 296.

Where plaintiff did not file his complaint within time, and thus defendant could not answer within time, plaintiff cannot defeat defendant's petition for removal of the cause to the federal court on the ground that the petition was not filed within the time for answering. Hyder v. Southern Ry. Co. (1914) 83 S. E. 689, 167 N. C. 584.

Plaintiff's motion for publication of summons as for service on nonresident, after defendants appeared by moving to dissolve attachment, was an election not to stand on the appearance, extending defendants' time to answer under Code Civ. Proc. S. C. 1912, § 180, and hence for filing petition for removal. Stephens v. Ringling (S. C. 1915) 86 S. E. 683.

Defendant having been served with a summons requiring an answer in the November 1909, term of the state court, and no such term having been held, the court at the December term made a general order extending the time to answer in all cases not otherwise provided "until the next term as of this term." At the succeeding January, 1910, term a similar order was entered, and on February 23, 1910, the courthouse with the records, including the summons and complaint, was destroyed by fire. At the succeeding March term the court entered an order reciting the fact, and directing that all parties should have until the next term of court to supply papers, and that in all cases in which complaints and answers were filed it would only be necessary to file

new complaints and answers without restoring the summons. In cases where no answers had been filed, the summons and complaint should be restored. Held, that such order did not extend defendant's time to answer, which had expired at the beginning of the March term, and hence the filing of a petition and bond to remove in the state court on April 23, 1910, was too late. Higson v. North River Ins. Co. (C. C. 1911) 184 Fed. 165.

44. Effect of plaintiff's failure to take default.—The failure of plaintiff to take judgment by default does not extend the time for removal. Kansas City Ft. S. & M. R. Co. v. Daughtry (1891) 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963 (affirming [1890] 88 Tenn. [4 Pickle] 721, 13 S. W. 698; Tennessee Coal, Lumber & Tanbark Co. v. Waller (C. C. 1889) 37 Fed. 545; Kaitel v. Wylie (C. C. 1889) 38 Fed. 865; South Park Com'rs v. Ayer (1908) 86 N. E. 704, 237 Ill. 211; Higson v. North River Ins. Co. (1910) 68 S. E. 920, 153 N. C. 35.

Though the state law permits the entry of defenses where default has not been entered. Lockhart v. Memphis & L. R. R. Co. (C. C. 1889) 38 Fed. 274; Wayt v. Standard Nitrogen Co. (C. C. 1911) 189 Fed. 231; Adams v. Puget Sound Traction, Light & Power Co. (D. C. 1913) 207 Fed. 205.

The fact that no advantage could be taken of the default of answer in the state court, because the suit was a joint one against the defendant and another, who had not been served, is immaterial. Davis v. Tillotson (C. C. 1891) 48 Fed. 606.

Where an application for removal for diversity of citizenship is not made at the term at which the answer in the case should be filed, the right of removal is forfeited, though it is afterwards made at the time of filing the answer which is treated as if filed in proper time. Williams v. Southern Bell Telephone & Telegraph Co. (1895) 116 N. C. 558, 21 S. E. 298.

The fact that the original summons and complaint were destroyed by fire subsequent to the time for answering does not affect the rights of defendant. Higson v. North River Ins. Co. (1910) 68 S. E. 920, 153 N. C. 35.

45. Effect of plea in abatement or other dilatory proceeding.—The time within which a petition for the removal of a cause from a state to a federal court may be filed is not extended by the filing of a plea to the jurisdiction of the state court. Wedekind v. Southern Pac. Co. (C. C. 1888) 36 Fed. 279, 13 Sawy. 475; Tennessee Coal, Lumber & Tanbark Co. v. Waller (C. C. 1889) 37 Fed. 545; Olds v. City Trust, Safe Deposit & Surety Co. (C. C. 1902) 114 Fed. 975; Olds v. City Trust, Safe Deposit & Surety Co. (1901) 180 Mass. 1, 61 N. E. 223. CONTRA, Lockhart v. Memphis & L. R. R. Co. (C. C. 1889) 38 Fed. 274; Craven v. Turner (1890) 82 Me. 383, 19 Atl. 864.

Where, on the third day of the term, defendant is ruled to answer, and files a plea in abatement on the next day, which is overruled on demurrer on the sixth day, a petition for removal, not filed until the seventh day, is too late, even if the plea in abatement suspended the rule to answer, as such rule became operative on the overruling of the plea. Browning v. Reed (C. C. 1889) 39 Fed. 625.

Where defendants, their motion to quash the service of the summons having been overruled, are required to plea to the merits instanter, but omit to do so, a petition for removal, filed nearly a month afterwards, is too late. Kaitel v. Wylie (C. C. 1889) 38 Fed. 865.

46. Effect of demurrer.—The filing of a demurrer, instead of an answer, does not enlarge the time for filing the petition. Tennessee Coal, Lumber & Tanbark Co. v. Waller (C. C. 1889) 37 Fed. 545; McDonald v. Hope Min. Co. (C. C. 1891) 48 Fed. 593; Case v. Olney (C. C. 1900) 106 Fed. 433.

A defendant cannot remove a cause after the hearing and determination of a demurrer by the state court. Winkler v. Chicago & E. I. R. Co. (C. C. 1901) 108 Fed. 305; Lantz v. Fretts (C. C. 1909) 173 Fed. 1007.

Defendant waived his right to removal of suit to the federal court, where, though not served with process, he files a demurrer, and stipulates as to hearing of the same. Case v. Olney (C. C. 1900) 106 Fed. 433.

A petition filed after the overruling of the demurrer to the bill on appeal to the supreme court of the state, is too late. Lookout Mountain R. Co. v. Houston & Co. (C. C. 1887) 32 Fed. 711.

Defendants demurred to plaintiffs' complaints in the state court. The demurrers were heard and sustained in the state court, and plaintiffs were given leave and time to file amended complaints, which they filed. To plaintiffs' amended complaints defendants demurred, and at the same time filed their petitions and bonds for removal of the cases to this court. Held, that the petitions and bonds were not filed within the statutory time, and that the cases must be remanded. Delbanco v. Singletary (C. C. 1889) 40 Fed. 177.

Although the statutes of Indiana do not prescribe the time for filing pleadings, and there are no rules of court fixing such time, the same being fixed in each case by order, yet, under 1 Burns' Rev. St. Ind. 1894, § 403, requiring the courts to direct the making up of issues without unreasonable delay, and Id. § 348, which provides that "the judgment on overruling the demurrer shall be that the party shall

plead over," where a demurrer to the complaint was overruled on the third day of the second term after that to which the summons was returnable a petition for removal filed on the fourth day of the succeeding term is presumptively too late, and the federal court will not take jurisdiction unless it affirmatively appears from the record that the state court extended the time to answer to that date. Winkler v. Chicago & E. I. R. Co. (C. C. 1901) 108 Fed. 305.

47. Effect of amendment of declaration or complaint.—Where the time for filing a petition for the removal of a cause has expired, the cause is not rendered removable by the filing of an amended declaration, which does not state a new cause of action. Gregory v. Boston Safe Deposit & Trust Co. (C. C. 1898) 88 Fed. 3; Painter v. New River Mineral Co. (C. C. 1899) 98 Fed. 544; Independent Cotton Oil Co. v. Beacham (Okl. 1911) 120 Pac. 969; Houston & T. C. Ry. Co. v. State (Tex. Civ. App. 1902) 39 S. W. 390 (affirmed State v. Houston & T. C. Ry. Co. [1902] 68 S. W. 777, 95 Tex. 507); Beyer v. Soper Lumber Co. (1890) 76 Wis. 145, 44 N. W. 750, 833. But, where the amended pleading makes a substantially different suit from that stated in the original, the time for removing the cause is to be calculated with reference to the amended petition. Evans v. Dillingham (C. C. 1890) 43 Fed. 177; Mattoon v. Reynolds (C. C. 1894) 62 Fed. 417; Mecke v. Valley Town Mineral Co. (C. C. 1898) 89 Fed. 209.

A motion to remove a cause made at the close of the evidence and after plaintiff was allowed to file an amended petition asking judgment for the amount of damages alleged in the petition, which the petition apparently through clerical error omitted to ask, was properly overruled, as the amendment did not change the cause of action nor affect defendant's appearance. Cincinnati, N. O. & T. P. Ry. Co. v. Evans' Adm'r (1908) 110 S. W. 844, 33 Ky. Law Rep. 596.

The right to remove a cause under an amended complaint was waived by defendant proceeding to make up the issues and try the case, taking his chances on a favorable outcome with the jury before applying for removal. Lesh v. Bailey (Ind. App. 1911) 95 N. E. 341.

Under Comp. St. Mont. p. 88, § 115, which provides that in case the complaint is amended as of course, pursuant to the right given by that section, defendant shall answer within 10 days after the amended complaint is served on him, where defendant waives service by demurring to the amended complaint the time for him to answer, and hence the time to file a petition for removal, is within 10 days after such waiver. Martin v. Carter (C. C. 1891) 48 Fed. 596.

The fact that after defendants' failure to answer plaintiffs amended their pleading does not relieve defendants from the effect of their default on their right of removal. Kaitel v. Wylie (C. C. 1889) 38 Fed. 865.

48. Time for proceedings in cause not originally removable.—A petition for the removal of a cause from a state court to a federal circuit court is not too late, although defendant may be in default in the state court for failure to answer in time, if such petition is filed as soon as the cause becomes a removable one. Powers v. Chesapeake & O. Ry Co. (1898) 18 Sup. Ct. 264, 169 U. S. 92, 42 L. Ed. 673; Remington v. Central Pac. R. Co. (1905) 25 Sup. Ct. 577, 198 U. S. 95, 49 L. Ed. 959; Speckart v. German Nat. Bank (C. C. 1898) 85 Fed. 12; Barber v. Boston & M. R. Co. (C. C. 1906) 145 Fed. 52; Anaconda Copper Mining Co. v. Butte-Balaklava Copper Co. (D. C. 1912) 200 Fed. 808; Kelly v. Virginia Bridge & Iron Co. (D. C. 1913) 203 Fed. 566; Boatmen's Bank of St. Louis v. Fritzlen (1907) 89 Pac. 915, 75 Kan. 479. Either by amendment to the complaint. Huskins v. Cincinnati, N. O. & T. P. R. Co. (C. C. 1889) 37 Fed. 504, 3 L. R. A. 545 (writ of error dismissed [1894] 154 U. S. 506, 14 Sup. Ct. 1147, 38 L. Ed. 1076); Cookerly v. Great Northern Ry. Co. (C. C. 1895) 70 Fed. 277; Bailey v. Mosher (C. C. 1899) 95 Fed. 223; Myrtle v. Nevada, C. & O. Ry. Co. (C. C. 1905) 137 Fed. 193; Robinson v. Parker-Washington Co. (C. C. 1909) 170 Fed. 850. Or by dismissal or nonsuit as to all defendants who were residents of the state. Powers v. Chesapeake & O. R. Co. (1898) 18 Sup. Ct. 264, 266, 169 U. S. 92, 42 L. Ed. 673; Cookerly v. Great Northern R. Co. (C. C. 1895) 70 Fed. 277.

But see Cincinnati, N. O. & T. P. Ry. Co. v. Evans' Adm'r (1908) 110 S. W. 844, 33 Ky. Law Rep. 596, holding that a motion to remove an action against a railway company and its employé made at the close of plaintiff's evidence, and after a verdict had been directed for the employé, was properly denied as being made too late.

Where an action was brought against two defendants jointly for personal injuries, and at the close of plaintiff's evidence a verdict was directed for one of them, and the other renewed its motion made at the beginning of the trial to have the case removed to the United States courts, but did not file a new application in writing and bond, nor was a non pros entered by plaintiff as to the other defendant, the application was too late. Diamond State Telephone Co. v. Blake (Md. 1907) 66 Atl. 631.

A defendant waived the right of removal on the ground of diverse citizen-

ship by not filing his petition until the second day of the trial at the close of the introduction of plaintiff's evidence in chief upon plaintiff's failure to then serve a joint defendant, which the petitioning defendant claimed showed a joinder merely to prevent the transfer of the case to the federal court, as the petition should have been filed at the opening of trial. Golden v. Northern Pac. Ry. Co. (1909) 104 Pac. 549, 39 Mont. 435.

Where the summons in an action against a foreign corporation was returnable to the March term, but no complaint was filed at that time, and an entry of "time to file pleadings" was made, defendant was not thereby entitled to an extension of the time limited by statute within which to file a petition for removal, on the ground that such petition could not be filed till after the filing of the complaint, because the right to removal depended on the sum demanded in the complaint, as defendant could have moved to dismiss upon failure to file the complaint within the first three days of the March term, and lost its right to removal by failing to so move. Lewis v. Clyde S. S. Co. (1902) 42 S. E. 969, 131 N. C. 652, rehearing granted on other grounds (1903) 44 S. E. 666, 132 N. C. 904.

Where defendant appeared and took no exception to an order granting complainant 90 days to file his complaint, and granting defendant 90 days thereafter to answer, and after the complaint was filed at a term succeeding that at which the summons was returned, defendant appeared, requested time to answer, and was granted 60 days, it was not then entitled to remove the cause to the federal courts, though it could not be known prior to the filing of the complaint that the amount demanded would be sufficient to confer jurisdiction on the federal courts. Bryson v. Southern Ry. Co. (1906) 54 S. E. 434, 141 N. C. 594.

But see Hyder v. Southern Ry. Co. (1914) 83 S. E. 689, 167 N. C. 584, holding that the extension of time to file the complaint, granted over defendant's objection, extends the time for filing the petition for removal.

The right to remove must be asserted as soon as a cause, not theretofore removable, assumes a removable shape; and where defendants, citizens of the state, were dismissed, leaving the action solely between corporations of different states, and hence removable, a petition to remove, presented nine days thereafter, and after judgment, with no prior notice that it would be filed, was too late. Ætna Indemnity Co. v. City of Little Rock (1909) 115 S. W. 960, 89 Ark. 95.

When a cause of action which is removable is first disclosed by an amended complaint filed after the time has expired for pleading to the original complaint, an application for removal should be filed at once, or within the time allowed by statute or rule of court to answer the amended complaint, when such time is prescribed by the local law; otherwise, the right of removal is waived. Jones v. Mosher (1901) 107 Fed. 561, 46 C. C. A. 471. Where the statute fixes no time within which he is required to answer or plead to the amended complaint, the time prescribed therefor by a rule of court will, by analogy, be taken as the time within which he must file his application for removal, unless it appears that such time is unreasonably short. Enders v. Lake Erie & W. R. Co. (C. C. 1900) 101 Fed. 202.

A petition for removal, filed 13 days after the cause of removal arose, is in time. Markey v. Chicago, M. & St. P. Ry. Co. (Iowa, 1915) 153 N. W. 1053. So is one granted 19 days from the dismissal of the resident defendant, though it does not appear when the moving party learned of his right to remove, or when the petition for removal was filed. Fogarty v. Southern Pac. Co. (C. C. 1903) 121 Fed. 941.

A petition to remove a cause to a federal court is in time when filed as soon as petitioner learns of the filing, without notice, of additional pleadings in the state court, which disclose a removable controversy. Fritzlen v. Boatmen's Bank (1909) 29 Sup. Ct. 366, 212 U. S. 364, 53 L. Ed. 551, affirming decree Boatmen's Bank of St. Louis v. Fritzlen (1907) 89 Pac. 915, 75 Kan. 479, 22 L. R. A. (N. S.) 1235; Markey v. Chicago, M. & St. P. Ry. Co. (Iowa, 1915) 153 N. W. 1053.

The mere fact of not filing the petition until after trial in a state court has begun does not necessarily establish laches. Markey v. Chicago, M. & St. P. Ry. Co. (Iowa, 1915) 153 N. W. 1053.

A nonresident defendant who failed to request the court to suspend the trial to enable him to prepare a bond and application for removal of the action to the federal court on the dismissal of the action as to the resident defendant, but who continued in the trial, and took his chances with the jury, waived his right of removal to the federal court. Morgan's L. & T. R. & S. S. Co. v. Street (Tex. Civ. App. 1909) 122 S. W. 270.

49. Time for proceedings by party brought in after the institution of the suit.—Parties made defendants by amendment are not precluded from obtaining a removal because the time had elapsed within which the original defendant could apply therefor. Green v. Valley (C. C. 1900) 101 Fed. 882; Youtsey v. Hoffman (C. C. 1901) 108 Fed. 693; Robert v. Pineland Club (C. C. 1905) 139 Fed. 1001.

But, if the right of removal has been terminated by a failure to exercise it within the time limited, it cannot be

availed of by one who associates with or is substituted for the defendant, against whom the statute has run. Burnham v. First Nat. Bank (1892) 53 Fed. 163, 167, 3 C. C. A. 486.

50. Time for filing bond.—The court cannot, by an order made after the time to answer has expired, directing the bond to be filed nunc pro tunc as of a day prior to such expiration of time, cut off the right of the plaintiff to remain in the state court, which has already become vested and fixed under the statute. Austin v. Gagan (C. C. 1889) 39 Fed. 626, 5 L. R. A. 476.

The bond must be filed at or before the time for answering expires, to effect a removal. Id. It must be offered for acceptance when the application is made. Best v. New York Life Ins. Co. (Ohio, 1872) 2 Cin. Super. Ct. Rep'r, 329. But see Campbell v. Wallen's Lessee (1827) 8 Tenn. (Mart. & Y.) 266, holding that it is not necessary that the petition filed under the provisions of the act of congress, to remove a suit from a state court to a United States court, should make a tender of the security required by the act upon the removal of the cause; such security may be given after it is judicially determined that the facts disclosed by the petition are sufficient to authorize its transfer.

(C) Effect of delay and objections thereto

51. Effect of delay in general.—A party failing to file a petition for the removal of a cause to the federal court in time is precluded from doing so at any subsequent stage of the proceedings. Sweeney v. Coffin (C. C. 1870) Fed. Cas. No. 13,686; Deford v. Mehaffy (C. C. 1882) 13 Fed. 481; Davis v. Tillotson (C. C. 1891) 48 Fed. 606; Price v. Lehigh Val. R. Co. (C. C. 1895) 65 Fed. 825; Savings Bank v. Benton (1859) 59 Ky. (2 Metc.) 240; Murphy v. Stone & Webster Engineering Corporation (Mont. 1911) 119 Pac. 717; Hyatt v. McBurney (1882) 18 S. C. 199; Watt v. White (1876) 46 Tex. 338; Paris & G. N. R. Co. v. Boston (Tex. Civ. App. 1912) 142 S. W. 944; Southern Express Co. v. Jacobs (Va. 1908) 63 S. E. 17; Chapman v. Pittsburg & S. R. Co. (1885) 26 W. Va. 324.

A petition filed after the expiration of the time fixed for answering does not deprive the state court of jurisdiction. Wilson v. Big Joe Block Co. (1907) 113 N. W. 348, 135 Iowa, 531.

Though a state court agree to consider a petition to remove a cause as filed in time, yet, if the federal court see, on the record, that it was not filed till a subsequent term, they will not permit a cause to be docketed. Gibson v. Johnson (C. C. 1810) Fed. Cas. No. 5,397.

52. Effect of delay by one coparty.—Where the petition for removal was filed by some of the defendants after answer, and after their time to answer had expired, but before the expiration of the time, and before answer by the others, the application by the answering defendants was too late, and the others are subjected to their disability. Rogers v. Van Nortwick (C. C. 1891) 45 Fed. 513; Abel v. Book (C. C. 1903) 120 Fed. 47. But see Swan v. Mansfield, C. & L. M. R. Co. (Ohio, 1879) 4 Wkly. Law Bul. 898, holding that, where one of several defendants only can apply for removal of the cause to the United States court, the other defendants being too late in their application, they having been served with summons and issue having been made as to them several terms before, such defendant, removing the cause to the federal court, removes it as to all the defendants.

53. —— Right of one coparty to remove.—See notes to § 1010, ante.

54. Excuses for delay.—The court has no power to permit a removal after the time prescribed, though defendant's attorney was prevented by inevitable accident from reaching the place of holding court till after the last day on which the petition and bond could be filed. Daugherty v. Western Union Tel. Co. (C. C. 1894) 61 Fed. 138.

55. Waiver of objections to delay.—The matter of time in removal of a cause to a federal court is not jurisdictional, and objection thereto may be waived. Knight v. International & G. N. Ry. Co. (1894) 61 Fed. 87, 90, 9 C. C. A. 376 (writ of certiorari dismissed [1897] 17 Sup. Ct. 995, 41 L. Ed. 1187); Collins v. Stott (C. C. 1896) 76 Fed. 613; Williams v. Wilson Fruit Co. (D. C. 1915) 222 Fed. 467.

The time within which a cause may be removed, being a requirement of mode and form and not of jurisdiction, is a subject of waiver and estoppel, and a party who fraudulently attempts to prevent a removal, whereby the defendant fails to file his petition for removal within the statutory time, will not be allowed to take advantage of his own wrong, but will be estopped to object that the petition for removal was not filed in time. Boatmen's Bank of St. Louis v. Fritzlen (1907) 89 Pac. 915, 75 Kan. 479. But a plaintiff cannot divest a state court of jurisdiction of a cause, removable when brought, if at all, by consenting to its removal after trial and verdict. Johnson v. Butte Alex Scott Copper Co. (D. C. 1914) 213 Fed. 910.

Objection to the jurisdiction of a United States court over a case, otherwise removable, on the ground that the petition for removal was filed too late, cannot be raised for the first time on appeal or writ of error. Gerling v. Baltimore & Ohio R. Co. (1894) 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311 (dismissing writ of error Martin

v. Baltimore & O. R. Co. [C. C. 1889] 41 Fed. 125); Knight v. International & G. N. R. Co. (1894) 61 Fed. 87, 9 C. C. A. 376, 23 U. S. App. 356 (certiorari dismissed [1897] 17 Sup. Ct. 995, 41 L. Ed. 1187); Newman v. Schwerin (1894) 61 Fed. 865, 10 C. C. A. 129, 22 U. S. App. 393.

(D) Notice

56. Decisions prior to the Judicial Code which first required notice to be given.—P. Schwenk & Co. v. Strang (1893) 59 Fed. 209, 8 C. C. A. 92; McVaughter v. Cassily (C. C. 1848) Fed. Cas. No. 8,930; Fisk v. Union Pac. R. Co. (C. C. 1871) Fed. Cas. No. 4,828; Wehl v. Wald (C. C. 1879) Fed. Cas. No. 17,356; Wormser v. Dahlman (C. C. 1879) Fed. Cas. No. 18,048, 57 How. Prac. 286; Stevens v. Richardson (C. C. 1881) 9 Fed. 191, 20 Blatchf. 53; Chiatovich v. Hanchett (C. C. 1897) 78 Fed. 193; Creagh v. Equitable Life Assur. Soc. (C. C. 1897) 83 Fed. 849; Ashe v. Union Cent. Life Ins. Co. (C. C. 1902) 115 Fed. 234; Loop v. Winters' Estate (C. C. 1902) 115 Fed. 362; Ficklin v. Tarver (1877) 59 Ga. 263; Carpenter v. New York & N. H. R. Co. (N. Y. 1854) 11 How. Prac. 485; Disbrow v. Driggs (N. Y. 1858) 8 Abb. Prac. 305, note, 16 How. Prac. 346; Bristol v. Chapman (N. Y. 1867) 34 How. Prac. 140; Rhode Island Horseshoe Co. v. Goodenough Horseshoe Co. (N. Y. 1876) 1 Abb. N. C. 11, 52 How. Prac. 111; Southern Ry. Co. v. Hudgins (1899) 33 S. E. 442, 107 Ga. 334; Sharp v. Gutcher (1881) 74 Ind. 357; Muir v. Preferred Acc. Ins. Co. (1902) 53 Atl. 158, 203 Pa. 338.

57. Necessity for notice.—The Judicial Code requirement of notice of application for removal does not apply to an order for removal made before it became effective. Cayce v. Southern Ry. Co. (D. C. 1912) 195 Fed. 786.

The unexcused failure of a petitioner for removal to give the notice required by this section, if objection is duly made, requires the federal court to decline jurisdiction and remand the cause. Goins v. Southern Pac. Co. (D. C. 1912) 198 Fed. 432; Wanner v. Bissinger & Co. (D. C. 1913) 210 Fed. 96; Arthur v. Maryland Casualty Co. (D. C. 1914) 216 Fed. 386; Booki v. Pullman Co. (1914) 107 N. E. 418, 220 Mass. 71. Though a copy of the petition and bond has been served. Loland v. Northwest Stevedore Co. (D. C. 1913) 209 Fed. 626.

While the provision requiring notice is mandatory and is jurisdictional in a limited sense, it does not change the respective powers of the state and federal courts with reference to the ultimate determination of the sufficiency of such proceedings. Cropsey v. Sun Printing & Publishing Ass'n (D. C. 1914) 215 Fed. 132.

Notice is unnecessary, where the motion was made upon dismissal as to resident defendant while all parties were in court. Byrne's Adm'r v. Chesapeake & O. R. Co. (1913) 152 S. W. 538, 151 Ky. 553.

58. Sufficiency of notice.—Notice of removal proceedings, which was satisfactory to the state court, is sufficient on objection made in the federal court. Chase v. Erhardt (D. C. 1912) 198 Fed. 305.

A notice of intention to remove a cause to the federal court, reciting that defendant on the date specified would file in the state court the petition for and bond on removal, copies of all of which were served before filing and filed on the date specified, was sufficient. Hansford v. Stone-Ordean-Wells Co. (D. C. 1912) 201 Fed. 185.

A notice of intention to file a petition and bond for the removal of a cause is sufficient, though it did not specify the time and place where it was to be presented; the proceeding for removal being ex parte. Potter v. General Baking Co. (D. C. 1914) 213 Fed. 697.

A notice of the filing of a removal petition, reciting that the petition and bond would be filed "on or before" April 6, 1914, is not fatally defective because the date of filing was not stated with certainty. Cropsey v. Sun Printing & Publishing Ass'n (D. C. 1914) 215 Fed. 132.

(E) Petition

59. Averments in general.—A party seeking to remove a case must show affirmatively in his petition for removal the facts essential to give the federal court jurisdiction. Jones v. Adams Express Co. (C. C. 1904) 129 Fed. 618.

A cause is not removable under Act March 3, 1875, or R. S. § 639, unless the petition for removal sets forth the jurisdictional facts. Smith v. Horton (C. C. 1881) 7 Fed. 270; Woolridge v. McKenna (C. C. 1881) 8 Fed. 650; Brigham v. C. C. Thompson Lumber Co. (C. C. 1893) 55 Fed. 881; Hodge v. Chicago & A. Ry. Co. (1903) 121 Fed. 48, 57 C. C. A. 388; Higson v. North River Ins. Co. (1910) 68 S. E. 920, 153 N. C. 35; Katalla Co. v. Rones (1911) 186 Fed. 30, 108 C. C. A. 132 (affirming judgment Rones v. Katalla Co. [C. C. 1910] 182 Fed. 946); Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. (1881) 17 W. Va. 812.

A petition for the removal of a cause from a state to a federal court, under Act March 3, 1875, on the ground of diverse citizenship of the parties, which shows on its face that the petitioner is entitled to removal, is sufficient. Meyer v. Delaware R. R. Const. Co. (1879) 100 U. S. 457, 25 L. Ed. 593.

A petition to remove a cause to the federal Circuit Court should contain the essential averments to show jurisdiction on removal. Gillespie v. Pocahontas Coal & Coke Co. (C. C. 1907) 162 Fed. 742 (judgment reversed [C. C. A.

1908] 163 Fed. 992); Neesley v. Southern Pac. Co. (1909) 99 Pac. 1067, 35 Utah, 259.

To authorize removal of a cause to the federal court, the facts on which the right is based must be alleged through appropriate pleadings, accompanied by appropriate procedure. Miller v. Soule (D. C. 1915) 221 Fed. 493; Phœnix Ins. Co. v. Pechner (1877) 95 U. S. 183, 185, 24 L. Ed. 427.

If the right of removal to a federal court does not appear in the record of the state court, it must be clearly shown in the petition for removal, or it will be presumed that it does not exist. Fife v. Whittell (C. C. 1900) 102 Fed. 537.

The allegations of the petition for removal are jurisdictional, and they must be positive and certain; and the allegation that the defendant is an alien, "as plaintiff is informed and verily believes," is insufficient. Wolff v. Archibald (C. C. 1882) 14 Fed. 369, 4 McCrary, 581.

The absence of any allegation, in a petition for removal of a cause to the federal court, identifying the plaintiff with the person to whom the policy of insurance sued upon is made payable, is not fatal where the person named in the complaint and in the policy is so well known that the name alone is sufficient as a descriptio personæ of the plaintiff. Hoge v. Canton Ins. Office of Hong Kong (C. C. 1900) 103 Fed. 513.

Where a removal petition based entirely on diversity of citizenship was filed by one of the defendants alone, and wholly failed to disclose the fact that the other defendant was merely a nominal or formal party to the action, and such fact did not sufficiently appear elsewhere in the record, the petition was fatally defective, since, for the purpose of removal, the parties must be considered collectively. Santa Clara County v. Goldy Mach. Co. (C. C. 1908) 159 Fed. 750.

The petition need not negative any defense which may be made to the petition. Wisecarver & Reynard v. Chicago, R. I. & P. Ry. Co. (Iowa, 1908) 117 N. W. 961.

Under Civ. Code Prac. Ky. § 119, which provides that, "in pleading a private statute, it shall be sufficient to refer to it by stating its title and the day on which it became a law," a petition for removal was defective, which did not state the title of a private statute, nor its contents, but merely the petitioner's conclusions as to its contents. Illinois Cent. R. Co. v. Sheegog's Adm'r (1907) 103 S. W. 323, 31 Ky. Law Rep. 691.

A petition for the removal of a cause to a United States court must not merely state that the case is a proper one for removal, but must set forth the facts showing it to be so. Lalor v. Dunning (N. Y. 1878) 56 How. Prac. 209.

Averments in a petition for the removal of a cause from the state to the federal courts should be clearly made and not generally stated, so that the court can see that it affirmatively presents a case which should be removed. Pacific Express Co. v. Needham (Tex. Civ. App. 1906) 94 S. W. 1070.

A petition to have a cause removed is but the initiatory step for setting on foot the proceedings to obtain a removal. Its office is like that of filing a declaration at law, or a bill in equity, and it must contain such averments as will, on being either conceded or established, entitle the petitioners to the relief asked for; but it is no part of its office to furnish proof of its averments. De Camp v. New Jersey Mut. Ins. Co. (1870) 32 N. Y. Super. Ct. (2 Sweeny) 481.

60. —— **Grounds for removal.**—A petition to remove must show the grounds for which removal is asked. Neesley v. Southern Pac. Co. (Utah, 1909) 99 P. 1067.

If the petition alleges that the parties are citizens of different states as the basis of removal, the petitioner cannot prove, by the transcript or otherwise, in support of the jurisdiction, that it is a case for removal on account of subject-matter. The allegata and probata must correspond as in other pleadings. Woolridge v. McKenna (C. C. 1881) 8 Fed. 650.

A contention that a suit against a domestic and against a foreign corporation presents a separable controversy cannot be considered on the hearing of a petition for removal which is grounded on fraudulent joinder to prevent removal. Keller v. Kansas City, St. L. & C. R. Co. (C. C. 1903) 135 Fed. 202.

Where a removal petition was based wholly on the ground of diverse citizenship, defendant was not entitled to removal on proof that the plaintiff was an alien, and that the case was removable on the ground that it was an action brought by an alien in a state court against a citizen of another state. Wallenburg v. Missouri Pac. Ry. Co. (C. C. 1908) 159 Fed. 217.

But see the following cases which hold that, where the petition seeks removal on one ground which is not sustained, but states facts entitling petitioner to removal on another ground, the removal should be granted. Removal Cases (1879) 100 U. S. 457, 463, 471, 25 L. Ed. 593; Canal & C. Sts. R. Co. v. Hart (1885) 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226; Norris v. Mineral Point Tunnel (C. C. 1881) 7 Fed. 272, 19 Blachf. 201; Dart v. Walker (N. Y. 1871) 4 Daly, 188.

61. —— **Prayer.**—When it appears, upon a petition for removal of a cause, that the same is removable upon the application of the petitioners as involving a separable controversy, it will not limit or restrain the effect or operation of such petition if the petitioners only

ask the court therein to proceed no further "as to them." Northern Pac. Terminal Co. v. Lowenberg (C. C. 1883) 18 Fed. 339, 9 Sawy. 348.

A prayer "that said surety and bond may be accepted that his suit may be removed into the next circuit court of the United States" is sufficient as a prayer for a removal; a semicolon after the word "accepted" being obviously inadvertently omitted. Gruetter v. Cumberland Telephone & Telegraph Co. (C. C. 1909) 181 Fed. 248.

An application for the removal of a cause from a state to a federal court, which complies with the requirements of the existing law, is not invalid because it prays for the removal under laws which have been repealed. Stanley v. Chicago, R. I. & P. R. Co. (1876) 62 Mo. 508.

62. Matters apparent of record.—The record may be examined in aid of a petition for the removal of a cause to the federal courts, where such averments do not disclose sufficient ground for jurisdiction on removal. Bondurant v. Watson (1880) 103 U. S. 281, 285, 286, 26 L. Ed. 447; Nat. Steamship Co. v. Tugman (1882) 1 Sup. Ct. 58, 59, 106 U. S. 118, 27 L. Ed. 87; Supreme Lodge Knights of Pythias of the World v. Wilson (1895) 66 Fed. 785, 14 C. C. A. 264, 30 U. S. App. 234; Woolridge v. McKenna (C. C. 1881) 8 Fed. 650; Freeman v. Butler (C. C. 1889) 39 Fed. 1, 2; Gillespie v. Pocahontas Coal & Coke Co. (C. C. 1907) 162 Fed. 742 (judgment reversed [1908] 163 Fed. 992, 91 C. C. A. 494); Wells v. Russellville Anthracite Coal Mining Co. (D. C. 1913) 206 Fed. 528; Hayes v. Todd (1894) 34 Fla. 233, 15 South. 752.

The new requirement of the Judicial Code that the petition be verified does not change this rule. Missouri, K. & T. R. Co. v. Chappell (D. C. 1913) 206 Fed. 688.

The citizenship of plaintiff's assignor need not be alleged in the petition, when it appears from other parts of the record. Shattuck v. North British & Mercantile Ins. Co. (1893) 58 Fed. 609, 7 C. C. A. 386, 19 U. S. App. 215.

A cause may be removed where the whole record discloses a case over which the court has jurisdiction, although the ground of removal be erroneously alleged in the petition. Ruckman v. Ruckman (C. C. 1880) 1 Fed. 587.

The question whether the cause is removable as a controversy between citizens of different states must be determined from the original petition and the one for removal. Duncan v. St. Louis, I. M. & S. Ry. Co. (1897) 22 So. 924, 49 La. Ann. 1700.

In an application for the removal of a cause to the federal court, the petition and accompanying affidavits are to be taken as part of the same instrument, so that it is error to deny the application because the proper showing has not been made, when it is contained in the affidavit. Yulee v. Vose (1878) 99 U. S. 539, 25 L. Ed. 355; Bixby v. Blair (1881) 56 Iowa, 416, 9 N. W. 318.

A petition for the removal of a cause on the ground of diverse citizenship stated that plaintiff was a resident of Kansas, and that defendants were, and still are, nonresidents and citizens of states other than Kansas, "as will more fully appear by the affidavit of the plaintiff for an order of publication filed herein." Such affidavit recited that defendants (giving their names) were nonresidents, and the complaint in the cause referred to certain of defendants as residents of Vermont and Missouri. Held, that the diverse citizenship of the parties sufficiently appeared, and a motion to remand because the petition for removal failed to show the citizenship of defendants should be denied. Chambers v. McDougal (C. C. 1890) 42 Fed. 694.

Where there is no allegation as to the citizenship of the orators other than the description as to their residence contained in their original bill, the cause will be remanded, as there is nothing to sustain the jurisdiction of the circuit court. Sherman v. Windsor Mfg. Co. (C. C. 1881) 11 Fed. 852, 19 Blatchf. 314.

A petition for the removal of a cause for diverse citizenship is not fatally defective which alleges plaintiff's citizenship only by reference to her allegation in her petition, and not as a fact. Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688.

To render a cause removable on the ground of diversity of citizenship, it is not essential that such diversity be alleged in the pleadings, or, if alleged, that it should be in the language of the statute; but it is sufficient if facts from which such diversity follows as a legal conclusion appear from the record. Vestal v. Ducktown Sulphur, Copper & Iron Co. (D. C. 1911) 210 Fed. 375.

A petition for removal is not insufficient, because it does not present an issuable fact, but states merely conclusions of law, where the complaint to which the petition is directed shows on its face that the grounds for removal stated in the petition exist; it not being necessary to repeat in the petition the facts so disclosed by the complaint. Stratton's Independence v. Sterrett (Colo. 1911) 117 Pac. 351.

A petition for removal of a cause to the United States court is properly refused where the facts on which the application was based were not made to appear from the record as a whole. Hyatt v. McBurney (1882) 18 S. C. 199.

In an action to annul title to land acquired under a sale decreed by a federal circuit court in a case removed from a state court, the petition for removal

showed that a citizen of Illinois sued a citizen of the same state, and an alien, but complainant did not set out the bill, cross bill, and answers in such case. Held, that it did not appear beyond controversy that on the record the federal court could not have had jurisdiction, so as to render such decree void. Goodsell v. Delta & Pine Land Co. (1895) 72 Miss. 580, 18 South. 452.

63. Existence and description of controversy.—In an action in a state court, plaintiff claimed damages in the sum of $27,000 for a death by wrongful act. Defendant, being a citizen of another state, filed in the state court a petition for the removal of the cause to a federal court, averring that the "matter and amount in dispute" exceeded $2,000. The state court accepted this petition and the bond filed therewith, and the transcript was filed in the federal court. Held, on a motion to remand, that it sufficiently appeared that a "controversy" existed between the parties, although the petition did not directly allege the same. Egan v. Chicago, M. & St. P. R. Co. (C. C. 1893) 53 Fed. 675.

The petition need not state that the petitioner has a just cause or a just defense and intends to prosecute. Chase v. Erhardt (D. C. 1912) 198 Fed. 305. But see Stanbrough v. Griffin (1879) 52 Iowa, 112, 2 N. W. 1011, and Bosler v. Booge (1880) 54 Iowa, 251, 6 N. W. 301, holding that a petition for removal which does not show that defendants had a defense to the action, or that they had pleaded or answered therein, shows no controversy between the parties, and no cause entitling them to a removal.

64. Subject-matter as ground for removal.—A petition for the removal of a cause on the ground that it arises under the constitution and laws of the United States must state the facts and indicate the questions arising therein, which are claimed to give the federal court jurisdiction, so that the court can determine for itself, from the facts, the question of jurisdiction. A petition which only states the opinion or conclusion of the petitioner, that the case arises under the constitution and laws of the United States, is insufficient, and a suit transferred on such petition will be remanded. Trafton v. Nougues (C. C. 1877) Fed. Cas. No. 14.134; Hambleton v. Duham (C. C. 1884) 22 Fed. 465; Los Angeles Farming & Milling Co. v. Hoff (C. C. 1891) 48 Fed. 340; Rural Home Telephone Co. v. Powers (C. C. 1910) 176 Fed. 986; Dale v. Smith (C. C. 1910) 182 Fed. 360; Texas & P. Ry. Co. v. Hightower (1854) 12 Tex. Civ. App. 41, 33 S. W. 541.

Unless a case arises out of a controversy as to the effect or operation of a provision in a law of the United States, as shown by the facts alleged, it cannot be removed under the second section of the act of 1875. Hambleton v. Duham (C. C. 1884) 22 Fed. 465.

In a petition for the removal of a cause from a state court, an averment that, prior to the Iowa prohibitory law, the property in question was erected and fitted for the sale of beverages then authorized and permitted by law, is an allegation of matter of law, and not sufficient to give the federal court jurisdiction. McLane v. Leicht (C. C. 1886) 27 Fed. 887.

An action for libel against individuals is not removable upon averments in the petition for removal that the action complained of was taken by defendants as officers of the United States, and that such fact was fraudulently omitted from plaintiff's petition for the purpose of preventing a removal, since such fact, if it had been pleaded, would not have conferred original jurisdiction on the federal court. People's United States Bank v. Goodwin (C. C. 1908) 160 Fed. 727.

The fact that a removal petition alleged that compliance with an order of the State Corporation Commission, requiring removal of its freight station in a city, would cost the defendant more than $2,000 did not per se make the regulation an infraction of the fourteenth amendment of the federal Constitution, so as to confer jurisdiction on the inferior federal courts to review such order. North Carolina Corp. Commission v. Southern Ry. Co. (1909) 66 S. E. 427, 151 N. C. 447.

65. Citizenship of parties in general.—An averment of residence in a petition for removal is not equivalent to an averment of citizenship, and will not support the jurisdiction of the federal court. Parker v. Overman (1855) 59 U. S. (18 How.) 137, 15 L. Ed. 318; Grace v. American Cent. Ins. Co. (1883) 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; Southwestern Telegraph & Telephone Co. v. Robinson (1891) 48 Fed. 769, 1 C. C. A. 91; Pennsylvania Co. v. Bender (1893) 148 U. S. 255, 13 Sup. Ct. 591, 37 L. Ed. 441; Neel v. Pennsylvania Co. (1895) 157 U. S. 153, 15 Sup. Ct. 589, 39 L. Ed. 654; Grand Trunk R. Co. v. Twitchell (1894) 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; Kansas City Southern Ry. Co. v. Prunty (1904) 133 Fed. 13, 66 C. C. A. 163; Overman v. Parker (C. C. 1854) Fed. Cas. No. 10,-623; Merchants' Nat. Bank v. Brown (C. C. 1883) 17 Fed. 161; Kelly v. Houghton (C. C. 1883) 23 Fed. 417; Dinet v. City of Delavan (C. C. 1902) 117 Fed. 978; Harding v. Standard Oil Co. (C. C. 1910) 182 Fed. 421; Brock v. Doyle (1881) 18 Fla. 172; Darst v. Bates (1869) 51 Ill. 439; Cleveland, C., C. & St. L. Ry. Co. v. Monaghan (1892) 140 Ill. 474, 30 N. E. 869; Eastin v. Rucker (1829) 24 Ky. (1 J. J. Marsh.) 232; Corp v. Vermilye (N.

Y. 1808) 3 Johns. 145; Clarke Co. v. Figgins (1886) 27 W. Va. 663.

A description of one as of a certain place is not the equivalent of an allegation of citizenship. Grand Trunk R. Co. v. Twitchell (1894) 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45; Dinet v. City of Delavan (C. C. 1902) 117 Fed. 978; Carswell v. Schley (1877) 59 Ga. 17.

An allegation in that defendant, an insurance underwriters' association, is a resident and citizen of New York and a nonresident of the state of Tennessee, where the suit was brought, is a conclusion and not sufficient. Rife v. Lumber Underwriters (1913) 204 Fed. 32, 122 C. C. A. 346.

An averment in a plea to a petition for removal that a party is a citizen of Oregon is not neutralized by an admission therein that such party is residing abroad. Residence is prima facie evidence of citizenship, but not conclusive; and a person may be a citizen of one state or country, and reside for the time being in another. McDonald v. Salem Capital Flour-Mills Co. (C. C. 1887) 31 Fed. 577, 12 Sawy. 492; First Nat. Bank v. Same (C. C. 1887) 31 Fed. 580, 12 Sawy. 485, 496.

A petition for removal filed by an alien, which alleges positively that plaintiff is a citizen of one of the states of the United States, and on information and belief that he is a citizen and resident of the district, is sufficient to give the federal court jurisdiction on the face of the record. Holton v. Helvetia-Swiss Fire Ins. Co. of St. Gall, Switzerland (C. C. 1908) 163 Fed. 659.

A petition for removal may allege the citizenship of the parties regardless of the allegations of the plaintiff's pleading, and where its allegations show the requisite citizenship to authorize the removal they are to be deemed true unless controverted by the plaintiff. Harrington v. Great Northern Ry. Co. (C. C. 1909) 169 Fed. 714.

An allegation that plaintiff is a citizen of a certain parish, as appears by his petition, which states that he is a resident, is a sufficient allegation of citizenship. Stoker v. Leavenworth (1834) 7 La. 390.

The petition should not only allege that the citizenship of the parties is diverse, but should also disclose the states of which the parties, respectively, are citizens. Thompson v. Stalmann (C. C. 1904) 131 Fed. 809. The fact that there are a large number of parties plaintiff or defendant does not take a case out of this rule. Jones v. Adams Exp. Co. (C. C. 1904) 129 Fed. 618.

An allegation that none of the complainants are citizens of the same state as defendant is not sufficient as to the complainants' citizenship to give the federal court jurisdiction. Cameron v. Hodges (1888) 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. Ed. 132.

An allegation in a petition for removal, merely, that certain of the petitioners are "residents" of a state other than that of which plaintiff is a citizen, and that none of the petitioners are "residents and citizens" of the state whereof the plaintiff is a citizen, is insufficient to give the federal court jurisdiction. Laden v. Meck (1904) 130 Fed. 877, 65 C. C. A. 361.

Where a removal petition alleged that petitioner was a citizen of Illinois and a nonresident of Iowa, it was not necessary that it should also allege that it was not a citizen of Iowa. Wisecarver & Reynard v. Chicago, R. I. & P. Ry. Co. (Iowa, 1908) 117 N. W. 961.

The right to remove a cause, if founded on citizenship of parties, depends on their citizenship as persons. A petition in a suit brought by executors, which alleges that plaintiffs, as such executors, are citizens, is insufficient. Amory v. Amory (1877) 95 U. S. 186, 24 L. Ed. 428. But see Cooke v. Seligman (C. C. 1880) 7 Fed. 263, 17 Blatchf. 452, holding that an averment that the defendants (naming them), "as they are the qualified executors of the last will and testament of Y., deceased," were and are citizens, etc., is a sufficient averment of personal citizenship, and should not be construed to refer to their official citizenship as executors.

A cause is not removable on the ground of diversity of citizenship, where the petition failed to disclose the citizenship of a codefendant, or the existence of a separable controversy. Oliver v. Iowa Cent. Ry. Co. (C. C. 1900) 102 Fed. 371.

The citizenship of the parties is to be shown to the satisfaction of the court, and necessarily ex parte. Louisiana State Bank v. Morgan (La. 1826) 4 Mart. (N. S.) 344.

66. —— Citizenship of plaintiff.—A petition which does not state the citizenship of the plaintiff is fatally defective, and the case will be remanded on motion. McMurdy v. Connecticut Gen. Life Ins. Co. (C. C. 1877) Fed. Cas. No. 8,903. The petition must show that the plaintiff is a citizen of the state in which suit was brought. Harrison v. Shorter (1877) 59 Ga. 512; Field v. Blair (N. Y. 1852) 1 Code R. (N. S.) 361; Amory v. Amory (1874) 36 N. Y. Super. Ct. (4 Jones & S.) 520.

A right of removal on the ground of diversity of citizenship is not shown by a petition therefor which does not allege the citizenship of the plaintiff, although his petition in the state court alleges him to be a resident of the state in which the action is brought. Kansas City Southern Ry. Co. v. Prunty (1904) 133 Fed. 13, 66 C. C. A. 163.

67. —— Citizenship of assignors.—In a petition for removal of a suit on a check, brought against the maker by an indorsee, if the maker and payee are citizens of different states, a failure to allege that fact is fatal. Levy v. Laclede Bank (C. C. 1883) 18 Fed. 193.

Where, in an action on an insurance policy, it appears that the policy was assigned by the insured to a third person, who assigned it to one of the parties to the action, a petition for removal on the ground of diverse citizenship, which fails to show the citizenship of such third person, is not sufficient. McNulty v. Connecticut Mut. Life Ins. Co. (C. C. 1891) 46 Fed. 305.

In an action on a number of claims, which in the aggregate, but not separately, exceed the amount necessary to give jurisdiction to the federal court, and some of which, as shown by the complaint, were assigned to the plaintiff, a petition for removal on the ground of diversity of citizenship must, in connection with the other parts of the record, show the citizenship of plaintiff's assignors. Murphy v. Payette Alluvial Gold Co. (C. C. 1899) 98 Fed. 321.

Where an action is brought in a state court upon a policy of insurance by one purporting to be the assignee of the party to whom the policy issued, but who the complaint shows was originally a principal party to the contract, and is the person to whom the defendant promised indemnity, so that the assignment was a useless formality, it is not necessary that a petition for removal of the cause to the circuit court of the United States show that the assignor of the cause of action sued upon is a citizen of a different state from that of the defendant. Hoge v. Canton Ins. Office of Hong Kong (C. C. 1900) 103 Fed. 513.

Where a suit by the transferee of a note was removed to the federal courts, but the removal petition contained no allegation as to the citizenship or residence of the transferror, showing that the citizenship of the defendant and transferror was diverse, the federal court had no jurisdiction. Hall v. Tevis (C. C. 1910) 177 Fed. 600.

68. —— **Citizenship of corporations.**— Where a corporation defendant in a petition for removal alleges that it was organized under the laws of a state other than that in which it is sued or of a foreign country, an allegation that it is not a citizen of the latter state is unnecessary. Lee v. Atlantic Coast Line R. Co. (C. C. 1906) 150 Fed. 775.

A petition which shows that defendant is a corporation need not allege negatively that it is not a citizen of the state in which suit is brought, though it have an office and do business in such state. Shattuck v. North British & Mercantile Ins. Co. (1893) 58 Fed. 609, 7 C. C. A. 386, 19 U. S. App. 215; Roberts v. Pacific & A. Ry. & Navigation Co. (1903) 121 Fed. 785, 58 C. C. A. 61; Robertson v. Scottish Union & National Ins. Co. (C. C. 1895) 68 Fed. 173.

But an allegation that defendant corporation was a citizen and subject of the dominion of Canada, without negativing its citizenship in plaintiff's state, is insufficient to ground a removal on the ground of diverse citizenship. Guarantee Co. of North America v. First Nat. Bank (1898) 28 S. E. 909, 95 Va. 480.

A corporation created by the laws of another state to obtain a removal need not allege the citizenship of its stockholders. Oakey v. Commercial & Railroad Bank (1840) 14 La. 515.

A petition by a defendant corporation for removal of a cause from a state to a federal court, which merely states that petitioner is a citizen of another state, is insufficient to show federal jurisdiction; an allegation that petitioner is a corporation created under the laws of such other state, and not a citizen of the state in which the action was brought, being indispensable. Frisbie v. Chesapeake & O. R. Co. (C. C. 1893) 57 Fed. 1; Winkler v. Chicago & E. I. R. Co. (C. C. 1901) 108 Fed. 305; Dalton v. Milwaukee Mechanics' Ins. Co. (C. C. 1902) 118 Fed. 876; Wells v. Russellville Anthracite Coal Mining Co. (D. C. 1913) 206 Fed. 528; Springs v. Southern Ry. Co. (1902) 41 S. E. 100, 130 N. C. 186; Lewis v. Clyde S. S. Co. (1902) 42 S. E. 969, 131 N. C. 652, rehearing granted (1903) 44 S. E. 666, 132 N. C. 904. CONTRA, Vestal v. Ducktown Sulphur Copper & Iron Co. (D. C. 1911) 210 Fed. 375.

A petition by a corporation for a removal to the federal court is properly denied where it fails to set forth that defendant is a "citizen" of the state. An allegation that it is a "resident" is not sufficient. Cleveland, C., C. & St. L. Ry. Co. v. Doerr (1891) 41 Ill. App. 530.

In a petition for removal, the plaintiff in the title of the cause was designated as a national bank, but there was nothing in the petition by way of averment to show that it was organized and incorporated as a national bank pursuant to the laws of the United States, and the only allegation of citizenship was that the plaintiff, at the commencement of the suit, was and still is a corporation engaged in the banking business in the city and county of Alexandria and state of Virginia. Held, that the petition was fatally defective for failure to aver plaintiff's citizenship, as the title of the cause could not be treated as an averment of the petition. Alexandria Nat. Bank v. Willis C. Bates Co. (1908) 160 Fed. 839, 87 C. C. A. 643.

A record not showing whether defendant, entitled by a company name, is a natural or artificial person, and a petition stating that defendant is a citizen of another state, without averring incorporation in that state, do not affirmatively show a right to removal because of such citizenship, and the defect cannot be supplied by amendment. De Loy v. Travelers' Ins. Co. (C. C. 1893) 59 Fed. 319.

In an action for personal injuries, two

defendants were alleged in the complaint to be foreign corporations, but the complaint contained no allegation as to whether a street railway company which was joined as a defendant was a corporation. The two defendants described as foreign corporations filed a petition and bond for removal to the federal court, stating that the street railway company was not a corporation, but a trade-name under which one of two individuals was doing business, and that neither of such persons had been served with process or were parties to the suit. Held, that on the showing made by the petition it was the duty of the trial court to accept the petition and bond, and proceed no further in the suit. Texarkana Telephone Co. v. Bridges (1905) 86 S. W. 841, 75 Ark. 116.

A railway company, having complied with Act N. C. Feb. 10, 1899, providing the manner in which foreign corporations may become domestic, cannot remove a cause to the United States circuit court on a petition not specifically alleging that it is a nonresident of North Carolina, but merely that it is a corporation originally created under the laws of Virginia. Thompson v. Southern Ry. Co. (1902) 41 S. E. 9, 130 N. C. 140.

Allegations in a petition for removal, that defendant is a federal corporation incorporated under the acts of congress, and that the action is one arising under the laws of the United States constituting its charter, and setting out said laws; will prevail over an undenied allegation of plaintiff's petition that defendant is a corporation created and existing under and by virtue of the laws of Texas. Greer v. Texas & P. Ry. Co. (1897) 42 S. W. 1038, 17 Tex. Civ. App. 356.

A foreign corporation, in a petition to remove, having alleged that it was not a resident or inhabitant of Oregon, could not in support of its right to remove claim that, having complied with the laws of Oregon regulating foreign corporations, it became for purposes of federal jurisdiction a resident or inhabitant of the federal district in which it was doing business. Baldwin v. Pacific Power & Light Co. (D. C. 1912) 199 Fed. 291.

69. **Residence of parties.**—Where the jurisdiction of a federal court depends on diverse citizenship, either the record or the petition for removal must show that defendant is a nonresident of the state where the suit is brought. Fife v. Whittell (C. C. 1900) 102 Fed. 537.

A removal petition by an alien which fails to allege that he is a nonresident of the state is insufficient. Mayer v. Karaghuesian (C. C. 1909) 169 Fed. 736.

An allegation that defendant is a citizen and resident of a state other than that in which the suit is pending is not equivalent to an allegation that he is a "nonresident of that state," and does not show his right to a removal. Irving v. Smith (C. C. 1904) 132 Fed. 207.

A petition by defendant for removal of a cause to a federal court on the ground of diverse citizenship, which alleges diverse citizenship and residence of the parties, but fails to allege that the defendant is a "nonresident of the state" where the suit is brought, is insufficient to authorize a removal under Act Aug. 13, 1888, c. 866, § 2, 25 Stat. p. 433, providing that suits between citizens of different states pending in a state court, involving amounts within the jurisdiction of the federal court, may be removed by the defendant or defendants therein, "being nonresidents of the state." Fife v. Whittell (C. C. 1900) 102 Fed. 537.

A petition to remove a cause from the state court of California, alleging that when the action was commenced and when the petition was filed petitioner was a resident of New York, did not allege that he was a "nonresident" of California, and was therefore insufficient. De La Montanya v. De La Montanya (D. C. 1907) 158 Fed. 117. CONTRA, Lawrence v. Southern Pac. Co. (C. C. 198) 165 Fed. 241.

The petition for removal of a cause from a state court to the federal court, which states that a certain firm are residents of a state different from the one in which defendant resides, is insufficient. It should state the name and residence of each member of the firm. Adams v. May (C. C. 1886) 27 Fed. 907.

A petition for removal showing that petitioner was a resident of another state, but not showing that the opposing party was a resident of the state in which the action was brought is fatally defective. Elliott v. Stocks (1880) 67 Ala. 290.

70. —— **Residence of corporations.**—Where the pleadings of the plaintiff show the defendant to be a foreign corporation, the fact that it is a nonresident of the state is presumed, under the law, and need not be alleged in a petition for removal. Shattuck v. North British & Mercantile Ins. Co. (1893) 58 Fed. 609, 7 C. C. A. 386; Myers v. Murray, Nelson & Co. (C. C. 1890) 43 Fed. 695, 11 L. R. A. 216; Wilcox & Gibbs Guano Co. v. Phœnix Ins. Co. of Brooklyn (C. C. 1894) 60 Fed. 929 (judgment affirmed Phenix Ins. Co. v. Charleston Bridge Co. [1895] 65 Fed. 628, 13 C. C. A. 58, 25 U. S. App. 190, following Shattuck v. North British & Mercantile Ins. Co. of London & Edinburgh [1893] 58 Fed. 609, 7 C. C. A. 386, 19 U. S. App. 215); Howard v. Gold Reefs of Georgia (C. C. 1900) 102 Fed. 657. CONTRA, Overman Wheel Co. v. Pope Mfg. Co. (C. C. 1891) 46 Fed. 577; Guinault v. Louis-

ville & N. R. Co. (1889) 41 La. Ann. 571, 6 South. 850.

A petition for removal of a cause by a corporation of one state sued in the courts of another state is not sufficient unless it alleges, in addition to the usual averments as to citizenship, that it is a nonresident of the state in which it is sued. Hirschl v. J. I. Case Threshing-Mach. Co. (C. C. 1890) 42 Fed. 803.

Petition by defendant for removal of a cause in a Pennsylvania state court, averring that it is a resident of New Jersey, is sufficient, where the record elsewhere clearly shows that defendant was a nonresident of Pennsylvania. Miller v. Soule (D. C. 1915) 221 Fed. 493.

Where a petition by a corporation created by the laws of Connecticut, praying the removal of a cause from an Oregon court to the circuit court of the United States, alleges that it is a citizen of Connecticut, and of no other state, and has its principal office and place of business there, it need not aver that the corporation is not a resident of Oregon. Koshland v. National Fire Ins. Co. (1897) 49 P. 845, 31 Or. 205.

71. Citizenship at time of bringing suit.—To sustain federal jurisdiction over a removed cause on the ground of diverse citizenship or alienage, it must appear affirmatively from the petition for removal, or elsewhere in the record, that such diversity or alienage existed at the commencement of the suit, and not merely at the time of removal or subsequently. Phœnix Ins. Co. v. Pechner (1877) 95 U. S. 183, 24 L. Ed. 427 (affirming Pechner v. Phœnix Ins. Co. [1875] 65 N. Y. 195); Gibson v. Bruce (1883) 108 U. S. 561, 2 Sup. Ct. 878, 27 L. Ed. 825; Houston & T. C. R. Co. v. Shirley (1884) 111 U. S. 358, 4 Sup. Ct. 472, 28 L. Ed. 455; Smith v. Akers (1886) 117 U. S. 197, 6 Sup. Ct. 669, 29 L. Ed. 888; Stevens v. Nichols (1889) 130 U. S. 230, 9 Sup. Ct. 518, 32 L. Ed. 914; Jackson v. Allen (1889) 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249; La Confiance Campagnie D'Assurance Contre L'Incendie v. Hall (1890) 137 U. S. 61, 11 Sup. Ct. 5, 34 L. Ed. 573; Kellam v. Keith (1892) 144 U. S. 568, 12 Sup. Ct. 922, 36 L. Ed. 544; Mattingly v. Northwestern Virginia R. Co. (1895) 158 U. S. 53, 15 Sup. Ct. 725, 39 L. Ed. 894; Kaeiser v. Illinois Cent. R. Co. (C. C. 1880) 6 Fed. 1; MacNaughton v. South Pac. C. R. Co. (C. C. 1884) 19 Fed. 881; Seddon v. Virginia, T. & C. Steel & Iron Co. (C. C. 1888) 36 Fed. 6, 1 L. R. A. 108; Foster v. Paragould S. E. R. Co. (C. C. 1896) 74 Fed. 273; Weed Sewing Mach. Co. v. Smith (1873) 71 Ill. 204; United States Sav. Inst. v. Brockschmidt (1874) 72 Ill. 370; Indianapolis, B. & W. Ry. Co. v. Risley (1875) 50 Ind. 60; Holden v. Putnam Fire Ins. Co. (1871) 46 N. Y. 1, 7 Am. Rep. 287; Risley v. Indianapolis B. & W. R. Co. (N. Y. 1874) 1 Hun, 202; Pechner v. Phœnix Ins. Co. (1875) 65 N. Y. 195 (affirming [1872] 6 Lans. 411); Tugman v. National S. S. Co. (1879) 76 N. Y. 207 (affirming [1878] 13 Hun, 332); Herndon v. Ætna Ins. Co. (1890) 107 N. C. 194, 12 S. E. 240, 10 L. R. A. 53; Same v. Lancashire Ins. Co. (1890) 107 N. C. 191, 12 S. E. 241; Blackwell v. Lynchburg & D. R. Co. (1890) 107 N. C. 217, 12 S. E. 133; Bradley v. Ohio River & C. Ry. Co. (1896) 26 S. E. 169, 119 N. C. 744. CONTRA, Jackson v. Mutual Life Ins. Co. (C. C. 1878) Fed. Cas. No. 7,141; Chicago, St. L. & N. O. R. Co. v. McComb (C. C. 1879) Fed. Cas. No. 2,670; McLean v. St. Paul & C. Ry. Co. (C. C. 1879) Fed. Cas. No. 8,892 (affirmed St. Paul & C. R. Co. v. McLean [1883] 108 U. S. 212, 2 Sup. Ct. 498, 27 L. Ed. 703); Wehl v. Wald (C. C. 1879) Fed. Cas. No. 17,356; Jackson v. Mutual Life Ins. Co. of New York (1878) 60 Ga. 423; Stafford v. Hightower (1882) 68 Ga. 394.

An allegation in the petition that a party "is" a citizen of a certain state is not sufficient to show citizenship at the commencement of the action. Phœnix Ins. Co. v. Pechner (1877) 95 U. S. 183, 24 L. Ed. 427 (affirming Pechner v. Phœnix Ins. Co. [1875] 65 N. Y. 195, which affirmed 6 Lans. 411); People v. Superior Court of Chicago (1864) 34 Ill. 356; Green v. Heaston (1900) 56 N. E. 87, 154 Ind. 127; Holden v. Putnam Fire Ins. Co. (1871) 46 N. Y. 1, 7 Am. Rep. 287; Herndon v. Ætna Ins. Co. (1890) 107 N. C. 191, 12 S. E. 240, 10 L. R. A. 53; Same v. Lancashire Ins. Co. (1890) 107 N. C. 191, 12 S. E. 241.

An allegation in a petition for removal that one of the petitioners is a corporation organized under the laws of a foreign country is a sufficient allegation that it was a citizen of such country when the action was commenced against it. Roberts v. Pacific & A. Ry. & Navigation Co. (1903) 121 Fed. 785, 58 C. C. A. 61 (reversing on other grounds Roberts v. Pacific & A. Ry. & Nav. Co. (C. C. 1900) 104 Fed. 577); Continental Wall Paper Co. v. Lewis Voight & Sons Co. (C. C. 1900) 106 Fed. 550.

Where an averment in the original complaint that defendant company is a foreign corporation is supplemented by the statement in the petition for removal that it is a corporation under the laws of Great Britain, the fact that it was a foreign corporation at the commencement of the action is sufficiently alleged. National S. S. Co. v. Tugman (1882) 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87.

The complaint originally filed in a cause afterwards removed to the circuit court alleged that plaintiff was a

resident of Washington, and defendant was a resident of Prince Edward's island, Canada, on certain dates therein mentioned, all before the bringing of the action. The petition for removal alleged that "said suit is a controversy between plaintiff, a citizen of Washington, and this defendant, who is * * * a citizen of the British empire," etc. Held, that it does not affirmatively appear that this diversity of citizenship existed at the time the action was commenced. Craswell v. Belanger (1893) 56 Fed. 529, 6 C. C. A. 1, 15 U. S. App. 104.

Though the petition for removal failed to show diverse citizenship when the action was commenced, the judgment will not be reversed when from the whole record diverse citizenship can fairly be presumed. La Belle Box Co. v. Stricklin (1914) 218 Fed. 529, 134 C. C. A. 257.

But a petition for removal by an intervener, if filed simultaneously with his petition of intervention, is sufficient if it aver the citizenship of the parties in the present tense; for, as to the intervener, the filing of his petition of intervention is the commencement of the suit. Burdick v. Peterson (C. C. 1880) 6 Fed. 840, 2 McCrary, 135.

The petition for removal alleged that the controversy was wholly between citizens of different states and that the defendant was a corporation organized and incorporated and existing under the laws of the state of New York, and is a citizen and resident of such state, with its principal place of business in New York City, N. Y., and never has been and is not now a citizen or resident of the state of Iowa. Held, that a defect in such petition, in failing to allege that defendant was a citizen of the state of New York at the time the suit was brought, was not cured by an averment in plaintiff's petition that defendant is, and was at all the dates therein stated, a corporation duly organized and authorized to do business within the state of Iowa, since, if any inference as to defendant's citizenship is to be drawn from that allegation, it is that the corporation was organized within the state of Iowa. Dalton v. Germania Ins. Co. (C. C. 1902) 118 Fed. 936.

A petition by defendant for the removal of an action to the federal court, which avers that "the controversy in said action is between citizens of different states"; that defendant "at the time of the commencement was and still is a citizen and resident * * * of Illinois; that plaintiff was then and still is a resident * * * of Iowa"—is insufficient, for failing to allege the citizenship of plaintiff at the commencement of the action. O'Connor v. Chicago, R. I. & P. Ry. Co. (Iowa, 1908) 117 N. W. 979, on rehearing (Iowa, 1909) 122 N. W. 947. But see Dalton v. Germania Ins. Co. (C. C. 1902) 118 Fed. 936, holding that a petition for removal, alleging that the controversy is wholly between citizens of different states, in that the plaintiff is now and was at the time of filing the petition in the action a citizen and resident of the state of Iowa, and the defendant "is a corporation organized, incorporated, and existing under the laws of the state of New York, and is a citizen and resident of said state, with its principal place of business in New York City, New York, and never has been and is not now a citizen or resident of the state of Iowa," was insufficient for failure to allege that defendant "was" a citizen of the state of New York at the time the suit was brought in the state court.

72. Residence at time of bringing suit.—Where neither the petition for removal of a cause from the state to the federal court on the ground of diverse citizenship nor the record shows that defendant was a nonresident of the state where the suit was brought at the time of filing the petition, the federal court does not obtain jurisdiction. Freeman v. Butler (C. C. 1889) 39 Fed. 1; Camprelle v. Balbach (C. C. 1891) 46 Fed. 81; Chesapeake & O. R. Co. v. Banks' Adm'r (1911) 135 S. W. 285, 142 Ky. 746.

An allegation in the present tense that the defendants are residents of another state is insufficient. Beede v. Cheeney (C. C. 1881) 5 Fed. 388; Chesapeake & O. R. Co. v. Banks' Adm'r (1911) 135 S. W. 285, 142 Ky. 746.

An averment, in a petition for removal on the ground of diversity of citizenship, that the defendant was, at the time of the commencement of the suit, and still is, a citizen and resident of another state, named, is a sufficient allegation that he was at the time of the commencement of the suit and when the petition was filed a nonresident of the state in which the suit was brought, since a person cannot be a resident of two states at the same time. While it is the well-established rule that the fact of such nonresidence must clearly appear from the petition or record, and that no fact can be taken by intendment, no set form of words is indispensable, and it is sufficient to allege facts from which such nonresidence follows as a necessary legal conclusion. Zebert v. Hunt (C. C. 1901) 108 Fed. 449.

73. Fraudulent joinder to prevent removal.—Where an action is brought in a state court jointly against a foreign corporation and a citizen of the same state with plaintiff, the defendant corporation may allege, in a petition for removal from the state to the federal court, and prove that its codefendant was joined with it merely for the fraudulent purpose of defeating the jurisdiction of the federal court. Dow

v. Bradstreet Co. (C. C. 1891) 46 Fed. 824.

A petition to remove a case to the federal court because of diversity of citizenship must, where plaintiff had joined a resident as defendant, state the facts showing a fraudulent joinder; a mere general allegation of fraud being insufficient. Offner v. Chicago & E. R. Co. (1906) 148 Fed. 201, 78 C. C. A. 359; Clark v. Chicago, R. I. & P. Ry. Co. (D. C. 1912) 194 Fed. 505; Illinois Cent. R. Co. v. Robinson (Ala. 1914) 66 So. 519; Lloyd v. North Carolina R. Co. (1913) 78 S. E. 489, 162 N. C. 485; Smith v. Harris Granite Quarries Co. (1913) 80 S. E. 388, 164 N. C. 338; Pruitt v. Charlotte Power Co. (1914) 81 S. E. 624, 165 N. C. 416; Lloyd v. Southern Ry. Co. (1914) 81 S. E. 1003, 166 N. C. 24; Cogdill v. Clayton (N. C. 1915) 87 S. E. 338; Rutherford v. Illinois Cent. R. Co. (1905) 85 S. W. 199, 27 Ky. Law Rep. 397, 120 Ky. 15; Carter Coal Co. v. Prichard's Adm'r (Ky. 1915) 179 S. W. 1038; Eastin & Knox v. Texas & P. Ry. Co. (1906) 92 S. W. 838, 99 Tex. 654, reversing judgment Texas & P. Ry. Co. v. Eastin & Knox (Tex. Civ. App. 1905) 89 S. W. 440.

Allegations in a removal petition that a resident employé was fraudulently joined with a nonresident railway company as defendant in a personal injury suit by another employé, to prevent a removal for diverse citizenship, are insufficient to entitle petitioner to a removal, where under the local law the facts alleged stated a case for which defendants might be jointly sued. Illinois Cent. R. Co. of State of Illinois v. Sheegog (1909) 30 S. Ct. 101, 215 U. S. 308 (affirming judgment Illinois Cent. R. Co. of State of Illinois v. Sheegog's Adm'r [1907] 103 S. W. 323, 126 Ky. 252); Chicago, R. I. & P. R. Co. v. Dowell (1913) 33 Sup. Ct. 684, 229 U. S. 102, 57 L. Ed. 1090 (affirming judgment Dowell v. Chicago, R. I. & P. Ry. Co. [1910] 112 P. 136, 83 Kan. 562); Chesapeake & O. R. Co. v. Cockrell (1914) 34 S. Ct. 278, 232 U. S. 146, 58 L. Ed. 544 (affirming judgment Same v. Banks' Adm'r [1911] 137 S. W. 1066, 144 Ky. 137); Armstrong v. Kansas City Southern Ry. Co. (C. C. 1911) 192 Fed. 608.

An averment that a resident railway employé, made a party defendant in a personal injury action brought against a nonresident railroad company by another employé, was a man of small means, and the responsibility of the railroad company was unquestioned, does not show a fraudulent joinder to prevent removal. Chicago, R. I. & P. R. Co. v. Dowell (1913) 33 S. Ct. 684, 229 U. S. 102, 57 L. Ed. 1090, affirming judgment Dowell v. Chicago, R. I. & P. Ry. Co. (1910) 112 P. 136, 83 Kan. 562.

Where a petition for removal alleged that the resident defendant was joined for the purpose of preventing a removal of the action, but did not allege that said defendant was "wrongfully or fraudulently" made a party defendant, and it appeared that plaintiff was entitled to sue the defendants jointly, the petition was insufficient. Thomas v. Great Northern Ry. Co. (1906) 147 Fed. 83, 77 C. C. A. 255.

A petition for removal charging fraudulent joinder must do more than deny the cause alleged. Cogdill v. Clayton (N. C. 1915) 87 S. E. 338.

Where a nonresident defendant and resident superior servants were jointly sued for death of plaintiff's intestate, a petition by the nonresident defendant for removal which merely denies the resident employés' liability as a conclusion and alleges that they were not present at the time does not state facts sufficient to show a fraudulent joinder. Smith v. Harris Granite Quarries Co. (1913) 80 S. E. 388, 164 N. C. 338.

Where an action is brought against two defendants, a petition by one of them for removal to the federal court on the ground of nonresidence, alleging that the other defendant is a sham, made such to prevent the removal, is insufficient for that purpose. Baber v. Southern Ry. Co. (1907) 56 S. E. 540, 76 S. C. 4.

Where a removal petition alleged the requisite diversity of citizenship, that the matter in dispute exceeded, exclusive of interest and costs, the sum of $2,000, that a separable controversy existed between plaintiff and petitioner, and that a codefendant was fraudulently joined to defeat federal jurisdiction and prevent removal, it was sufficient for that purpose, though it was defective in detail as to what constituted the alleged fraud. Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250.

A petition for removal, filed by one of a number of defendants in an action for negligence, which charges that no grounds of action are alleged by plaintiff or exist against its codefendants, and that they were fraudulently joined to deprive petitioner of its right to remove the case, shows a right of removal on its face, where the requisite jurisdictional facts are stated, and, unless issue is joined on such allegations, a motion to remand is properly denied. Hunter v. Illinois Cent. R. Co. (1911) 188 Fed. 645, 110 C. C. A. 459; Bradshaw v. Bowden (D. C. 1914) 226 Fed. 323.

In an action against resident and nonresident railway companies, a petition of the defendant for removal alleging that the cause was severable, with the facts showing the reason therefor, and that plaintiff with knowledge of these facts set out a fictitious statement showing joint liability to defeat the jurisdiction of the federal court, raised

an issue of fact which required the immediate removal of the cause to the federal court. Gibson v. Chesapeake & O. Ry. Co. (C. C. A. 1914) 215 Fed. 24; Sears v. Atchison, T. & S. F. Ry. Co. (1912) 147 S. W. 860, 163 Mo. App. 711.

Where, in an action for injuries, the petition stated as a ground for liability against the resident defendant that he knew of the defective mold into which plaintiff was pouring molten iron at the time he was injured by such defect, and with such knowledge directed plaintiff so to do, a petition for removal on the ground of fraudulent joinder, alleging that such defendant had nothing to do with the accident, but which failed to deny plaintiff's allegation and to allege that it was known by plaintiff to be untrue when made, and was made to prevent removal, was insufficient. Evansberg v. Insurance Stove, Range & Foundry Co. (C. C. 1908) 168 Fed. 1001.

A petition by one of several defendants based on the ground that the other defendants were joined for the sole purpose of preventing a removal alleged that the other defendants were men of small means, having but little property from which a judgment against them might be recovered, and that the petitioner was, at time of suit, entirely solvent and able to pay its debts, or any judgment recovered against it, and that it had property more than sufficient to pay the amount sued for, and that, according to the allegations in the petition in the action, any act of negligence on the part of the other defendants alleged to have produced the injury to plaintiff was an act of the petitioner, which was accordingly responsible therefor. Held to plead specific facts from which petitioner concluded that the joinder was fraudulent. Schwyhart v. Barrett (Mo. App. 1910) 130 S. W. 388.

Petition for removal of action against foreign corporation to federal court held insufficient in connection with the pleadings and admissions of record not inconsistent therewith to show that plaintiff joined a domestic corporation, and based his action on the federal Employers' Liability Act fraudulently to prevent a removal. Lloyd v. North Carolina R. Co. (1913) 78 S. E. 489, 162 N. C. 485.

74. Separable controversies.—A petition by one of several defendants for removal on the ground of separable controversy should of itself distinctly show and point out the separable controversy, name the parties to it, and state all the grounds upon which the petitioner relies; and it should also show that such controversy involves the requisite jurisdictional amount. Gates Iron Works v. James E. Pepper & Co. (C. C. 1899) 98 Fed. 449. But see Sharkey v. Port Blakely Mill Co. (C. C. 1899) 92 Fed. 425, holding that, when a cause which is removable because of diverse citizenship is joined with a cause which is not removable, the removal of the former carries the entire suit, so that defendant need not set forth in his petition the existence of a separable controversy.

It is usual in a petition for removal which alleges a separable controversy to set out the nature of such controversy, but it is sufficient if it appears from the record that such controversy actually exists. Harding v. Standard Oil Co. (C. C. 1909) 170 Fed. 651.

A motion for the removal of a cause to the federal court must be overruled unless the petition for removal shows the existence of a controversy which is wholly between citizens of different states, and which can be fully determined as between them, that being the jurisdictional fact upon which the right of removal depends. McCabe's Adm'x v. Maysville & B. S. R. Co. (1902) 66 S. W. 1054, 23 Ky. Law Rep. 2328, 112 Ky. 861.

An applicant for severance and transfer of an ejectment suit must make an affirmative showing that the federal court can finally and effectually determine the controversy as to him without his codefendant. Crane v. Seitz (1874) 30 Mich. 453; Crane v. Gerloff (1875) 31 Mich. 454.

Allegations in a petition for removal of a separable controversy, amounting simply to a traverse of the facts alleged in plaintiff's petition, are insufficient. Southern Ry. Co. v. Lloyd (1916) 36 S. Ct. 210.

Where one brings an action of ejectment against a citizen of the same state with himself, in a state court, and defendant pleads to the merits, and a citizen of another state is, on his own application, made a codefendant, the cause will not be transferred to the federal courts on a petition of both defendants, which states no facts in relation to the ownership of the land, or their relation to each other. Allin v. Robinson (C. C. 1871) Fed. Cas. No. 249.

Where, in an action for injuries to a passenger, the petition joined the railroad company and its servants as defendants, and charged them jointly as wrongdoers, a petition by the railroad company to remove the cause to the federal court, for diversity of citizenship, on the ground that the action involved a separable controversy between it and its servants, whose citizenship was the same as plaintiffs'—merely denying the negligence of its codefendants as charged, and alleging that plaintiffs' purpose in joining such codefendants was for the fraudulent purpose of defeating the jurisdiction of the federal court—was insufficient; such averments being mere conclusions, and not facts showing a separable controversy.

Rutherford v. Illinois Cent. R. Co. (1905) 85 S. W. 199, 27 Ky. Law Rep. 397, 120 Ky. 15.

A showing in an application by one of two defendants for a transfer merely by the general statement that the suit is one in which there could be a final determination of the controversy as far as it concerned such applicant without the presence of his codefendant is but the statement of an opinion or legal conclusion. Such application must state the facts constituting a proper basis for the decision of the court. Crane v. Seitz (1874) 30 Mich. 453; Crane v. Gerloff (1875) 31 Mich. 454.

75. Amount in controversy.—In case of a controversy between citizens of different states as to the validity of an attachment in an action, in which plaintiff's claim was admitted, the application for removal should show affirmatively that the amount involved in that controversy is more than the jurisdictional amount. Keith v. Levi (C. C. 1880) 2 Fed. 743, 1 McCrary, 343.

Where the petition for removal alleges that the action is on a fraudulently executed mortgage, and to cancel bonds fraudulently issued and secured by it, to the amount of $45,000, and states that the amount in controversy exceeds the jurisdictional amount, and the controversy is sufficiently stated in the complaint, a motion to remand to the state court on the ground that the petition for removal and the record do not show that the amount in controversy is sufficient will be denied. Chambers v. McDougal (C. C. 1890) 42 Fed. 694.

In an action for the specific performance of a sale of land, where plaintiff alleged that she had performed all of her agreements, and asked for a conveyance, and there was no question of interest involved, it was unnecessary for the petition to allege that the amount involved exceeded the jurisdictional amount, exclusive of costs and "interest." Weber v. Travelers' Ins. Co. (C. C. 1891) 45 Fed. 657.

Where a petition by defendant for removal states that there is a controversy between the parties involving the requisite amount, it is no objection to the removal that defendant has filed no pleadings from which such controversy appears. Creagh v. Equitable Life Assur. Soc. (C. C. 1897) 83 Fed. 849.

Where, on motion to remand a cause removed to the federal court, the removal petition stated that the amount in controversy exceeded the jurisdictional amount, and it was alleged in the complaint that land contracts sought to be set aside were of greater value than that amount, a contention that the matter in dispute was not sufficient in value was without merit. Hyde v. Victoria Land Co. (C. C. 1903) 125 Fed. 970.

Where plaintiff's pleading in a state court contained a number of counts or paragraphs, each claiming damages for alleged wrongful acts of defendant in the sum of $1,900, and also a prayer for an injunction to restrain a continuance of such acts, an allegation in a petition for removal that the amount in controversy exceeds the jurisdictional amount must be accepted as true, even if the prayers for damages be construed as claiming only $1,900 in all; there being nothing in the pleading showing the value of the matter involved in the controversy with respect to the injunctive relief sought. Southern Cash Register Co. v. National Cash Register Co. (C. C. 1906) 143 Fed. 659.

Where a suit was brought by a city against a telegraph company to recover $1,772 for street rentals for the maintenance of defendant's poles and wires and the bill prayed for the payment of the rentals or forfeiture of defendant's rights in the streets, and that its occupation thereof should cease, the matter in controversy was not necessarily limited to the amount of the money sought to be recovered, and hence a verified removal petition stating that the value of the matter in controversy was more than the jurisdictional amount sufficiently showed that the amount in controversy was sufficient to confer federal jurisdiction. City of Memphis v. Postal Telegraph Cable Co. (1906) 145 Fed. 602, 76 C. C. A. 292, reversing decree (C. C. 1905) 139 Fed. 707.

An allegation in a petition for the removal of a suit to determine the right to take water from a public stream for irrigation or other purposes, that the value of the matter in dispute exceeds the jurisdictional amount, where not denied, is sufficient to authorize the federal court to take jurisdiction. Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irr. Co. (C. C. 1907) 158 Fed. 137.

A petition for removal showing that the case involved sufficient to render it removable, in the absence of any denial of its allegations, must be taken as showing the amount involved. Studebaker v. Salina Waterworks Co. (D. C. 1912) 195 Fed. 164.

In condemnation proceedings before the county court, where the petition averred the value of the land sought to be taken and the resulting damages as not exceeding the jurisdictional amount, the court properly refused to dismiss the proceedings on the filing of affidavits on an application for removal of the cause to a federal court averring that the damages would exceed that amount, the averments of the petition being conclusive as to the jurisdiction on an attack made before

final judgment. Colorado Fuel & Iron Co. v. Four Mile Ry. Co. (1901) 66 Pac. 902, 29 Colo. 90.

In an action in a district court of Kansas to quiet title to land, defendant filed an unverified petition for removal to the United States circuit court, alleging that the land was worth $1,000, and that the parties were citizens of different states, but no evidence was offered in support of such allegations. Held, that such petition was not sufficient to oust the district court of jurisdiction. Goddard v. Bosson (1878) 21 Kan. 139.

Where a controversy relates to plaintiffs' right to have their property and business undisturbed and undiminished in value by defendant's malicious conduct, and the petition for removal avers that the matter in controversy exceeds the jurisdictional amount, this is controlling, it not appearing from the averments of the bill that the matter in controversy is not capable of being valued in money, and that it does not exceed the required amount in value. Duff v. Hildreth (1903) 67 N. E. 356, 183 Mass. 440.

In a complaint to the corporation commission to compel a railroad company to deliver four cars of coal on a private siding, the complainant put no valuation either on the particular delivery or on the effect of a similar delivery of all cars in future. After an appeal to the superior court, the railroad company petitioned for removal to the federal Circuit Court, alleging that the proceeding was of a civil nature to assert the right of the complainant to have the commission order the company to deliver interstate shipments to the complainant, and that "the matter actually in controversy, involving the right of the defendant to manage its large interstate commerce without any interference on the part of the plaintiffs, largely exceeds" the jurisdictional amount. Held that, as the allegation as to value was a mere conclusion of law, unwarranted by the facts in the record or the petition, the petition was insufficient to oust the superior court of jurisdiction, and was properly denied. State v. Southern Ry. Co. (1904) 47 S. E. 229, 135 N. C. 81.

Where plaintiff sued to recover $2,250 for lumber alleged to have been wrongfully cut by defendant, and the latter in a petition to remove the cause to the federal court alleged that the title to the land would be put in issue, and that it was worth $800 apart from the timber, the value of the land should be added to the value of the timber in determining the amount in controversy for the purpose of ascertaining whether the action was removable. Brinkley v. John L. Roper Lumber Co. (1914) 82 S. E. 855, 166 N. C. 501.

A petition to remove cause to federal court, alleging that cause arose prior to January 1, 1913, without setting forth facts or alleging fraud in the petition as to date of accrual, is insufficient to secure removal under the Judiciary Act, where the action is for $3,000 only. Cogdill v. Clayton (N. C. 1915) 87 S. E. 338.

In an action on an account, where the complaint shows the original indebtedness, the payments thereon, and the balance due, which is less than the required amount, and the petition for removal merely alleges in general terms that the petitioner is defendant in the cause, which is a suit of a civil nature involving a controversy between citizens of different states, involving more than that amount, exclusive of interest and costs, but there are no facts stated controverting the complaint as to the amount in controversy, no issue of fact is raised, and an order for removal is properly denied; the petitioner for removal being bound to show by the record a case within the statute. Gibbes v. Santee River Cypress Lumber Co. (1908) 60 S. E. 689, 79 S. C. 201.

An allegation, in a petition for removal to a federal court, that the matter in controversy is "of the sum and value of over" the required amount, "as petitioner is informed and verily believes," is insufficient. New York & T. Land Co. v. Martin (Tex. Civ. App. 1894) 25 S. W. 475.

As an information in equity in behalf of the state to enjoin a federal receiver from destroying a railroad, pursuant to an order of court, for the purpose of selling the materials of which it was composed, clearly shows the subject of the dispute, a petition for the removal of the cause to a federal court, stating that "the amount involved therein, exclusive of interest and costs, exceeds" the jurisdictional amount, sufficiently alleges the amount in dispute, though not stated in the language of the statute. State v. Frost (1902) 89 N. W. 915, 113 Wis. 623.

76. Time of removal.—A petition is not insufficient to justify the removal of a cause from a state court to a federal circuit court because the allegation that the time had not arrived at which the defendant was required to answer or plead is an allegation of a conclusion of law. Remington v. Central Pac. R. Co. (1905) 25 S. Ct. 577, 198 U. S. 95, 49 L. Ed. 959.

It must affirmatively appear on the record, or by facts in a petition for removal under the Act of 1875, that the case could not have been heard and tried at a term before the application was made. Aldrich v. Crouch (C. C. 1882) 10 Fed. 305.

77. Court to which removal is sought.—A petition for the removal of a cause incorrectly designated the division of the district to which removal was prayed as the Southern instead of the East-

ern. There was no Southern Division, and the city where the court was held was properly designated. Held, the defect was immaterial, and would be disregarded. Hodge v. Chicago & A. Ry. Co. (1903) 121 Fed. 48, 57 C. C. A. 388.

The requirement for the removal of causes from the state courts to the "next circuit court to be held in the district where the suit is pending," is not complied with by an application for removal to the circuit court of the United States, to be held "for the middle district of the state of Alabama." Ex parte Groom (1867) 40 Ala. 731.

78. Signature.—A petition for removal is sufficiently signed by the attorney of the party. Wormser v. Dahlman (C. C. 1879) Fed. Cas. No. 18,048, 57 How. Prac. 286. So is one signed by the attorney of the only one of several defendants who appeared. Vandervoort v. Palmer (1855) 11 N. Y. Super. Ct. (4 Duer) 677.

A petition by a company to remove signed by an agent on whom the bill was served is sufficiently signed. Fayette Title & Trust Co. v. Maryland, P. & W. V. Telephone & Telegraph Co. (C. C. 1910) 180 Fed. 928.

79. Verification.—When a complaint states a cause of action against two defendants, one of whom is a citizen of the same state as the plaintiff, an averment in a petition for removal that the allegations involving such defendant are made to prevent removal must be sustained by proof. The mere verification of the petition for removal is not sufficient. Landers v. Felton (C. C. 1896) 73 Fed. 311.

A verification by the attorney for defendant, who personally knew the facts as to the citizenship of the parties, would seem to be sufficient. Berry v. Mobile & O. R. Co. (D. C. 1915) 228 Fed. 395.

Where the facts alleged in a petition for removal are positively stated, a verification that the facts are true except such as are alleged on information and belief is sufficient. Murray v. Southern Bell Telephone & Telegraph Co. (D. C. 1914) 210 Fed. 925.

The new requirement of verification to petition for removal does not dispense with the well-settled rule that in aid of the petition the rest of the record may be consulted. Missouri, K. & T. R. Co. v. Chappell (D. C. 1913) 206 Fed. 688.

80. —— Decisions under prior statutes which did not require verification.—Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250; Hunter v. Illinois Cent. R. Co. (1911) 188 Fed. 645, 110 C. C. A. 459; Sweeney v. Coffin (C. C. 1870) Fed. Cas. No. 13,686; Osgood v. Chicago, D. & V. R. Co. (C. C. 1875) Fed. Cas. No. 10,604; Connor v. Scott (C. C. 1876) Fed. Cas. No. 3,119; Houser v. Clayton (C. C. 1878) Fed. Cas. No. 6,739; Wormser v. Dahlman (C. C. 1879) Fed. Cas. No. 18,048, 57 How. Prac. 286; Howard v. Gold Reefs of Georgia (C. C. 1900) 102 Fed. 657; Harley v. Home Ins. Co. (C. C. 1903) 125 Fed. 792; Groton Bridge & Manufacturing Co. v. American Bridge Co. (C. C. 1905) 137 Fed. 284; Porter v. Northern Pac. Ry. Co. (C. C. 1908) 161 Fed. 773; Guinault v. Louisville & N. R. Co. (1890) 42 La. Ann. 52, 7 South. 62; Ogden v. Baker (1832) 13 N. J. Law (1 J. S. Green) 75; Vanderwoort v. Palmer (1855) 11 N. Y. Super. Ct. (4 Duer) 677; Florance v. Butler (N. Y. 1870) 9 Abb. Prac. (N. S.) 63; Shaft v. Phœnix Mut. Life Ins. Co. (1876) 67 N. Y. 544, 23 Am. Rep. 138; Rea v. Standard Mirror Co. (N. C. 1911) 73 S. E. 116; Western Coal & Mining Co. v. Osborne (Okl. 1911) 119 Pac. 973; Bilby v. Hancock (Tex. Civ. App. 1910) 125 S. W. 370.

81. Counter affidavits or reply and proof.—Allegations of fact in a petition for removal may be put in issue by a plea to the jurisdiction, or by answer to the petition for removal. Jones v. Casey-Hedges Co. (D. C. 1913) 213 Fed. 43.

Averments of fact in a petition for removal, in the absence of some denial by answer or by comparison with the record, must be taken as admitted, and, if sufficient upon their face to justify a removal, all other questions out of the way, will sustain the jurisdiction of the Circuit Court. Atlanta, K. & N. Ry. Co. v. Southern Ry. Co. (1907) 153 Fed. 122, 82 C. C. A. 256; Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250; Camp v. Field (C. C. 1911) 189 Fed. 285; Jones v. Casey-Hedges Co. (D. C. 1913) 213 Fed. 43; Hardwick v. Kean (1894) 95 Ky. 563, 26 S. W. 589.

As the removal act does not require the petition for removal to be verified, the allegations as to citizenship need not be proved, unless put in issue by a special plea under oath, or, if a plea is not filed, by evidence offered to sustain the objection. Southern Pac. Co. v. Harrison (1889) 73 Tex. 103, 11 S. W. 168. But see De Camp v. New Jersey Mut. Life Ins. Co. (1870) 32 N. Y. Super. Ct. (2 Sweeny) 481, holding that, where an application for removal is made ex parte, the court will require legal proof of the averments in the petition alleged on information and belief, while, if the application is made on notice of the adverse party, the court will consider the averments not controverted by the adverse party as true.

Where a petition for the removal to a federal court of an action in a state court against nonresident and resident defendants on the ground that the resident defendant was fraudulently joined merely to defeat removal is accompanied by supporting affidavits, plaintiff

may file controverting affidavits. Chesapeake & O. Ry. Co. v. Banks' Adm'r (1911) 137 S. W. 1066, 144 Ky. 137. Where such a petition was denied and no proof taken thereon, the removal was improper. Broadway Coal Mining Co. v. Robinson (1912) 150 S. W. 1000, 150 Ky. 707.

A petition for removal to the federal court, alleging that certain defendants are united as codefendants to prevent petitioner from exercising its right of removal, necessarily concedes the residence of the codefendants, and an answer affirmatively alleging such residence is immaterial. Pierce's Adm'r v. Illinois Cent. R. Co. (1905) 86 S. W. 703, 27 Ky. Law Rep. 801.

The denial of a motion for leave to plead to a petition for removal, not made until more than five months after a motion to remand had been overruled, and when the case was at issue and ready for trial on the merits, was within the discretion of the court. Hunter v. Illinois Cent. R. Co. (1911) 188 Fed. 645, 110 C. C. A. 459. So was the denial of a similar motion made after a motion to remand was denied and defendants had demurred to the petition. Gibson v. Chesapeake & O. Ry. Co. (1914) 215 Fed. 24, 131 C. C. A. 332.

The facts stated in the petition for the removal of a case from a state court to a United States circuit court, as a ground for removal, cannot be controverted in the state court in determining whether the case is removable or not. Byson v. McPherson (1887) 71 Iowa, 437, 32 N. W. 418; Louisiana State Bank v. Morgan (1826) 4 Mart. (N. S.) 344; Stoker v. Leavenworth (1834) 7 La. 390; Oakey v. Commercial & R. Bank (1840) 14 La. 515; Franciscus v. Surget (1843) 6 Rob. 33; Dickey v. Robins (N. Y. 1880) 22 Alb. Law J. 157.

An averment in reply to the application that the attorneys had, by an agreement for continuance, waived the right of removal, which is unsworn to, cannot be considered, in the absence of any other showing as to the agreement. Southern Pac. Co. v. Harrison (1889) 73 Tex. 103, 11 S. W. 168.

When a petition for removal alleges that a defendant has been joined merely to prevent removal, the plaintiff may take issue, and the court will hear evidence, but, if issue is not taken, the allegations of the petition, if supported by affidavit, will be taken as true. Durkee v. Illinois Cent. R. Co. (C. C. 1897) 81 Fed. 1.

(F) Bond

82. **Necessity.**—The filing of a proper and sufficient bond is a condition precedent to a removal of a cause to a federal court. Alexandria Nat. Bank v. Willis C. Bates Co. (1908) 160 Fed. 839, 87 C. C. A. 643; McMurdy v. Connecticut Gen. Life Ins. Co. (C. C. 1877) Fed. Cas. No. 8,903; Clark v. Guy (C. C. 1902) 114 Fed. 783; Combs v. Nelson (1883) 91 Ind. 123; State ex rel. Basket v. Woodson (1901) 64 S. W. 774, 164 Mo. 440; Paris & G. N. R. Co. v. Boston (Tex. Civ. App. 1912) 142 S. W. 944. But see Beede v. Cheeney (C. C. 1881) 5 Fed. 388, holding that the jurisdiction of the federal court does not depend on the form or substance of the bond approved by the state court, and Miller v. Soule (D. C. 1915) 221 Fed. 493, holding that a state court need not remove a cause to a federal court, unless defendant, applying for removal, presents a proper bond; but, where removal is made, a remand will not be ordered because of defective bond.

The bond should be offered at the time of presenting the petition for removal. Roberts v. Carrington (1829) 2 N. Y. Super. Ct. (2 Hall) 694; Kirkpatrick v. Hopkins (Pa. 1838) 2 Miles, 277.

83. **Form.**—In an action against the Willis C. Bates Company, a corporation, a removal bond reciting that the "Willis C. Bates & Co., undertake," etc., and describing the suit as one pending "wherein the Alexandria National Bank is plaintiff and said Willis C. Bates is defendant," was void for failure to properly describe the action. Alexandria Nat. Bank v. Willis C. Bates Co. (1908) 160 Fed. 839, 87 C. C. A. 643.

Where a bond filed to obtain a removal of a cause contained interlineations, and the name of the obligee was misspelled, such bond, though not void, was properly rejected by the court because of the irregularities. Greacen v. Beam (1836) 15 N. J. Law (3 J. S. Green) 460.

The bond required is a joint and several bond. Roberts v. Carrington (1829) 2 N. Y. Super. Ct. (2 Hall) 694; Hazard v. Durant (1870) 9 R. I. 602.

84. **Condition.**—Where the bond given for the removal of an action from a state to a federal court follows substantially the words of the statute, and the legal effect is not varied, the bond is sufficient. Removal Cases (1879) 100 U. S. 457, 472, 25 L. Ed. 593; Ellis v. Atlantic & P. R. Co. (1883) 134 Mass. 338.

Where an action for wrongful death was brought in the state court subsequent to the taking effect of the Judicial Code (January 1, 1912), the form of the bond required to accompany a petition for removal was governed by the provision of the Code requiring that the bond be conditioned to secure the entry of a certified copy of the record in the federal court within 30 days from the filing of the petition for removal, and a bond conditioned as required by the old law was insufficient. Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688. But see State Improvement-Development Co. v.

Leininger (D. C. 1914) 226 Fed. 884, holding that to be a mere formal defect which did not render the bond void.

A defect in bond in removal proceedings, in that it provided for filing copy of record on first day of next term of court, instead of within 30 days, is not fatal to defendant's right to remove. Chase v. Erhardt (D. C. 1912) 198 Fed. 305.

Under R. S. § 639, which provided that the petitioner must, at the time of filing his petition therefor, offer in said state court good and sufficient surety for his entering in the Circuit Court, on the first day of its session, copies of said process against him, a bond contained the condition that the petitioner "shall enter in such Circuit Court, on the first day of its session next after the granting of said petition, a copy of the record" was sufficient, where the next session of the Circuit Court for the district, held after the granting of the petition, was the session next held after the filing of the petition. Ellis v. Atlantic & P. R. Co. (1883) 134 Mass. 338. But a condition that plaintiff shall file in the circuit court "copies of all process" does not comply with the statute. Burdick v. Hale (C. C. 1876) Fed. Cas. No. 2,147. And a bond is insufficient where it provides for entering appearance in the wrong court, and for the payment of such costs as may accrue in consequence of the "improper removal of said cause." Hayes v. Todd (1894) 34 Fla. 233, 15 South. 752.

The bond tendered by an applicant for the removal of a cause from a state to a federal court must be conditioned on the applicant's appearance in the cause in the federal court. Bell v. Bell (1869) 3 W. Va. 183. But, where an action against a firm is commenced by service on one partner only, and all partners are citizens of another state, and plaintiff is a citizen of the state in which the action is brought, it is not necessary that the bond filed with the petition for the removal of the cause to the federal court should be conditioned for the appearance of any defendant except the one served. Vandervoort v. Palmer (1855) 11 N. Y. Super. Ct. (4 Duer) 677. And the clause in the condition of the bond for removal providing that the defendants shall "do, or cause to be done, such other and appropriate acts," etc., is a sufficient compliance with the requirement that the bond shall be one for appearing in the federal court. Cooke v. Seligman (C. C. 1880) 7 Fed. 263, 17 Blatchf. 452.

The bond must contain a provision for the payment of costs. McMurdy v. Connecticut Gen. Life Ins. Co. (C. C. 1877) Fed. Cas. No. 8,903; Webber v. Bishop (C. C. 1882) 13 Fed. 49; Sheldrick v. Cockcroft (C. C. 1886) 27 Fed. 579; New Orleans, Ft. J. & G. I. R. Co. v. Rabasse (1892) 44 La. Ann. 178, 10 South. 708; Harold v. Arrington (1885) 64 Tex. 233.

A stipulation to "do such other appropriate acts as by the act of congress in that behalf are required" is not a substitute for such condition.—Harrold v. Arrington (1885) 64 Tex. 233.

An undertaking to dissolve a foreign attachment, under the law of Pennsylvania, must be an absolute one for the payment of the debt or damages recovered, and constitutes "special bail"; but, since a defendant is not required to enter such bail under the law of the state, but may at his option appear and contest the action, leaving the attachment in force, it is not necessary that a removal bond in such case be so conditioned, particularly where an undertaking to that effect has been given in the state court, which necessarily remains in full force and effect in the federal court after the removal. Preston v. McNeil Lumber Co. (C. C. 1906) 143 Fed. 555.

The removal bond need not contain a condition for the entry of the defendant's appearance in the federal court, though he has not yet entered such appearance in the state court, where special bail is not originally demandable in the action, as it is only in such event that the act requires such condition in the bond. Burck v. Taylor (C. C. 1889) 39 Fed. 581, judgment affirmed (1894) 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578.

The provision for special bail does not refer to a delivery bond for property attached in the state courts, but to undertakings for the personal appearance of a party. Ramsey v. Coolbaugh (1862) 13 Iowa, 164.

A citizen of another state, sued in a bailable action in the supreme court, in New York, by a citizen of that state, at the time of entering his appearance and presenting his petition to remove the cause to the circuit court of the United States, pursuant to the act of congress, need not put in special bail in the state court. Suydam v. Smith (1845) 1 Denio, 263.

85. Penalty.—A paper filed as a removal bond which left the amount of the obligation blank was fatally defective. Burdick v. Hale (C. C. 1876) Fed. Cas. No. 2,147; Austin v. Gagan (C. C. 1889) 39 Fed. 626, 628, 5 L. R. A. 476; Quarrier v. Baltimore & O. R. Co. (1882) 20 W. Va. 424. But see Johnson v. F. C. Austin Manuf'g Co. (C. C. 1896) 76 Fed. 616, holding that, while the removal bond should, properly, state a penal sum, yet its failure to do so is not material on a motion to remand.

Whether or not a removal bond should be without fixed penalty, a bond otherwise valid is properly accepted where the penalty is sufficient to cover the costs likely to accrue. Kentucky v.

Louisville Bridge Co. (C. C. 1890) 42 Fed. 241.

A bond to remove a cause is sufficient where there is a good and sufficient surety for payment of costs. Fayette Title & Trust Co. v. Maryland, P. & W. V. Telephone & Telegraph Co. (C. C. 1910) 180 Fed. 928.

A penalty of $500 is sufficient. Groton Bridge & Manufacturing Co. v. American Bridge Co. (C. C. 1905) 137 Fed. 284. So is one of $1,000, though the sum demanded is $14,000, if defendant has not been held to bail in the state court. Blanchard v. Dwight (N. Y. 1834) 12 Wend. 192.

86. Parties and execution.—The petitioner need not join in the bond for removal. Stevens v. Richardson (C. C. 1881) 9 Fed. 191, 20 Blatchf. 53; Public Grain & Stock Exch. v. Western Union Tel. Co. (C. C. 1883) 16 Fed. 289, 11 Biss. 568; People's Bank of Greenville v. Ætna Ins. Co. (C. C. 1892) 53 Fed. 161; Groton Bridge & Manufacturing Co. v. American Bridge Co. (C. C. 1905) 137 Fed. 284; Vandevoort v. Palmer (1855) 11 N. Y. Super. Ct. (4 Duer) 677; Nye v. Northern Cent. R. Co. (1881) 24 Hun, 556; Swan v. Mansfield, C. & L. M. R. Co. (Ohio Com. Pl. 1879) 4 Wkly. Law Bul. 898. CONTRA, Rough v. Booth (Cal. 1884) 3 Pac. 91.

A circuit court of the United States cannot entertain a cause on removal from a state court where the removal bond was not signed either by the principal or the surety. Clark v. Guy (C. C. 1902) 114 Fed. 783.

A removal cannot be effected on filing the petition of one party and a bond given by another. Farmers' Loan & Trust Co. v. Lake St. El. R. Co. (1897) 68 Ill. App. 666, affirmed (1898) 51 N. E. 55, 173 Ill. 439, reversed on other grounds (1900) 20 S. Ct. 564, 177 U. S. 51, 44 L. Ed. 667.

The bond on the removal of a cause to the United States circuit court should be made to the plaintiff in the action, and not to the people. Grow v. Wiman (1886) 3 N. Y. St. Rep. 281.

A seal is not essential to the validity of a removal bond, where the use of a seal is declared unnecessary by the statutes of the state. Loop v. Winters' Estate (C. C. 1902) 115 Fed. 362.

The bond for the removal required to be given may be taken, though the defendant be not personally in court. Brown v. Crippin (Va. 1809) 4 Hen. & M. 173.

Where a removal bond was signed "Willis C. Bates Company, by Willis C. Bates, Treasurer," but it did not appear that Willis C. Bates as treasurer had any authority to execute the bond, and the corporate seal was not attached, and it was not shown that the person signing the bond had authority to attach the seal, the bond was void. Alexandria Nat. Bank v. Willis C. Bates Co. (1908) 160 Fed. 839, 87 C. C. A. 643.

Civ. Code S. C. 1902, §§ 599, 600, authorizing the giving of surety company bonds, declares that any foreign company, empowered by its charter to issue bonds or policies of suretyship, may, with the consent and approval of the Governor, Comptroller General, and Secretary of State, issue such bonds within the state. A removal bond tendered with a removal petition was signed by M. as attorney in fact for the foreign corporate surety, authorized to do business within the state, and was sealed with the seal of the corporation. It also contained an affidavit that the affiant saw the corporate seal of the company affixed, saw M. sign as attorney in fact for such surety, and witnessed the execution and delivery thereof as the act and deed of such surety. Held, that the bond was sufficient, though it was not accompanied by a power of attorney authorizing M. to sign the bond. Mutual Life Ins. Co. of New York v. Langley (C. C. 1906) 145 Fed. 415.

A bond by a company to remove a cause signed by an agent of the company on whom the bill was served is sufficient, though his authority does not appear. Fayette Title & Trust Co. v. Maryland, P. & W. V. Telephone & Telegraph Co. (C. C. 1910) 180 Fed. 928.

87. Sufficiency of surety.—The bond is sufficient if there is one surety able to respond to the condition, so that it is error for the state court to refuse removal because a second surety was disqualified under the state laws. Meyer v. Construction Co. (1879) 100 U. S. 457, 472, 25 L. Ed. 593.

Where a cause is removed from the state court into the federal court, on the petition of the nonresident defendant who is the only party in interest, a formal defendant who is a nominal party is not bound as principal in the removal bond, and is therefore a good surety for his codefendant. Steiner v. Mathewson (1886) 77 Ga. 657.

On a petition for the removal of a cause from a state court to a federal court, accompanied by a bond, the sureties are not bound to justify until a rule to do so is laid upon them. Empire Transp. Co. v. Richards (1878) 88 Ill. 404.

An affidavit of a surety on a removal bond, which fails to state that the affiant has property subject to execution in the district, and that he is a resident of the state, is insufficient. Cleveland, C., C. & St. L. Ry. Co. v. Monaghan (1892) 140 Ill. 474, 30 N. E. 869.

Where the bond filed with a petition for removal is not the bond of the petitioner, and there is no evidence as to the responsibility of the obligor, it is

insufficient. Cleveland, C., C. & St. L. Ry. Co. v. Monaghan (1892) 140 Ill. 474, 30 N. E. 869 (affirming [1891] 41 Ill. App. 498); Farmers' Loan & Trust Co. v. Lake St. El. R. Co. (1898) 51 N. E. 55, 173 Ill. 439, reversed on other grounds (1900) 20 S. Ct. 564, 177 U. S. 51, 44 L. Ed. 667, affirming judgment (1897) 68 Ill. App. 666.

Where a bond for removal was filed, signed by the sureties, but was neither executed nor approved, and contained no affidavit of the solvency of the sureties, and the penalty was not fixed, it is insufficient. Goddard v. Bosson (1878) 21 Kan. 139.

While a removal bond should be presented to the judge of the state court for approval of the surety, the arbitrary refusal of the judge to approve a surety will not prevent the removal, the removing party then being entitled to file the bond and petition, procure the filing of the record on removal, and proceed in the federal Circuit Court, subject to a motion to remand for insufficiency of the surety. Groton Bridge & Manufacturing Co. v. American Bridge Co. (C. C. 1905) 137 Fed. 284.

88. Breach and actions therefor.—A removal bond in the sum of $500 provided that if defendant "shall enter in said circuit court of the United States on the first day of the next term thereof a copy of the record in said suit, and shall pay all costs that may be awarded by said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect." Defendant failed to file the record at such first term, whereupon plaintiff moved to remand, which was denied. Held, that the $500 was a penalty, and not liquidated damages, but that plaintiff was entitled to recover at least nominal damages thereon for the failure to file. Henry v. Louisville & N. R. Co. (1890) 91 Ala. 585, 8 South. 343.

Defendant, on removing suit, gave a penal bond, conditioned that he would appear and put in special bail, and, on breach of the condition, plaintiff dismissed the suit, and sued to recover the penalty. Held that, not having proceeded to judgment on the merits, or shown any damages, plaintiff cannot recover. Welch v. Thorn (1840) 16 La. 188.

A bond for the removal of a cause from the state to a United States court was conditioned that if defendant entered into the latter court, on the first day of its next session, the record of the case, the obligation was to be void, otherwise to remain in full effect. Defendant failed to so enter the record, and plaintiff sued for damages on breach of the bond. Held, that the measure of his damages was the costs incident to plaintiff's appearance in the United States court and procuring the cause to be remanded to the state court. Hale v. Fallon (1881) 4 N. J. Law J. 308.

89. Discharge of bail and surrender of principal.—Where a cause is removed, and special bail is given, if the bail afterwards seek to surrender the principal, it should be in open court, and not by a commitment to jail according to the local law of the state. But, if the party is so committed, the circuit court will, upon the petition of the bail, grant a writ of habeas corpus to bring the party into court to be surrendered in discharge of his bail. Holbrook v. Seagraves (C. C. 1841) Fed. Cas. No. 6,593.

(G) Filing petition and bond

90. Filing in state court.—The petition for removal must be filed in the state court. Virginia v. Paul (1893) 13 Sup. Ct. 536, 539, 148 U. S. 107, 37 L. Ed. 386.

A petition and bond addressed to the judge of the federal court and an order obtained from him for such removal were ineffective to remove the cause, though the petition and bond were subsequently filed in the office of the clerk of the state court. Higson v. North River Ins. Co. (C. C. 1911) 184 Fed. 165; Higson v. North River Ins. Co. (1910) 68 S. E. 920, 153 N. C. 35.

The proper procedure for removing a cause against a postmaster as one arising under the laws of the United States is for the defendant to file a petition and bond in the state court, as required by this section, not to file them in the federal court, as provided by section 1015, post. Bryant Bros. Co. v. Robinson (1906) 149 Fed. 321, 79 C. C. A. 259.

A petition and bond for removal may be filed in vacation. Osgood v. Chicago, D. & V. R. Co. (C. C. 1875) Fed. Cas. No. 10,604. But see Scott v. Otis (C. C. 1877) Fed. Cas. No. 12,543, holding that, where, under the state statutes, its courts can act only in term, a cause referred to a referee for trial in vacation cannot be removed to the federal court, under R. S. § 639, by the filing of a petition, affidavit, and bond in vacation.

A petition and bond for the removal of a cause to a federal court, filed in the office of the clerk of the state court during vacation, and not presented to the judge during a term thereof, is insufficient to effect a removal. Shedd v. Fuller (C. C. 1888) 36 Fed. 609; Roberts v. Chicago, St. P., M. & O. R. Co. (C. C. 1891) 45 Fed. 433 (writ of error dismissed Chicago, St. P., M. & O. R. Co. v. Roberts [1891] 141 U. S. 690, 12 Sup. Ct. 123, 25 L. Ed. 902); Fox v. Southern Ry. Co. (C. C. 1897) 80 Fed. 945; Mays v. Newlin (C. C. 1906) 143 Fed. 574; Higson v. North River Ins. Co. (C. C. 1911) 184 Fed. 165; Rhode Island Horseshoe Co.

v. Goodenough Horseshoe Co. (N. Y. 1876) 52 How. Prac. 111, 1 Abb. N. C. 11; Howard v. Southern Ry. Co. (1898) 29 S. E. 778, 122 N. C. 944; Higson v. North River Ins. Co. (1910) 68 S. E. 920, 153 N. C. 35. CONTRA, Noble v. Massachusetts Ben. Ass'n (C. C. 1891) 48 Fed. 337.

But see North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co. (1893) 3 S. D. 590, 54 N. W. 659, holding that actual presentation of the petition and bond for removal to the state court, if in session, is a courtesy due to the court, but it is not expressly required by the law; and, where there will be no session of the court to which the petition could be formally presented within the time when the defendant must answer, the claim of courtesy to such court cannot be allowed to defeat defendant's right of removal and that filing the petition and bond with the clerk of the state court is filing them in such court.

The presentation of a petition and bond for the removal of a cause to the federal court, to a justice of the state court in vacation, and, on his declining to act thereon, filing them in the office of the clerk of the county, is not a compliance with the statute. Williams v. Massachusetts Ben. Ass'n (C. C. 1891) 47 Fed. 533.

An oral motion in a state court for the removal of a cause is a sufficient presentation to the court of the petition and bond for removal, where they are on file with the clerk. Mays v. Newlin (C. C. 1906) 143 Fed. 574.

When defendant in an action in a state court files in the office of the clerk—the court not being in session—a petition and bond for removal of the cause to the circuit court of the United States, it is also incumbent on him to direct the attention of the court to the fact; and, if he fails to do so, the state court has jurisdiction to render judgment. Roberts v. Chicago, St. P., M. & O. Ry. Co. (1892) 48 Minn. 521, 51 N. W. 478.

The presentation of a petition and bond for removal to a judge of the state court in chambers, and the filing of the same, with his order approving the bond indorsed thereon, with the clerk of the state court, is a sufficient presentation to such court within the removal statute. Remington v. Central Pac. R. Co. (1905) 25 S. Ct. 577, 198 U. S. 95, 49 L. Ed. 959; Groton Bridge & Manufacturing Co. v. American Bridge Co. (C. C. 1905) 137 Fed. 284; Johnson v. Computing Scale Co. (C. C. 1905) 139 Fed. 339.

A positive averment, on oath, by the counsel for the removing party, that the judge to whom the papers were presented was then holding a special term of the court, under a rule providing that the special term is always open when the judge is present, is sufficient to show that the court was in session, though the judge, on presentation of the papers, made an order to show cause which was not in form a court order. La Page v. Day (C. C. 1896) 74 Fed. 977.

It is sufficient if the petition is filed in time, though it is not actually presented to the court until after the expiration of the time to plead. Burck v. Taylor (C. C. 1889) 39 Fed. 581, judgment affirmed (1894) 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578.

It is immaterial that removal papers which have been actually made part of the record were not marked "Filed" before presentation to the state court. Waite v. Phœnix Ins. Co. (C. C. 1894) 62 Fed. 769.

The petition and bond for the removal of a cause must be filed in the clerk's office of the county in which the venue is laid; and, if filed in another county where the court is then sitting, it does not effect a removal, though approved by the presiding judge. Noble v. Massachusetts Ben. Ass'n (C. C. 1891) 48 Fed. 337.

(H) Order for removal

91. Necessity.—Where the requirements of the act of congress for the removal of a cause from a state court to a United States court are complied with, no order of the state court for such removal is necessary. Mannington v. Hocking Valley Ry. Co. (C. C. 1910) 183 Fed. 133; Hatch v. Chicago, R. I. & P. R. Co. (C. C. 1868) Fed. Cas. No. 6,204; Fisk v. Union Pac. R. Co. (C. C. 1869) Id. 4,827; Commercial & Sav. Bank v. Corbett (C. C. 1878) Id. 3,057; Petrie v. Pennsylvania R. Co. (1879) Id. 11,040a; Shepherd v. Bradstreet Co. (C. C. 1895) 65 Fed. 142; La Page v. Day (C. C. 1896) 74 Fed. 977; Lund v. Chicago, R. I. & P. Ry. Co. (C. C. 1897) 78 Fed. 385; Eisenmann v. Delemar's Nevada Gold Min. Co. (C. C. 1898) 87 Fed. 248; Kirby v. Chicago & N. W. R. Co. (C. C. 1900) 106 Fed. 551; Loop v. Winters' Estate (C. C. 1902) 115 Fed. 362; Mutual Life Ins. Co. of New York v. Langley (C. C. 1906) 145 Fed. 415; City of Montgomery, Ala., v. Postal Telegraph-Cable Co. (D. C. 1914) 218 Fed. 471; Southern Ry. Co. v. Dukes (1910) 68 S. E. 332, 7 Ga. App. 784; Le Roux v. Bay Circuit Judge (1881) 46 Mich. 189, 9 N. W. 154; St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co. (1876) 23 Minn. 186, 23 Am. Rep. 682; Scheffer v. National Life Ins. Co. (1879) 25 Minn. 534; Shohoney v. Quincy, O. & K. C. Ry. Co. (1909) 122 S. W. 1025, 223 Mo. 649; State ex rel. Iba v. Mosman (1910) 133 S. W. 38, 231 Mo. 474; Richards v. Modern Woodmen of America (1901) 85 N. W. 999, 14 S. D. 440.

But such an order is usual and should be made where the right of removal appears. Mannington v. Hock-

ing Valley Ry. Co. (C. C. 1910) 183 Fed. 133; Edwards v. Ward (1866) 65 Ky. (2 Bush) 606; State ex rel. Missouri & N. A. R. Co. v. Johnston (1911) 137 S. W. 595, 234 Mo. 338. But see Harlan v. Van Alstan (1887) 10 N. J. Law J. 111, holding that an order for removal will not be granted, as the case goes up by virtue of the act of congress, and to give and refuse an order is useless; filing the bond and petition is all that is necessary, though notice should be given that the court may know what position the cause is in.

Since no order of removal is necessary, where removal of a cause to a federal court is proper, an order of removal by the judge of the state court confers no jurisdiction on the federal court. Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994.

92. Effect of refusal.—When all the steps required by the acts of congress have been complied with, and a transcript of the proceedings in the state court has been filed in the federal court within the time prescribed by law, the cause is then pending in the latter court, although the state court has refused to grant an order of removal. Kern v. Huidekoper (1880) 103 U. S. 485, 490, 26 L. Ed. 354; U. S. v. Judges (C. C. 1872) Fed. Cas. No. 15,501; Atlantic Coast Line R. Co. v. Bailey (C. C. 1907) 151 Fed. 891; Stevenson v. Illinois Cent. R. Co. (C. C. 1911) 192 Fed. 956.

The action of the state court in refusing a removal cannot affect the federal court. Mecke v. Valley Town Mineral Co. (C. C. 1898) 89 Fed. 114, 115.

Where a state court refuses to order the removal of a cause, defendant within the prescribed time may file a copy of the record in the proper federal court and have the cause docketed there, after which the federal court is required to proceed in the exercise of the jurisdiction lost by the state court, which can be regained only by an order of the federal court remanding the cause. Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250.

The action of state court in denying order of removal does not result in its retention of jurisdiction of the cause to pass on defendants' demurrer. State Improvement-Development Co. v. Leininger (D. C. 1914) 226 Fed. 884.

A petitioner wrongfully denied the right of removal may remain in the state court under protest, and rely on his remedy by review if he chooses, or he may enter the record in the circuit court, and rquire his adversary to litigate with him there while the state court proceeds with the case. Baltimore & O. R. Co. v. Koontz (1881) 104 U. S. 5, 15, 26 L. Ed. 643; Barlow v. Chicago & N. W. Ry. Co. (C. C. 1908) 164 Fed. 765.

93. Requisites and entry of order.—Where the petition and bond were filed by defendant seeking removal, within the time allowed, it was immaterial that the order of removal was not within such time. Houser v. Clayton (C. C. 1878) Fed. Cas. No. 6,739; Vermeule v. Vermeule (1901) 54 Atl. 99, 67 N. J. Law, 219.

In a suit for partition in a court of North Carolina, in which, under the laws of the state, the clerk is authorized to make all necessary orders and to enter judgment, such clerk has authority to make an order for the removal of the cause on a petition filed before answer. Sanderlin v. People's Bank of Buffalo (C. C. 1905) 140 Fed. 191.

An order of removal which has been improperly denied may be made after reversal of a judgment against the petitioner by the supreme court of the state. Stix v. Keith (1890) 90 Ala. 121, 7 South. 423.

If it be questionable whether the United States court will take jurisdiction of a cause to be removed from this court, the removal will be on terms that if the United States refuses to take jurisdiction the judgment below shall stand affirmed. Edgarton v. Webb (1870) 41 Ga. 417.

Where the time of holding a court, mentioned in an order of removal of a cause, differs from the true time fixed by law, it is mere surplusage. State v. Seaborn (1833) 15 N. C. 305.

94. Vacation of order for or denying removal.—After an order has once been made in a state court, for the removal of a cause to a United States court, any order subsequently made, or any step subsequently taken in the state court, is void. Hence the state court cannot vacate the order of removal. Livermore v. Jenks (N. Y. 1854) 11 How. Prac. 479; Chamberlain v. American Nat. Life & Trust Co. (N. Y. 1877) 11 Hun, 370. CONTRA, Edgarton v. Webb (1870) 41 Ga. 417; Larson v. Cox (1888) 39 Kan. 631, 18 Pac. 892; Lamblin v. Cox, 40 Kan. 311, 19 Pac. 709; Seth v. Chamberlaine (1874) 41 Md. 186; Lalor v. Dunning (N. Y. 1878) 56 How. Prac. 209; Henderson v. Cabell (1892) 83 Tex. 541, 19 S. W. 287.

Where the petition and bond for the removal of a cause from a state to United States court on the ground of prejudice or local influence have been accepted, allowed, and approved by a justice of the state court, such acceptance and approval imply that the justice was satisfied and decided that the amount in dispute exceeded $500, and if such decision can be reviewed at all in the state court, the application, if made to a judge other than the one who made such decision, must be on notice of motion to set aside such acceptance and approval as having been improvidently made. Thatcher v. Rankin

(N. Y. 1885) 2 How. Prac. (N. S.) 459.

Where a petition for removal of a cause is denied, and it thereafter becomes apparent to the court at any time that the resident defendant has been joined without reasonable grounds therefor, it is the court's duty in its discretion to set aside the former order and direct a removal of the cause. Ward v. Pullman Car Corp. (Ky. 1908) 114 S. W. 754.

(I) Filing copy of record in United States court

95. Duty and necessity for filing copy of record and effect of filing.—A nonresident citizen, to remove a cause for prejudice and local influence, must file a copy of the record in the federal court at the proper time. Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399.

It is the duty of the removing party, and not of the clerk of the state court, to transmit the record to the federal court. Hatcher's Adm'x v. Wadley (C. C. 1897) 84 Fed. 913.

After a party has filed his petition and bond in the state court, the opposing party may file a copy of the record in the federal court before the expiration of the time limited for the removing party to do so; and the court may then require the latter to plead. Delbanco v. Singletary (C. C. 1889) 40 Fed. 177, 181; Consolidated Traction Co. v. Guarantors' Liability & Indemnity Co. of Pennsylvania (C. C. 1897) 78 Fed. 657 (decree affirmed Bryar v. Campbell [1898] 90 Fed. 690, 33 C. C. A. 236, affirmed [1900] 20 Sup. Ct. 794, 177 U. S. 649, 44 L. Ed. 926); Carpenter v. New York & N. H. R. Co. (N. Y. 1855) 11 How. Prac. 481.

A party applying for the removal of a cause from a state to a federal court, should file his transcript in the federal court before or on the first day of the term of such court next following his application, irrespective of what may be done in the state court on such application. Kaufman v. McNutt (Super. Ct. Cin., Ohio, 1876) 1 Wkly. Law Bul. 94.

Entering the copy of the record in the circuit court is necessary for it to proceed, but its jurisdiction attaches when, under the law, it becomes the duty of the state court to "proceed no further." Entering the record is unnecessary to transfer jurisdiction. Baltimore & O. R. Co. v. Koontz (1881) 104 U. S. 5, 14, 15, 26 L. Ed. 643; Texas & St. L. Ry. Co. v. Rust (C. C. 1883) 17 Fed. 275, 5 McCrary, 348.

The requirement for filing the transcript is directory, not mandatory. Delbanco v. Singletary (C. C. 1889) 40 Fed. 177, 181.

Where a defendant waived its right to remove a cause, if it had such a right, by proceeding with the trial in the state court after denial of its petition for removal, the removal cannot be subsequently effected by the plaintiff over the defendant's objection, by filing a transcript in the federal court. Johnson v. Butte Alex Scott Copper Co. (D. C. 1914) 213 Fed. 910.

Where the allegation in a petition for the removal of a cause to the federal court as to the amount in controversy was contradicted by the record depriving the federal court of jurisdiction, the fact that a transcript of the record was filed in the federal court did not deprive the state court of jurisdiction. Bacon v. Iowa Cent. Ry. Co. (1912) 137 N. W. 1011, 157 Iowa, 493.

96. Form and contents of transcript to be filed.—In cases removed from the state courts the record must be filed by the petitioners which must show affirmatively the facts necessary to give the federal court jurisdiction, and, where the federal court has any doubt of the right of removal, the safer practice is to remand the case to the state court which has jurisdiction. Long v. Buford (C. C. 1885) 24 Fed. 241, 248.

The law devolves on the party removing a cause the duty of procuring and filing a copy of the record, but for purposes of removal and jurisdiction to hear and determine the cause the original is equivalent to the copy, and in filing it the party has substantially complied with the statute. Miller v. Wattier (C. C. 1885) 24 Fed. 49; Miller v. Soule (D. C. 1915) 221 Fed. 493.

Where a petition for removal is denied, the files and papers must remain in the court in which the petition is filed, and the petitioner must secure certified copies, and cause same to be filed in the United States court; Williams' Const. Okl. § 431, providing for a transfer of the original papers, applying only where the case is removed. Lawson v. Guthrie (1914) 137 Pac. 1186, 40 Okl. 598.

A party who applies for the removal of a case from a state to a federal court, under Judiciary Act 1789, § 12, which required filing copies of the "process" in the federal court, must file in the latter court copies, not only of the summons or other process, but also of the declaration, petition, or bill, the petition for the removal, and the order of the state court thereon, if any was made. McBratney v. Usher (C. C. 1870) Fed. Cas. No. 8,661. But see Brownell v. Gordon (C. C. 1856) Fed. Cas. No. 2,039, holding that it is not indispensable that the averment of the citizenship or alienage of a defendant should appear on any one of the papers transmitted with the order of the state court, for the transfer of the case to the federal court.

The term "record" includes the testimony taken and on file in a cause at the time of filing a petition and bond for its removal from a state court. Miller v. Tobin (C. C. 1883) 18 Fed. 609, 9 Sawy. 401.

A petition for the removal of a cause

to the federal court, though filed in the state court, is transmitted to the federal court as a part of the record, and is a pleading on the allegations of which the right of removal rests, and to which the pleadings of the adverse party must refer. Randall v. New England Order of Protection (C. C. 1902) 118 Fed. 782.

Under the statutes of Georgia, and especially Civ. Code 1895, § 4518, which provides that an attachment against a nonresident of the state may be made returnable to the superior court of any county where an attachment is sued out in one county, and executed by serving summons of garnishment in another county on filing in the court therein a certified copy of the original affidavit and bond, the proceedings in the court where the service is made are ancillary to, and a part of, the original suit, and on a removal of such suit, the record required to be filed in the federal court includes such proceedings. Woodward Lumber Co. v. Vizard (C. C. 1906) 144 Fed. 982.

When a state court grants a removal, the cause is to be removed as of the date when the motion for removal was made; and the papers should be certified as they were at that date. Clark v. Delaware & H. Canal Co. (1874) 11 R. I. 36.

Where a defendant enters in the circuit court what purports to be a copy of a declaration in the action in the state court, but such copy is not certified from the state court or accompanied by a certified copy of any order of the state court for its transmission, and the defendant then enters in the circuit court a rule to declare, the rule will be vacated, and the copy of the declaration will be taken from the files. Martin v. Kanouse (C. C. 1846) Fed. Cas. No. 9,162.

Upon a proceeding for the removal of a cause from a state to the federal court, it is not essential that the record be certified by the judge of the state court; the attestation of the clerk under the seal of the court is sufficient. Osgood v. Chicago, D. & V. R. Co. (C. C. 1875) Fed. Cas. No. 10,604.

Where, in making up the record of a cause for its removal to the federal court, the clerk of the state court made it up in detached papers, certifying to each one, and also that the papers constituted the whole record, this is a sufficient copy thereof. Commercial & Sav. Bank v. Corbett (C. C. 1878) Fed. Cas. No. 3,057.

When an action commenced in the state district court, involving lands described in the complaint as being in "Bottineau's addition to Minneapolis," is removed to the circuit court of the United States, and the certified complaint in that court describes the lands as being in "Bottinen's addition to Minneapolis," the record in the latter court is prima facie applicable to the land in question in Bottineau's addition. Pierro v. St. Paul & N. P. Ry. Co. (1888) 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673.

97. Time and place for filing.—The additional term of the federal circuit court, appointed to be held on the second Wednesday of October by Act Feb. 7, 1873, § 1 (17 Stat. 422), being exclusively for the trial and disposal of criminal cases and matters, was not a session of the court, requiring copies of proceedings in a suit to be entered in court on the first day of the session, in order to perfect the removal of such suit into a federal court. Jones v. Oceanic Steam Nav. Co. (C. C. 1873) Fed. Cas. No. 7,485.

The proper time for entering in the federal circuit court "copies of the proper papers," etc., is on the first day of the next session after the filing of the petition for removal, affidavits, etc. But if the term of such circuit court to which the same is removable should commence within 20 days after the filing of the petition and bond in that court, still the removing party is to have 20 days to file copy of record. Clippinger v. Missouri Val. Life Ins. Co. (C. C. 1876) Fed. Cas. No. 2,901.

When an order is made by a state court for removal of a cause to the circuit court for the Western district of Virginia, the removing party must file the record in the latter court on the first day of the ensuing session, whether it be held at Lynchburg, Danville, Abingdon, or Harrisonburg. Hatcher's Adm'x v. Wadley (C. C. 1897) 84 Fed. 913.

Where a term of the federal Circuit Court was in session at the time an application for removal of a cause was made, the applicant was not in default for failure to file the record within 20 days, but was entitled to file the same on or before the first day of the next succeeding term. Goldberg, Bowen & Co. v. German Ins. Co. of Freeport, Ill. (C. C. 1907) 152 Fed. 831.

98. Excuses for delay.—If a petitioner, entitled to removal, is kept by his adversary, and against his will, in the state court, he may, after reversal of the judgment, and an order allowing removal, enter the cause in the circuit court, after time for entering the record under other circumstances has gone by. Baltimore & O. R. Co. v. Koontz (1881) 104 U. S. 5, 17, 26 L. Ed. 643.

It is sufficient excuse for not filing the petition in the federal court on the day regularly set for the beginning of the first term after the petition and bond were filed in the state court, being November 5th, that defendant's attorney inquired of the clerk when the term would begin, and was told that the first day would be December 5th; it appearing that, owing to the absence of the judge, no court was held until that date. Burgunder v. Browne (C. C. 1893) 59 Fed. 497.

The federal court will not remand the case when satisfied that the delay was

due to the erroneous belief that the district was divided into divisions, and that defendants had the right to file the record at the next session held in the place most convenient to them; the failure not having caused any delay in the trial. Pierce v. Corrigan (C. C. 1896) 77 Fed. 657.

99. Effect of defect in transcript or of delay in filing.—When a sufficient case for removal is made in the state court, the fact that only a part of the record is filed in the federal court will not oust its jurisdiction. Clark v. Chicago, M. & St. P. Ry. Co. (C. C. 1882) 11 Fed. 355, 3 McCrary, 591; Miller v. Soule (D. C. 1915) 221 Fed. 493.

If the petitioner fails to enter the record and docket the cause on the first day of the next term, jurisdiction is not lost, but the court, if good cause be shown, may allow the entry on a subsequent day. Baltimore & O. R. Co. v. Koontz (1881) 104 U. S. 5, 16, 26 L. Ed. 643; Nat. Steamship Co. v. Tugman (1882) 1 Sup. Ct. 58, 60, 106 U. S. 118, 27 L. Ed. 87; Hyde v. Phœnix Ins. Co. (C. C. 1873) Fed. Cas. No. 6,973; Jackson v. Mutual Life Ins. Co. (C. C. 1878) Fed. Cas. No. 7,141; Arthur v. New England Mut. Life Ins. Co. (C. C. 1879) Fed. Cas. No. 565; Lucker v. Phœnix Assur. Co. of London (C. C. 1895) 66 Fed. 161; Pierce v. Corrigan (C. C. 1896) 77 Fed. 657; Chase v. Erhardt (D. C. 1912) 198 Fed. 305; Kramer v. Ferry (1888) 27 Ill. App. 479. CONTRA, Broadnax v. Eisner (C. C. 1876) Fed. Cas. No. 1,909; Cobb v. Globe Mut. Life Ins. Co. (C. C. 1877) Fed. Cas. No. 2,921; Kaufman v. McNutt (Super. Ct. Cin., Ohio, 1876) 1 Wkly. Law Bul. 94.

When, upon proper application, the jurisdiction of the state court is devested, and that of the circuit court has attached, a failure to file the transcript within the time prescribed will not restore the jurisdiction of the state court, but the circuit court retains the case, to dismiss or remand, as it may determine. National S. S. Co. v. Tugman (1882) 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87.

And see Stoutenburgh v. Wharton (C. C. 1883) 18 Fed. 1, holding that the requirement is mandatory; and an order extending the time within which the copy of the record shall be filed can only be allowed in cases where it is impossible for the party removing the cause to obtain the required copy.

The court, under R. S. §§ 948, 954, post, §§ 1580, 1591, may, and on good cause shown should, enlarge the time for filing, or cure the defect by allowing the transcript to be filed nunc pro tunc. Woolridge v. McKenna (C. C. 1881) 8 Fed. 650.

Where an action is brought in a state court, and, on motion, removed to the United States circuit court, but, by misunderstanding between the clerk and defendant's attorney, the record is not filed at the first term of the United States court, as required by law, it is within the power of that court, upon payment of terms to the plaintiff to cover expenses of the delay, to permit the defendant to file the record at a subsequent term. Rowell v. Hill (C. C. 1886) 28 Fed. 433.

A delay in filing the record in the federal court for 12 terms after entry of the order of the state court for removal is inexcusable laches, and the federal court will not then permit it to be filed by an order nunc pro tunc. Hatcher's Adm'x v. Wadley (C. C. 1897) 84 Fed. 913.

The mere fact that the record is not filed in the federal court until after the first day of the next term is not sufficient ground for remanding the cause, where the delay was not from inexcusable neglect, but the court may impose conditions on the removing party. Eisenmann v. Delemar's Nevada Gold-Min. Co. (C. C. 1898) 87 Fed. 248.

The removal act should be given such reasonable construction as will encourage comity between the two jurisdictions, and the right of removal will not be held lost because the petitioning defendant awaits the action of the state court upon his petition before filing the transcript in the federal court, although in consequence it is not filed until after the first day of the next ensuing term after the petition is presented, as required by the terms of his bond. Kelly v. Chicago & A. Ry. Co. (C. C. 1903) 122 Fed. 286.

100. Motions to docket cause.—When the papers are regularly transmitted from the state court to the clerk of the circuit court, and are on the files of the court on the first day of the first term after the filing of the petition for removal and bond, and proceedings have been taken in the circuit court by both parties, although a formal motion to docket the case was not made, they must be considered as having been filed and the cause entered. Glover v. Shepperd (C. C. 1883) 15 Fed. 833, 11 Biss. 572.

(J) Defects in proceedings, objections, amendments, and waiver

101. Compliance with requirements.—Parties seeking to remove causes to the federal courts must comply strictly with the provisions and conditions presented by the statute, and any material omission will be fatal to such removal. Wilcox & Gibbs Sewing Mach. Co. v. Follett (C. C. 1878) Fed. Cas. No. 17,643; St. Anthony Falls Water Power Co. v. King Wrought Iron Bridge Co. (1876) 25 Minn. 186, 23 Am. Rep. 682.

102. Amendment of petition.—A perfect petition and a strict compliance with the practice regulations of the statute, are not absolutely essential as jurisdictional requirements, but only directory, and not imperative, methods

of procedure—regulations that should be carefully followed and reasonably enforced by the courts, but, after all, regulations that are protected by R. S. §§ 948, 954, post, §§ 1580, 1591, authorizing amendments to cure defects and omissions in legal proceedings. These amendments may be made in either the state or federal courts, according to their practice, respectively. Deford v. Mehaffy (C. C. 1882) 13 Fed. 481.

A petition and bond for removal are in the nature of process which may be amended under the provisions of R. S. §§ 948, 954, post, §§ 1580, 1591. Kinney v. Columbia Savings & Loan Ass'n (1903) 24 Sup. Ct. 30, 32, 191 U. S. 78, 48 L. Ed. 103.

A petition for removal showing sufficient grounds may be amended by permission of the federal court after the cause has been filed therein. Powers v. Chesapeake & O. R. Co. (1898) 18 Sup. Ct. 264, 267, 169 U. S. 92, 42 L. Ed. 673; Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688. But, where it shows that the cause was not removable, it cannot be amended to show a different state of facts in the federal court. Healy v. McCormick (C. C. 1907) 157 Fed. 318. Nor can it be amended where it fails to state the necessary jurisdictional facts. Santa Clara County v. Goldy Mach. Co. (C. C. 1908) 159 Fed. 750; Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688; Springs v. Southern Ry. Co. (1902) 41 S. E. 100, 130 N. C. 186. But see the following cases, which hold generally that the petition may be amended: Houser v. Clayton (C. C. 1878) Fed. Cas. No. 6,739; Barclay v. Levee Com'rs (C. C. 1872) Fed. Cas. No. 977.

A petition for removal, though defective in containing mere conclusions of law, may be considered sufficiently amended by subsequent answer setting forth facts which go to show the jurisdiction of the United States Court. Carson v. Dunham (1887) 7 Sup. Ct. 1030, 1032, 121 U. S. 421, 30 L. Ed. 992.

The court cannot allow a petition to be amended so as to show that defendant was a nonresident of the state at the time of bringing suit. Freeman v. Butler (C. C. 1889) 39 Fed. 1.

Where a cause has been removed on the ground of diversity of citizenship on a motion to remand on the ground that plaintiff sues as assignee of a chose in action, and that the petition for removal does not show the citizenship of the assignors, the court has power to permit its amendment to show, according to the fact, that their citizenship was such as to give jurisdiction. Muller v. Chicago, I. & L. R. Co. (C. C. 1906) 149 Fed. 939.

Where a petition for removal in connection with the record, as presented to the state court, fails to disclose grounds for removal, the federal court, after the cause has been removed, has no authority to permit an amendment of the petition to state other and different grounds of removal, inconsistent with those stated in the original petition. Shane v. Butte Electric Ry. Co. (C. C. 1906) 150 Fed. 801.

Where, in a petition for removal, counsel through misinformation erroneously stated the citizenship of the plaintiff, the federal court may permit an amendment after removal accurately stating the fact so as to show that the court has jurisdiction. Wilbur v. Red Jacket Consol. Coal & Coke Co. (C. C. 1907) 153 Fed. 662.

Where a removal petition was based wholly on diverse citizenship, and the proof showed that plaintiff was an alien, the federal court had no jurisdiction, nor could the defect be cured by amendment which would necessitate the setting up of an entirely new and distinct ground for removal. Wallenburg v. Missouri Pac. Ry. Co. (C. C. 1908) 159 Fed. 217.

On the removal of a cause in which, as appears by the record, the parties are citizens of different states, but neither is an inhabitant of the district of suit, the federal court acquires general jurisdiction by virtue of the diversity of citizenship of the parties, and has power to permit the petition for removal to be amended to show that plaintiff is in fact a citizen and resident of the district of suit. Harding v. Standard Oil Co. (C. C. 1909) 170 Fed. 651.

Where a removal petition was defective in alleging that, when the action was commenced and when petition was filed, petitioner was a resident of New York, instead of alleging that he was a nonresident of the state in which the action was brought, but it also alleged that petitioner was a citizen of the republic of France, such allegation, coupled with the allegation of nonresidence in the state, gave petitioner the right to remove, and hence entitled him to amend the removal petition so as to correct the allegation of nonresidence. De La Montanya v. De La Montanya (D. C. 1907) 158 Fed. 117.

An allegation in a petition for removal that a corporation is a "citizen and resident" of a state may be amended at any stage of the proceedings to show the state under whose laws it was incorporated. Wells v. Russellville Anthracite Coal Mining Co. (D. C. 1913) 206 Fed. 528.

A petition to remove may be amended to make clear averments already present, not essential to supply a jurisdictional fact, though the state court has ignored the petition as originally filed and proceeded to final judgment. Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688.

A verification of a petition for removal which is only slightly and not substantially defective may be amended by leave of court. Murray v. Southern

Bell Telephone & Telegraph Co. (D. C. 1914) 210 Fed. 925.

Verification of petition for removal by attorney, if not sufficient, is curable by filing amended affidavit. Berry v. Mobile & O. R. Co. (D. C. 1915) 228 Fed. 395.

A state court may properly permit a petition for removal to be amended, although the time for filing such petition has expired, by inserting an allegation that the citizenship of the petitioner was the same at the time of the commencement of the action as at the time the petition was filed. Roberts v. Pacific & A. Ry. & Nav. Co. (C. C. 1900) 104 Fed. 577.

A new motion to transfer a cause, where a removal has properly been denied, no new facts being shown, will be denied. Thacher v. McWilliams (1872) 47 Ga. 306.

103. Amendment of bond or new bond.—The formalities prescribed by the statute are not conditions precedent to the jurisdiction of the federal courts, and a defect in the bond required by that act may be cured by the substitution of a new bond upon motion in the federal court to amend. Deford v. Mehaffy (C. C. 1882) 13 Fed. 481; Harris v. Delaware, L. & W. R. Co. (C. C. 1884) 18 Fed. 833; Chase v. Erhardt (D. C. 1912) 198 Fed. 305.

A bond for a removal of a cause obligated the petitioner to lodge the transcript in the Circuit Court for the Central Division of the Western District of Missouri. The county in which the action was brought was within the Eastern District of Missouri, but had formerly been in the Central Division of the Western District. The petition for removal disclosed all the essential jurisdictional facts, and the bond was filed in connection therewith. Held, that the defect in the bond was not jurisdictional, but could be amended, on leave of court, after the time allowed to remove the cause had expired. Hodge v. Chicago & A. Ry. Co. (1903) 121 Fed. 48, 57 C. C. A. 388.

If the removal bond omit the condition for the payment of costs, the defect may be cured by amendment, either in the state or federal court, or by the substitution of a new bond containing the proper conditions, filed nunc pro tunc. Deford v. Mehaffy (C. C. 1882) 13 Fed. 481. So may the omission of the seal to the surety's signature. Overman Wheel Co. v. Pope Mfg. Co. (C. C. 1891) 46 Fed. 577.

The state court cannot arbitrarily refuse to receive the bond, without giving the party an opportunity to correct the same in any respect in which it may be deemed insufficient. Taylor v. Shew (1873) 54 N. Y. 75; Grow v. Wiman (1886) 3 N. Y. St. Rep. 281. But there is no error in refusing to postpone a cause removed from a state to a federal court for the purpose of allowing a party to amend his bond. Harrold v. Arrington (1885) 64 Tex. 233.

104. Waiver of objections.—Where a petition fails to show the jurisdictional facts the objection is fatal at any stage of the case and cannot be waived. Hodge v. Chicago & A. Ry. Co. (1903) 121 Fed. 48, 57 C. C. A. 388. So an objection that a bond for removal does not contain a provision for the payment of costs may be taken at any time. Webber v. Bishop (C. C. 1882) 13 Fed. 49.

Imperfections in a petition for removal of a cause to the federal court which are formal and modal only are waived where no objection has been made to them. White v. Chase (1912) 201 Fed. 896, 120 C. C. A. 194.

One may waive objections to the time and manner of removal of a suit from a state to a federal court by silently proceeding to trial upon the merits in the federal court without filing a motion to remand, because matters of time and method are formal and modal, and not essential to the right of removal. Union Pac. R. Co. v. Myers (1885) 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319; Gerling v. Baltimore & Ohio R. Co. (1894) 14 Sup. Ct. 533, 539, 151 U. S. 673, 38 L. Ed. 311; Guarantee Co. of North Dakota v. Hanway (1900) 104 Fed. 369, 44 C. C. A. 312; Hodge v. Chicago & A. Ry. Co. (1903) 121 Fed. 48, 57 C. C. A. 388.

An objection that the act has not been complied with, in respect of time and other important particulars will not be listened to in this court, the point not having been made in the court below until three years after the removal made, and when the testimony was all taken, and the case ready for hearing. Nor ought it under such circumstances to have been listened to in the circuit court. It came too late, and was thereby waived. French v. Hay (1874) 89 U. S. (22 Wall.) 238, 22 L. Ed. 854.

Where no objection was made in the state court on account of the petition for removal of a case to the circuit court not being signed, the objection on such account could not be made in the circuit court. Meyer v. Delaware R. R. Const. Co. (1879) 100 U. S. 457, 25 L. Ed. 593.

Any irregularity in docketing a cause removed to a federal Circuit Court from a state court, or in the order of the pleadings, may be waived, and neither it nor the method of securing the attendance of the parties deprives the federal court of jurisdiction where a controversy between the citizens of different states was presented. Mackay v. Uinta Development Co. (1913) 33 Sup. Ct. 638, 229 U. S. 173, 57 L. Ed. 1138.

Where, in a suit on a life insurance policy by an assignee holding it as collateral security, the administrator of

the assured is made a defendant, but in a petition for removal to the federal court he aligns himself on the side of plaintiff, and becomes an actor against the insurance company, the latter, if it desires him to abandon his position as defendant, and assume that of plaintiff, and plead specially as such, must make the objection before going to trial on the merits, as otherwise it will be waived. Manhattan Life Ins. Co. v. P. J. Willis & Bro. (1894) 60 Fed. 236, 8 C. C. A. 594.

Where plaintiffs made no motion to remand, they could not object, for the first time on writ of error, that the removal was not to the proper district. Klink v. Chicago, R. I. & P. Ry. Co. (1915) 219 Fed. 457, 135 C. C. A. 169.

Prior to the Judicial Code the absence of an oath to a petition by plaintiff for the removal of a cause was at most an informality, which defendant waived by not taking the objection on the motion to remand. Canal & Claiborne Sts. R. Co. v. Hart (1885) 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226.

An objection that a petition for removal is not verified under oath, or was filed too late, is waived by delay. Union Pac. R. Co. v. Myers (1885) 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, reversing judgment Myers v. Union Pac. Ry. Co. (C. C. 1882) 16 Fed. 292, 3 McCrary, 578.

Objection that an affidavit, taken in another state, for the purpose of removing a cause to the United States circuit court, is not properly certified, is waived, unless taken when the affidavit is read. Mix v. Andes Ins. Co. (1878) 74 N. Y. 53, 30 Am. Rep. 260.

Plaintiff must be deemed to have consented to accept the jurisdiction of a federal court over a suit removed from a state court on defendant's petition, where, after the removal, plaintiff, instead of moving to remand, filed an amended petition in the federal court, signed a stipulation giving time to the defendant to answer, and entered with the defendant into successive stipulations for continuances. In re Moore (1908) 28 Sup. Ct. 585, 209 U. S. 490, 52 L. Ed. 904.

Where a case is removed on motion of the defendant, and after such removal the plaintiff's attorney admits service of a rule for the plaintiff to declare, any informality attending the removal of the cause is thereby waived. Abranches v. Schell (C. C. 1859) Fed. Cas. No. 21.

Where a defendant has removed a cause, and plaintiff, at the time of appearing in the federal court, does not suggest to it that the time had elapsed within which a removal could properly be had, nor move to remand to the state court, but demands a trial, he waives his right to raise the question in answer to defendant's bill to restrain the further prosecution of the suit in the state court. Baltimore & O. R. Co. v. Ford (C. C. 1888) 35 Fed. 170, 171.

Merely formal defects in a petition to remove a cause from the state to the federal court are waived by appearing in the latter court and moving to remand on the ground that the alleged cause for removal does not exist. Tomson v. Iowa State Traveling Men's Ass'n (Neb. 1907) 110 N. W. 997.

Where the bond on the removal of a cause to the United States circuit court is irregular in form, and plaintiff, after the removal, receives a plea from the defendant entitled in the United States circuit court, and admits due service thereof, he waives such irregularity. Grow v. Wiman (1886) 3 N. Y. St. Rep. 281.

The objection that no evidence is given of the sufficiency of the sureties on a bond filed with a petition for the removal of a cause to the federal court is waived if not made at the time of the application for removal. Bates v. Baltimore & O. R. Co. (1883) 39 Ohio St. 157.

III. DETERMINATION OF RIGHT TO REMOVE AND TRANSFER OF JURISDICTION

(A) Determination of right to remove

105. Jurisdiction of state and United States courts in general.—The federal court is the one to determine whether or not a case was removable, and was properly removed. Osgood v. Chicago, D. & V. R. Co. (C. C. 1875) Fed. Cas. No. 10,604; Cobb v. Globe Mut. Life Ins. Co. (C. C. 1877) Fed. Cas. No. 2,921; Taylor v. Rockefeller (C. C. 1878) Fed. Cas. No. 13,802; Brodhead v. Shoemaker (1890) 85 Ga. 728, 11 S. E. 845; Clinger's Adm'x v. Chesapeake & O. Ry. Co. (1910) 128 S. W. 1055, 138 Ky. 615; Bell v. Dix (1872) 49 N. Y. 232; Kendrick's Lessee v. McQuary (1814) 3 Tenn. (Cooke) 480.

Notwithstanding the order of the state court allowing or denying a petition for removal, the federal court must determine for itself the question of its jurisdiction. Field v. Lownsdale (C. C. 1867) Fed. Cas. No. 4,769; Traders' Bank v. Tallmadge (C. C. 1881) 9 Fed. 363, 20 Blatchf. 39; Walker v. O'Neill (C. C. 1889) 38 Fed. 374; Louisiana State Bank v. Morgan (La. 1826) 4 Mart. (N. S.) 344. But see Springer v. Howes (C. C. 1895) 69 Fed. 849, holding that, where the state supreme court affirmed an order refusing a removal, and the moving party filed a transcript in the federal court, and attempted to proceed therein, the motion to remand would be granted, leaving movant to an appeal to the federal supreme court from the decision of the state court.

The fact that a petition and bond have been filed in the state court during vacation will not warrant the federal circuit court in declaring the cause

removed before the state court has had an opportunity to take action thereon. Hall v. Chattanooga Agricultural Works (C. C. 1891) 48 Fed. 599.

Upon filing a proper petition for removal and sufficient bond, in a proper cause, the state court is divested of all jurisdiction whether the order for removal is made or refused. Marshall v. Holmes (1891) 12 Sup. Ct. 62, 63, 141 U. S. 589, 35 L. Ed. 870; McMullen v. Northern Pac. R. Co. (C. C. 1893) 57 Fed. 16, 17.

But the filing of a petition and bond in a cause not removable does not deprive the state court of jurisdiction. Stone v. South Carolina (1886) 6 Sup. Ct. 799, 800, 117 U. S. 430, 29 L. Ed. 962; City of Montgomery, Ala., v. Postal Telegraph-Cable Co. (D. C. 1914) 218 Fed. 471; Larson v. Cox (1888) 18 Pac. 892, 39 Kan. 631; Smith v. Dewire (1888) 18 Pac. 894, 39 Kan. 634; Ward v. Pullman Car Corp. (Ky. 1908) 114 S. W. 754; Schwyhart v. Barrett (1910) 130 S. W. 388, 145 Mo. App. 332; Pruitt v. Charlotte Power Co. (1914) 81 S. E. 624, 165 N. C. 416; Missouri, K. & T. Ry. Co. of Texas v. Smith (Tex. Civ. App. 1914) 164 S. W. 885.

Nor does the filing of a petition and bond which do not comply with the requirements of this section. Stone v. South Carolina (1886) 6 Sup. Ct. 799, 800, 117 U. S. 430, 29 L. Ed. 962; Shedd v. Fuller (C. C. 1888) 36 Fed. 609; Fife v. Whittell (C. C. 1900) 102 Fed. 537.

Or which are filed too late. Larson v. Cox (1888) 18 Pac. 892, 39 Kan. 631; Smith v. Dewire (1888) 18 Pac. 894, 39 Kan. 634; Higson v. North River Ins. Co. (1910) 68 S. E. 920, 153 N. C. 35.

The state court therefore can in the first instance determine whether the cause is removable, and whether the proceedings are sufficient to effect the removal. Miller v. Soule (D. C. 1915) 221 Fed. 493; Colorado Fuel & Iron Co. v. Four Mile Ry. Co. (1901) 66 Pac. 902, 29 Colo. 90; Carswell v. Schley (1877) 59 Ga. 17; McWhinney v. Brinker (1878) 64 Ind. 360; Combs v. Nelson (1883) 91 Ind. 123; Larson v. Cox (1888) 18 Pac. 892, 39 Kan. 631; Smith v. Dewire (1888) 18 Pac. 894, 39 Kan. 634; State ex rel. Jumel v. Johnson (1877) 29 La. Ann. 399; Duff v. Hildreth (1903) 67 N. E. 356, 183 Mass. 440; Jackson v. Alabama Great Southern R. Co. (1881) 58 Miss. 648; Schwyhart v. Barrett (Mo. 1910) 130 S. W. 388; State ex rel. Iba v. Mosman (1910) 133 S. W. 38, 231 Mo. 474; Golden v. Northern Pac. Ry. Co. (1909) 104 Pac. 549, 39 Mont. 435; Johnson v. Gelston (1810) 3 N. J. Law (2 Penning.) 668; National Union Bank v. Dodge (1880) 42 N. J. Law (13 Vroom) 316; Vermeule v. Vermeule (1901) 54 A. 99, 67 N. J. Law, 219; Orr v. Baltimore & O. R. Co. (1913) 145 N. Y. S. 378, 83 Misc. Rep. 221; James v. Thurston (1860) 6 R. I. 428; Williams v. Adkins (1869) 46 Tenn. (6 Coldw.) 615; Texas & P. Ry. Co. v. McAllister (1883) 59 Tex. 349; White v. Holt (1883) 20 W. Va. 792.

But such determination is not conclusive on the federal courts which must finally determine the question themselves. Chesapeake & O. R. Co. v. McCabe (1909) 29 Sup. Ct. 430, 434, 213 U. S. 207, 53 L. Ed. 765; Cropsey v. Sun Printing & Publishing Ass'n (D. C. 1914) 215 Fed. 132; Jackson v. Alabama Great Southern R. Co. (1881) 58 Miss. 648; National Union Bank v. Dodge (1880) 42 N. J. Law (13 Vroom) 316; Vermeule v. Vermeule (1901) 54 Atl. 99, 67 N. J. Law, 219.

And in case of a conflict of decision, the decision of the federal court will prevail. National Union Bank v. Dodge (1880) 42 N. J. Law (13 Vroom) 316.

Though a state court has denied an application to remove a cause to the federal court on the ground that the application was not made within the time prescribed by the federal statute, a subsequent order of the federal court that the cause be entered and docketed therein is conclusive of the question; and the state court has no right to thereafter retain jurisdiction of the cause, and proceed with the trial. Northern Pac. R. Co. v. McMullen (1893) 86 Wis. 501, 56 N. W. 629.

Where a petition for the removal of a cause is demurrable on its face, the state court may properly decline to order the removal, and will not lose jurisdiction; but, if the petition is not demurrable, jurisdiction thereby passes, however inartificial the petition may be. Donovan v. Wells, Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250.

The want of acknowledgment or proof of the execution of the bond for removal is a matter of practice for the state court to pass on, and cannot be reviewed by the circuit court after the state court has accepted the bond. Cooke v. Seligman (C. C. 1880) 7 Fed. 263, 17 Blatchf. 452.

The judge of a state court to which an application is made for the removal of a cause to the United States court must exercise a legal discretion as to the right of removal. Gordon v. Longest (1842) 16 Pet. 97, 104, 10 L. Ed. 900.

A strict compliance with the statute for the removal of causes to a federal court is essential; for the jurisdiction of the federal court is special so that it must clearly appear affirmatively. Wedekind v. Southern Pac. R. Co. (C. C. 1888) 36 Fed. 279, 281.

Where the right of defendant to remove a case into the United States circuit court is extremely doubtful, the state court should not exercise its pow-

er of removal. Anderson v. Manufacturers' Bank (N. Y. 1862) 14 Abb. Prac. 436.

In an action for breach of a contract to manufacture a patented article in a workmanlike manner and to pay royalties to the owner of the patent, and for failure to account for or to pay royalties on articles imitating those covered by the patent, an order of the trial court for the removal of the cause to a federal court will not be disturbed, objections to the form and sufficiency of the petition being more properly determinable by the federal court on motion to dismiss. Forncrook Mfg. Co. v. Barnum Wire Works (1884) 54 Mich. 552, 20 N. W. 582.

The petition's failure to allege notice is a defense to be asserted only on motion to remand in the United States District Court. Booki v. Pullman Co. (1914) 107 N. E. 418, 220 Mass. 71.

The State Court should determine the issue of when defendants should have answered, which controlled the question whether their petition and bond had been filed in time, though the final decision lay with the federal Supreme Court. Stephens v. Ringling (S. C. 1915) 86 S. E. 683.

Though defendant's petition and bond for removal are filed in apt time, and based on proper grounds, they do not affect such removal when at the time he moves the state court for an order of removal he reserves his right to remove pending the determination of a motion to dismiss and a plea in abatement theretofore filed. Manning v. Amy (1891) 11 Sup. Ct. 707, 708, 140 U. S. 137, 35 L. Ed. 386.

Where a motion for the removal of a cause on a petition and bond on file was overruled by the state court, on the ground that the cause was still at rules and not on the court docket, and defendant acquiesced in such decision by taking no further action for removal until the next term and then again presenting the motion, such action had the effect of a temporary withdrawal of the motion, and the state court retained jurisdiction until it was again presented. Mays v. Newlin (C. C. 1906) 143 Fed. 574.

Where a state court, on the filing of a petition for the removal to the federal court of an action against resident and nonresident defendants on the ground that the residents were fraudulently joined to defeat removal, declines to order a removal either on the petition alone or on accompanying affidavits, the case must go on for trial, but the nonresident defendant may, on the conclusion of plaintiff's evidence, or after the close of all the evidence, renew the application for removal, and the state court on finding that there was a fraudulent joinder, may remove the action; otherwise not. Chesapeake & O. Ry. Co. v. Banks' Adm'r (1911) 137 S. W. 1066, 144 Ky. 137.

The overruling of a motion to remove a cause that is not removable to a federal court is notice to the parties that the state court has assumed jurisdiction, and will try the case, and defendant cannot delay the trial by protesting against its jurisdiction, and demanding time to decide whether or not to submit to it; and a judgment against him after a trial in which he took no part will be sustained. Hickman v. Missouri, K. & T. Ry. Co. (1899) 52 S. W. 351, 151 Mo. 644, judgment reversed on other grounds Missouri, K. & T. Ry. Co. v. Hickman (1901) 22 Sup. Ct. 18, 183 U. S. 53, 46 L. Ed. 78.

Where a complaint filed in a state court, and a petition for the removal of the cause, raise an issue as to the necessary parties to the controversy, upon which the right of removal depends, the allegations of the petition must prevail. Mackaye v. Mallory (C. C. 1881) 6 Fed. 743, 19 Blatchf. 165.

Whether an action of debt under Gen. Laws N. H. c. 147, § 13, imposing a penalty on corporate officers and agents for neglect or refusal, on demand, to furnish copies of accounts, records, and papers in their keeping, to creditors or stockholders entitled to inspect them, is a suit of a civil nature, will not be determined after defendant has taken the proper steps to remove it. Robertson v. Kettell (1887) 64 N. H. 430, 14 Atl. 78.

Where a party moved to consolidate and remove two cases from a state to a federal court, and filed but one petition and bond for removal, the court rightly assumed that he did not desire the removal of one without the other. Pelzer Mfg. Co. v. Sun Fire Office of London (1892) 36 S. C. 213, 15 S. E. 562.

Where the petition for removal was filed eight days after the passage of Act March 3, 1887, c. 373, 24 Stat. 552, by which the amount necessary to give the circuit courts jurisdiction was increased, and, in evident ignorance of such enactment, petitioner averred that the amount in dispute exceeded the former amount, but the record showed that the lands were actually valued at $25,000, the removal should have been granted, and a judgment rendered after refusal thereof will be reversed. Reed v. Hardeman County (1890) 77 Tex. 165, 13 S. W. 1024.

Where the United States circuit court has jurisdiction over the parties and causes of action on removal by virtue of the twelfth section of the judiciary act, it cannot be affected by any amendment of the pleading so as to change the nature of the controversy. Green v. Custard (1859) 23 How. 484, 16 L. Ed. 471; Jones v. Foreman (1881) 66 Ga. 371.

106. Determination of issues of law. —A petition for removal of a case to the federal court presents to the state court a question of law as to whether,

admitting the facts stated in the petition to be true, it appears on the face of the record which includes the petition, pleading, and proceedings down to that time, that petitioner has complied with the statute and is entitled to removal of the suit. Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250; Powers v. Chesapeake & O. R. Co. (C. C. 1895) 65 Fed. 129 (judgment affirmed [1898] 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; Steed v. Henry (Ark. 1915) 180 S. W. 508; Southern Ry. Co. v. Hudgins (1899) 33 S. E. 442, 107 Ga. 334; Morbeck v. Bradford-Kennedy Co. (1910) 113 Pac. 89, 19 Idaho, 83; Boatmen's Bank of St. Louis v. Fritzlen (1907) 89 Pac. 915, 75 Kan. 479, 22 L. R. A. (N. S.) 1235; Chesapeake & O. Ry. Co. v. Banks' Adm'r (1911) 137 S. W. 1066, 144 Ky. 137; Craven v. Turner (1890) 82 Me. 383, 19 Atl. 864; State ex rel. Iba v. Mosman (1910) 133 S. W. 38, 231 Mo. 474; Schwyhart v. Barrett (Mo. App. 1910) 130 S. W. 388; Sears v. Atchison, T. & S. F. Ry. Co. (1912) 147 S. W. 860, 163 Mo. App. 711; Cox v. Atlantic Coast Line R. Co. (1914) 82 S. E. 979, 166 N. C. 652; Cogdill v. Clayton (N. C. 1915) 87 S. E. 338; Western Coal & Mining Co. v. Osborne (Okl. 1911) 119 Pac. 973; Chicago, R. I. & P. Ry. Co. v. Brazzell (1912) 124 Pac. 40, 33 Okl. 122; Texas & P. Ry. Co. v. Eastin & Knox (Civ. App. 1905) 89 S. W. 440 (judgment reversed Eastin & Knox v. Texas & P. Ry. Co. [1906] 92 S. W. 838, 99 Tex. 654).

In determining whether a defendant is entitled to a removal, the state court must examine the whole record as it was at the time of filing the petition for removal, including the petition. Little York Gold Washing & Water Co. v. Keyes (1877) 96 U. S. 199, 201, 24 L. Ed. 656; Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688; Miller v. Soule (D. C. 1915) 221 Fed. 493; Springer v. Bricker (1905) 76 N. E. 114, 165 Ind. 532; Illinois Cent. R. Co. v. Sheegog's Adm'r (1907) 103 S. W. 323, 31 Ky. Law Rep. 691.

107. Determination of issues of fact. —Issues of fact on a petition for removal from a state to a federal court are to be determined in the federal court, and the state court in determining whether it will surrender jurisdiction must accept as true the allegations of fact in the petition. Kansas City, Ft. S. & M. R. Co. v. Daughtry (1891) 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963; Texas & P. Ry. Co. v. Eastin & Knox (1909) 29 Sup. Ct. 564, 214 U. S. 153, 53 L. Ed. 946 (affirming judgment [1907] 102 S. W. 105, 100 Tex. 556); Chesapeake & O. R. Co. v. Cockrell (1914) 34 Sup. Ct. 278, 232 U. S. 146, 58 L. Ed. 544 (affirming judgment [1911] 137 S. W. 1066, 144 Ky. 137); Boatmen's Bank v. Fritzlen (1905) 135 Fed. 650, 68 C. C. A. 288 (writ of certiorari denied [1905] 25 Sup. Ct. 803, 198 U. S. 586, 49 L. Ed. 1174); Sinclair v. Pierce (C. C. 1892) 50 Fed. 851; Powers v. Chesapeake & O. R. Co. (C. C. 1895) 65 Fed. 129 (judgment affirmed [1898] 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673); Fidelity Trust & Safety-Vault Co. v. Newport News & M. V. Co. (C. C. 1895) 70 Fed. 403; Shane v. Butte Electric Ry. Co. (C. C. 1906) 150 Fed. 801; Atlantic Coast Line R. Co. v. Bailey (C. C. 1907) 151 Fed. 891; Stix v. Keith (1890) 90 Ala. 121, 7 South. 423; Texarkana Telephone Co. v. Bridges (1905) 86 S. W. 841, 75 Ark. 116; St. Louis Southwestern Ry. Co. v. Adams (1908) 112 S. W. 186, 87 Ark. 136; Steed v. Henry (Ark. 1915) 180 S. W. 508; Horan v. Strachan (1889) 9 S. E. 429, 82 Ga. 566; Southern Ry. Co. v. Hudgins (1899) 33 S. E. 442, 107 Ga. 334; Lane Bros. Co. v. Rickard (1911) 70 S. E. 565, 135 Ga. 650; Van Horn v. Litchfield (1886) 70 Iowa, 11, 29 N. W. 783; Wisecarver & Reynard v. Chicago, R. I. & P. Ry. Co. (Iowa, 1908) 117 N. W. 961; Boatmen's Bank of St. Louis v. Fritzlen (1907) 89 Pac. 915, 75 Kan. 479, 22 L. R. A. (N. S.) 1235; Illinois Cent. R. Co. v. Jones' Adm'r (1904) 80 S. W. 484, 118 Ky. 158, 26 Ky. Law Rep. 31; Guinault v. Louisville & N. R. Co. (1890) 42 La. Ann. 52, 7 South. 62; Craven v. Turner (1890) 19 Atl. 864, 82 Me. 383; Long v. Quinn Bros. (1913) 102 N. E. 348, 215 Mass. 85; Munnss v. American Agricultural Chemical Co. (1914) 103 N. E. 859, 216 Mass. 423; Roberts v. Chicago, St. P., M. & O. Ry. Co. (1892) 48 Minn. 521, 51 N. W. 478; State ex rel. Iba v. Mosman (1910) 133 S. W. 38, 231 Mo. 474; Herrick v. Norfolk-Southern R. Co. (1912) 73 S. E. 1008, 158 N. C. 307; Hurst v. Southern Ry. Co. (N. C. 1913) 78 S. E. 434; Hyder v. Southern Ry. Co. (1914) 83 S. E. 689, 167 N. C. 584; Cogdill v. Clayton (N. C. 1915) 87 S. E. 338; Western Coal & Mining Co. v. Osborne (Okl. 1911) 119 Pac. 973; Chicago, R. I. & P. Ry. Co. v. Brazzell (1912) 124 Pac. 40, 33 Okl. 122. CONTRA, Burch v. Davenport & St. P. R. Co. (1877) 46 Iowa, 449; Dunn v. Burlington, C. R. & N. R. Co. (1886) 35 Minn. 73, 27 N. W. 448; Levy v. O'Neil (N. Y. 1873) 14 Abb. Prac. (N. S.) 63; Clark v. Opdyke (N. Y. 1877) 10 Hun, 383.

So the federal court alone can determine controverted issues of fact as to the citizenship or residence of the parties. Carson v. Hyatt (1886) 6 Sup. Ct. 1050, 1054, 118 U. S. 279, 30 L. Ed. 167; Burlington, C. R. & N. Ry. Co. v. Dunn (1887) 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159; Kansas City, Ft. S. & M. R. Co. v. Daughtry (1891) 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963 (affirming [1890] 88 Tenn. [4 Pickle] 721, 13 S. W. 698); Ashe v. Union Cent. Life Ins. Co. (C.

C. 1902) 115 Fed. 234, 235; Miller v. Soule (D. C. 1915) 221 Fed. 493; Horan v. Strachan (1889) 82 Ga. 566, 9 S. E. 429. CONTRA, Disbrow v. Driggs (N. Y. 1858) 8 Abb. Prac. 305, note, 16 How. Prac. 346; Miller v. Kent (N. Y. 1881) 60 How. Prac. 451.

Fraud in joining resident defendants to defeat the right of removal. St. Louis Southwestern Ry. Co. v. Adams (Ark. 1908) 112 S. W. 186; Southern Ry. Co. v. Sittasen (Ind. 1905) 74 N. E. 898 (reversed [1906] 76 N. E. 973, 166 Ind. 257); Boatmen's Bank of St. Louis v. Fritzlen (1907) 89 Pac. 915, 75 Kan. 479; Illinois Cent. R. Co. v. Sheegog's Adm'r (1907) 103 S. W. 323, 31 Ky. Law Rep. 691; Sears v. Atchison, T. & S. F. Ry. Co. (1912) 147 S. W. 860, 163 Mo. App. 711; Town of Monroe v. Connecticut River Lumber Co. (1891) 66 N. H. 628, 32 Atl. 152; Davis v. Rexford (N. C. 1907) 59 S. E. 1002; Lloyd v. Southern Ry. Co. (1914) 81 S. E. 1003, 166 N. C. 24; Western Coal & Mining Co. v. Osborne (Okl. 1911) 119 P. 973; Texas & P. Ry. Co. v. Eastin & Knox (Tex. Civ. App. 1905) 89 S. W. 440, judgment reversed Eastin & Knox v. Texas & P. Ry. Co. (1906) 92 S. W. 838, 99 Tex. 654. CONTRA, Bradshaw v. Bowden (D. C. 1914) 226 Fed. 323; Chesapeake & O. Ry. Co. v. Banks' Adm'r (1911) 137 S. W. 1066, 144 Ky. 137.

The amount in controversy. Postal Tel. Cable Co. v. Southern Ry. Co. (C. C. 1898) 88 Fed. 803; Western Union Tel. Co. v. Horack (1881) 9 Ill. App. 309; First Nat. Bank v. Glaser (Tex. Civ. App. 1907) 102 S. W. 171. CONTRA, Disbrow v. Driggs (N. Y. 1858) 8 Abb. Prac. 305, note, 16 How. Prac. 346. And whether the petition for removal was filed in time. Fidelity Trust & Safety-Vault Co. v. Newport News & M. V. Co. (C. C. 1895) 70 Fed. 403. But see Orosco v. Gagliardo (1863) 22 Cal. 83, holding that under the statute of California respecting the removal of causes the court must first be fully satisfied by proper evidence that the application for removal is founded upon facts which entitle the applicant to the order, and for this purpose the court has a right to inquire into the truth of the facts set forth in the petition as well as to investigate the sufficiency of the security, and Disbrow v. Driggs (N. Y. 1858) 8 Abb. Prac. 305, note, 16 How. Prac. 346, holding that the mode of ascertaining the fact of the alienage or citizenship of the petitioner for the removal of a cause from the state court to the federal court rests with the state court, and White v. Holt (1882) 20 W. Va. 792, holding that the facts set out in a petition for the removal of a case from a state court to a federal court should be such as, taken with what already appears on the record, show that the suit, under the act of Congress, is removable, and, if such facts are not alleged in the petition and appear in the record, it is the duty of the state court to inquire no further, but to refuse to order the removal of the case. If such facts are alleged in the petition and show the suit to be removable, such facts may be controverted, and the court will then hear the evidence and judicially decide on the evidence, and either enter an order removing or refusing to remove the cause.

Where an action could not have been originally brought in the federal Circuit Court, the removal acts do not require the determination of a question of alleged fraudulent joinder of parties by the federal court after the filing of a removal petition and bond. Ward v. Pullman Car Corp. (Ky. 1908) 114 S. W. 754.

Whether plaintiff reduced the ad damnum of his writ to $3,000 or less prior to the filing of defendant's petition and bond for removal of the cause must be determined in the state court on the face of the record. Munnss v. American Agricultural Chemical Co. (1914) 103 N. E. 859, 216 Mass. 423.

Where plaintiff denies the allegations of a petition to remove, the burden is on the petitioner for removal to prove them. Carson v. Dunham (1887) 7 Sup. Ct. 1030, 1032, 121 U. S. 421, 30 L. Ed. 992; Gibson v. Chesapeake & O. Ry. Co. (1914) 215 Fed. 24, 131 C. C. A. 332; Armstrong v. Kansas City Southern Ry. Co. (C. C. 1911) 192 Fed. 608.

A second application for removal to a federal court raising the issue of fraudulent joinder of defendants, when made after a ruling sustaining, in favor of one of two defendants, a demurrer to the evidence, cannot be regarded as erroneously denied by a state court, where the evidence demurred to is not made part of the record, and this issue was first raised on the second application, without stating when the petitioner first learned of the fraud, and the averments of fraud were specifically denied, and, so far as the record discloses, the petitioner, who had the affirmative of the issue, failed to make out its case. Kansas City Suburban Belt Ry. Co. v. Herman (1902) 23 Sup. Ct. 24, 187 U. S. 63, 47 L. Ed. 76, affirming judgment (1902) 68 Pac. 46, 64 Kan. 546.

108. Hearing by state court.—A motion to dismiss a writ of error takes precedence over one to remove the cause to the United States court. Edgarton v. Webb (1870) 41 Ga. 417.

The hearing of an application for the removal of a cause from a state to a United States court should have precedence over a motion to dismiss for nonpayment of taxes. Bragg v. Tibbs (1871) 44 Ga. 294.

It is the duty of the court, and not of the clerk, to determine the sufficiency of the security accompanying the

petition. Southern Pac. Co. v. Harrison (1889) 73 Tex. 103, 11 S. W. 168.

109. Review of determination as to right of removal.—Defendant's remedy for the erroneous denial of removal is by a petition in error, presenting the facts by a bill of exceptions or a plea to the jurisdiction. Shelby v. Hoffman (1857) 7 Ohio St. 450.

A defendant who makes no application for a removal cannot assign for error the refusal of the state court to permit a removal on the application of other defendants. Merchants' Cotton-Press & Storage Co. v. Insurance Co. of North America (1894) 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195.

The fact that a nonresident complainant, as a stockholder of the banking corporation suing, is not allowed to transfer the cause to the United States court, can only be assigned for error by him, and when he does not unite in the appeal the corporation cannot be heard to complain of the refusal to transfer the cause. Danville Banking & Trust Co. v. Parks (1878) 88 Ill. 170.

The refusal of the court below to transfer a case to the federal court cannot be assigned for error, unless the affidavit and bond on which the motion for removal was based are embodied in the bill of exceptions, and also the exception, if any, to the decision of the court refusing the motion. The affidavit and bond do not become a part of the record unless thus preserved. Merchants' Despatch Transp. Co. v. Joesting (1878) 89 Ill. 152; Cairo & St. L. R. Co. v. Easterly, Id. 156; Peirce v. Walters (1897) 45 N. E. 1068, 164 Ill. 560; Louisville & N. R. Co. v. Satterwhite (1904) 79 S. W. 106, 112 Tenn. 185. But see Stratton's Independence v. Sterrett (Colo. 1911) 117 Pac. 351, holding that a petition to a state court for removal of a cause to a federal court must be considered on review, though it was not incorporated in the bill of exceptions, and no exception was saved to the ruling of the court in refusing it, regardless of state code provisions, defining what constitutes the record proper.

Burns' Rev. St. Ind. 1894, § 640 (Horner's Rev. St. 1897, § 628), provides that one may have an exception noted at the end of the decision, where the decision and the ground of objection are entered on the legal record. Section 662 (section 650) declares that the legal record comprises all proper entries made by the clerk, and all papers filed therein, except papers used as evidence, affidavits, and other papers, when they relate to collateral matters, which shall not be certified unless made a part of the record by exception or by order of court. Held, that the denial of an application to remove a cause to a federal court, not relating to the merits, could not be reviewed on appeal, where the ruling and application were not in the record by bill of exceptions or order of court. American Carbon Co. v. Jackson (1900) 56 N. E. 862, 24 Ind. App. 390.

An action was filed in Tennessee by a citizen of Kentucky against another citizen of Kentucky. Thereafter, on the death of the plaintiff, a citizen of Tennessee was substituted. Defendant then presented to the court a petition, with proper bond, for removal of the cause to the federal court, on the ground of diversity of citizenship, and that the case was then for the first time removable, and moved the court for permission to file the petition and bond and for an order of removal, which the court denied. No bill of exceptions was tendered making the petition and bond a part of the record at that term of court. The case was tried at a subsequent term, and the petition and bond were incorporated in the bill of exceptions then filed, and were copied into the transcript on appeal. Held, that this was ineffective to bring them into the record and authorize the Supreme Court on appeal to consider them and review the action of the trial court. Louisville & N. R. Co. v. Fort (1904) 80 S. W. 429, 112 Tenn. 432.

Objection to the sufficiency of a bond on removal cannot be raised for the first time on bill of exceptions to the order of removal. Stone v. Sargent (1880) 129 Mass. 503.

Where a cause has been removed, and all the papers in it have been afterwards destroyed by fire, and the parties then, by writing filed in the United States court, admit that the cause was brought to the United States court by transfer from the state court in accordance with the statutes in such case provided, and asked and obtained leave to file a declaration and plea as substitutes for the ones originally filed and now destroyed, this court will, in the absence of all proof to the contrary, presume that the citizenship requisite to give the circuit court jurisdiction was shown in some proper manner, though it be not apparent on the mere pleadings. Pittsburgh, C. & St. L. R. Co. v. Ramsey (1874) 22 Wall. 322, 22 L. Ed. 823.

An inspection of the petition for removal is essential to determine whether it contained allegations sufficient to authorize a transfer of the cause, and in its absence from the record it must be presumed, in support of the judgment of the state court, that it was defective in the allegations of jurisdictional facts. Bush v. Kentucky (1882) 107 U. S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354.

Where a bond for removal is not objected to, it will be presumed to be formal and the sureties sufficient. Terre Haute & I. R. Co. v. Abend (1881) 9 Ill. App. (9 Bradw.) 304; Western Union Tel. Co. v. Horack, Id. 309.

Where, on appeal from an order denying a petition for removal, it appears that such petition was not made until after an amended complaint had been filed after answer, and the original complaint is not in the record, it will be presumed that there was no such difference between the complaints as would authorize a removal at such time. Pennsylvania Co. v. Leeman (1903) 66 N. E. 48, 160 Ind. 16.

The inspection of a petition to remove a prosecution from a state to the federal court is essential to determine whether it contained allegations sufficient to authorize a transfer, and in its absence it must be presumed that it was defective in the allegation of jurisdictional facts, and that the court below did right in disregarding it. Busch v. Commonwealth (1882) 80 Ky. 244, 3 Ky. Law Rep. 740.

The court receiving an application for the removal of a cause into the United States circuit court cannot arbitrarily reject the bond tendered, if sufficient in form, without specifying any cause; and upon appeal, therefore, such a bond must be assumed to have been sufficient if not otherwise stated. Mix v. Andes Ins. Co. (1878) 74 N. Y. 53, 30 Am. Rep. 260, reversing (1876) 9 Hun, 397.

An error of the state court in denying an application to remove to a federal court is not prejudicial if, notwithstanding such denial, the record is filed in the federal court, and the cause proceeds therein to final hearing, when it is remanded, and the state court in the meantime awaits the action of the federal court. Missouri Pac. Ry. Co. v. Fitzgerald (1896) 160 U. S. 556, 16 Sup. Ct. 389, 40 L. Ed. 536.

On the removal of a cause from the state to the United States court, the amount of surety to be taken is a matter in the discretion of the court to which the petition is presented, and will not be reviewed by the general term, except in an extraordinary case. Bell v. Lycoming Fire Ins. Co. (N. Y. 1875) 3 Hun, 409, 6 Thomp. & C. 54.

Whether a party has waived his right to have a cause removed from a state to United States court, and submitted it for final adjudication in the state court, is a question to be determined from the record. Pollock v. Cohen (1877) 32 Ohio St. 514.

In reviewing an order refusing to remove a cause, on the ground that the amount in controversy was not large enough, the entire record may be examined to ascertain the value of the matter in controversy. Building & Loan Ass'n of Dakota v. Cunningham (1898) 47 S. W. 714, 92 Tex. 155.

Where a proper application made by a nonresident defendant for the removal of a case from the state court to the United States court is refused by the state court, whose judgment is reversed on writ of error to the state Supreme Court, plaintiff cannot dismiss the case, so as to defeat its removal to the United States court, by an entry of dismissal before the remittitur from the Supreme Court has been formally made the judgment of the lower court. Louisville & N. R. Co. v. Newman (1909) 64 S. E. 541, 132 Ga. 523.

Where a cause is instituted in the state court by a citizen of this state against a nonresident, and the latter applies for its removal to the United States court, and on its being refused appeals to this court, which requires the cause to be removed on the execution of the proper bond, and on return of the case to the state court the nonresident omits to give the bond, the state court will have jurisdiction to go on and try the case. Hill v. Henderson (1850) 21 Miss. (13 Smedes & M.) 688.

In view of the conflict of the decisions of the federal courts as to whether a cause, in order to be entitled to be removed from a state to a federal court must be an action which might have been instituted in the federal court in the first instance, a decision of the trial court, refusing to remove a cause to the federal court because the ground of removal arose after its commencement, will not be reversed on appeal, though a motion is pending in the federal court for the removal of the cause to it. Phœnix Ins. Co. v. Summerfield (1893) 70 Miss. 827, 13 South. 253.

110. Review by state court.—The state court may not review or control the exercise of the jurisdiction of the federal court in determining the removability of a case. Chesapeake & O. R. Co. v. McCabe (1909) 29 Sup. Ct. 430, 435, 213 U. S. 207, 53 L. Ed. 765; Ryan v. Mathews (1884) 64 Iowa, 250, 20 N. W. 174.

A state court has no power to entertain an appeal or other proceeding to review an order made in such court granting a petition to remove a cause from the state court to a court of the United States. Akerly v. Vilas (C. C. 1869) Fed. Cas. No. 119; Ellerman v. New Orleans, M. & T. R. Co. (C. C. 1875) Fed. Cas. No. 4,382; Ewert v. Minneapolis & St. L. R. Co. (1914) 150 N. W. 224, 128 Minn. 77; Fargo v. McVicker (N. Y. 1869) 55 Barb. 437, 38 How. Prac. 1; Kendrick's Lessee v. McQuary (1814) 3 Tenn. (Cooke) 480. CONTRA, Illinois Cent. R. Co. v. Jones' Adm'r (1904) 80 S. W. 484, 118 Ky. 158, 26 Ky. Law Rep. 31; State ex rel. Coons v. Judge of Thirteenth Judicial Dist. (1871) 23 La. Ann. 29, 8 Am. Rep. 583; Stone v. Sargent (1880) 129 Mass. 503; Lloyd v. Southern Ry. Co. (1914) 81 S. E. 1003, 166 N. C. 24.

Though the requirements necessary to a suspensive appeal from such an order may have been observed, they

are not effectual to prevent a removal. Ellerman v. New Orleans, M. & T. R. Co. (C. C. 1875) Fed. Cas. No. 4,382.

Since an order of the state trial court removing a cause to the federal court on the ground of diversity of citizenship is not reviewable by the state Supreme Court by appeal or writ of error, it may be reviewed on certiorari; the error, if any, appearing on the face of the record. State ex rel. Iba v. Mosman (1910) 133 S. W. 38, 231 Mo. 474.

Under Civ. Code Ga. § 5526, providing that a writ of error will lie to the supreme court whenever "the decision or judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final" judgment, a refusal to allow the removal of a cause to the federal court is reviewable. Western Union Tel. Co. v. Griffith (1898) 30 S. E. 420, 104 Ga. 56.

An order denying an application for removal of a cause to the federal court is not appealable. State ex rel. Coons v. Judge of Thirteenth Judicial Dist. (1871) 23 La. Ann. 29, 8 Am. Rep. 583.

Code Miss. § 34, authorizing the chancellor to grant an appeal from any interlocutory order, whereby money is required to be paid or the possession of property changed, or where the chancellor thinks it proper to state the principles in the case or to avoid delay or expense, does not authorize an appeal from an interlocutory order refusing to remove a cause to the federal courts. Vicksburg Water Works Co. v. City of Vicksburg (1902) 31 So. 1, 79 Miss. 510.

From an order denying an application to remove a cause to the federal court an appeal presently lies. Pruett v. Charlotte Power Co. (1914) 83 S. E. 830, 167 N. C. 598.

Where a motion was made in the superior court for removal to the United States court, which was denied by the court, and after the report of the committee finding the facts the case was reserved for the advice of this court "on the questions arising on the report, and also on the question what decree should be passed on the facts reported," the court will refuse to consider the question whether the cause ought not to have been removed to the United States court. Occum Co. v. A. & W. Sprague Mfg. Co. (1868) 35 Conn. 496.

Where an order has been made by a state court for the removal of a cause to the United States court, and an appeal has been taken from that order to the supreme court, and the proper steps have been taken to stay proceedings as in other cases of appeal, further proceedings on the order or judgment for removal are at once suspended. Burson v. National Park Bank (1872) 40 Ind. 173, 13 Am. Rep. 285.

A nonresident defendant, joined with residents in an action which on the face of the petition was not removable to the federal court, petitioned for its removal, but stated no ground in the petition for such removal. The court, in its orders, did not pass upon the petition for removal, but merely approved and accepted the bond, and permitted plaintiff's answer to the petition for removal to be filed. Defendant evidently assumed that the case was ipso facto removed to the federal court, without any order by the state court, and plaintiff also concluded that that forum must pass upon the propriety of the removal. Held, that there was no order of the state court removing the cause to the federal court, from which plaintiff could or should have appealed in order to preserve his rights to a trial in the state court. Pierce's Adm'r v. Illinois Cent. R. Co. (1905) 86 S. W. 703, 27 Ky. Law Rep. 801.

The state court is the judge of the sufficiency of the sureties offered on an application to remove; and the supreme court will not interfere, except in very strong cases of the improper exercise of that discretion. Fitz's Syndic v. Hayden (La. 1826) 4 Mart. (N. S.) 653.

Where on suggestion of diminution of record certificates of the clerk of the United States court were produced to show that before judgment was rendered the case had been removed to that court, the question of removal could only be reviewed on a bill of exceptions, showing the course taken to obtain it, and the action of the district court thereon. Singleton v. Boyle (1876) 4 Neb. 414.

Where the court of common pleas refuses to remove a proper case to the federal courts, on appeal to the district court from the judgment, a motion for removal should be sustained. Hadley v. Dunlap (1859) 10 Ohio St. 1.

The action of the trial court in refusing a motion to remove the case to a federal court will not be reviewed on appeal, where, before trial, the federal court had entered an order remanding the case. Talbott & Sons v. Planters' Oil Co. (1895) 12 Tex. Civ. App. 49, 33 S. W. 745.

Where a state court erroneously permitted certain defendants to file petitions for removal, and approved bonds given thereon, and such defendants took a transcript to the federal court, and plaintiffs appeared there, and moved to have the cause remanded, and subsequently on their motion the cause was dismissed without prejudice, plaintiffs, by their conduct, lost their right to have the state court's action corrected. Stephenson's Adm'r v. Illinois Cent. R. Co. (1903) 75 S. W. 260, 25 Ky. Law Rep. 442.

III. Review by federal trial court.—The federal circuit court cannot review the decision of the state court on ques-

tions arising under the petition for removal of a cause from the state to the federal court. The remedy is by appeal to the supreme court of the state, and thence by writ of error to the supreme court of the United States. Hough v. Western Transp. Co. (C. C. 1864) Fed. Cas. No. 6,724.

Where, on the filing of a petition, and bond for removal of an action from a state court to the United States circuit court on the ground of diversity of citizenship, the judge of the state court makes an order for such removal, the federal court has no right to review the order, and decide whether the judge had a right to sign it, especially as no order was necessary, the cause being removed ipso facto on the petition and bond being filed. Ashe v. Union Cent. Life Ins. Co., (C. C. 1902) 115 Fed. 234.

112. Review by United States supreme court.—Where, after petition for removal and bond is filed, the state court goes to trial, and the case goes to judgment and is carried to the highest court in the state, and it affirms the judgment, a writ of error lies to the supreme court of the United States under the Judiciary Act, § 25 (1 Stat. 85). Kanouse v. Martin (1852) 14 How. 23, 14 L. Ed. 310; Id. (1853) 15 How. 198, 14 L. Ed. 660; Oakley v. Goodnow (1886) 118 U. S. 43, 6 Sup. Ct. 944, 30 L. Ed. 61; State ex rel. Jumel v. Johnson (1877) 29 La. Ann. 399; Schwyhart v. Barrett (Mo. 1910) 130 S. W. 388.

Where a petition for removal was in accordance with the practice of the state reserved for the decision of the supreme court, and the latter dismissed the petition and remanded the cause to the inferior court for further proceedings, according to law, this court has no jurisdiction. Kimball v. Evans (1876) 93 U. S. 320, 23 L. Ed. 920.

Where a petition and bond for the removal of a cause to the federal court is duly filed, and on the record made defendant is entitled to removal, its right is preserved, not only for review in the state court, but also in the Supreme Court of the United States. Shohoney v. Quincy, O. & K. C. Ry. Co. (1909) 122 S. W. 1025, 223 Mo. 649.

113. Mandamus to compel transfer of cause.—A state court can grant mandamus to compel an inferior state court to remove a cause, defendant being entitled to such removal. Hopper v. Kalkman (1861) 17 Cal. 517; Kennedy v. Woolfolk (1809) 1 Tenn. (1 Overt.) 453; Brown v. Crippin (Va. 1809) 4 Hen. & M. 173. CONTRA, State v. Curler (1868) 4 Nev. 445; People v. Judges of New York Common Pleas (N. Y. 1846) 2 Denio, 197.

No mandamus from a court of the United States to a state court is necessary to enforce affirmative action by a state court to allow a cause to be removed in an ordinary case of removal of a cause before judgment; and therefore a court of the United States has no jurisdiction to issue such mandamus. In re Cromie (C. C. 1869) Fed. Cas. No. 3,405; Fisk v. Union Pac. R. Co. Id. 4,827. CONTRA, Spraggins v. Humphries County Court (C. C. 1812) Fed. Cas. No. 13,246, 3 Tenn. (Cooke) 160.

Mandamus will issue out of the Supreme Court directing a district judge to grant an appeal from an order removing a cause to the federal Circuit Court, if the cause is otherwise appealable. State ex rel. Coons v. Judge of Thirteenth Judicial Dist. (1871) 23 La. Ann. 29, 8 Am. Rep. 583.

Application for mandamus to compel the circuit judge to set aside an order transferring a cause to the federal court will be denied if the record fails to show that application was made to the judge himself to vacate the order. Le Roux v. Bay Circuit Judge (1881) 45 Mich. 416, 8 N. W. 100.

(B) Transfer of jurisdiction.

114. Essentials to transfer of jurisdiction.—Upon the filing in the state court, in due time, of a sufficient petition and bond, in a cause removable thereby, the jurisdiction of the state court absolutely ceases, and that of the circuit court of the United States immediately attaches, regardless of any action thereon by the state court; and any further proceeding in the state court is coram non judice, unless its jurisdiction is actually restored. Kern v. Huidekoper (1880) 103 U. S. 485, 490, 26 L. Ed. 354; Baltimore & O. R. Co. v. Koontz (1881) 104 U. S. 5, 26 L. Ed. 643; Nat. Steamship Co. v. Tugman (1882) 1 Sup. Ct. 58, 60, 106 U. S. 118, 27 L. Ed. 87; Manning v. Amy (1891) 11 Sup. Ct. 707, 708, 140 U. S. 137, 35 L. Ed. 386; Madisonville Traction Co. v. St. Bernard Min. Co. (1905) 25 Sup. Ct. 251, 253, 196 U. S. 239, 49 L. Ed. 462; North American Transportation & Trading Co. v. Howells (1903) 121 Fed. 694, 58 C. C. A. 442; Boatmen's Bank of St. Louis v. Fritzlen (1905) 135 Fed. 650, 68 C. C. A. 288 (reversing judgment and order, Weldon v. Fritzlen [C. C. 1904] 128 Fed. 608); McAlister v. Chesapeake & O. Ry. Co. (1907) 157 Fed. 740, 85 C. C. A. 316, 13 Ann. Cas. 1068; Flint v. Coffin (1910) 176 Fed. 872, 100 C. C. A. 342; Mannington v. Hocking Valley Ry. Co. (C. C. A. 1910) 183 Fed. 133; Dunham v. Baird (C. C. 1875) Fed. Cas. No. 4,147; Ellerman v. New Orleans, M. & T. R. Co., Id. 4,382; Osgood v. Chicago, D. & V. R. Co., Id. 10,604; Cobb v. Globe Mut. Life Ins. Co. (C. C. 1877) Fed. Cas. No. 2,921; Connor v. Scott Id. 3,119; Arthur v. New England Mut. Life Ins. Co. (C. C. 1879) Fed. Cas. No. 565; Second Nat. Bank v. New York Silk Mfg. Co. (C. C. 1882) Fed. Cas. No. 12,601a;

New York Silk Mfg. Co. v. Second Nat. Bank (C. C. 1882) 10 Fed. 204; In re Iowa & M. Const. Co. Id. 401; Clark v. Chicago, M. & St. P. R. Co. (C. C. 1882) 11 Fed. 355; Texas & St. L. R. Co. v. Rust (C. C. 1883) 17 Fed. 275; Miller v. Tobin (C. C. 1883) 18 Fed. 609; Judge v. Anderson (C. C. 1884) 19 Fed. 885; Wilson v. Western Union Tel. Co. (C. C. 1888) 34 Fed. 561; Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C. 1888) 36 Fed. 9, 10; Freeman v. Butler (C. C. 1889) 39 Fed. 1, 3; Chattanooga, R. & C. R. Co. v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1890) 44 Fed. 456; South Carolina v. Coosaw Min. Co. (C. C. 1891) 45 Fed. 804; Brigham v. C. C. Thompson Lumber Co. (C. C. 1893) 55 Fed. 881, 882; Shepherd v. Bradstreet Co. (C. C. 1895) 65 Fed. 142; Wills v. Baltimore & O. R. Co. Id. 532; La Page v. Day (C. C. 1896) 74 Fed. 977; Lund v. Chicago, R. I. & P. Ry. Co. (C. C. 1897) 78 Fed. 385; Monroe v. Williamson (C. C. 1897) 81 Fed. 977; Eisenmann v. Delemar's Nevada Gold-Min. Co. (C. C. 1898) 87 Fed. 248; Postal Tel. Cable Co. v. Southern Ry. Co. (C. C. 1898) 88 Fed. 803; Mecke v. Valley Town Mineral Co. (C. C. 1898) 89 Fed. 209; Probst v. Cowen (C. C. 1898) 91 Fed. 929; Hickman v. Missouri, K. & T. Ry. Co. (C. C. 1899) 97 Fed. 113; Kirby v. Chicago & N. W. R. Co. (C. C. 1900) 106 Fed. 551; Loop v. Winters' Estate (C. C. 1902) 115 Fed. 362; Mutual Life Ins. Co. of New York v. Langley (C. C. 1906) 145 Fed. 415; Atlantic Coast Line R. Co. v. Bailey (C. C. 1907) 151 Fed. 891; Goldberg, Bowen & Co. v. German Ins. Co. of Freeport, Ill. (C. C. 1907) 152 Fed. 831; Phillips v. Western Terra Cotta Co. (C. C. 1909) 174 Fed. 873; Stevenson v. Illinois Cent. R. Co. (C. C. 1911) 192 Fed. 956; Hansford v. Stone-Ordean-Wells Co. (D. C. 1912) 201 Fed. 185; Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688; Williston v. Raymond (D. C. 1914) 213 Fed. 527; City of Montgomery, Ala., v. Postal Telegraph-Cable Co. (D. C. 1914) 218 Fed. 471; Buxton v. Pennsylvania Lumber Co. (D. C. 1914) 221 Fed. 718; Miller v. Soule (D. C. 1915) 221 Fed. 493; Stix v. Keith (1890) 90 Ala. 121, 7 South. 423; Little Rock, M. R. & T. Ry. Co. v. Iredell (1888) 50 Ark. 388, 8 S. W. 21; Stratton's Independence v. Sterrett (Colo. 1911) 117 Pac. 351; Hayes v. Todd (1894) 34 Fla. 233, 15 South. 752; Southern Ry. Co. v. Dukes (1910) 68 S. E. 332, 7 Ga. App. 784; Chattanooga Boiler & Tank Co. v. Robinson (Ga. App. 1913) 80 S. E. 299; Morbeck v. Bradford-Kennedy Co. (Idaho, 1910) 113 Pac. 89; Risley v. Indianapolis, B. & W. Ry. Co. (Ind. 1874) Wils. 572; Sharp v. Gutcher (1881) 74 Ind. 357; Pennsylvania Co. v. Leeman (1903) 66 N. E. 48, 160 Ind. 16; Chambers v. Illinois Cent. R. Co. (1897) 73 N. W. 593, 104 Iowa, 238; Chicago, R. I. & P. Ry. Co. v. Stone & Bronnenberg (1905) 79 Pac. 655, 70 Kan. 708; Chesapeake & O. Ry. Co. v. Banks' Adm'r (1911) 137 S. W. 1066, 144 Ky. 137; Beery v. Chicago, R. I. & P. R. Co. (1877) 64 Mo. 533; Powell v. Same, Id. 544; Shohoney v. Quincy, O. & K. C. Ry. Co. (1909) 122 S. W. 1025, 223 Mo. 649; Chastain v. Missouri, K. & T. Ry. Co. (1910) 125 S. W. 1099, 226 Mo. 94; Schwyhart v. Barrett (Mo. App. 1910) 130 S. W. 388; State ex rel. Iba v. Mosman (1910) 133 S. W. 38, 231 Mo. 474; Chastain v. Missouri, K. & T. Ry. Co. (1911) 133 S. W. 853, 152 Mo. App. 478; Blair v. West Point Mfg. Co. (1878) 7 Neb. 146; Stevens v. Phœnix Ins. Co. (1869) 41 N. Y. 149; Shaft v. Phœnix Mut. Life Ins. Co. (1876) 67 N. Y. 544, 23 Am. Rep. 138; Bushnell v. Parker Bros. & Co. (1891) 59 Hun, 625, 13 N. Y. Supp. 695; Winslow v. Collins (1892) 110 N. C. 119, 14 S. E. 512; McCulloch v. Southern Ry. Co. (1908) 62 S. E. 1096, 149 N. C. 305; Higson v. North River Ins. Co. (1910) 68 S. E. 920, 153 N. C. 35; Rea v. Standard Mirror Co. (N. C. 1911) 73 S. E. 116; Smith v. Harris Granite Quarries Co. (1913) 80 S. E. 388, 164 N. C. 338; Anderson v. United Realty Co. (1908) 86 N. E. 644, 79 Ohio St. 23, 51 L. R. A. (N. S.) 477; Ft. Smith & W. R. Co. v. Blevins (1913) 130 Pac. 525, 35 Okl. 378; Jones v. Amazon Ins. Co. (Pa. 1875) 8 Leg. Gaz. 59; Fox v. American Casualty Ins. & Security Co. (Com. Pl. 1892) 12 Pa. Co. Ct. R. 207, 2 Pa. Dist. R. 158; North American Loan & Trust Co. v. Colonial & U. S. Mortg. Co. (1893) 3 S. D. 590, 54 N. W. 659; Richards v. Modern Woodmen of America (1901) 85 N. W. 999, 14 S. D. 440; Durham v. Southern Life Ins. Co. (1876) 46 Tex. 182; Southern Pac. Co. v. Harrison (1889) 73 Tex. 103, 11 S. W. 168; Texas & P. Ry. Co. v. Davis (1900) 55 S. W. 562, 93 Tex. 378 (reversing judgment [App. 1899] 54 S. W. 381, 93 Tex. 378); Bilby v. Hancock (Tex. Civ. App. 1910) 125 S. W. 370; Weller v. Guajardo (Tex. Civ. App. 1915) 174 S. W. 673; Wells Fargo & Co. Express v. Hale (Tex. Civ. App. 1915) 175 S. W. 469. CONTRA, Ex parte Jones (1880) 66 Ala. 202; Southern Pac. R. Co. v. Los Angeles County Superior Court (1883) 63 Cal. 607; Delaware R. Const. Co. v. Davenport & St. P. Ry. Co. (1877) 46 Iowa, 406; State v. Murray (1895) 47 La. Ann. 1424, 17 South. 832; National Union Bank v. Dodge (1880) 42 N. J. Law (13 Vroom) 316; Howard v. Southern Ry. Co. (1898) 29 S. E. 778, 122 N. C. 944; Hadley v. Dunlap (1859) 10 Ohio St. 1.

If upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to sur-

render its jurisdiction, and may proceed as if no application for removal had been made. Madisonville Traction Co. v. St. Bernard Min. Co. (1905) 25 Sup. Ct. 251, 253, 196 U. S. 239, 49 L. Ed. 462; Keeney v. Roberts (C. C. 1886) 39 Fed. 629, 630; Miller v. Soule (D. C. 1915) 221 Fed. 493; Darton v. Sperry (1899) 41 A. 1052, 71 Conn. 339; State v. American Surety Co. of New York (1915) 145 Pac. 1007, 26 Idaho, 652; Williamson v. First Nat. Bank of Newport (1888) 10 Ky. Law Rep. (abstract) 283; Silva v. First Nat. Bank, Id. 365; Hickman v. Missouri, K. & T. Ry. Co. (1899) 151 Mo. 644, 52 S. W. 351 (reversed on other grounds Missouri, K. & T. Ry. Co. v. Hickman [1901] 22 Sup. Ct. 18, 183 U. S. 53, 46 L. Ed. 78); Debnam v. Southern Bell Tel. Co. (1900) 36 S. E. 269, 126 N. C. 831, 65 L. R. A. 915; North Carolina Corp. Commission v. Southern Ry. Co. (1909) 66 S. E. 427, 151 N. C. 447; Higson v. North River Ins. Co. (1910) 68 S. E. 920, 153 N. C. 35.

And the petition and bond must be sufficient, and filed within the statutory time. Johnson v. Butte Alex Scott Copper Co. (D. C. 1914) 213 Fed. 910; Silva v. First Nat. Bank (1888) 10 Ky. Law Rep. (abstract) 365; Smith v. Harris Granite Quarries Co. (1913) 80 S. E. 388, 164 N. C. 338.

Though defendant's petition and bond for removal to the federal court are filed in apt time, and based upon proper grounds, they do not effect such removal, when at the time he moves the state court for an order of removal he reserves his right to remove pending the determination of a motion to dismiss and a plea in abatement theretofore filed. Manning v. Amy (1891) 140 U. S. 137, 11 Sup. Ct. 707, 35 L. Ed. 386, affirming Amy v. Manning (1887) 144 Mass. 153, 10 N. E. 737.

If defendant does all that is necessary to secure a removal, he can, whether the state court makes an order of removal or not, perfect the removal by entering in the federal court, at the proper time, copies of the proper papers, and his appearance, and special bail, if necessary; and when that is done, the cause will proceed in the federal court. Hatch v. Chicago, R. I. & P. R. Co. (C. C. 1868) Fed. Cas. No. 6,204; Fisk v. Union Pac. R. Co. (C. C. 1869) Fed. Cas. No. 4,827; Bell v. Dix (1872) 49 N. Y. 232.

Where a proper bond and petition have been filed in the state court, the omission to ask that court to act on the petition is no ground for remanding the cause, especially where no term of the state court intervenes between the filing of the petition and the motion to remand, and the judge of that court has refused to consider the petition until the court is in session. Brown v. Murray Nelson & Co. (C. C. 1890) 43 Fed. 614.

On the filing of a proper petition for removal from the state court, in due time, the cause is removed eo instanti, and an error of the clerk of the state court in disposing of the petition is not material. Wills v. Baltimore & O. R. Co. (C. C. 1895) 65 Fed. 532.

The action of the state court in refusing a removal cannot affect the federal court, nor can the action of the federal court in refusing to remove affect the state court, and the trial in both courts can proceed. Mecke v. Valley Town Mineral Co. (C. C. 1898) 89 Fed. 114, 115.

In the case of the removal of a cause from a state to a federal court, the approval, by the state court, of the bond of removal of a cause, is not necessary to the jurisdiction of the federal court. Dennis v. Alachua County (C. C. 1877) Fed. Cas. No. 3,791.

Defendants not served or appearing in the state court when an order of removal was made are not affected by it; as to them the cause is still pending in that court and must be removed by its order on the petition of such defendants before they can come into the federal courts. Field v. Lownsdale (C. C. 1867) Fed. Cas. No. 4,769.

The jurisdiction of the federal court is not lost for want of an averment of citizenship in the bill of complaint originally filed, or in the amendments thereto, which were made in the circuit court. Briges v. Sperry (1877) 95 U. S. 401, 24 L. Ed. 390.

The jurisdiction of the federal court over a removed cause is not affected by the subsequent death of the defendant, and the execution of the appeal bond by his executor. Garrett v. Bonner (1878) 30 La. Ann. 1305.

The removal invests the federal court with jurisdiction of the case with all its incidents, including the taxation of costs. Chastain v. Missouri, K. & T. Ry. Co. (1911) 133 S. W. 853, 152 Mo. App. 478.

115. Duty of state court to transfer cause.—A state court is not bound to surrender its jurisdiction until a case is made which, on the face of the record, shows that the petitioner is entitled to such a removal. The mere filing of a petition is not enough, unless, when taken in connection with the rest of the record, it shows on its face that the petitioner has, under the statute, the right to take the suit to another tribunal. Gregory v. Hartley (1885) 113 U. S. 742, 5 Sup. Ct. 743, 28 L. Ed. 1150; Stone v. South Carolina (1886) 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688; Ex parte Grimball (1878) 61 Ala. 598; Ex parte Mobile & O. R. Co. (1879) 63 Ala. 349; McWhinney v. Brinker (1878) 64 Ind. 360; Wilson v. Big Joe Block Coal Co. (1907) 113 N. W. 348, 135 Iowa, 531; Bacon v. Iowa Cent. Ry. Co. (1912) 137 N. W. 1011; Chappell Chemical & Fertilizer

Co. v. Sulphur Mines Co. (1897) 36 A. 712, 85 Md. 684; Long v. Quinn Bros. (1913) 102 N. E. 348, 215 Mass. 85; Schwyhart v. Barrett (1910) 130 S. W. 388, 145 Mo. App. 332; Blair v. West Point Mfg. Co. (1878) 7 Neb. 146; National Docks & N. J. Junction Connecting Ry. Co. v. Pennsylvania R. Co. (1889) 52 N. J. Eq. (7 Dick.) 58, 28 Atl. 71; Hurst v. Southern R. Co. (1913) 78 S. E. 434, 162 N. C. 368; Stuart v. Bank of Staplehurst (1899) 78 N. W. 298, 57 Neb. 569; Pruitt v. Charlotte Power Co. (1914) 81 S. E. 624, 165 N. C. 416; Lloyd v. Southern Ry. Co. (1914) 81 S. E. 1003, 166 N. C. 24; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co. (1881) 17 W. Va. 812.

But, if a petition for removal is seasonably and formally made, and shows a right to remove, and the requisite bond filed, the state court has no power to do otherwise than to make the necessary order for removal and can proceed no further with the suit. Gordon v. Longest (1842) 16 Pet. 97, 104, 10 L. Ed. 900; Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250; St. Louis & S. F. R. Co. v. Kitchen (Ark. 1911) 136 S. W. 970; Terre Haute & I. R. Co. v. Abend (1881) 9 Ill. App. 304; Western Union Telegraph Co. v. Horack, Id. 309; Indianapolis, B. & W. Ry. Co. v. Risley (1875) 50 Ind. 60; Stoker v. Leavenworth (1836) 7 La. 390; Hyder v. Southern Ry. Co. (1914) 83 S. E. 689, 167 N. C. 584.

Where all the requisites of the act of congress relative to removal of causes from the state to the federal court have been complied with, the state court has no right to deny the removal. Gordon v. Longest (1842) 41 U. S. (16 Pet.) 97, 10 L. Ed. 900; Matthews v. Lyall (C. C. 1853) Fed. Cas. No. 9,285; Hatch v. Chicago, R. I. & P. R. Co. (C. C. 1868) Fed. Cas. No. 6,204; Akerly v. Vilas (C. C. 1869) Fed. Cas. No. 119; Duff v. Hildreth (1903) 67 N. E. 356, 183 Mass. 440; Bell v. Dix (1872) 49 N. Y. 232; O'Malie v. Home Ins. Co. (Pa. 1875) 4 Luz. Leg. Reg. 63; James v. Thurston (1860) 6 R. I. 428; Williams v. Adkins (1869) 46 Tenn. (6 Coldw.) 615.

The right to remove a cause from a state to a federal court under all the acts of congress providing for removals is a right conferred directly by the act of congress, and is not dependent on the volition, or action, or nonaction of a state court. Fisk v. Union Pac. R. Co. (C. C. 1869) Fed. Cas. No. 4,827.

No action of the state court can confer or take away the right to remove a cause from a state to a federal court; the party seeking a removal is to do all that is necessary to secure a removal. Whether the state court makes an order for removal or not, he can perfect the removal by entering in this court, at the proper time, copies of the proper papers, and his appearance and special bail, if necessary. Clippinger v. Missouri Val. Life Ins. Co. (C. C. 1876) Fed. Cas. No. 2,901.

Where no copy of the petition on which an order of removal to a federal court is made, is presented to the trial court, and the order itself fails to show any ground therefor, the district court is not required to surrender its jurisdiction, but may proceed to try the cause. Anglo-American Provision Co. v. Evans (1892) 34 Neb. 44, 51 N. W. 310.

116. Removal on consent.—An action pending in a state court cannot be removed to the circuit court by written stipulation, where there is nothing in the latter or the record to show that, by reason of the subject-matter, or the character of the parties, the latter court can take cognizance of it. People's Bank v. Calhoun (1880) 102 U. S. 256, 26 L. Ed. 101; Katalla Co. v. Rones (1911) 186 Fed. 30, 108 C. C. A. 132, affirming judgment (C. C. 1910) Rones v. Katalla Co., 182 Fed. 946; Kingsbury v. Kingsbury (C. C. 1871) Fed. Cas. No. 7,817; Richardson v. Packwood (La. 1823) 1 Mart. (N. S.) 299.

A cause cannot be removed from a state court by the entry of a consent agreement therefor in a circuit court of the United States, without the filing in the state court of the petition and bond required by the removal act. First Nat. Bank v. Prager (1899) 91 Fed. 689, 34 C. C. A. 51.

A minor is incapable of consenting to a removal either by his guardian ad litem or any other person. Kingsbury v. Kingsbury (C. C. 1871) Fed. Cas. No. 7,817.

117. Proceedings in state court pending proceedings for removal.—The affidavit for removal and bond having been filed in term time, but during a temporary recess of the state court, and the record not having been filed in the federal court, the state court, on a proper case being shown, had jurisdiction to appoint a receiver. First Nat. Bank of Manhattan v. King Wrought Iron Bridge Co. (D. C. 1875) Fed. Cas. No. 4,803.

While a petition filed by defendant for the removal of a cause from a state to the United States court pursuant to the act of 1789 is pending and undetermined in the state court, it is irregular to enter the default of defendant, and, if entered, a motion to set it aside should be granted. Mattoon v. Hinkley (1864) 33 Ill. 208.

No stay of proceedings in a cause in a state court exists under the federal removal statute, unless the removal proceedings are valid, and divest the state court of further jurisdiction and vest it in the federal court. Tierney v. Helvetia Swiss Fire Ins. Co. (1908) 110 N. Y. S. 613, 126 App. Div. 446.

A state court will not resume consideration of a case removed to a United States court, pending the determination of an appeal to the United States supreme court involving the question of the jurisdiction of the United States courts. Bruce v. Gibson (1882) 8 Ohio Dec. 319, 7 Wkly. Law Bul. 94.

Where a petition for removal to the United States court and a bond are filed, and petition is denied, and the party desiring the removal files a transcript of the record in the Circuit Court of the United States, and the party opposing the removal moved in state court to remand said cause, which motion was overruled, the question of removability being a federal question, the state court should withhold further jurisdiction, on the facts being brought to its attention by the objecting party. Bolen-Darnell Coal Co. v. Kirk (Okl. 1909) 106 P. 813.

Though, in case an appeal is taken from the order of the trial court refusing to remove the case to a federal court, the court should not proceed with the case until the appeal is decided, yet, where such removal was properly refused, and in view of special circumstances of the case making it important that an early decision be had, the decree of the trial court will not be reversed for such error. State v. Port Royal & A. Ry. Co. (1895) 45 S. C. 413, 23 S. E. 363.

(C) Effect of removal

118. In general.—Defendant after offering a petition for removal and bond is not bound to plead to the jurisdiction of the state court. Kanouse v. Martin (1853) 56 U. S. (15 How.) 198, 14 L. Ed. 660.

The right under Civ. Code Prac. Ky. § 83, to consolidation or election and objection to splitting of cause of action is waived, where one of the two actions was removed. Land v. Ferro-Concrete Const. Co. (D. C. 1915) 221 Fed. 433.

After removal the state court can take no action in the case, even to the extent of allowing a dismissal by plaintiff, who should apply to the federal court if he desires to dismiss. Southern Ry. Co. v. Dukes (1910) 68 S. E. 332, 7 Ga. App. 784; Chambers v. Illinois Cent. R. Co. (1897) 73 N. W. 593, 104 Iowa, 238.

Where a cause is removed from the state to the federal court, and the parties appear in the latter, proceedings in the state court will be stayed until the delays for an appeal from a judgment against plaintiffs in the federal court have expired. Ferriday v. Middlesex Banking Co. (1907) 43 So. 403, 118 La. 770.

A state court cannot dismiss an action on granting a petition for removal to a federal court, but can merely stay proceedings pending a determination by the federal court of the federal question of jurisdiction. Springs v. Southern Ry. Co. (1902) 41 S. E. 100, 130 N. C. 186.

To a petition in error seeking a review of an order of the court of common pleas overruling a motion to discharge an attachment it is a sufficient answer that the cause in which the attachment was issued has been removed to a federal court. Richardson v. Jenks (1897) (Ohio Sup.) 47 N. E. 49, 56 Ohio St. 422.

The removal of a cause from a state court to a United States circuit court is a removal for trial, merely; and such cause is still pending in the state court, so as to render a plea in abatement to a second action for the same injury, based on the pendency of the first cause, proper, though such cause is alleged in the plea to be pending in the United States circuit court. Hollingsworth v. Southern Ry. Co. (1900) 35 S. E. 739, 57 S. C. 453.

Where a suit had been transferred from a state to a federal court, and plaintiff had taken a nonsuit, a new suit against the same defendant, on the same cause of action, need not be commenced in the federal court, but, in the absence of any attempt to remove the new suit, the state court has jurisdiction of the same. Texas & P. Ry. Co. v. Maddox (1901) 63 S. W. 134, 26 Tex. Civ. App. 297.

119. Proceedings in state court after removal.—Any proceedings in the state court after removal are erroneous and must be vacated. Kern v. Huidekoper (1880) 103 U. S. 485, 26 L. Ed. 354; Baltimore & O. R. Co. v. Koontz (1881) 104 U. S. 5, 14, 15, 26 L. Ed. 643; Matthews v. Lyall (C. C. 1853) Fed. Cas. No. 9,285; U. S. v. Judges (C. C. 1872) Id. 15,501; Sharp v. Gutcher (1881) 74 Ind. 357; Rosenfield v. Adams Exp. Co. (1869) 21 La. Ann. 233; Golden v. Northern Pac. Ry. Co. (1909) 104 P. 549, 39 Mont. 435; Blair v. West Point Mfg. Co. (1878) 7 Neb. 146; Tomson v. Iowa State Traveling Men's Ass'n (Neb. 1907) 110 N. W. 997; National Union Bank v. Dodge (1880) 42 N. J. Law (13 Vroom) 316; Stevens v. Phœnix Ins. Co. (1869) 41 N. Y. 149; Bell v. Dix (1872) 49 N. Y. 232; Shaft v. Phœnix Mut. Life Ins. Co. (1876) 67 N. Y. 544, 23 Am. Rep. 138; Holbrook v. J. J. Quinlan & Co. (Vt. 1911) 80 A. 339; City of Ashland v. Whitcomb (1904) 98 N. W. 531, 120 Wis. 549.

An amendment of the pleadings subsequently allowed in the state court is invalid. Wellman v. Howland Coal & Iron Works (C. C. 1884) 19 Fed. 51; Stanley v. Chicago, R. I. & P. R. Co. (1876) 62 Mo. 508; Winslow v. Collins (1892) 110 N. C. 119, 14 S. E. 512; Southern Pac. Ry. Co. v. Harrison (1889) 73 Tex. 103, 11 S. W. 168.

Even one making a new party defendant, who is a resident of the same state with plaintiff. Probst v. Cowen (C. C. 1898) 91 Fed. 929. So is the appointment of a receiver. Fayette Title & Trust Co. v. Maryland, P. & W. V. Telephone & Telegraph Co. (C. C. 1910) 180 Fed. 928; Erisman v. Pidcock (N. Y. 1881) 62 How. Prac. 327.

The filing of an answer in the state court after the presentation of the petition to remove is ineffective to raise an issue as to the facts relied on for removal, since all pleading attacking the facts so alleged and the federal court's jurisdiction must be filed in and heard by the federal court to which the cause is removed. Phillips v. Western Terra Cotta Co. (C. C. 1909) 174 Fed. 873.

The state court is without jurisdiction to declare that an amended complaint does not state a cause of action against defendant and remit plaintiff to his original complaint, and thereby prevent a removal because the amount involved is not within federal jurisdiction. McCulloch v. Southern Ry. Co. (1908) 62 S. E. 1096, 149 N. C. 305.

Depositions taken after removal before a referee theretofore appointed to take testimony in the case are no part of the record or proceedings therein. Miller v. Tobin (C. C. 1883) 18 Fed. 609, 9 Sawy. 401.

Where, after issuance of a temporary injunction procured by plaintiff's giving bond, the cause was removed to the federal court, and there decided for defendants, the state court to which the cause was never remanded has no jurisdiction to grant a motion for a reference to ascertain the damages sustained by reason of the injunction. Byrne v. Lathrop, Shea & Henwood Co. (1908) 112 N. Y. S. 273, 60 Misc. Rep. 350. Even where the action was discontinued as to certain defendants though the state court had the right, after the removal, to modify its order of discontinuance, so as to preserve the rights of those defendants as to whom the suit was discontinued upon an injunction bond given by plaintiff. Benedict v. Dixon (1881) 47 N. Y. Super. Ct. (15 Jones & S.) 379.

Where an action in which an attachment against land has issued is afterwards removed into the United States circuit court, the state court in which it was pending has no longer any jurisdiction to allow an amendment to the return to the writ of attachment. Hall v. Stevenson (1890) 19 Or. 153, 23 Pac. 887.

A state court has no jurisdiction to grant a motion to consolidate several causes, where the necessary petition and bond were filed for the removal of one of the causes to a federal court, since on the filing of such petition and bond the case is, in law, removed, so as to be docketed in the federal court. Pelzer Mfg. Co. v. Sun Fire Office of London (1892) 36 S. C. 213, 15 S. E. 562.

If the state court proceeds after removal, the final judgment must be reversed, though otherwise sustainable. Stone v. South Carolina (1886) 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; Murphy v. Stone & Webster Engineering Corporation (Mont. 1911) 119 P. 717. And a subsequent order of the federal court remanding the case does not validate the judgment. Texas & P. Ry. Co. v. Davis (1900) 55 S. W. 562, 93 Tex. 378, reversing judgment (Civ. App. 1899) 54 S. W. 381, 93 Tex. 378.

A surety of a contractor to furnish materials for a building, and to build the same, is not bound by judgments obtained on suits for mechanics' liens on the building, if such judgments were rendered after he had removed so much of the controversy as was between himself and the plaintiff to the circuit court, under the provisions of the act of July 27, 1866. State v. Tiedermann (C. C. 1881) 10 Fed. 20.

Where a suit for the wrongful seizure of property has been removed to a federal court, an appeal will lie from a prior order, discharging a sheriff as defendant, and substituting the creditor, though no appeal has been or could be taken from the order removing the case to the federal court. Sunberg v. Babcock (1883) 61 Iowa, 601, 16 N. W. 716.

Where removal of a cause to the United States Circuit Court is denied by a state court, and the decision is affirmed by the appellate and supreme courts of the state, but reversed, on appeal, by the Supreme Court of the United States, and remanded to the state court, with directions to accept the bond tendered, and proceed no further in the case, a judgment in favor of the appellant for costs in the various courts, thereupon rendered by the state court, is a nullity. National Steamship Co. v. Tugman (1897) 82 Fed. 246, 27 C. C. A. 116 (modifying decree [C. C. 1895] 67 Fed. 16); Williams v. Adkins (1869) 46 Tenn. (6 Coldw.) 615. But see Wisecarver & Reynard v. Chicago, R. I. & P. Ry. Co. (Iowa, 1909) 122 N. W. 909, holding that, where judgment for plaintiff was reversed on appeal, on the ground that the lower court erred in denying the removal, the state court had jurisdiction to render judgment for costs which accrued in that court, though the petition for removal filed before the accrual of costs, or the major part of them, should have been sustained. But that until final determination of the case by the federal court no order should be made in the state court regarding the costs which had accrued in that court, and that a motion theretofore made was premature.

Defendant in attachment filed a delivery bond. Thereafter he petitioned

for an order of removal to a federal court, which was granted on condition that defendant furnish a new bond, with leave to withdraw thereupon the indemnifying bond before executed by him in said cause. Held, that such substitution of a bond was not a "further proceeding." Ramsey v. Coolbaugh (1862) 13 Iowa, 164.

Rules made by consent after an order for the removal of a cause, but before it is removed, are not erroneous. Smith v. Greenlee (1832) 14 N. C. 387.

A state court has jurisdiction of an action by an attorney to enforce his lien on the proceeds of a settlement made by the parties to an action brought by him as attorney in a court of the state, though before the settlement the action had been removed to a federal court. Oishei v. Pennsylvania R. Co. (1905) 91 N. Y. S. 1034, 101 App. Div. 473; Id., 92 N. Y. S. 1136, 102 App. Div. 609; Oishei v. Pennsylvania R. Co. (1908) 85 N. E. 1113, 191 N. Y. 544, affirming judgment (1907) 102 N. Y. S. 368, 117 App. Div. 110, and (1907) 102 N. Y. S. 374, 117 App. Div. 119.

A defendant may raise, by answer, the question of a loss of jurisdiction by a state court, by reason of proceedings taken under the laws of the United States for a removal of the cause to the federal courts; and upon proof of proceedings, taken regularly and in strict accordance with said laws, he is entitled to judgment adjudging all subsequent proceedings in the state court void. Shaft v. Phœnix Mut. Life Ins. Co. (1876) 67 N. Y. 544, 23 Am. Rep. 138.

Where a cause is properly removed to the federal court, and disposed of, but not on the merits, plaintiff cannot recommence the action in the state court, though, under like circumstances, he might have done so had the cause not been removed. Baltimore & O. R. Co. v. Fulton (1899) 53 N. E. 265, 59 Ohio St. 575, 44 L. R. A. 520.

Where a cause is removed to the federal court, notwithstanding the refusal of the state court to grant the application for removal, and the party resisting the removal appears in the federal court and submits himself to its jurisdiction, asking that the cause be remanded, and failing in which he appears in the federal court and takes a nonsuit, and consents that a judgment be entered against him, he cannot thereafter prosecute the same suit in the state court, but must commence a new suit in the state court. Texas & P. Ry. Co. v. Huber (Tex. Civ. App. 1906) 95 S. W. 568.

Where a party procures a withdrawal of the petition and bond by the party filing it, and dismisses his action in the state court as to such party, and by agreement with the remaining parties prosecutes his suit in a state court, he cannot, after judgment against him, assert that the jurisdiction of the state court had not been restored. Anderson v. United Realty Co. (1908) 86 N. E. 644, 79 Ohio St. 23.

120. Stay of proceedings in state court.—Where a cause was properly removed to a federal court, but the state court erroneously denied a motion for an order transferring the cause, the federal court had jurisdiction on the application of the party removing the cause to grant an ancillary injunction restraining the opposite party from taking further proceedings in the state court, without violating R. S. § 720, post, § 1242, forbidding a federal court from enjoining proceedings in a state court. McAlister v. Chesapeake & O. Ry. Co. (C. C. A. 1907) 157 Fed. 740; Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250; Alabama Great Southern Ry. Co. v. American Cotton Oil Co. (C. C. A. 1916) 229 Fed. 11; Baltimore & O. R. Co. v. Ford (C. C. 1888) 35 Fed. 170; Frishman v. Insurance Cos. (C. C. 1890) 41 Fed. 449; St. Bernard Min. Co. v. Madisonville Traction Co. (C. C. 1904) 130 Fed. 794 (affirmed Madisonville Traction Co. v. St. Bernard Min. Co. [1905] 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed. 462); Mutual Life Ins. Co. of New York v. Langley (C. C. 1906) 145 Fed. 415; Atlantic Coast Line R. Co. v. Bailey (C. C. 1907) 151 Fed. 891; Chicago, R. I. & P. Ry. Co. v. Stepp (C. C. 1907) 151 Fed. 908; Miller v. Soule (D. C. 1915) 221 Fed. 493; Palmer v. Delaware, L. & W. R. Co. (D. C. 1915) 222 Fed. 461.

If plaintiff persists in proceeding in the state court after removal, defendant should apply to the federal court for the proper mandate staying the proceedings in the state court, and to compel a transcript of the record to be certified to that court; and if plaintiff claims that the cause has not, for any reason, been removed, he may apply to the circuit court to remand the cause. Bell v. Dix (1872) 49 N. Y. 232. And, where defendant omits to apply for a mandate staying proceedings in the state court, that court will not oust itself of jurisdiction, unless such party shows that he has strictly complied with the statute. Vose v. Yulee (1876) 64 N. Y. 449, affirming (1875) 4 Hun, 628, reversed (1878) 99 U. S. 539, 25 L. Ed. 355.

A bill to restrain a state court from proceeding in an action at law after jurisdiction had been removed to the federal court until the question of removability had been determined was maintainable as an auxiliary proceeding to protect the federal court's jurisdiction and to prevent unnecessary, embarrassing, fruitless, and expensive litigation. Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250. And is not subject to the objection that com-

plainant had a plain, adequate, and complete remedy at law in the state court. Missouri, K. & T. Ry. Co. v. Chappell (D. C. 1913) 206 Fed. 688.

But see Fisk v. Union Pac. R. Co. (C. C. 1869) Fed. Cas. No. 4,827, and Penrose v. Penrose (C. C. 1879) Fed. Cas. No. 10,958, holding that such an injunction will not be granted, as such injunction is not required to uphold the jurisdiction of the circuit court over the cause and the proceedings in the state court are null and void.

The injunction will not be granted where no injury is about to result to the moving party, and the question of the right to remove the cause is not finally decided. Frishman v. Insurance Cos. (C. C. 1890) 41 Fed. 449. Nor when the petition for removal has not been presented to or acted upon by the state court. Coker v. Monaghan Mills (C. C. 1901) 110 Fed. 803.

Upon denial of a defendant's petition to remove a cause to the federal court, defendant may either have the judgment of the state Supreme Court reviewed upon an adverse decision by error to the United States Supreme Court or enjoin plaintiff from proceeding further upon final decision of the state Supreme Court until the right of removal is finally determined, so that upon appeal to the state Supreme Court from a decision denying a defendant's right to remove the case to the federal court, where it appears that the petition for removal was correctly denied, the state Supreme Court will not refrain from acting on the appeal on the record made below before the federal court assumed jurisdiction, because that court afterward assumed jurisdiction and denied a motion to remand. Golden v. Northern Pac. Ry. Co. (1909) 104 P. 549, 39 Mont. 435, 34 L. R. A. (N. S.) 1154, 18 Ann. Cas. 886.

When, in a case which is properly removed from a state court into the United States court, a complainant, getting a decree in the state court and sending a transcript of it into another state, sues the defendant on it there, the United States court into which the case is removed may enjoin the complainant from proceeding in any such or other distant court until it hears the case; and if, after hearing, it annuls the decree in the state court, and dismisses, for wanting equity, the bill on which the decree was made, it may make the injunction perpetual. French v. Hay (1874) 89 U. S. (22 Wall.) 250, 22 L. Ed. 857.

After plaintiff removed to the proper United States court a suit in replevin brought in a state court, the latter proceeded to try it and render judgment for a retorno habendo. An action having been brought thereupon in the state court against him and his sureties on the replevin bond, they filed their bill in the circuit court, praying that plaintiff be enjoined from further prosecuting it. Held, that the lower court properly granted the prayer of the bill. Dietzsch v. Huidekoper (1880) 103 U. S. 494, 26 L. Ed. 497.

An action for damages was brought in a state court against an army officer and two other persons for wrongfully arresting and detaining an alleged deserter. The other defendants were defaulted, and the officer filed a petition and bond for removal on the ground that the case arose under the laws of the United States. The state court held the petition insufficient, and was about to proceed with the trial, when the officer applied to the federal court to enjoin further proceedings. Held, that as the right of removal by the single defendant after default of his codefendants was extremely doubtful, and as the question presented was only one of the inconvenience and expense of double litigation, the injunction should be denied without prejudice to a renewal of the application, in the expectation that, on proper representations, the state court would stay proceedings until a decision could be had on a motion to remand. Sinclair v. Pierce (C. C. 1892) 50 Fed. 851.

Where a state court, after denying a petition to remove an action at law to the federal court, continued to exercise jurisdiction notwithstanding the cause was removed by the filing of a certified transcript of the record, whereupon the removing party obtained an injunction restraining plaintiff from proceeding in the state court until the federal court could pass on the issue determinative of its jurisdiction, the determination of such issue should have been by the federal court having jurisdiction of the action at law, and not as a part of the injunction suit. Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250.

Where a defendant has removed a cause, and plaintiff, at the time of appearing in the federal court, does not suggest to it that the time had elapsed for a removal, nor move to remand, but demands a trial, he waives his right to raise the question in answer to defendant's bill to restrain the further prosecution of the suit in the state court. Baltimore & O. R. Co. v. Ford (C. C. 1888) 35 Fed. 170.

121. Unauthorized or improper removal.—Where it does not appear from the petitions and affidavits for removal or from the record that the necessary ground for removal existed at the proper time, the removal is improper, and the state court never loses its jurisdiction. Young v. Ewart (1889) 10 Sup. Ct. 75, 77, 132 U. S. 267, 33 L. Ed. 352; Johnson v. Wells Fargo & Co. (C. C. 1899) 91 Fed. 1; People v. Judge of Superior Court (1879) 1 N. W. 985, 41 Mich. 31; Johnson v. Gelston (1810) 3 N. J. Law (2 Penning.) 668.

An order by a federal judge for removal, based on an affidavit plainly in-

sufficient to authorize it, does not constitute a removal of the cause, and the jurisdiction of the state court is not thereby ousted. Lawson v. Richmond & D. R. Co. (1893) 112 N. C. 390, 17 S. E. 169; Greenlaw v. Williams (1879) 70 Tenn. (2 Lea) 533; Seeligson's Ex'rs v. Texas Transp. Co. (1888) 70 Tex. 198, 7 S. W. 708.

A state court does not lose jurisdiction of a cause by making an order transferring it to the circuit court of the United States, when the latter court refuses to entertain jurisdiction. Thacher v. McWilliams (1872) 47 Ga. 306; Knahtla v. Oregon Short Line & U. N. Ry. Co. (1891) 21 Or. 136, 27 Pac. 91.

A defendant on whose petition a cause is removed into a federal court is estopped to deny the jurisdiction of such court to render judgment against him therein, unless on the ground that the state court was without jurisdiction. Mastin v. Chicago, R. I. & P. Ry. Co. (C. C. 1903) 123 Fed. 827.

Since proceedings instituted by a foreign corporation for the condemnation of land are void, if such proceedings are commenced by a foreign corporation, and it then procures a removal of the cause to the federal court on the ground that it is a citizen and resident of another state, such order of removal confers no jurisdiction on the federal court, and the cause should, on motion, be reinstated in the district court, and dismissed, under Const. Neb. art. 11, § 8, relating to eminent domain, for want of jurisdiction. Trester v. Missouri Pac. Ry. Co. (1888) 23 Neb. 242, 36 N. W. 502.

Where an ex parte order was made for the removal from the state Supreme Court to the federal Circuit Court of an action on judgments, but the order was void because of the failure of the petition for removal to show the citizenship of plaintiff's assignors, and no stay of proceedings having been obtained, the state court did not lose jurisdiction of the case, and properly entered judgment against defendant on default in serving an answer. Tierney v. Helvetia Swiss Fire Ins. Co. (1908) 110 N. Y. S. 613, 126 App. Div. 446.

A state court does not lose jurisdiction of an action for death because the federal court made several orders continuing the case after filing of transcript in that court and dismissed it for want of prosecution, where on the face of the record the case was not a removable one. Iowa Central Ry. Co. v. Bacon (1915) 35 S. Ct. 357, 236 U. S. 305, 59 L. Ed. 591, affirming judgment Bacon v. Iowa Cent. Ry. Co. (1912) 137 N. W. 1011, 157 Iowa, 493.

Where the state court refused to remove a cause to the federal court, defendant's act in having the record copied and filing the same with the clerk of the federal court did not carry the case into the federal court in such sense as to render it a pending action there. Cincinnati, N. O. & T. P. Ry. Co. v. Curd (1905) 89 S. W. 140, 28 Ky. Law Rep. 177.

If the cause is not in fact removable, plaintiff is entitled to have it tried in the state court in the first instance without going in the federal court to have it remanded. State ex rel. Iba v. Mosman (1910) 133 S. W. 38, 231 Mo. 474.

Where a federal court orders the removal of a cause, of which it is manifest a state court has exclusive jurisdiction, it is the duty of the latter court, although the record may have been transmitted in obedience to the order, to insist on its jurisdiction, and any subsequent proceedings in the federal court looking to a determination of the controversy are void. Tucker v. Interstate Life Ass'n (1893) 112 N. C. 796, 17 S. E. 532. But see Durham v. Southern Life Ins. Co. (1876) 46 Tex. 182, holding that, where a cause has been improperly transferred from a state to a federal court, the latter court only has jurisdiction to correct the error.

Mandamus will not lie to compel a judge of the district court to try an action therein begun, but by him ordered to be transferred to the United States court. Such order is not void, even if erroneous, and the act was judicial, not ministerial. Francisco v. Manhattan Ins. Co. (1868) 36 Cal. 283. CONTRA, White v. Holt (1883) 20 W. Va. 792.

The circuit court of appeals may acquire jurisdiction of a cause improperly removed in so far as to determine that fact, and therefore also to award costs. Grand Trunk Ry. Co. v. Twitchell (C. C. 1894) 59 Fed. 727, 8 C. C. A. 237.

Where a cause is erroneously removed from a state court to the Circuit Court of the United States and thereafter remanded to the state court, all orders made in the case by the United States court, except the one remanding the case, are void for want of jurisdiction. Floody v. Chicago, St. P., M. & O. Ry. Co. (1908) 116 N. W. 111, 104 Minn. 132.

Error, if any, in the denial by a state court of an application for removal to the federal court, was immaterial, where the record was subsequently filed in the federal court, which remanded the case. Telluride Power Transmission Co. v. Rio Grande W. R. Co. (1903) 23 Sup. Ct. 178, 184, 187 U. S. 569, 47 L. Ed. 307.

Where a cause is removed to the United States courts, and on appeal is remanded to the state court because improperly removed, no valid proceedings could be taken in the state court during the pendency of the cause in the United States court. Roberts v. Chicago, St. P., M. & O. Ry. Co. (1892) 48 Minn. 521, 51 N. W. 478; Parker's

Adm'r v. Clarkson (1894) 39 W. Va. 184, 19 S. E. 431.

The action of the state court in allowing the application for removal, approving the bond, and declining further proceedings in a nonremovable suit has not the force of an order abating the suit or erasing it from the docket. Winchell v. Coney (1886) 54 Conn. 24, 5 Atl. 354.

If, notwithstanding an attempted removal, the jurisdiction of the federal court has never attached, proceedings of the state court are valid, as though the removal had not been attempted. Hunter v. Colquitt (1884) 73 Ga. 44.

If proceedings on the part of a defendant to remove the cause into the federal court are so imperfect as not, in fact, to effect a removal of the cause, the suit in the state court is not stayed pending the decision of the federal court as to the removal of the cause. National Union Bank v. Dodge (1880) 42 N. J. Law (13 Vroom) 316.

The removal of a cause to federal court for trial after final judgment was a mere nullity, and could not justify the state judge's refusal to hear motion for new trial. Cooney v. Isaacks (Tex. Civ. App. 1915) 173 S. W. 901.

CITED WITHOUT DEFINITE APPLICATION

Providence & N. Y. S. S. Co. v. Hill Mfg. Co. (1883) 3 Sup. Ct. 379, 291, 109 U. S. 578, 27 L. Ed. 1038; Baggs v. Martin (1900) 21 Sup. Ct. 109, 110, 179 U. S. 206, 45 L. Ed. 155; Cochran v. Montgomery County (1905) 26 Sup. Ct. 58, 62, 199 U. S. 260, 50 L. Ed. 182, 4 Ann. Cas. 451; North Muskegon v. Clark (1894) 62 Fed. 694, 698, 10 C. C. A. 591; Beede v. Cheeney (C. C. 1880) 5 Fed. 388, 389; New York I. & P. Co. v. Milburn Gin & Machine Co. (C. C. 1886) 35 Fed. 225, 229; Lookout Mountain R. Co. v. Houston & Co. (C. C. 1887) 32 Fed. 711; Shawnee Nat. Bank v. Missouri, K. & T. Ry. Co. (C. C 1909) 175 Fed. 456; Goins v. Southern Pac. Co. (D. C. 1912) 198 Fed. 432; Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1912) 201 Fed. 932; Rice v. Boston & M. R. R. (D. C. 1913) 203 Fed. 580; Adams v. Puget Sound Traction, Light & Power Co. (D. C. 1913) 207 Fed. 205, 206.

§ 1012. (Jud. Code, § 30.) Suits under grants of land from different States.

If in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

R. S. § 647. Act March 3, 1875, c. 137, § 3, 18 Stat. 470. Act March 3, 1887, c. 373, § 1, 24 Stat. 552. Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 435. Act March 3, 1911, c. 231, § 30, 36 Stat. 1096.

Notes of Decisions

Grant by state as agent of another state.—This section does not apply where defendant claimed land in dispute by virtue of a grant issued by the state of North Carolina while the plaintiff claimed under a grant issued by the state of Tennessee, in which, however, the state of Tennessee did not act by virtue of her sovereignty as a state, but only by virtue of a power duly delegated by North Carolina to perfect titles which, before the separation of the state, were inaccurate and imperfect. Thompson v. Kendrick's Lessee (1818) 6 Tenn. (5 Hayw.) 113.

Parties entitled to remove.—A party claiming land, under a grant from a state in which the suit is pending, can-

not remove the cause to the United States court, because the other party claims under a grant from another state. Shepherd's Heirs v. Young (1824) 17 Ky. (1 T. B. Mon.) 203.

Amount in controversy.—It is not error to refuse a removal, on application by defendant, where the land claimed by plaintiff in his declaration is of greater value than the jurisdictional amount, but that part of it claimed by defendant is not worth that sum. Thompson v. Kendrick's Lessee (1818) 6 Tenn. (5 Hayw.) 113.

—— **Determination of amount.**—It is proper to examine witnesses to ascertain the value of the land in controversy. Thompson v. Kendrick's Lessee (1818) 6 Tenn. (5 Hayw.) 113.

Cited without definite application, Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Stevenson v. Fain (1904) 25 Sup. Ct. 6, 8, 195 U. S. 165, 49 L. Ed. 142.

§ 1013. (Jud. Code, § 31.) Removal of causes against persons denied any civil rights, etc.

When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit, and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court, as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said State court the cause shall proceed therein as if no petition for removal had been filed.

R. S. § 641. Act March 3, 1911, c. 231, § 31, 36 Stat. 1096.

Notes of Decisions

Constitutionality.—Congress, under its power to enforce the provisions of the fourteenth amendment by appropriate legislation, had authority to enact this section, and it is not in conflict with the constitution of the United States. Strauder v. West Virginia (1879) 100 U. S. 303, 25 L. Ed. 664,

reversing State v. Strauder (1877) 11 W. Va. 745, 27 Am. Rep. 606.

Relation to other statutes.—The contention of the plaintiff in a suit brought in a state court that his right to removal was founded on this section, and therefore he had a right under the saving clause of Act March 3, 1887, ante, § 1010, to bring error from an order of the federal court remanding the cause, was idle, since right to removal under this section is limited to a defendant. Cole v. Garland (1901) 107 Fed. 759, 46 C. C. A. 626, writ of error dismissed (1901) 22 Sup. Ct. 933, 183 U. S. 693, 46 L. Ed. 393.

This section does not authorize removal from the state courts in every case in which the federal courts would have original jurisdiction, under § 991, subds. 12–14, ante, but only in the circumstances specified. Gaughan v. Northwestern Fertilizing Co. (C. C. 1873) Fed. Cas. No. 5,272.

Proceedings removable.—An action of trespass brought in a state court against a United States marshal and sureties cannot be removed into the United States circuit court under this section. McKee v. Rains (1869) 10 Wall. 22, 26, 19 L. Ed. 860. Nor can proceedings by the state against a railroad company, under Act Ill. May 2, 1873, entitled "An act to prevent extortion and unjust discrimination in the rates charged the passengers, etc., and to punish the same," where it is insisted by defendant company that such act of the legislature of Illinois impairs the obligation of the contract which the state made with the company by its charter. Illinois v. Chicago & A. R. Co. (C. C. 1874) Fed. Cas. No. 7,006. Nor a suit instituted to try the title of a party to a state office, whereof he is the incumbent, and whereto he was, by the constituted authorities of the state, duly declared to be elected pursuant to her laws, on a petition setting forth that, by reason of bribery and threats, colored persons who were qualified to vote at the election, and who would have voted for him, were deterred from voting, and that the returning board rejected the votes of the parishes where such illegal practices prevailed. Dubuclet v. Louisiana (1880) 103 U. S. 550, 26 L. Ed. 504. Nor proceeding in the nature of quo warranto to try respondent's title to the office of lieutenant governor, on the ground that he had not been a resident of the state for the time required by the constitution. State v. Gleason (1869) 12 Fla. 190.

This section is for the benefit of all of every race whose cases are embraced in its provisions, and not alone for the benefit of the African race. Kentucky v. Powers (1906) 26 Sup. Ct. 387, 397, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 692.

There is no law enabling a colored citizen, when sued by another citizen of the same state, to remove his cause because of local influence or prejudice. This right is only given him when sued by a citizen of another state. Fowlkes v. Fowlkes (C. C. 1875) Fed. Cas. No. 5,005.

A mandamus suit in a state court is not removable to a federal court on a plea or allegation which raises the issue of title to an office. State ex rel. Jumel v. Johnson (1877) 29 La. Ann. 399.

Nature of denial which authorizes removal.—The denial of civil rights on account of which a proceeding may be removed from a state court is a denial of such rights or an inability to enforce them, resulting from the constitution or laws of the state, as construed by its highest court, rather than a denial first made manifest at the trial of the case. Virginia v. Rives (1879) 100 U. S. 313, 318, 25 L. Ed. 667; Gibson v. Mississippi (1896) 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075; Murray v. Louisiana (1896) 163 U. S. 101, 16 Sup. Ct. 990, 41 L. Ed. 87; Commonwealth of Kentucky v. Powers (1906) 26 Sup. Ct. 387, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 692; Texas v. Gaines (C. C. 1874) Fed. Cas. No. 13,847; Ex parte Murray (C. C. 1895) 66 Fed. 297, 298; Cooper v. State (1885) 20 Atl. 986, 64 Md. 40; Fitzgerald v. Allman (1880) 82 N. C. 492.

It is only when some state law, statute, ordinance, regulation, or custom hostile to the rights of the petitioner, and their enforcement, is alleged to exist, that the petitioner is entitled to a removal. Ex parte Wells (C. C. 1878) Fed. Cas. No. 17,386. Not when the exclusion or discrimination is by the officers of the state. Cooper v. State (1885) 64 Md. 40, 20 Atl. 986. Nor in cases of mere local prejudice, for which the case may be removed to another county. Fitzgerald v. Allman (1880) 82 N. C. 492.

The possibility that, during the trial of a particular case, a state court may not respect and enforce the right to the equal protection of the laws, constitutes no ground for removing the prosecution. Gibson v. Mississippi (1896) 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075.

The nonrecognition by the state courts of the validity of a pardon pleaded in bar of a criminal prosecution, even if involving a denial of a right secured to the accused by the federal Constitution or laws, does not make a case for a removal. Commonwealth of Kentucky v. Powers (1906) 26 Sup. Ct. 387, 201 U. S. 1, 50 L. Ed. 633, reversing order (C. C. 1905) 139 Fed. 452.

A suit by a state in one of its own courts against a citizen of another state is not a denial of the equal protection of the laws, within the meaning of the fourteenth amendment of the constitution of the United States, such as to

be removable on that ground. Alabama v. Wolffe (C. C. 1883) 18 Fed. 836.

A removal of an indictment to a federal court on the ground that under the law of the state the petitioner has no right to challenge a grand juror after he has been sworn is unauthorized, as petitioner has an adequate remedy for any alleged grievance in the state courts, and, failing therein, can obtain relief by a writ of error to the United States Supreme Court. State of New Jersey v. Corrigan (C. C. 1905) 139 Fed. 758.

Where petitioner's failure to obtain a trial of an action in a state court resulted from her inability to secure an attorney for that purpose, or because the plaintiff had been able to secure postponements of the trial against defendant's protest, and not because of any command or authority of the state, or any provision of the laws of the state, defendant was not entitled to remove the cause. Scott v. R. D. Kinney & Co. (C. C. 1905) 137 Fed. 1009.

A petition alleging that defendant's attorney is a witness in the cause and is willfully prevented from attending court to testify and try the cause by threatened service of process in other proceedings, presents no cause for removal. Chappell v. Real Estate Pooling Co. of Baltimore City (1899) 42 A. 936, 89 Md. 258.

—— **Race prejudice.**—The existence of prejudice against a colored person on account of his race in the county where he was indicted is no ground for removal. Texas v. Gaines (C. C. 1874) Fed. Cas. No. 13,847 (affirming Gaines v. State [1873] 39 Tex. 606, 2 Woods, 342); Thomas v. State (1877) 58 Ala. 365; Ex parte State (1882) 71 Ala. 363; State v. Smalls (1879) 11 S. C. 262.

A prosecution against a Chinaman for having in his possession a lottery ticket, under a law applying to "any person," cannot be removed on the ground of local prejudice or maladministration of the law. California v. Chue Fan (C. C. 1890) 42 Fed. 865.

—— **Discriminating constitutional provisions or statutes.**—The provision of Mississippi constitution prescribing the qualification of voters of the grand and petit jurors cannot be held to warrant removal of actions to the federal courts on the ground of denying any one their civil rights, even though they may operate as a discrimination against the colored race. Williams v. Mississippi (1898) 18 Sup. Ct. 583, 585, 170 U. S. 213, 42 L. Ed. 1012.

A negro proceeded against in a state court may have his cause removed to a federal court only if by the constitution or laws of the state negroes are discriminated against, so that a fair and impartial trial cannot be had. Dixon v. State (1896) 20 South. 839, 74 Miss. 271.

Where the highest state court, by its decision, had recognized the change in its fundamental law by the constitutional amendments giving certain rights to negroes, the fact that the state laws did not authorize their service on juries will not authorize a removal of a cause against a negro to the federal courts. Neal v. Delaware (1880) 103 U. S. 370, 386, 26 L. Ed. 567.

Where a state court of final resort had held that state laws excluding from grand and petit juries citizens of African descent were unconstitutional and void, it could not be presumed in advance of a trial that the officers summoning the juries would disregard the law so declared, and the case was not removable, on the ground that defendant was denied the equal protection of the laws guarantied him by the fourteenth amendment, because such statutes had not been formally repealed. Bush v. Kentucky (1882) 107 U. S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354.

Whether a particular state statute, which does not discriminate against any class of citizens in respect to their civil rights, is applicable to the prosecution of a crime committed before its passage, is a question, in the first instance, for the determination of the state court; and its right and duty to determine the same cannot be interfered with by removing the prosecution to a federal court, except in those cases which have been made removable by express enactment of congress. Gibson v. Mississippi (1896) 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075.

A proceeding under Iowa statute declaring that the building in which intoxicating liquors is sold may be declared a nuisance is not removable, because the defendant claimed that he had at great expense established the building for a saloon, and that it was fit for no other purpose. Schmidt v. Cobb (1887) 7 Sup. Ct. 1373, 1377, 119 U. S. 286, 30 L. Ed. 321. Nor because citizens of other states have the right to sell such liquors in the state in the original packages. Stommel v. Timbrel (1892) 84 Iowa, 336, 51 N. W. 159.

Neither a prosecution under Pen. Code N. Y. § 351, which provides for the punishment of persons who keep or occupy rooms for recording or registering wagers or selling pools, or who receive, record, or register the money of others bet or wagered, etc., nor one under Laws N. Y. 1895, c. 570, providing that any one who records a wager by some memorandum in his own possession, and does not transfer any memorandum thereof, shall not be punishable criminally, if he makes that record on certain race courses authorized by the act, but shall be punished criminally if he makes it elsewhere, is removable into the federal court. People of State of New York v. Bennett (C. C. 1902) 113 Fed. 515.

2 Gen. St. N. J. p. 1853, § 47, relative to the qualifications of grand jurors,

and providing that persons to be competent must be above the age of 21 and under the age of 65 years, and that no exception to any such juror on account of his age shall be allowed after he has been sworn, does not deny or prevent the enforcement of any rights secured to a person indicted by the grand jury under any law providing for equal civil rights of citizens of the United States, within the meaning of this section. State of New Jersey v. Corrigan (C. C. 1905) 139 Fed. 758.

—— **Discrimination in selection of jurors.**—The fact that, in a county where there were 7,000 colored citizens qualified to serve as jurors, and but 1,500 whites similarly qualified, there had not been, for a number of years, any colored man summoned on the grand jury, and that colored citizens were purposely, on account of their color, excluded from jury service by the officers charged with the selection of jurors, constitutes no ground for the removal, by a colored man, of a criminal prosecution against him, when the state laws do not provide for any such discrimination. Smith v. Mississippi (1896) 162 U. S. 592, 16 Sup. Ct. 900, 40 L. Ed. 1082; Gibson v. Same (1896) 162 U. S. 565, 16 Sup. Ct. 904, 40 L. Ed. 1075, affirming (Miss. 1895) 17 South. 892. But see Ex parte Reynolds (C. C. 1878) Fed. Cas. No. 11,720, holding that the writ will issue where colored prisoners have been tried capitally before a state court by a jury exclusively white.

The denial in summoning or impaneling jurors, of any equal civil rights secured to an accused by the federal Constitution or laws, does not, unless authorized by the state Constitution or laws, as interpreted by its highest court, give the right to remove a criminal prosecution. Commonwealth of Kentucky v. Powers (1906) 26 Sup. Ct. 387, 201 U. S. 1, 50 L. Ed. 633, reversing order (C. C. 1905) 139 Fed. 452.

A case where two colored men were jointly indicted for murder, and moved that the venire be modified so as to allow one-third of the jury to be composed of colored men, which motion was overruled on the ground that the court had no authority to change the venire, it appearing that it had been regularly drawn, is not removable. Virginia v. Rives (1879) 100 U. S. 313, 25 L. Ed. 667.

It is not ground for removal to the federal court of a prosecution against a negro that the indictment was found by a grand jury from which negroes were excluded because of their race. Tillman v. State (Ark. 1915) 181 S. W. 890.

Where the grand jury which returned the indictment against defendant, who was a negro, and the trial jury which returned the verdict against him, were composed exclusively of white persons, he was not deprived of his equal rights, so as to make the cause removable to the United States court. Bush v. Commonwealth (1882) 80 Ky. 244, 3 Ky. Law Rep. 740.

Ky. St. § 2253 (Russell's St. § 3076), provides that no person shall be a competent juror for the trial of a criminal case, unless he be a citizen at least 21 years of age, a housekeeper, sober, temperate, discreet, and of good demeanor. Section 2254 (section 3077) provides that juries de medietate linguæ may be directed by the court. Held, that it did not appear as a matter of law that, because section 2253 required jurymen in criminal cases to be citizens, the court had no power to grant an alien charged with a criminal offense a jury consisting of six citizens and six aliens of his own nationality, or that the state courts would so construe such sections as to deny an alien such right; and hence an alien charged with a crime committed in Kentucky was not entitled to have the prosecution removed to the federal courts because he could not secure a jury de medietate linguæ in the state courts. Commonwealth of Kentucky v. Wendling (C. C. 1910) 182 Fed. 140.

Petition.—A petition for removal which alleges that a state law for the selection of jurors which is fair and constitutional upon its face will be so administered as to secure a jury inimical to the petitioner, and that there is a general prejudice against him in the minds of the court, jurors, officers and people, is not sufficient. Ex parte Wells (C. C. 1878) Fed. Cas. No. 17,386.

A petition for removal which shows only that a prosecution is pending against a citizen of the state for selling within the state intoxicating liquors, manufactured in and shipped from other states, and sold by drawing them from the original packages, although citizens of other states have the right to sell such liquors within the state in the original packages, does not on its face show a denial of or inability to enforce any right mentioned in the statute, and the filing of such petition does not deprive the state court of jurisdiction; such cases are not removable in anticipation that the state court may deny the rights mentioned. Stommel v. Timbrel (1892) 84 Iowa, 336, 51 N. W. 159.

A defendant under prosecution in a state court is not entitled to have the cause removed on a petition alleging the existence of a prejudice against him on account of his race and color and other causes, and alleging, further, that he is denied and cannot enforce in the judicial tribunals of the state where he is being tried the rights secured to him by the laws of the United States. State v. Smalls (1879) 11 S. C. 262.

Effect of removal.—The removal of a criminal prosecution on the ground that

the defendant is denied the equal civil rights of citizens secured to him by the constitution and laws of the United States does not operate to absolutely devest the state court of all jurisdiction of the offense, and after that indictment is quashed by the federal court it remains for the state court to determine whether the accused shall be again indicted or the prosecution abandoned. Bush v. Commonwealth (1882) 107 U. S. 110, 1 Sup. Ct. 625, 27 L. Ed. 354.

Where it appears from the affidavit of a colored person charged with a capital offense that he cannot have the full benefit of the laws to the extent enjoyed by white citizens, and that his rights cannot be enforced in the state courts, a state court can proceed no further in the prosecution until certified of the action of the circuit court of the United States. State v. Dunlap (1871) 65 N. C. 491, 6 Am. Rep. 746.

Cited without definite application, Nashville v. Cooper (1867) 6 Wall. 247, 251, 254, 18 L. Ed. 851; Beard v. Burts (1877) 95 U. S. 434, 437, 24 L. Ed. 485; Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Tennessee v. Union & Planters' Bank (1894) 14 Sup. Ct. 654, 657, 152 U. S. 454, 38 L. Ed. 511; Hunt v. U. S. (1897) 17 Sup. Ct. 609, 610, 166 U. S. 424, 41 L. Ed. 1063; Capital Traction Co. v. Hof (1899) 19 Sup. Ct. 580, 584, 174 U. S. 1, 43 L. Ed. 873; Barney v. New York (1904) 24 Sup. Ct. 502, 193 U. S. 430, 48 L. Ed. 737; Goddard v. Mailler (C. C. 1897) 80 Fed. 422, 423; In re Barnesville & M. Ry. Co. (D. C. 1880) 4 Fed. 10, 12.

§ 1014. (Jud. Code, § 32.) When petitioner is in actual custody of State court.

When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said district court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said district court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ.

R. S. § 642. Act March 3, 1911, c. 231, § 32, 36 Stat. 1097.

Notes of Decisions

Office of writ.—The writ of habeas corpus is not required to effect the removal; it is issued to bring the defendant before the federal court and to notify the state court that no further proceedings may be had therein. Abranches v. Schell (C. C. 1859) Fed. Cas. No. 21.

Cited without definite application, Nashville v. Cooper (1867) 6 Wall. 247, 251, 254, 18 L. Ed. 851; Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Tennessee v. Union & Planters' Bank (1894) 14 Sup. Ct. 654, 657, 152 U. S. 454, 38 L. Ed. 511; Capital Traction Co. v. Hof (1899) 19 Sup. Ct. 580, 584, 174 U. S. 1, 43 L. Ed. 873; Kentucky v. Powers (1906) 26 Sup. Ct. 387, 393, 201 U. S. 1, 50 L. Ed. 633, 5 Ann. Cas. 692; Goddard v. Mailler (C. C. 1897) 80 Fed. 422, 423; Kentucky v. Powers (C. C. 1905) 139 Fed. 452.

§ 1015. (Jud. Code, § 33, as amended, Act Aug. 23, 1916, c. 399.) Suits and prosecutions against revenue officers, etc.

When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law, or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House, the said suit or prosecution may at any time before the trial or final hearing there-

of be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced or of the United States stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpœna, petition, or any other process except capias, the clerk of the district court shall issue a writ of certiorari to the State court requiring it to send to the district court the record and the proceedings in the cause. When it is commenced by capias or by any other similar form of proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court or left at his office by the marshal of the district or his deputy or by some other person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed de novo and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non prosequitur may be rendered against him, with costs for the defendant.

R. S. § 643. Act March 3, 1875, c. 130, § 8, 18 Stat. 401. Act Feb. 8, 1894, c. 25, § 1, 28 Stat. 36. Act March 3, 1911, c. 231, § 33, 36 Stat. 1097. Act Aug. 23, 1916, c. 399, 39 Stat.

This section, as enacted in the Judicial Code, was amended by Act Aug. 23, 1916, c. 399, cited above, to read as set forth above. Said amendment consisted in substituting for the phrase "or when any suit is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House," the following: "or against any officer of the courts of the United States for or on account of any act done under color of his office or in the performance of his duties as such officer, or when any civil suit or criminal prosecution is commenced against any person for or on account of anything done by him while an officer of either House of Congress in the discharge of his official duty in executing any order of such House."

Notes of Decisions

1. Decisions under prior statute allowing removal of suits and prosecutions against officers acting under the laws relating to the elective franchise.
2. Decisions as to the effect and relation of the various acts for removal of suits and prosecutions against officers acting under the revenue laws.

3. Constitutionality.
4. Construction in general.
5. Suits or prosecutions removable.
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14. Petition.
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16. Certiorari and habeas corpus cum causa.
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18. Effect of removal.
19. Procedure after removal.

1. Decisions under prior statute allowing removal of suits and prosecutions against officers acting under the laws relating to the elective franchise.—Ex parte Anderson (C. C. 1878) Fed. Cas. No. 349; State of Illinois v. Fletcher (C. C. 1884) 22 Fed. 776.

2. Decisions as to the effect and relation of the various acts for removal of suits and prosecutions against officers acting under the revenue laws.—City of Philadelphia v. Collector (1866) 72 U. S. (5 Wall.) 720, 18 L. Ed. 614; Venable v. Richards (1881) 105 U. S. 636, 26 L. Ed. 1196 (affirming [C. C. 1876] Fed. Cas. No. 16,913); Peyton v. Bliss (C. C. 1868) Fed. Cas. No. 11,055; Salt Co. of Onondaga v. Wilkinson (C. C. 1870) Fed. Cas. No. 12,269; Ex parte Carson (C. C. 1873) Fed. Cas. No. 2,459.

3. Constitutionality.—This section is constitutional. Tennessee v. Davis (1879) 100 U. S. 257, 25 L. Ed. 648; Findley v. Satterfield (C. C. 1877) Fed. Cas. No. 4,792; State v. Hoskins (1877) 77 N. C. 530.

4. Construction in general.—This act was passed in consequence of an attempt by one of the states to make penal the collection by United States officers within the state of duties under the tariff laws. Tennessee v. Davis (1879) 100 U. S. 257, 25 L. Ed. 648; People's United States Bank v. Goodwin (C. C. 1908) 162 Fed. 937.

Its purpose is to protect the revenue officers of the government in the line of their official duties, and those who are employed to act under them in the performance of such duties; but, further than providing this necessary protection to the administration of its revenues, the federal government has no interest in the business affairs of the people incidentally brought within range of its tariff system. The statute must be interpreted with reference to its manifest spirit and general purpose, and a word or phrase should not be extended beyond its proper relation to give jurisdiction where the jurisdiction does not appear to have been intended. Johnson v. Wells, Fargo & Co. (C. C. 1899) 98 Fed. 3, 8; Virginia v. De Hart (C. C. 1902) 119 Fed. 626, 629.

Jurisdiction of an action to recover back duties exacted under the Foraker Act of April 12, 1900, and paid under protest, upon goods brought from Porto Rico, is given to a federal court of the United States by R. S. § 629, subd. 4, ante, § 991 (5), vesting it with jurisdiction "of all suits at law or equity arising under any act providing for a revenue from imports or tonnage," when construed with this section. Downes v. Bidwell (1901) 21 S. Ct. 770, 182 U. S. 244, 45 L. Ed. 1088.

Under Act March 3, 1887, ante, § 1010, forbidding appeal or error from an order remanding a cause from a federal to a state court, and which originally provided that nothing therein contained should be held to repeal or affect any jurisdiction or right mentioned in this section, the contention of the plaintiff in a suit brought in a state court that his right to removal was founded on this section, and therefore he had a right to bring error from an order of the federal court remanding the cause, was idle, since right to removal under this section is limited to a defendant. Cole v. Garland (1901) 107 Fed. 759, 46 C. C. A. 626.

This section seems to indicate the classes of cases thought to come within the designation of cases arising under the revenue laws. Eaton v. Calhoun (C. C. 1880) 15 Fed. 155, 157.

The section must be liberally construed as part of the revenue system. North Carolina v. Sullivan (C. C. 1892) 50 Fed. 593.

Section 3 of Act March 2, 1833, furnished the original text from which R. S. § 643, incorporated in this section, was drawn. As to the portion of said original section embraced in it, section 643 became the law in force, as provided by R. S. § 5596, post, § 10593, and resort can be had to the original act only to interpret anything left in doubt by the language of the revisers. Johnson v. Wells, Fargo & Co. (C. C. 1899) 98 Fed. 3, 7.

This section must be read in connection with section 1017, post. Whether congress intended that it or section 1584, post, should govern the practice in removals is open to doubt, but the issues should, it seems, be submitted to the jury, subject to the right of the court to direct a verdict when proper. Virginia v. Felts (C. C. 1904) 133 Fed. 85.

This provision does not extend to all government officers, and had its origin in a revenue law within the constitutional limitation. Twin Falls Canal Co. v. Foote (C. C. 1911) 192 Fed. 583.

5. Suits or prosecutions removable.—This section provides for removal of criminal prosecutions for offenses against state laws when a claim of federal right or authority arises. Tennessee v. Davis (1879) 100 U. S. 257, 262,

25 L. Ed. 648. It applies to every case of a federal revenue officer indicted in a state court for an act done under color of the United States revenue laws, but charged to be in violation of the criminal law of the state, and are not restricted to cases where an attempt is made by a state legislature to nullify a law of the United States. Findley v. Satterfield (C. C. 1877) Fed. Cas. No. 4,792.

Where an informer sues the collector of a port in a state court, for a part of the proceeds of goods condemned as forfeited for a breach of the revenue laws, the collector may remove the case. Van Zandt v. Maxwell (C. C. 1852) Fed. Cas. No. 16,884.

The collector may, if served with a foreign attachment, remove the suit. Fischer v. Daudistal (C. C. 1881) 9 Fed. 145.

A rule upon a federal internal revenue collector, granted by a state court to show cause why an attachment should not issue against him for contempt of the process of such court is a "civil suit" removable into the United States court under this section. McCullough v. Large (C. C. 1884) 20 Fed. 309, 310.

This section does not apply to suits brought against such officers in the territories. (1871) 13 Op. Atty. Gen. 584.

6. Commencement of prosecution.—A prosecution is not "commenced," so as to be removable, when the officer is merely held under a warrant of arrest for preliminary examination before a magistrate. Virginia v. Paul (1893) 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386, overruling Georgia v. Port (C. C. 1880) 3 Fed. 117, 4 Woods, 513; Same v. Bolton (C. C. 1882) 11 Fed. 217; North Carolina v. Kirkpatrick (C. C. 1890) 42 Fed. 689.

But the rule that a prosecution has not been commenced in a state court until accused has been indicted does not apply where the offense can be tried without an indictment. Commonwealth of Virginia v. Bingham (C. C. 1898) 88 Fed. 561; Virginia v. Felts (C. C. 1904) 133 Fed. 85.

7. Officers entitled to remove suits or prosecutions.—Although a marshal or deputy marshal is not an officer appointed under a revenue law, when engaged officially in lawful attempts to enforce a revenue law, he is an officer acting under that law. Davis v. South Carolina (1882) 2 Sup. Ct. 636, 107 U. S. 597, 27 L. Ed. 574.

This section does not apply to commissioners appointed by the federal circuit court and acting as examining and committing magistrates for offenses against the laws of the United States. Benchley v. Gilbert (C. C. 1871) Fed. Cas. No. 1,291.

8. "Revenue laws" construed.—Any law providing for the assessment and collection of a tax to defray the expenses of the government is a revenue law. Legislation designed to effect this end is commonly referred to under the general term "revenue measures." Any definition of a government revenue must include all the money raised by any form of taxation. Peyton v. Bliss (C. C. 1868) Fed. Cas. No. 11,055.

Post office laws are "revenue laws." Warner v. Fowler (C. C. 1859) Fed. Cas. No. 17,182. So are acts imposing direct taxes on the states. Peyton v. Bliss (C. C. 1868) Fed. Cas. No. 11,055. But the reclamation act is not. Twin Falls Canal Co. v. Foote (C. C. 1911) 192 Fed. 583; City of Stanfield v. Umatilla River Water Users' Ass'n (C. C. 1911) 192 Fed. 596.

9. Acts under or by authority of revenue laws.—The language of the statute does not authorize a removal of every prosecution against a revenue officer; but the words "under color of" and "right of authority claimed" show clearly that the act for which the prosecution is commenced need not be one done strictly in pursuance of a federal revenue statute in order to justify removal. Virginia v. De Hart (D. C. 1902) 119 Fed. 626, 629.

Suits against revenue officers of the United States to recover sums which it is alleged they illegally collected may be removed. Venable v. Richards (C. C. 1876) Fed. Cas. No. 16,913, affirmed (1881) 105 U. S. 636, 26 L. Ed. 1196. So is an indictment for murder committed by a noncommissioned officer in the United States army while detailed as a guard in aid of the marshal, and acting as one of his posse comitatus, in arresting an illicit distiller, and the forfeiture of his recognizance by the state court after removal is void and of no effect. Davis v. State (1882) 107 U. S. 597, 2 Sup. Ct. 636, 27 L. Ed. 574.

Although Act June 10, 1880, § 10, post, § 5667, requiring a collector of customs, when notified of a carrier's lien, to give the carrier reasonable notice of delivery to the consignee, does not authorize the collector to receive payment of the carrier's lien for freight, yet, in a suit by a carrier against a collector to recover the amount so paid, the act of receiving payment is one done "under color of office," and, as such, removable. Cleveland, C., C. & I. R. Co. v. McClung (1886) 119 U. S. 454, 7 Sup. Ct. 262, 30 L. Ed. 465, affirming judgment (C. C. 1883) 15 Fed. 905.

A corporation, in the performance of a contract made with the secretary of the treasury for the building of an addition to a post office authorized by an act of congress, is a person acting by authority of a revenue officer of the United States, given under color of his office; and a suit in a state court against the corporation to enjoin the building of such addition is removable. Ward v. Congress Const. Co. (1900) 99 Fed. 598, 39 C. C. A. 669.

A suit against a United States officer to recover the value of bonds issued to a state by the United States, and which, having been allowed by the plaintiff to go into defendant's hands, were retained by him on the ground that they were unlawfully put into circulation as against the state, cannot be removed. Victor v. Cisco (C. C. 1862) Fed. Cas. No. 16,934. But an action on the case, begun in a state court, to recover damages for alleged slanderous words spoken by a United States collector of customs while in the discharge of his official duty, and explanatory of it, can. Buttner v. Miller (C. C. 1871) Fed. Cas. No. 2,254.

A summary proceeding by a landlord to recover premises used as a bonded warehouse, to which the collector of internal revenue and a United States storekeeper are made parties, and described as undertenants holding over, is removable. Galatin v. Sherman (C. C. 1896) 77 Fed. 337.

A cause involving the question whether an express company or its customer must furnish the stamp required by the war revenue act of 1898 to be affixed to a receipt given by the company is one arising under a law providing internal revenue, within R. S. § 629, and is removable. Crawford v. Hubbell (C. C. 1898) 89 Fed. 1. CONTRA, Johnson v. Wells, Fargo & Co. (C. C. 1899) 98 Fed. 3.

A United States marshal, sued for trover in a state court by a citizen of the same state for the seizure of property under process issued by a federal district court in a private cause, cannot have such action removed into the federal court under this section, but it can only be removed on petition filed in the state court, and upon some ground provided for by the general removal act. Mayo v. Dockery (C. C. 1901) 108 Fed. 897.

A criminal prosecution for an assault committed by defendant, in repelling an attack made upon him while acting as a posseman under appointment by a deputy United States marshal, and while assisting in an effort to find and arrest a person charged with a violation of the revenue laws, is removable. Commonwealth of Virginia v. De Hart (C. C. 1902) 119 Fed. 626.

To render an action against an officer of the United States removable under this section, the acts which constitute the cause of action must have some rational connection with official duties under a "revenue law," and in some way affect the revenue of the government, and such fact must appear on the face of the complaint in the action or the petition for the writ. An action for libel against the Assistant Attorney General for the Post Office Department and an inspector of such department, based on the promulgation by them of a fraud order against the plaintiff, does not meet such requirements and is not removable under said section. People's United States Bank v. Goodwin (C. C. 1908) 162 Fed. 937.

A deputy United States marshal, having been informed that two men were selling whisky in the neighborhood in violation of the revenue laws, met them a few minutes later in the highway, carrying a keg. He asked what was in the keg, and they replied, "A little whisky." One of them said, "Who the hell are you?" and he replied, "A deputy marshal." The former then said that no deputy marshal should arrest him, and drew his pistol, whereupon the deputy shot and killed him. Held, that the deputy was justified in presuming that they had the whisky for the purpose of selling the same in violation of the revenue laws; and that whether it was his intention to arrest them, or to make further inquiries as to whether they had been engaged in violating the revenue laws, he was acting within the scope of his authority; and, a prosecution having been commenced against him in the state court for murder, he was entitled to have the same removed to the federal court. Carico v. Wilmore (D. C. 1892) 51 Fed. 196.

An indictment for being a common seller of intoxicating liquors, or one for keeping and maintaining a tenement used for the illegal sale and keeping of intoxicating liquors by one holding a license to sell such liquors under the internal revenue laws of the United States, cannot be removed. State v. Elder (1866) 54 Me. 381. Nor can an indictment under Gen. St. Mass. c. 87, for maintaining a tenement used for the illegal sale and keeping of intoxicating liquors by one holding a license to sell such liquors under the internal revenue laws of the United States. Commonwealth v. Casey (1866) 94 Mass. (12 Allen) 214.

10. Original jurisdiction of federal court.—Though suits to recover back moneys illegally exacted as internal revenue taxes cannot, under existing laws, be commenced in the circuit courts, except where the taxpayer and the assessor or collector sued are citizens of different states, and such suits under other circumstances must be commenced in the state courts, defendant, if he sees fit, and seasonably takes the proper steps, may remove the case into the circuit court for trial. Collector v. Hubbard (1870) 79 U. S. (12 Wall.) 1, 20 L. Ed. 272; Cincinnati Brewing Co. v. Bettman (C. C. 1900) 102 Fed. 16. CONTRA, State v. Davis (1879) 12 S. C. 528.

11. Waiver of right to remove.—Where a state court proceeds with a prosecution against a United States marshal after he has effected a removal to a federal court, he does not lose his right of trial in the latter court by defending in the former. North Caro-

lina v. Sullivan (C. C. 1892) 50 Fed. 593.

12. Amount in controversy.—This section gives the right of removal "in any case" falling within the particular class of cases provided for, without any regard to the amount in controversy in the suit. Hence no question can be raised in the circuit court, based upon the trifling value of the property, for the taking of which the suit was commenced. Wood v. Matthews (C. C. 1852) Fed. Cas. No. 17,955, 23 Vt. 735.

13. Time and place for filing petition.—In the Western district of Virginia, where the federal judge is judge both of the district and circuit court and both courts are held at the same time and place, and have the same clerk, a deputy United States marshal arrested for murder on a warrant from a justice of the peace, before his preliminary examination before such justice, filed in the district court a petition addressed to the judge of the circuit court, alleging his arrest, that he was then confined in jail "awaiting trial before said justice upon the said charge of murder," and that the killing was done in self-defense, while acting under the revenue laws. The petition prayed a removal into the circuit court, and for a writ of habeas corpus cum causa. The federal judge thereupon made an order entitled in the district court, awarding a writ of habeas corpus in common form. Pending an adjournment of the hearing thereon, the state grand jury for the proper county found an indictment against the petitioner for murder, which was exhibited to the federal court by an amendment to the jailer's return. After the hearing an order was entered in the district court, simply requiring the petitioner to be recognized for his appearance before the federal circuit court "to answer the indictment found against him by a grand jury of the county court of Smyth county, Virginia." Held, that these proceedings were not in compliance with this section. Virginia v. Paul (1893) 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386.

The petition is not required to be filed at the place where the next session of the Circuit Court is to be held after indictment, where there are several places of holding court in the district, but it may be filed, at any time before trial, at the place where the next term thereafter is to be held. And such requirement is directory only, and the filing of the petition in the clerk's office at a different place is not ground for remanding the cause to the state court. State of Virginia v. Felts (C. C. 1904) 133 Fed. 85.

14. Petition.—A petition, duly verified, alleging that, though the petitioner had been indicted for murder, no murder had been committed; that the killing was done in necessary self-defense; that the petitioner was and still is a United States revenue officer; that the act was committed while engaged in the discharge of his duties as such officer in attempting to seize an illicit distillery; and that, while so doing, he was assaulted and fired upon, and in defense of his life returned the fire—authorizes the removal of the prosecution to the United States court. Tennessee v. Davis (1879) 100 U. S. 257, 25 L. Ed. 648.

An application must state facts sufficient to enable the court to decide whether the case is one within the provisions of the act. It is not enough that the petitioner alleges in general terms that he intends to rely in his defense to the suit upon the revenue laws of the United States. Salem & L. R. Co. v. Boston & L. R. Co. (C. C. 1857) Fed. Cas. No. 12,249.

The petition need not state the cause of action or the kind of process, but is sufficient where it appears therefrom that the defendant was sued on account of acts done by him under the revenue laws of the United States. Abranches v. Schell (C. C. 1859) Fed. Cas. No. 21.

The petition for removal must be verified by affidavit. Sweeney v. Coffin (C. C. 1870) Fed. Cas. No. 13,686.

15. Determination of right to removal.—The fact that under the act of congress the certiorari from the United States court in a case against a United States revenue officer is issued on an ex parte application, without any judicial determination that the cause is one which comes within the statute, does not make it the duty of the state court to proceed and try the cause so as to determine that question. State v. Circuit Judge (1873) 33 Wis. 127.

16. Certiorari and habeas corpus cum causa.—The writ of certiorari provided for in this section is not the common-law writ, but a statutory writ, performing the office and function of an order of removal; and the jurisdiction of the federal court to issue the writ and entertain the suit after such removal is dependent entirely upon the provisions of the statute as applied to the facts of the case. Johnson v. Wells Fargo & Co. (C. C. 1899) 98 Fed. 3, 5.

Where a prosecution against a revenue officer has been commenced by capias or other process of arrest, the federal court, on the filing of the petition for removal, issues a writ of habeas corpus cum causa, which, in case the defendant has given bail, may be addressed to the marshal, a duplicate to be served upon the clerk of the state court. It is the duty of the petitioner, and not of the state, to procure the indictment and proceedings of the state court; and where the clerk has been tendered his proper fees therefor, and fails or refuses to furnish a certified

copy of the record, a writ of certiorari should issue from the federal court, or the record may be supplied by affidavit, as provided in R. S. § 645, post, § 1017, which course may also be taken when the petitioner is unable to pay the clerk's fees. State of Virginia v. Felts (C. C. 1904) 133 Fed. 85.

A writ of certiorari was properly issued when the accused officer had been released on bail, and had made no application for the writ of habeas corpus cum causa. North Carolina v. Sullivan (C. C. 1892) 50 Fed. 593.

When a petition for the removal of a prosecution against a federal revenue officer to a federal court is filed during vacation in the office of the clerk of the federal court, the proper writ, such as the issuance of a writ of certiorari or habeas corpus cum causa, may be issued by his deputy without showing upon its face that the clerk has held the petition to be sufficient. North Carolina v. Sullivan (C. C. 1892) 50 Fed. 593, 599. CONTRA, State v. Sullivan (1892) 110 N. C. 513, 14 S. E. 796.

A writ of certiorari addressed to the marshal of the district, instead of to the state court, commanding the marshal to make known to the clerk of the state court the removal of the cause, and that such court is required to send a transcript of the record to the circuit court, is a sufficient compliance with the statute. North Carolina v. Sullivan (C. C. 1892) 50 Fed. 593. CONTRA, State v. Sullivan (1892) 110 N. C. 513, 14 S. E. 796.

17. Transfer of jurisdiction.—The prosecution which was commenced in the state court, after the filing of the petition, by the finding of an indictment, was not removed by an order holding the petitioner to trial in the federal court; for, in cases of removal under this section, the jurisdiction of the federal court depends entirely on the statements made in the verified petition, and it is not accomplished until the state court receives notice from the clerk of the federal court of the petition filed in his office. Virginia v. Paul (1893) 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386.

The jurisdiction of the circuit court attaches upon the filing therein of a proper petition; and, upon the delivery of the prescribed process issued to the state court, the jurisdiction of the latter court is wholly devested. McCullough v. Large (C. C. 1884) 20 Fed. 309.

The removal of a prosecution against a United States revenue officer from a state to a federal court is effected, and complete jurisdiction acquired, immediately upon the finding of a proper petition therefor in the clerk's office of the federal court; and the subsequent issuance of a writ of certiorari or habeas corpus cum causa is but the use of auxiliary process and the performance of a ministerial duty. North Carolina v. Sullivan (C. C. 1892) 50 Fed. 593.

18. Effect of removal.—The forfeiture of the officer's recognizance by the state court after removal is void and of no effect. Davis v. South Carolina (1883) 107 U. S. 597, 2 Sup. Ct. 636, 27 L. Ed. 574. But see State v. Davis (1879) 12 S. C. 528, holding that the jurisdiction of the state court over a prisoner charged with a crime against the laws of the state is not affected by the removal of the prisoner from the custody of the court by virtue of the writ of habeas corpus issued by the United States judge. The writ of habeas corpus under this section is not an original remediable writ, but merely an auxiliary process to bring the person of the petitioner within the jurisdiction of the United States court.

Orders of the state court subsequent to the removal are coram non judice and void. McCullough v. Large (C. C. 1884) 20 Fed. 309; North Carolina v. Sullivan (C. C. 1892) 50 Fed. 593.

An indictment found in a state court after the removal of the cause to the United States circuit court is null; and where, upon habeas corpus cum causa, it appears that the prisoners were in the discharge of their duty as revenue officers of the United States when the act was committed, and were without fault, they will be discharged. North Carolina v. Kirkpatrick (C. C. 1890) 42 Fed. 689.

A writ of certiorari from the United States circuit court for the Western district of Wisconsin, filed with the clerk of the circuit court for Rock county, in that state, stated that a certain action of ejectment commenced in said Rock county circuit court was for and on account of certain rights, authority, and title set up and claimed by a collector of internal revenue in and for the Second district of Wisconsin, under the provisions of the revenue laws of the United States, and for and on account of rights, title, and authority set up and claimed by defendants under such revenue laws, and it commanded that the records and proceedings be certified and removed to the circuit court of the United States. Held, that the Rock county circuit court, on the filing of this writ, properly stayed all proceedings in the action. State v. Circuit Judge (1873) 33 Wis. 127.

19. Procedure after removal.—Under this section whether the property taken by defendant was so taken in the exercise of his functions as an officer of the customs, under the revenue laws, is a matter of fact belonging to the merits of the case, and cannot be raised on a motion to dismiss the suit. Wood v. Matthews (C. C. 1852) Fed. Cas. No. 17,955.

On the trial of a defendant who has removed the case into the federal court no procedure is prescribed by the stat-

ute; but, the offense charged being against the state law, and prosecuted by the state, the state practice should be followed in substantive matters, at least in felony cases, such as in the impaneling and charging of the jury, the number of challenges allowed, in determining the competency of witnesses, and in confining the jurors during the trial, where that is required by the law of the state. And, where the defendant is convicted and sentenced in the federal court in accordance with the state law, either to be executed or imprisoned, he should be delivered to the proper officer of the state for the execution of the sentence; if a fine is imposed, which is paid, it should be transmitted to the clerk of the court from which the cause was removed. State of Virginia v. Felts (C. C. 1904) 133 Fed. 85.

Cited without definite application, Nashville v. Cooper (1867) 6 Wall. 247, 254, 18 L. Ed. 851; Hornthall v. Keary (1869) 9 Wall. 560, 561, 19 L. Ed. 560; Home L. Ins. Co. v. Dunn (1873) 19 Wall. 214, 227, 22 L. Ed. 68; Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; U. S. v. Lee (1882) 1 Sup. Ct. 240, 264, 106 U. S. 196, 27 L. Ed. 171; Cunningham v. Neagle (1890) 10 Sup. Ct. 658, 679, 135 U. S. 1, 34 L. Ed. 551 (dissenting opinion); Tennessee v. Union & Planters' Bank (1894) 14 Sup. Ct. 654, 657, 52 U. S. 454, 38 L. Ed. 511; Hunt v. U. S. (1897) 17 Sup. Ct. 609, 610, 166 U. S. 424, 41 L. Ed. 1063; In re Strauss (1905) 25 Sup. Ct. 535, 537, 197 U. S. 324, 49 L. Ed. 774; American Freehold Land Mortg. Co. v. Thomas (1896) 71 Fed. 782, 786, 18 C. C. A. 327; In re Neagle (C. C. 1889) 39 Fed. 833, 848, 5 L. R. A. 78 (affirmed [1890] 10 Sup. Ct. 658, 135 U. S. 1, 34 L. Ed. 55); Richter v. Magone (C. C. 1889) 47 Fed. 192, 193; In re Hirsch (C. C. 1896) 74 Fed. 928, 929 (affirmed [1898] 87 Fed. 1005, 31 C. C. A. 350); Goddard v. Mailler (C. C. 1897) 80 Fed. 422, 423; Thomas & Son Co. v. Barnett (C. C. 1905) 135 Fed. 172; Kentucky v. Powers (C. C. 1905) 139 Fed. 452; In re Waite (D. C. 1897) 81 Fed. 359, 364; Schafer v. Craft (D. C. 1906) 144 Fed. 907, affirmed (1907) 153 Fed. 175, 82 C. C. A. 349.

§ 1016. (Jud. Code, § 34.) Removal of suits by aliens.

Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section.

R. S. § 644. Act March 3, 1911, c. 231, § 34, 36 Stat. 1098.

Cited without definite application, Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Hall v. Great Northern Ry. Co. (D. C. 1912) 197 Fed. 488.

§ 1017. (Jud. Code, § 35.) When copies of records are refused by clerk of State court.

In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

R. S. § 645. Act March 3, 1911, c. 231, § 35, 36 Stat. 1098.

Notes of Decisions

Inability to pay clerk's fees.—The record may be supplied by affidavit where the petitioner is unable to pay the clerk's fees. Virginia v. Felts (C. C. 1904) 133 Fed. 85.

Cited without definite application, Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Eaton v. Calhoun (C. C. 1880) 15 Fed. 155, 157.

§ 1018. (Jud. Code, § 36.) Previous attachment bonds, orders, etc., remain valid.

When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

R. S. § 646. Act March 3, 1875, c. 137, § 4, 18 Stat. 471. Act March 3, 1911, c. 231, § 36, 36 Stat. 1098.

Notes of Decisions

1. History of legislation.
2. Construction and operation in general.
3. State of case on removal.
4. Rulings of state court prior to removal.
5. Injunctions granted before removal.
6. Receivers appointed before removal.
7. Prior waiver of jury trial.
8. Contempt committed before removal.
9. Attachment by state court.
10. Process of state court.
11. Proceedings pending in state court at time of removal.
12. —— Pending motions.
13. Proceedings in state court after removal.

1. History of legislation.—The last clause of section 639, R. S., taken from the act of July 27, 1866, enacting that, on the removal of a cause to the federal court, "the copies of the pleadings shall have the same force and effect in every respect and for every purpose as the original pleadings would have had by the laws and practice of such state if the cause had remained in the state court," has been repealed by the act of March 3, 1875. Whittenton Mfg. Co. v. Memphis & O. R. P. Co. (C. C. 1883) 19 Fed. 273.

2. Construction and operation in general.—This section and section 1020, post, point to all such proceedings and orders as have relation to the prosecution and defense of the suit in due course, and the ultimate results aimed at in the litigation. Kirk v. Milwaukee Dust-Collector Mfg. Co. (C. C. 1885) 26 Fed. 501.

3. State of case on removal.—A case removed from a state court to the federal circuit court stands in the latter court as it did in the former at the time of removal. Gier v. Gregg (C. C. 1847) Fed. Cas. No. 5,406. Every right which a party has acquired in a state court, by attachment, by injunction, or any proceeding which has been initiated and consummated there, stands in full force and operative between the parties, the same as though it had been initiated and consummated in the federal court. Davis v. St. Louis & S. F. R. Co. (C. C. 1885) 25 Fed. 786, 788. The federal court, however, though not sitting as a court of errors, has the same power over such proceedings as though the case had been commenced before it, or that the state court would have had if the case had not been removed. Bryant v. Thompson (C. C. 1886) 27 Fed. 881.

Where a cause is removed from the state to the federal court after issue joined, the issues made up in the case on its removal remain and constitute the issues to be tried in the federal courts, and all the rights secured by either party under the practice and laws of the state where the suit was commenced are impressed upon the case, and as full effect must be given to them in the federal court as would have been given by the state court had the case been tried there. Akerly v. Vilas (C. C. 1872) Fed. Cas. No. 120.

4. Rulings of state court prior to removal.—On removal of a cause, the federal court has the same jurisdiction to modify or set aside orders or rulings previously made therein that the state court would have had, if the cause had not been removed. Buxton v. Pennsylvania Lumber Co. (D. C. 1914) 221 Fed. 718. A motion may be heard by the federal circuit court, in its discretion, to further justice, although, prior to removal, the same motion was argued and denied in the state court. Garden City Mfg. Co. v. Smith (C. C. 1871) Fed. Cas. No. 5,217. Where at the time a cause was removed a judgment has been rendered against the defendant, but the state court has power under the statute to vacate the same, the federal court is vested on the removal with the same power. Cady v. Associated Colonies (C. C. 1902) 119 Fed. 420. But the federal court will not review any interlocutory question which was determined in the state court before removal, at least unless such a showing is made as would entitle

the party applying to a rehearing under the state practice. Denison v. Shawmut Min. Co. (C. C. 1903) 124 Fed. 860.

A ruling made in a state court before removal is, after removal, as if made by the federal court. Davis v. St. Louis & S. F. R. Co. (C. C. 1885) 25 Fed. 786; Duncan v. Gegan (1879) 101 U. S. 810, 812, 25 L. Ed. 875. The federal court will not review orders made prior to the removal, if the state court acted within its jurisdiction. It will take the case precisely as it finds it, accepting all prior decrees and orders as adjudications in the cause. Loomis v. Carrington (C. C. 1883) 18 Fed. 97; Brooks v. Farwell (C. C. 1880) 4 Fed. 166, 2 McCrary, 220; Guernsey v. Cross (C. C. 1907) 153 Fed. 827. Thus a decision of the state supreme court on a demurrer is binding on the federal court. Lookout Mountain R. Co. v. Houston (C. C. 1890) 44 Fed. 449, appeal dismissed Huston v. Lookout Mountain R. Co. (1895) 159 U. S. 256, 15 Sup. Ct. 1040, 40 L. Ed. 143. As is a holding of the supreme court of the state that certain conduct of an insurance company should be submitted to the jury as evidence of intent to waive a forfeiture for overinsurance. Cleaver v. Traders' Ins. Co. (C. C. 1889) 40 Fed. 711. And an order made in the state court before removal, but not yet complied with, for the production of books and papers, under which contempt proceedings were instituted and an order made therein. Williams Mower & Reaper Co. v. Raynor (C. C. 1876) Fed. Cas. No. 17,748. But where the state court acted without jurisdiction a different rule applies, and a motion to quash the service on a defendant who has not entered a general appearance, which involves the question of jurisdiction over the defendant, although overruled by the state court, may be renewed after removal. Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co. (C. C. 1907) 150 Fed. 666; Flint v. Coffin (1910) 176 Fed. 872, 100 C. C. A. 342; Remington v. Central Pac. R. Co. (1905) 25 S. Ct. 577, 198 U. S. 95, 49 L. Ed. 959. Accordingly the right to immunity from the service of process in a cause removed from a state to a federal court must be determined independently of any view which the state court might entertain. Feister v. Hulick (D. C. 1916) 228 Fed. 821.

The circuit court of the United States has no power to review a decision of the state court denying intervention on a petition by the interveners to remove the cause; such decision, however erroneous, being binding on the federal court. Kidder v. Northwestern Mut. Life Ins. Co. (C. C. 1902) 117 Fed. 997.

Defendant, a foreign corporation, was sued in the Supreme Court of New York by service on its president while temporarily within the state, to settle a death claim out of which the action arose. Defendant appeared specially and moved to set aside the service, and, this motion being denied, served a general notice of appearence in the action and demanded a copy of the complaint which was thereafter served on defendant's attorneys. No appeal was taken from the order denying a motion to quash the service, though authorized by the state law, but after receiving a copy of the complaint defendant removed the cause to the federal Circuit Court, and after obtaining an extension of time to answer renewed its motion to quash the service without any restriction or limitation in the Circuit Court of its appearance. Held, that defendant was not again entitled to attack the service in the federal court under the rule that matters which have been decided in the state court and not appealed from should be regarded as settled when the case is thereafter removed to the federal court; also, that the general appearance under the circumstances was voluntary and conferred jurisdiction. Hoyt v. Ogden Portland Cement Co. (C. C. 1911) 185 Fed. 889.

Where defendant has removed a case from a state court after denial of a motion to set aside the service of summons, he cannot renew the motion in the federal court without leave to do so, either from the state or federal court. Allmark v. Platte S. S. Co. (C. C. 1896) 76 Fed. 615.

Where a nonresident defendant, sued in a state court, invokes the judgment of that court by a motion to set aside the service of the summons, he is concluded by the court's decision, and cannot renew the motion in the federal court, after removing the cause, on substantially the same evidence. Bragdon v. Perkins-Campbell Co. (C. C. 1897) 82 Fed. 338.

The decision of a state court that in an action for negligence the master and servant might be joined at common law has no controlling effect in the federal courts, and the question in the Supreme Court is not the rule of the federal courts in similar cases, but what controversies has Congress made removable. Alabama G. S. R. Co. v. Thompson (1905) 26 Sup. Ct. 161, 165, 200 U. S. 206, 50 L. Ed. 441, 4 Ann. Cas. 1147.

Where, before the removal of a cause, the state court has restricted plaintiff to his cause of action for breach of contract, on which an attachment has been granted, and he has elected to consent to such order, and it is still in force when the case is removed to the federal court, a motion by plaintiff in the circuit court for leave to amend his complaint may be denied; no change in the relative position or rights of the parties having been made. Phelps v. Canada Cent. R. Co. (C. C. 1882) 19 Fed. 801.

5. Injunctions granted before removal.—This section carefully saves to both parties the benefit of all proceedings taken in the action prior to its removal from the state court, and by section 4 of said act it is provided that, when any suit is removed from a state court to a circuit court of the United States, all injunction orders and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit has been removed. Fogg v. Fisk (C. C. 1884) 19 Fed. 235; Eureka & K. R. R. Co. v. California & N. Ry. Co. (C. C. 1900) 103 Fed. 897, affirmed (1901) 109 Fed. 509, 48 C. C. A. 517. In the cases provided for it is the intention to authorize and require that the question of dissolving, continuing, or perpetuating the injunction originally granted by the state court shall be dealt with by the courts of the United States into which the cause shall have been lawfully removed, and shall be disposed on its merits precisely as it ought to have been disposed of by the state tribunals if the cause had not been removed. Perry v. Sharpe (C. C. 1881) 8 Fed. 15, 24.

The federal court can maintain an injunction obtained in the state court. Smith v. Schwed (C. C. 1881) 6 Fed. 455, 2 McCrary, 441. Or, in a proper case, it may dissolve an ex parte preliminary injunction. Sharp v. Whiteside (C. C. 1883) 19 Fed. 156.

On filing in apt time a valid petition, the court's jurisdiction is determined, and defendant's remedy, as to an injunction granted in the cause, is by motion in the federal court to dissolve it. Harbison v. Allen (1910) 68 S. E. 207. 152 N. C. 720. This motion may be made at once. Champlain Const. Co. v. O'Brien (C. C. 1900) 104 Fed. 930.

The class of persons described in the bill having the right to come into the state, the injunction granted by the state court preventing their coming into the state will be dissolved on removal. State of Arkansas v. Kansas & T. Coal Co. (C. C. 1899) 96 Fed. 353.

The hearing in a federal court, of a motion to dissolve a preliminary injunction granted by a state court, from which the cause has been removed, should not be postponed on account of a motion to remand based upon a defect in the form or amount of the removal bond. Coburn v. Cedar Val. Land & Cattle Co. (C. C. 1885) 25 Fed. 791, affirmed (1891) 138 U. S. 196, 11 Sup. Ct. 258, 34 L. Ed. 876.

Where an injunction is granted and a receiver appointed by the state court without notice to the defendants, and no motion to dissolve the injunction and discharge the receiver is made and acted upon in the state court before the removal of the cause, such motion may be made and heard in the federal court, upon due notice to the plaintiff, at any time after the record in the case is filed in that court. Texas & St. L. Ry. Co. v. Rust (C. C. 1883) 17 Fed. 275, 5 McCrary, 348.

Upon the removal of a cause from a state court, an injunction will not be dissolved upon the ground that the bill filed in such court was not verified according to law and the practice of courts of chancery. Smith v. Schwed (C. C. 1881) 6 Fed. 455, 2 McCrary, 441.

An injunction having been issued by a state court and perpetuated by the decree of the supreme court of the state, a similar injunction, granted as between the same parties, with regard to the same subject-matter, in a new suit, by a court of the same state and removed to this court, the matter will be treated by this court as a thing adjudged, and the injunction perpetuated. New Orleans, M. & C. R. Co. v. New Orleans (C. C. 1878) 14 Fed. 373.

Before the removal of a cause an injunction was granted by the state court, on a full hearing, on notice, against defendants. After the removal, they moved, in the federal court, to dissolve the injunction, on the same papers on which it was granted. Held, that leave to make such motion must be applied for and obtained, before it could be made. Carrington v. Florida R. Co. (C. C. 1872) Fed. Cas. No. 2,448.

For decisions under prior law, see Bowen v. Kendall (C. C. 1860) Fed. Cas. No. 1,724; Liddle v. Thatcher (N. Y. 1856) 12 How. Prac. 294; Northwestern Distilling Co. v. Corse (C. C. 1869) Fed. Cas. No. 10,335.

6. Receivers appointed before removal.—A receiver appointed by a state court in a suit which was subsequently removed reported to the federal court stating the amount of the fund in his hands, and asking an order to pay therefrom certain liabilities. Held, that the circuit court had authority to require him to account for the fund. Hinckley v. Gilman, C. & S. R. Co. (1879) 100 U. S. 153, 25 L. Ed. 591.

A motion to discharge a receiver, made on the same grounds on which it had been previously dismissed in the state court, will not be granted by the United States circuit court after removal to the latter court. Bryant v. Thompson (C. C. 1886) 27 Fed. 881, 882.

7. Prior waiver of jury trial.—Waiver of jury in state court does not affect the right to a jury after removal of cause to the federal court. Montgomery County v. Cochran (C. C. 1902) 116 Fed. 985.

8. Contempt committed before removal.—The removal act does not empower a federal court to inquire into an alleged contempt of the state court committed before the case is removed.

Kirk v. Milwaukee Dust Collector Mfg. Co. (C. C. 1885) 26 Fed. 501.

9. Attachment by state court.—The want of any jurisdiction over the person of defendant in a case removed to a federal circuit court from a state court before service of summons, on a special appearance by defendant for that sole purpose, does not prevent the federal court from entering a judgment enforceable against the real property of defendant which had been attached before the case was removed, where the state court might, but for such removal, have rendered such a judgment on giving notice to defendant. Clark v. Wells (1906) 27 S. Ct. 43, 203 U. S. 164, 51 L. Ed. 138, modifying and affirming judgment Wells v. Clark (C. C. 1905) 136 Fed. 462.

Service by publication in the manner prescribed by the state statutes for nonresident defendants cannot be had in the federal Circuit Court to which a suit in which an attachment has issued has been removed from a state court before service of summons. Id.

When an action is removed from a state court into a federal court, the latter takes the case in the condition in which it stood at the time of removal, and a lien obtained by an attachment in the state court is not lost or terminated by the removal; but power to protect and enforce that lien after the removal exists in the federal court in like manner, as if it had been obtained by a proceeding in that court. Hatcher v. Hendrie & Bolthoff Mfg. & Supply Co. (1904) 133 Fed. 267, 68 C. C. A. 19.

Where an action begun by attachment was properly removed to the federal court pending a motion to dissolve the attachment, both the principal suit and the attachment proceeding were transferred into the federal Circuit Court, which, on the filing of the transcript and docketing the cause there, was as fully possessed of the case as if it had been begun in that court. Lebensberger v. Scofield (1905) 139 Fed. 380, 71 C. C. A. 476.

Where a suit was brought in a state court by attachment, and, pending a motion to dissolve the attachment, was removed to the federal court, the seizure of defendants' property was a sufficient basis on which the federal court was entitled to found its subsequent proceedings both in the principal suit and as to the attachment, though no jurisdiction of the persons of the defendants had been acquired. Id.

Where a suit in a state court is removed by a defendant, no attachment of the property of the defendant by the state court can hold that property, after the removal, unless such attachment was the original process in the suit in the state court. New England Screw Co. v. Bliven (C. C. 1854) Fed. Cas. No. 10,156.

On the removal of a cause to a federal court, an attachment will have the same effect as if the cause had remained in the state court. Clarke v. Chase (C. C. 1856) Fed. Cas. No. 2,845.

After the removal of a suit an attachment of property of the defendant made before the removal of the suit into said court, under a warrant of attachment issued by the state court after the commencement of the suit, will continue to hold the property to answer the final judgment of such court in the suit. Barney v. Globe Bank (C. C. 1862) Fed. Cas. No. 1,031.

A bill in chancery that had been filed in a state court to enjoin a judgment creditor from proceeding to enforce his judgment, and to set it aside, was removed to a federal court. Prior thereto the complainants had brought and prosecuted to judgment attachment suits against the judgment debtor, and the property attached had been sold by order of court and the proceeds remained in the hands of the sheriff. The bill prayed for the payment of their judgments out of this fund. Held, that the fund in the hands of the sheriff was no part of the subject-matter of the suit which had been removed, and that the court had no control over it. Smith v. Schwed (C. C. 1881) 9 Fed. 483.

Where a state attachment act provided that before appearance by the defendant all creditors who applied to be made parties to the suit should share pro rata in the fund, and that after such appearance all other creditors should be debarred from coming in upon the fund, held, that after the removal of the attachment suit to the federal court the latter had no power to strike off the defendant's appearance in order to let in the other creditors. Second Nat. Bank v. New York Silk Mfg. Co. (C. C. 1882) Fed. Cas. No. 12,601a.

Although, under Code Prac. La. arts. 732–753, giving the right to executory process, an order of seizure and sale, unless there is opposition, is a final order, where an issue is made up by the opposition, the order of seizure and sale, though first in point of time, becomes merely an incident in the cause, and when the cause is transferred to the circuit court the order comes as a part of it, and there the practice in equity governs. Boatmen's Sav. Bank v. Wagenspack (C. C. 1882) 12 Fed. 66.

Where the judgment of a federal court has been garnished, and the state court had made an order upholding the proceeding, the circuit court declined to review the propriety of this order. It seems, however, that the court whose judgment was thus garnished might properly disregard the writ. Loomis v. Carrington (C. C. 1883) 18 Fed. 97.

Where a sheriff holds property under an attachment issued by the state court in an action which was since removed to the federal court, and one of

the issues in such action is whether or not such property was legally attached, and what rights the plaintiff has therein, the court may order the marshal to take the property from the sheriff and hold it for the federal court. Friedman v. Israel (C. C. 1886) 26 Fed. 801.

An attachment granted by a state court in a suit in which service was made by publication cannot be vacated by the federal court on removal because the action is one in which such service is not provided for by the federal practice, but it must stand as it would in the state court, whatever effect the failure to obtain personal service may have on its efficacy. Blumberg v. A. B. & E. L. Shaw Co. (C. C. 1904) 131 Fed. 608.

Where an action by attachment against a nonresident pending in a state court having jurisdiction, in which property has been attached, and the plaintiff is proceeding in conformity to the state statute to obtain service, is removed by the defendant to the federal court on the ground of diversity of citizenship, such removal confers upon the federal court jurisdiction of the defendant's person, and that court may proceed to render a personal judgment against him, to be satisfied from the proceeds of the attached property. The removal statute cannot be so construed as to permit a defendant to oust the rightful jurisdiction of a state court by a removal, and then obtain a dismissal of the action in the federal court for want of jurisdiction. Wells v. Clark (C. C. 1905) 136 Fed. 462, judgment modified and affirmed Clark v. Wells (1906) 27 Sup. Ct. 43, 203 U. S. 164, 51 L. Ed. 138.

The removal of an attachment suit from a state into a federal court under the judiciary act of 1789 does not ipso facto render the delivery bond filed in the former court inoperative, nor does it discharge the sureties therein. Ramsey v. Coolbaugh (1862) 13 Iowa, 164.

The statute undoubtedly preserves an attachment in force where the action is removed from a state court to the United States circuit court. Carpenter v. New York & N. H. R. Co. (N. Y. 1855) 11 How. Prac. 481.

The lien acquired by a foreign attachment against the goods of a defendant is maintained to answer the final judgment after a removal of the cause in the same manner as if the case had not been removed. Martin v. Thompson (S. C. 1825) 3 McCord, 167.

A bond given by a defendant arrested in attachment, as required by Code W. Va. c. 106, §§ 31, 32, to answer interrogatories filed, upon the issuance of a fieri facias, before a commissioner of the state court, or in default to satisfy the decree rendered, is not affected by a removal of the cause to the federal court, and when the federal court renders a decree, and interrogatories are filed with the commissioner of the state court, which the defendant fails to answer, he and his sureties on the bond are liable for the amount of the decree of the federal court. State v. Peck (1889) 32 W. Va. 606, 9 S. E. 919.

10. Process of state court.—Where preliminary proceedings were taken for the condemnation of land for a railroad right of way without notice to the nonresident owner thereof, and no notice was given to such owner until after the report of commissioners had been filed in the state court, whereupon such owner removed the proceedings to the federal courts, the suit not having been begun until process was first issued against such owner, it was entitled in the federal court to contest the complainant's right to take the land, as well as the amount of compensation to be paid therefor. Madisonville Traction Co. v. St. Bernard Min. Co. (C. C. 1904) 130 Fed. 789.

A motion to vacate service of summons may properly be presented to the federal court after removal of the cause, where defendant has appeared only for the purpose of such removal, whether specially so limited or not; and such motion must be determined on facts appearing of record at the time of removal. Webster v. Iowa State Traveling Men's Ass'n (C. C. 1904) 165 Fed. 367.

Where, in a suit by attachment in a state court, after levy on property within the state, an order was made for service by publication on defendant as a nonresident, in strict accordance with the requirements of the state statute, such service is sufficient to give a federal court, to which the cause is removed, jurisdiction to render judgment enforceable against the attached property, although no proof was required by the state statute, or made, that defendant owns property in the state. Mercantile Nat. Bank of City of New York v. Barron (C. C. 1908) 165 Fed. 831.

Where a foreign corporation is doing some substantial business in a state, and a suit commenced in a state court by service of process valid under the state statute is removed into a federal court, such court will not set aside the service. Sleicher v. Pullman Co. (C. C. 1909) 170 Fed. 365.

A foreign railroad corporation, which maintains offices in New York and there employs freight and passenger agents to solicit business, which also holds directors' meetings, disburses dividends, and keeps an office for the transfer of its stock there, with an assistant secretary, is doing some substantial business in the state, and is subject to service of process under the New York statute, and such service will not be set aside by a federal court, in a suit brought in a state court, after its removal. Id.

11. Proceedings pending in state court at time of removal.—The exam-

ination of a party to a suit as a witness for the adverse party, pending in a state court under a provision of the Code of Procedure for that state, may be continued after the removal of such suit to the federal court, though such an examination would not be allowed under the practice of the federal court, had the action been originally brought there. Fogg v. Fisk (C. C. 1884) 19 Fed. 235; Fogg v. Fisk (N. Y. 1884) 66 How. Prac. 343.

Where, before the removal of a cause from the state to the federal court, a reference is made to take the deposition of a witness according to the state practice, to be used on a motion in the suit, the plaintiff may proceed with such reference after the removal of the cause. Bills v. New Orleans, St. L. & C. R. Co. (C. C. 1876) Fed. Cas. No. 1,409.

Where an order made in contempt proceedings instituted in a state court, before the removal, has been appealed from to the state supreme court, the federal court will hold in abeyance proceedings for the enforcement of such order until the appeal is disposed of. Williams Mower & Reaper Co. v. Raynor (C. C. 1876) Fed. Cas. No. 17,748.

When a plea to the jurisdiction and a demurrer thereto had been filed in the state court, and the case then removed to the federal court before the state court had passed upon the plea, held, that even though the plea was sufficient to defeat the action in the state court, still, as it set out such facts as were requisite to give the federal court jurisdiction, that court acquired jurisdiction by the removal, and was bound to treat the plea as if the suit had been originally begun there. Kelly v. Virginia Protection Ins. Co. (C. C. 1878) Fed. Cas. No. 7,677.

Where a cause has been removed from a state to a federal court, pending an application to punish one of the parties for contempt by disobeying an order of the state court, the federal court has no jurisdiction to hear and determine such application. Kirk v. Milwaukee Dust-Collector Mfg. Co. (C. C. 1885) 26 Fed. 501.

A petition for removal, filed in the state court on the earliest day possible, is an abandonment of a prior appeal from an interlocutory order which cannot be superseded, where the appeal does not appear to have been perfected. Freeman v. Butler (C. C. 1889) 39 Fed. 1.

A federal court, into which a cause has been removed by one of two or more defendants on the ground of diversity of citizenship, and that there was a separable controversy, has no jurisdiction to set aside a judgment rendered by the state court therein as against another defendant, who is a citizen of the same state as plaintiff. Youtsey v. Hoffman (C. C. 1901) 108 Fed. 699.

A defendant in a state court in Connecticut, who, after filing notices of his intention to suffer a default and to refuse to plead over and to move for a hearing in damages to the court, in accordance with the state practice, removes the cause into the federal court, is not required to file such notices a second time in that court, the cause standing after removal in the same condition as it did before in the state court. Johnson v. Bridgeport Deoxidized Bronze & Metal Co. (C. C. 1903) 125 Fed. 631.

12. —— **Pending motions.**—After the removal of a cause, the federal court has authority to hear and act on a motion pending in the state court at the time of removal to modify or vacate a restraining order or preliminary injunction previously granted. Mannington v. Hocking Valley Ry. Co. (C. C. 1910) 183 Fed. 133. And, since the case stands as though it had been originally commenced in the federal circuit court, a motion for an injunction on the face of the bill may be heard in such court. McLeod v. Duncan (C. C. 1852) Fed. Cas. No. 8,898.

By removing a cause to the circuit court of the United States, a motion to quash the service made previously in the state court is not waived. Kauffman v. Kennedy (C. C. 1885) 25 Fed. 785. But, where, before a petition and bond for removal were passed on a motion was made by defendant, which was brought on for hearing in the federal court, by seeking an adjournment of the hearing in the latter court without objecting to the irregularity of the hearing, plaintiff waived such irregularity. Kinne v. Lant (C. C. 1895) 68 Fed. 436.

A motion to set aside the service of process after removal, filed in the state court before removal, and not acted on, is properly before the federal court for decision after removal. Tortat v. Hardin Min. & Mfg. Co. (C. C. 1901) 111 Fed. 426.

A plea in abatement on ground of insufficient service, filed in the state court in accordance with the state practice, may be permitted to stand as a motion to quash in the federal court. Peterson v. Morris (C. C. 1899) 98 Fed. 48.

Where, at the time a petition for the removal of a cause was filed, a motion to make the complaint more definite and certain was pending and undetermined in the state court, such motion was transferred to the federal court with the record to be there determined. Bryce v. Southern Ry. Co. (C. C. 1904) 129 Fed. 966.

Though no bond for costs is required in case of suit originally brought in the United States court, yet when a cause is removed from the state court to the

federal court, the latter begins where the former left off; and motion to dismiss for want of bond for costs having been entered in the state court, and pending at the time of removal, will be heard in the federal court and determined in accordance with the law applicable to the motion when made. Sutro v. Simpson (C. C. 1882) 14 Fed. 370, 4 McCrary, 276.

On the removal of a cause from a state court, the circuit court may dispose of a motion pending before a general term of the state court, at the time of removal, for a resettlement of the form of an order on affirmance, and insert such reasonable provisions in the order of affirmance as it would have been competent and proper for the general term to have done had not the cause been removed. Milligan v. Lalance & G. Mfg. Co. (C. C. 1883) 17 Fed. 465.

13. Proceedings in state court after removal.—If the state court proceeds after a petition for removal, it does so at the risk of having its final judgment reversed, if the record on its face shows that when the petition was filed that court ought to have given up its jurisdiction. Stone v. South Carolina (1886) 6 Sup. Ct. 799, 800, 117 U. S. 430, 29 L. Ed. 962.

Plaintiff caused an attachment to be levied on book accounts belonging to defendant, and, while such accounts were in the custody of the sheriff and of the marshal, after removal to the federal court, proceeded to collect the same. Held, that this was a contempt. Lefavour v. Whitman Shoe Co. (C. C. 1894) 65 Fed. 785.

Cited without definite application, Parks v. Booth (1880) 102 U. S. 96, 26 L. Ed. 54; Capital Traction Co. v. Hof (1899) 19 Sup. Ct. 580, 584, 174 U. S. 1, 43 L. Ed. 873; Thurber v. Miller (1895) 67 Fed. 371, 375, 14 C. C. A. 432; Eaton v. Calhoun (C. C. 1880) 15 Fed. 155, 157; Mack v. Jones (C. C. 1887) 31 Fed. 189, 196; Wolf v. Cook (C. C. 1889) 40 Fed. 432, 437; Pullman's Palace Car Co. v. Washburn (C. C. 1895) 66 Fed. 790, 791 (affirmed [1896] 76 Fed. 1005, 21 C. C. A. 598); Louisville Trust Co. v. Cincinnati (C. C. 1896) 73 Fed. 716, 734 (reversed [1896] 76 Fed. 296, 22 C. C. A. 334); Sidway v. Missouri Land & Live Stock Co. (C. C. 1902) 116 Fed. 381.

§ 1019. (Jud. Code, § 37.) Suits improperly in district court may be dismissed or remanded.

If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

Act March 3, 1875, c. 137, § 5, 18 Stat. 472. Act March 3, 1887, c. 373, § 6, 24 Stat. 555. Act Aug. 13, 1888, c. 866, § 6, 25 Stat. 436. Act March 3, 1911, c. 231, § 37, 36 Stat. 1098.

Notes of Decisions

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See, also, notes under § 991(1), ante.

I. THE STATUTE IN GENERAL

1. In general.—The various acts of Congress, and the better decisions thereunder, look to the preservation of the constitutional rights of citizens, when fairly entitled thereto, and to a prevention of fraudulent or other contrivance, whereby the federal should supersede, or be substituted for, the more rightful jurisdiction of state courts. Greenwalt v. Tucker (C. C. 1882) 10 Fed. 884, 886.

The words "dismissal" and "remand" are not used interchangeably in this section. The former has reference only to suit brought in the circuit court and the latter to one removed from the state court. Northern Pacific Terminal Co. v. Lowenberg (C. C. 1883) 18 Fed. 339, 341.

This section applies to all cases, whether of contract or tort. Cerri v. Akron-People's Telephone Co. (D. C. 1914) 219 Fed. 285. It covers all dismissals for defects of jurisdiction arising on the evidence, and prescribes the showing necessary to the exercise of the power which it grants. Per Amidon, District Judge. Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633, writ of certiorari denied 29 Sup. Ct. 698, 214 U. S. 517, 53 L. Ed. 1064. But it has no application where the complaint to remove a cause alleges a removable controversy, and the only question in dispute is whether the case has in fact been removed. Higson v. North River Ins. Co. (C. C. 1911) 184 Fed. 165.

The circuit court having dismissed a bill on the merits, plaintiff appealed to the supreme court, which dismissed the appeal because the amount was insufficient to confer jurisdiction, without formally deciding that the circuit court was without jurisdiction. The mandate required appellant to pay the costs. He thereafter brought a bill to review the decree of the circuit court, and have the cause dismissed for want of jurisdiction, instead of on the merits. Held, that he was not entitled to a hearing thereon until he paid the costs pursuant to the mandate, or gave an excuse for not doing so; and that Act March 3, 1875 (18 Stat. 472), did not relieve him from this obligation. Miller v. Clark (C. C. 1891) 47 Fed. 850.

An action in a state court cannot be maintained to declare void a judgment of a federal court, on the ground that the cause of action was fraudulently assigned to transfer the question involved from the state court, which had theretofore adjudicated it in another action, to the federal court; but the remedy in such case is by application to the federal court, under this section. Town of Ontario v. First Nat. Bank (1891) 59 Hun, 29, 12 N. Y. Supp. 434.

2. Changes in statute.—Effect of defects in removal proceedings, on jurisdiction of federal court, see note, under § 1011, ante.

The original enactment of 1875 was not superseded by the Act of 1887, as amended in 1888 (25 Stat. 434, c. 866). Lehigh Min. & Mfg. Co. v. Kelly (1895) 16 Sup. Ct. 307, 312, 160 U. S. 327, 40 L. Ed. 444; Board of Com'rs of Lake County, Colo., v. Dudley (1899) 19 Sup. Ct. 398, 401, 173 U. S. 243, 43 L. Ed. 684 (reversing judgment Dudley v. Board of Com'rs of Lake County [1897] 80 Fed. 672, 26 C. C. A. 82); Barney v. New York (1904) 24 Sup. Ct. 502, 505, 193 U. S. 430, 48 L. Ed. 737; Steigleder v. McQuesten (1905)

25 Sup. Ct. 616, 198 U. S. 141, 49 L. Ed. 986.

Before this section as originally enacted in 1875, the jurisdiction of federal courts could only be challenged by a separate plea presenting the question for actual litigation, and there is nothing in the statute changing this practice. Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633, certiorari denied (1909) 29 Sup. Ct. 698, 214 U. S. 517, 53 L. Ed. 1064.

The principle that a suit in a state court, which falls within the description of suits removable into the federal circuit court, may be removed, although it could not originally have been brought in the federal circuit court, is not affected by this section. Warner v. Pennsylvania R. Co. (C. C. 1876) Fed. Cas. No. 17,186.

II. DISMISSAL OF CAUSE

(A) Power and duty to dismiss and grounds for dismissal

3. In general.—This section does not give the court power to choose the forum for litigants and dispense with rights created by statute from motives of interest or sympathy with the litigants, and, where the jurisdiction of a state court has been terminated by the action of a party under the removal statute and jurisdiction exclusively established in the federal court over the cause of action and the parties before it, such court cannot remand the cause for lack of an indispensable party, without whose presence it cannot be determined and which cannot be brought in, but must dismiss it, even though such dismissal may deprive the plaintiff of the right to maintain the suit in any forum because wherever brought it will be removable, and then subject to dismissal for the same reason. Lawrence v. Southern Pac. Co. (C. C. 1910) 180 Fed. 822, appeal dismissed Bogart v. Southern Pac. Co. (1913) 33 Sup. Ct. 497, 228 U. S. 137, 57 L. Ed. 768.

The want of remedy in the state courts constitutes no reason for affording a remedy in the federal court. Lozano v. Wehmer (C. C. 1885) 22 Fed. 755. But the dismissal by a federal court for want of jurisdiction of a suit to set aside a deed as a cloud on title cannot be justified by the fact that the matter was res judicata or was under the control of the state court, since those matters affect the merits of the case rather than the jurisdiction. Huntington v. Laidley (1900) 20 Sup. Ct. 526, 530, 176 U. S. 668, 44 L. Ed. 630. Nor, when a suit commenced by attachment is removed before the proceedings upon the attachment are complete, does the fact that the federal court cannot complete such proceedings authorize dismissing the action. Purdy v. Wallace Müller & Co. (C. C. 1897) 81 Fed. 513.

Ordinarily, where the Circuit Court is without jurisdiction, it is improper to make any order in the cause except to dismiss the suit, but that rule does not apply to the action of the court in setting aside orders improvidently made before the want of jurisdiction was discovered. New Orleans & B. S. Mail Co. v. Fernandez (1870) 12 Wall. 130, 135, 20 L. Ed. 249.

Though a suit brought in a state court, under a state statute, to quiet title against one in possession, is an equitable suit, which cannot, after removal to a federal court, be prosecuted therein, because there is an adequate remedy at law, the federal court will not dismiss the suit, but will remand it to the state court. Gombert v. Lyon (C. C. 1897) 80 Fed. 305.

Where a suit to recover money only on contract was instituted in the federal Circuit Court sitting in West Virginia by notice and motion, as authorized by Code W. Va. 1906, c. 121, §§ 6, 7, 8, but the notice did not show facts essential to confer federal jurisdiction, and there was nothing in the record when a motion to quash the notice was made to show that federal jurisdiction existed, the court erred in refusing to dismiss the action on the theory that such jurisdiction might be subsequently shown and appear from the record as finally made. West Fork Glass Co. v. Innes-Weld Glass Co. (1910) 178 Fed. 205, 101 C. C. A. 525.

A suit begun by plaintiffs as citizens of one state against defendant as a corporation duly established by the laws of another state and against corporations and partnerships as trustee of certain goods and chattels of defendants in their hands or possession in another state is not such a case in which it might appear at any time that it does not really and substantially involve a dispute or controversy within the jurisdiction of the circuit court or in which the parties have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable or removable, and which the court may on such fact appearing dismiss or remand at any time under this section, but is one on its face cognizable in or removable to a federal court as being between citizens of different states involving a proper amount, although the citizenship was not fully set forth in the writ. Randall v. New England Order of Protection (C. C. 1902) 118 Fed. 782, 784.

4. Want of jurisdiction.—Elimination of grounds for removal, see 40 of this section.

This section covers all dismissals for defects of jurisdiction arising on the evidence, and prescribes the showing necessary to the exercise of the power which it grants. Per Amidon, District Judge. Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633. It does not give the court power to choose the forum for

litigants and dispense with rights created by statute from motives of interest or sympathy with the litigants, and, where the jurisdiction of a state court has been terminated by the action of a party under the removal statute and jurisdiction exclusively established in the federal court over the cause of action and the parties before it, such court cannot remand the cause for lack of an indispensable party, without whose presence it cannot be determined and which cannot be brought in, but must dismiss it, even though such dismissal may deprive the plaintiff of the right to maintain the suit in any forum because wherever brought it will be removable, and then subject to dismissal for the same reason. Lawrence v. Southern Pac. Co. (C. C. 1910) 180 Fed. 822.

A cause which has been removed should be dismissed, and not remanded, where jurisdiction of the state court has never been lawfully devested. Merchants' Nat. Bank v. Brown (C. C. 1883) 17 Fed. 161, 4 Woods, 263. But should be remanded instead of being dismissed, where the theory is that, if plaintiff be required to replead and fully set up his title, he cannot prevail in any event. Anderson v. Sharp (C. C. 1911) 189 Fed. 247. Where the relief sought is grantable in a state court under a statute enlarging its equitable jurisdiction, but is beyond the federal court's jurisdiction. City of Knoxville v. Southern Paving Const. Co. (D. C. 1914) 220 Fed. 236. And where a nonresident necessary party to the right to remove was not personally served in the state court. Richmond v. Brookings (C. C. 1891) 48 Fed. 241.

A suit begun in a state court by attachment of property, and removed into a federal court, will not there be dismissed for want of jurisdiction because there has been no personal service on defendant; custody of the res being recognized as giving jurisdiction. Purdy v. Wallace Müller & Co. (C. C. 1897) 81 Fed. 513; Hubbard v. Central of Georgia Ry. Co. (C. C. 1904) 135 Fed. 256.

A bill in equity by a stockholder of a gas company against the company and a city to enforce a claim for gas furnished the city held insufficient to give a United States court jurisdiction. Quincy v. Steel (1887) 7 Sup. Ct. 520, 522, 120 U. S. 241, 30 L. Ed. 624.

If it does not appear at the outset that a suit is one of which the Circuit Court at the time its jurisdiction was invoked could properly take cognizance, a suit must be dismissed, and lack of jurisdiction cannot be supplied by anything set up by way of defense. Barker v. Eastman (1913) 206 Fed. 865, 124 C. C. A. 525, affirming decree (C. C. 1911) 192 Fed. 659.

Where the averments in a complaint or declaration in an action in a United States court make out a case arising under the constitution, laws, or treaties of the United States, if, when all the pleadings are in, it appears that the averments are immaterial in the determination of the matter really in dispute between the parties, and especially if they were evidently made for the purpose of creating a case cognizable by the United States court where none in fact existed, the court should not retain jurisdiction of the case, but immediately dismiss it, as this section applies directly to such a case. Robinson v. Anderson (1886) 121 U. S. 522, 7 Sup. Ct. 1011, 30 L. Ed. 1021.

5. —— **Amount involved.**—A suit by a transferee of bonds and coupons "does not really and substantially involve a dispute or controversy within the jurisdiction" of a federal court if the transfers to him are made for the purpose of collection only, and if the amount necessary to give jurisdiction to the court is made up by uniting in his hands the bonds or coupons of owners who separately had less than the jurisdictional amount. Waite v. Santa Cruz (1902) 22 Sup. Ct. 327, 184 U. S. 302, 46 L. Ed. 552, reversing judgment City of Santa Cruz v. Waite (1899) 98 Fed. 387, 39 C. C. A. 106.

The discretion granted to dismiss a case on the ground that it does not "really and substantially involve a dispute or controversy properly within" its jurisdiction, will not extend to the dismissal of an action of tort charging a malicious injury, and alleging damages at more than $500, because it appears that the actual damages are less than that amount. Barry v. Edmunds (1886) 6 Sup. Ct. 501, 116 U. S. 550, 29 L. Ed. 729. Its purpose was to prevent the court from taking jurisdiction on account of mere colorable allegations to give jurisdiction unwarranted by the facts, and where there is no controversy involving more than $2,000, the court has no jurisdiction, though there is an allegation of damages in a sum greater than $2,000 which the party knows or has reason to believe he cannot recover. Cabot v. McMaster (C. C. 1894) 61 Fed. 129, 130.

In actions of tort, if it appears clearly from plaintiff's statement or the testimony of his witnesses that a verdict for $2,000 would be so excessive as to require the court to set it aside and grant a new trial, it is its duty to dismiss the case for want of jurisdiction. Maxwell v. Atchison, T. & S. F. R. Co. (C. C. 1888) 34 Fed. 286, 290.

Where, in a suit in the federal courts to set aside conveyances as fraudulent and a cloud on plaintiff's title, the plaintiffs allege that the value of the land is more than $2,000, but it appears by undisputed testimony in support of a plea to the jurisdiction that it was much less, an order of dismissal must be entered. Simon v. House (1891) 46 Fed. 317.

6. —— **Federal question.**—Even if the complaint brought the case within the jurisdiction of the court, the suit should be dismissed when it appeared on the trial that no federal question was involved, but only the question whether the city had authority, under the laws of Minnesota, to enter into the contract in suit. City of Fergus Falls v. Fergus Falls Water Co. (1896) 72 Fed. 873, 19 C. C. A. 212.

A statement of claim which seeks to recover damages for acts of defendant done in his capacity as judge of a state court does not raise a federal question, and, where there is no diversity of citizenship, a circuit court of the United States is without jurisdiction, and it is its duty, on motion therefor, to dismiss the suit. Kinney v. Mitchell (C. C. 1905) 138 Fed. 270, writ of error dismissed (1906) 27 Sup. Ct. 784, 203 U. S. 586, 51 L. Ed. 329.

Where the averments in a complaint or declaration in an action in a United States circuit court make out a case arising under the constitution, laws, or treaties of the United States, if, when all the pleadings are in, it appears that the averments are immaterial in the determination of the matter really in dispute between the parties, and especially if they were evidently made for the purpose of creating a case cognizable by the United States court where none in fact existed, the court should not retain jurisdiction of the case, but immediately dismiss it. Robinson v. Anderson (1887) 7 Sup. Ct. 1011, 121 U. S. 522, 30 L. Ed. 1021.

7. —— **Diversity of citizenship.**—The court is bound to dismiss a suit depending for federal jurisdiction on the nonresidence of the plaintiff, when it is made to appear that he is not in fact a nonresident. Morris v. Gilmer (1889) 9 Sup. Ct. 289, 129 U. S. 315, 32 L. Ed. 690, reversing decree Gilmer v. Morris (C. C. 1888) 35 Fed. 682.

Where the complaint in an action on notes states only that the parties reside in different states, but the summons issued thereon describes them as citizens of different states, the requisite diversity of citizenship sufficiently appears from the record to warrant refusal to dismiss in the supreme court for want of jurisdiction. Gordon v. Third Nat. Bank (1892) 12 Sup. Ct. 657, 659, 144 U. S. 97, 36 L. Ed. 360.

Where the evidence is sufficient to support a finding that a plaintiff left the state of his residence, where the action was brought and the defendant is domiciled, without intention to permanently change his domicile, a federal court is justified in taking the case from the jury, and directing its dismissal, as one not properly within its jurisdiction. Alabama G. S. R. Co. v. Carroll (1898) 84 Fed. 772, 28 C. C. A. 207, petition for rehearing withdrawn (1897) 88 Fed. 985, 31 C. C. A. 591.

In an action by an alien in the United States circuit court for a district of Michigan against a Missouri corporation, a false allegation that plaintiff is a citizen of Michigan will be presumed to be a mistake of the pleader, as the court would have jurisdiction in either case, and the suit will not be dismissed. Betzoldt v. American Ins. Co. (C. C. 1891) 47 Fed. 705.

8. —— **Jurisdiction in doubt.**—Where the parties have an ample remedy by proceedings in the state courts, and the federal court clearly has no jurisdiction over most of the matters complained of, and as to the others the question of jurisdiction is extremely doubtful, a plea to the jurisdiction should be sustained. Freeney v. First Nat. Bank (C. C. 1882) 16 Fed. 433.

A suit in a federal court may be dismissed on motion for want of jurisdiction on the death of a defendant who is an indispensable party, where such fact plainly appears from the pleadings, and the executors of the decedent cannot be brought in, but if there is doubt on the question, and it appears that the suit may be separable, it should not be so dismissed, nor when there is a possibility of revival against the executors, until after the lapse of a reasonable time. Lawrence v. Southern Pac. Co. (C. C. 1910) 177 Fed. 547.

9. **Fraudulent or collusive acts to confer jurisdiction.**—See, also, notes under § 991(1), ante.

This statute is not intended to restrict those who contemplate bringing a suit from selecting as adversaries all against whom any substantial relief is sought. Garrett v. New York Transit & Terminal Co. (C. C. 1886) 29 Fed. 129. But federal courts have no jurisdiction on the ground of diverse citizenship, when this diversity is brought about by collusion, in order to bring the controversy within the jurisdiction of the court. Marvin v. Ellis (C. C. 1881) 9 Fed. 367. And, where the arrangement of parties to a suit in a federal court is merely a contrivance between friends having no real antagonism, to give the court jurisdiction and avoid the effect of state decisions, the suit will be dismissed as collusive, although, if the controversy were real, it would have jurisdiction. Stephens v. Smartt (C. C. 1909) 172 Fed. 466. To warrant a federal court in retaining jurisdiction of an action removed from a state court, in which a nonresident and a resident defendant are joined, on the ground that such joinder was fraudulent, it must appear to the satisfaction of the court that such joinder was wrongful, and for the purpose of preventing a removal by a defendant who is entitled to that right. Shane v. Butte Electric Ry. Co. (C. C. 1906) 150 Fed. 801.

A suit by a gas company against a city to restrain the enforcement of an

ordinance forfeiting its property and franchises, where it appeared that two of the three directors refused to institute proceedings in the local courts because of the excited condition of the public mind, in order that the third, who was a nonresident, might be driven to a proceeding in his own name in the federal courts, held a case of collusive jurisdiction, and that the bill should be dismissed without prejudice to a suit in the state court. City of Detroit v. Dean (1883) 1 Sup. Ct. 560, 106 U. S. 537, 27 L. Ed. 300.

The county of Sacramento, Cal., desiring to enjoin a certain nuisance, but unable to sue in the United States court, agreed to furnish the attorneys for the plaintiff and bear all the expenses of the present suit. The plaintiff was interested in the result of the suit as well as the county. Held, that this was a suit collusively made, and the United States court had no jurisdiction. Cashman v. Amador & S. Canal Co. (1886) 6 Sup. Ct. 926, 928, 118 U. S. 58, 30 L. Ed. 72.

The face of bill and the fact that within a month after judgment was obtained a suit was begun in the state court on the same cause of action held to show a collusive attempt to improperly give jurisdiction to a federal court. Quincy v. Steel (1887) 7 Sup. Ct. 520, 522, 120 U. S. 241, 30 L. Ed. 624.

The court is bound to dismiss a suit depending for federal jurisdiction on the nonresidence of the plaintiff, when it is made to appear that he is not in fact a nonresident. Morris v. Gilmer (1888) 129 U. S. 315, 9 Sup. Ct. 289, 32 L. Ed. 690.

Collusion requiring the dismissal, pursuant to this section, of a suit against a street railway company in a federal court, cannot be inferred because the parties desired that the administration of the railway affairs be taken in hand by the court, to which end the defendant admitted the averments in the bill and united with complainants in their request for the appointment of receivers, where no claim is made that the averments in the bill were untrue, or that the debts named therein as owing to the complainants did not in fact exist, and there is no question made as to the citizenship of the complainants, and not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the federal court. In re Reisenberg (1908) 28 Sup. Ct. 219, 224, 208 U. S. 90, 52 L. Ed. 403, dismissing petitions Pennsylvania Steel Co. v. New York City R. Co. (C. C. 1907) 157 Fed. 440.

A suit by nonresident taxpayers on behalf of themselves and all other taxpayers, to restrain a municipal public utilities commission from proceeding to acquire, by purchase or otherwise, a waterworks system, on the ground that it was an unconstitutional body and its expenditures illegal, should not be dismissed on the theory that complainants were collusively made parties in order to create a case justifiable in the federal courts, because they were solicited to bring the suit, and were indemnified by the existing waterworks company against liability for costs or counsel fees. Wheeler v. Denver (1913) 33 Sup. Ct. 842, 229 U. S. 342, 57 L. Ed. 1219.

The jurisdiction of a federal court of a suit in equity by a nonresident stockholder to enjoin an alleged breach of trust by the directors of the corporation, or other violation of corporate duty, is not affected by the fact that he is acting in concert with other stockholders, who are citizens of the same state as the corporation, or that such stockholders contribute to the expenses of the suit, where the controlling majority in the stockholders and directors is opposed to the objects of the suit; and there is therefore no collusion, in the sense of the statute. New Albany Waerworks v. Louisville Banking Co. (1903) 122 Fed. 776, 58 C. C. A. 576; Consumers' Gas Trust Co. v. Quinby (1905) 137 Fed. 882, 70 C. C. A. 220, writ of certiorari denied (1905) 25 Sup. Ct. 803, 198 U. S. 585, 49 L. Ed. 1174.

Nonresident trustee for bondholders held not entitled to maintain suit in the federal court, where it was evident that the suit was instituted by the plaintiff as trustee to relieve the railway company, the real party in interest, from the necessity of resorting to the state court. Williams v. City Bank & Trust Co. (1911) 186 Fed. 419, 108 C. C. A. 341, writ of certiorari denied City Bank & Trust Co. v. Williams (1911) 32 Sup. Ct. 526, 223 U. S. 727, 56 L. Ed. 632.

The provision herein that, if at any time it shall appear to the satisfaction of the court that such suit does not really and substantially involve a dispute properly within its jurisdiction, the court shall dismiss the suit, does not permit a defendant to admit an allegation of his adversary's pleading, and then on the trial offer proof that his own admission is untrue. Draper v. Springport (C. C. 1883) 15 Fed. 328, 332.

This section does not mean that a suit, properly brought, must be dismissed because defendant by admissions or failure to deny reduces the amount in dispute to less than the statutory sum. Fuller v. Metropolitan Life Ins. Co. (C. C. 1889) 37 Fed. 163.

A suit in a United States circuit court, against a railway company and others, to foreclose a mechanic's lien claimed under a state statute for materials alleged to have been used by the company in the construction of its railway and other works, was brought by procurement of one of the defendants, to enable him to file a cross-bill against his codefendants, residents of the state, to obtain an injunction against them,

and to evade the effect of proceedings in the state courts; and it appeared that, under the state statutes, complainant was entitled to a lien for part of its claim only, much less than $2,000. Held, that the circuit court had no jurisdiction, and its order continuing the injunction granted on the cross-bill must be reversed. Industrial & Mining Guaranty Co. v. Electrical Supply Co. (1893) 58 Fed. 732, 7 C. C. A. 471.

Refusal of trustees to sue, thereby enabling the cestui que trust to bring the action in a federal court, as involving a controversy wholly between citizens of different states, will not be held collusive, thus subjecting the action to dismissal, though they were willing the cestui que trust should bring the action and were friendly to it, where they would not have sued under any circumstances, for the reason that they would have had to sue in a state court, and thought that an effort would there be made to unduly influence the jury. Bowdoin College v. Merritt (C. C. 1894) 63 Fed. 213.

Complainants filed a bill in a circuit court of the United States in California against defendants, who were citizens of that state, alleging that complainants were heirs at law of a decedent from whom, prior to his death, one of the defendants, who was also a brother, and one of his heirs, had procured a conveyance of all his property without consideration, and which was invalid by reason of the decedent's insanity; that subsequently such defendant, who was insolvent, had conveyed such property to his codefendant in payment of an antecedent indebtedness. The prayer of the bill was that such conveyances be set aside as to such shares of the property as would have been inherited by complainants. Held, that the court could not determine from such allegations and prayer that the interest of the defendant, who was a coheir with complainants, would be best served by their success, so as to require such an arrangement of parties as would make him a complainant, and defeat the court's jurisdiction, there being no proof of fraud or collusion on the part of complainants. Reavis v. Reavis (C. C. 1899) 98 Fed. 145.

Evidence considered, and held to show that plaintiff, in an action in a federal court on municipal bonds, was not the owner of such bonds but that the same were owned when the action was commenced by a citizen of the state, and that the bringing of the action in plaintiff's name was a fraud on the jurisdiction of the court. Edwards v. Bates County (C. C. 1902) 117 Fed. 526.

Where the bill of a stockholder complies with the requirements of equity rule 94, by proper allegations of demand on the company to bring the suit, and its refusal, the court cannot determine on demurrer that such action was collusive. Mills v. City of Chicago (C. C. 1904) 127 Fed. 731.

The appointment of an alien consular representative of a foreign government as administrator of a decedent citizen, for the sole purpose of enabling a suit for wrongful death to be brought in a federal court, held such collusion as to make it the duty of the court to dismiss, under Judicial Code, § 37. Cerri v. Akron-People's Telephone Co. (D. C. 1914) 219 Fed. 285.

10. —— Colorable transfers of property.—See, also, notes under § 991(1), ante.

That a cause of action was transferred for the purpose of enabling the transferee to sue thereon in the federal courts does not deprive such courts of jurisdiction, where the transfer was real and absolute. Ashley v. Board of Sup'rs of Presque Isle County (1897) 83 Fed. 534, 27 C. C. A. 585 (certiorari denied Board of Sup'rs of Presque Isle County v. Ashley [1898] 18 Sup. Ct. 940, 169 U. S. 736, 42 L Ed. 1216); Cross v. Allen (1891) 12 Sup. Ct. 67, 69, 141 U. S. 528, 35 L. Ed. 843. But a colorable conveyance for the purpose of giving jurisdiction to a federal court will not give it jurisdiction. Maxfield v. Levy (C. C. 1797) Fed. Cas. No. 9,321, 4 Dall. 330, 331, 1 L. Ed. 854; Lake County v. Schradsky (1899) 97 Fed. 1, 38 C. C. A. 17. Thus the case will be dismissed where citizens of a state, owning coupons cut from bonds of a county of that state, transfer the same, without consideration, to a citizen of another state, in order that he may join the causes of action thereon with the causes of action on other coupons transferred to him for the same purpose by other persons, and thereby make a case cognizable in a federal court, though these latter persons might themselves have sued in the federal court. Board of Com'rs of Lake County, Colo., v. Dudley (1899) 19 Sup. Ct. 398, 401, 173 U. S. 243, 43 L. Ed. 684.

Where municipal bonds have been really and in good faith transferred to a citizen of another state, who could sue thereon in the federal courts, a subsequent transfer, though only colorable, does not deprive such courts of jurisdiction. Ashley v. Board of Sup'rs of Presque Isle County (1897) 83 Fed. 534, 27 C. C. A. 585, certiorari denied Board of Sup'rs of Presque Isle County v. Ashley (1898) 18 Sup. Ct. 940, 169 U. S. 736, 42 L. Ed. 1216.

A suit brought by a citizen of Indiana against a township in Michigan on bonds transferred to him for collection by citizens of Michigan held properly dismissed. Williams v. Nottawa (1881) 104 U. S. 209, 26 L. Ed. 719.

In a bill charging that defendant had purchased a valuable tract of land at a foreclosure sale while acting as attorney for the defendant therein, who was

the complainant's grantor, it appeared that complainant's grantor and defendant were citizens of the same state, and, after a suit begun in the state court was decided in defendant's favor, and pending an appeal to the supreme court of the state, the conveyance was made to her son-in-law, who was a resident of another state, and who, she testified, offered to "take the matter off her hands." It did not appear that any part of the purchase money stipulated in the deed had ever been paid, or that the deed had ever been delivered to the complainant, or that any bond for costs was ever given by complainant, or any one for him. Immediately after the conveyance, suit was begun in his name in the federal court. Held clearly a case of simulated jurisdiction, which should have been dismissed. Hayden v. Manning (1883) 1 Sup. Ct. 617, 106 U. S. 586, 27 L. Ed. 306.

Where a widow, a citizen of New Jersey, might have maintained an action on a policy of insurance on the life of her husband issued by a New York insurance company, in the circuit court of the United States in New York, but assigned the policy to a trustee residing in New York, for her benefit, the fact that such trustee petitioned the court appointing him to be relieved of his trust, and such court appointed a substitute trustee, who was a citizen of New Jersey, was insufficient in itself to require a dismissal of a suit brought by the substituted trustee in the federal court in New York on the ground that the substituted trustee was collusively made a plaintiff for the purpose of conferring jurisdiction. Manhattan Life Ins. Co. v. Broughton (1883) 3 Sup. Ct. 99, 101, 109 U. S. 121, 27 L. Ed. 878.

A bill in equity in the circuit court of the United States against a town in one state by a citizen of another, for relief against the accidental omission of seals from bonds of the defendant, payable to bearer, and held by the plaintiff, some of which are owned by him, and others of which are owned in different amounts, part by citizens of the state in which the town is, and part by citizens of other states, and have been transferred to him by the real owners for the mere purpose of being sued, should be dismissed so far as regards all bonds held by citizens of the same state as the defendant, and bonds held by a citizen of another state to a less amount than $500. Inhabitants of Bernards Tp. v. Stebbins (1883) 3 Sup. Ct. 252, 109 U. S. 341, 27 L. Ed. 956.

Two years after the decision of a state court pronouncing bonds issued by the defendant municipality void, owners of the bonds, citizens of the state, cut off the coupons, and transferred them to plaintiff, a citizen of another state, under an arrangement by which the latter gave his nonnegotiable note for an amount much less than the face of the coupons, payable in two years from date, and agreed, "as a further consideration for said coupons," that if he succeeded in collecting the full amount thereof he would pay to the owners of the bonds one-half the amount collected above the face of the note. Held, that an action by plaintiff on the coupons, brought in the United States circuit court, should be dismissed as coming within the prohibition of the above section. Farmington Village Corporation v. Pillsbury (1885) 5 Sup. Ct. 807, 809, 114 U. S. 138, 29 L. Ed. 114.

Where a firm of attorneys, who had received a deed to certain valuable property from parties desiring to contest the title of other claimants thereto, in turn conveyed the same to the father-in-law of one of the members of the firm, a poor farmer living in another state, who knew nothing about the property, and who afterwards, as defendant in a suit to quiet title to it, had the cause removed to the United States court on the ground of his citizenship in such other state, and it appeared, upon all the evidence, that the conveyance was made to him collusively, for the mere purpose of giving the United States circuit court jurisdiction, that court should refuse to entertain jurisdiction. Little v. Giles (1886) 7 Sup. Ct. 32, 118 U. S. 596, 30 L. Ed. 269, reversing decree Giles v. Little (C. C. 1881) 13 Fed. 100.

The assignment of a note to cut off an anticipated defense to a suit to foreclose the mortgage by which it is secured will not be considered collusive and justify a dismissal of a suit brought in a United States court by the assignee if the title made by the transfer is complete and such as would enable the assignee to maintain suit in his own name. Lanier v. Nash (1887) 7 Sup. Ct. 919, 922, 121 U. S. 404, 30 L. Ed. 947.

A suit by a transferee of bonds and coupons "does not really and substantially involve a dispute or controversy within the jurisdiction" of a circuit court of the United States within the meaning of this act if the transfers to him are made for the purpose of collection only, and if the amount necessary to give jurisdiction to the court is made up by uniting in his hand the bonds or coupons of owners who separately had less than the jurisdictional amount. Waite v. Santa Cruz (1902) 22 Sup. Ct. 327, 335, 184 U. S. 302, 46 L. Ed. 552.

Incorporation in Nevada by direction of a California corporation, for the sole purpose of having the matters in dispute between such California corporation and another corporation of that state determined in a federal rather than in the state court, where they were pending and undetermined must be regarded as an attempt collusively

to make a party plaintiff simply for the purpose of creating a case cognizable by the federal court, which under this section requires the dismissal of the suit, where the new corporation assumes to be the owner of the property rights which the old company had asserted only that it may have a standing in the federal court as a litigant in respect of those rights, and the old corporation can control the conduct of the suit brought by the new corporation at any time up to the date of the decree, and can require the new corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the old corporation without any new or valuable consideration. Miller & Lux v. East Side Canal & Irrigation Co. (1908) 29 Sup. Ct. 111, 113, 211 U. S. 293, 53 L. Ed. 189.

In an action in a circuit court by a foreigner against a municipal corporation on coupons from its bonds, where there was evidence sufficient to sustain a claim made by defendant that the coupons in suit were in fact owned by a citizen of the same state, and that their transfer to plaintiff was merely colorable, and for the purpose of enabling the suit to be brought in the federal court, the court should have dismissed the suit, as collusive, or, if not fully satisfied of the collusive character of the transfer, should have granted the defendant's request to submit that issue to the jury under proper instructions. Board of Com'rs of Lake County v. Schradsky (1899) 97 Fed. 1, 2, 38 C. C. A. 17.

A trial judge may properly dismiss a suit, where he is satisfied from the evidence produced on the trial that the property involved as the subject-matter of the action was collusively transferred to plaintiff, who was a citizen of another state, to enable a suit to be brought in the federal court and in fraud of its jurisdiction, notwithstanding the fact that he had previously overruled a motion to dismiss on that ground; and such dismissal may be made by the Circuit Court of Appeals on the same grounds. Turnbull v. Ross (1905) 141 Fed. 649, 72 C. C. A. 609.

Where persons largely interested in a Pennsylvania corporation, desiring to institute a suit in the federal courts of Pennsylvania for a receiver, caused certain bonds and stock of little or no value to be assigned to a citizen of New Jersey, who was a mere stenographer in the office of one of the corporation's attorneys, for no other consideration than that he should sign the bill, which the corporation's attorneys thereafter filed, such transaction constituted a fraud on the court's jurisdiction sufficient to defeat it, though the assignment was absolute. Kreider v. Cole (1907) 149 Fed. 647, 79 C. C. A. 339, reversing decree Cole v. Philadelphia & E. Ry. Co. (C. C. 1905) 140 Fed. 944.

The formation of a corporation under the laws of New Jersey to take over property in New Hampshire from a corporation of that state having the same name and composed largely of the same persons held not so clearly for the purpose of enabling it to invoke the jurisdiction of the federal courts as to defeat such jurisdiction on the ground of fraud. Percy Summer Club v. Astle (1908) 163 Fed. 1, 90 C. C. A. 527, rehearing denied (1908) 166 Fed. 1020, 92 C. C. A. 667.

Parties conveyed land to a stranger, a citizen of another state, without his knowledge and without consideration, for the express purpose of creating a case of jurisdiction in the United States courts, and immediately, with the subsequent consent of the grantee, commenced a suit in the United States circuit court for the benefit of the grantors, expecting a reconveyance, although care was taken that there should be no promise made to reconvey. Held, that the transaction was only colorable and collusive, for the improper purpose of creating a case of jurisdiction for the courts of the United States, within the provisions of the act of 1875, and the suit must be dismissed for want of jurisdiction. Coffin v. Haggin (C. C. 1882) 11 Fed. 219.

Where the plaintiff had no substantial interest in the coupons sued on, but obtained the legal title to enable him to maintain the action, and where he bought them without an inquiry as to their validity or value, and pretended to pay for them by a check which he never paid, it is the duty of the court to dismiss the suit. Fountain v. Town of Angelica (C. C. 1882) 12 Fed. 8.

A plaintiff who has been introduced into a controversy by assignment or transfer, merely that he may acquire a standing and relation to the controversy to enable him to prosecute it for the beneficial interests of the original party, is improperly and collusively made a party to the suit. Id.

Where an owner of certain lands leased the same to plaintiff, though the principal motive in making the lease was to enable plaintiff to sue in the circuit court of the United States, as it did not appear that the lease was not real and effectual to pass the title of the term to plaintiff, the federal court had jurisdiction, if the suit involved a controversy properly within the jurisdiction of such court. Van Dolsen v. City of New York (C. C. 1883) 17 Fed. 817.

C., a judgment creditor, and also the purchaser of land under an execution sale, conveyed the same to M., his son-in-law, a nonresident, for an interest in a worthless patent. Subsequent to his agreement to convey he endeavored to

obtain possession of the land by proceedings in which he swore that he was the owner, and entitled to possession. The grantee never saw the land, never examined the title or inquired as to its value, and took no part in the suit brought in his name to set aside a fraudulent deed made by the judgment debtor. Held, that the conveyance was collusive, and the court had no jurisdiction. McLean v. Clark (C. C. 1887) 31 Fed. 501.

Where it appeared that F. P. was the real party in interest, the transfers from him being colorable merely, within the meaning of the act of March 3, 1875, held, that suit by N. should be dismissed; the actual plaintiff and the defendant being both residents of Maine. Norton v. European & N. A. Ry. (C. C. 1887) 32 Fed. 865.

The organization by the individual stockholders of a corporation existing under the laws of one state of a corporation under the laws of another state for the purpose of bringing a suit in a federal court to try title to a tract of land claimed by the former corporation, and conveyed to the latter after its organization and before suit brought, will not enable the grantee to maintain a suit in ejectment in such court. Lehigh Min. & Manuf'g Co. v. Kelly (C. C. 1894) 64 Fed. 401, judgment affirmed (1895) 16 Sup. Ct. 307, 160 U. S. 327, 40 L. Ed. 444.

Circumstances held not to show that conveyance to corporation was collusive and fictitious, merely for the purpose of invoking the federal jurisdiction. Irvine Co. v. Bond (C. C. 1896) 74 Fed. 849, judgment affirmed Stuart v. City of Easton (1898) 18 Sup. Ct. 650, 170 U. S. 383, 42 L. Ed. 1078.

11. Waiver of right to dismissal.—Defendant does not preclude himself from raising the question of jurisdiction by interposing a plea of former adjudication, and waiting until it is decided against him. Morris v. Gilmer (1889) 9 Sup. Ct. 289, 292, 129 U. S. 315, 32 L. Ed. 690, reversing Gilmer v. Morris (C. C. 1888) 35 Fed. 682.

Regardless of this statutory provision, a party who has wrongfully procured a removal from the local Porto Rican court to the federal district court cannot, after judgment against him, assert that the federal court had no jurisdiction because of such irregularity. Garrozi v. Dastas (1907) 27 Sup. Ct. 224, 227, 204 U. S. 64, 51 L. Ed. 369.

Plaintiff, who was in fact an alien, sued defendant in the state courts of Washington to recover for an alleged injury while in defendant's employ; defendant being a citizen and resident of New York. Defendant filed a petition to remove the cause to the federal court sitting in Washington, alleging that plaintiff was a citizen of Washington and a resident of the Western district thereof. Defendant after removal answered the complaint, and entered on the trial without objection where it appeared that plaintiff was an alien, whereupon defendant moved to dismiss for want of jurisdiction. Held, that since the removal petition showed a valid ground for removal and the evidence disclosed an equally sufficient, though different ground, and defendant by its removal proceedings had waived its right to be sued in the district of its residence, the court had jurisdiction to try the cause, and that the motion to dismiss was properly denied. Katalla Co. v. Rones (1911) 186 Fed. 30, 108 C. C. A. 132, affirming judgment Rones v. Kattalla Co. (C. C. 1910) 182 Fed. 946.

Objection that case is not within general jurisdiction of federal court cannot be waived by defendant. McEldowney v. Card (C. C. 1911) 193 Fed. 475.

(B) Parties entitled to dismissal

12. In general.—The fact that removal into the federal court was had on the application of the defendant is immaterial on his motion to dismiss, if the controversy is one of which the court has no jurisdiction. Ferguson v. Ross (C. C. 1889) 38 Fed. 161, 3 L. R. A. 322.

A suit having been removed to a federal court on motion of defendant, he cannot move its dismissal because it was improperly brought in the original court, nor can he attack the jurisdiction of the court to which it was removed. Edwards v. Connecticut Mut. Life Ins. Co. (C. C. 1884) 20 Fed. 452.

Where a creditors' bill in a federal court against a corporation showed the requisite facts to give the court jurisdiction, a creditor who is subsequently brought in as a defendant to an intervening bill for the foreclosure of a mortgage on the property of the corporation, which is in the hands of the receiver, cannot attack the jurisdiction by a plea alleging that the original suit was brought by collusion between complainant and the corporation in procuring the assignment of the claim to complainant in order to give the court jurisdiction, when it is not shown that the intervener was a party to such collusion. Morton Trust Co. v. New York & O. R. Co. (C. C. 1900) 105 Fed. 539.

(C) Proceedings for dismissal

13. Objections—Manner of raising.—Under this section it is immaterial in what manner or by what pleading the question is raised. Briggs v. Traders' Co. (C. C. 1906) 145 Fed. 254. Where want of jurisdiction appears from the complaint in an action in a federal court, it is the duty of the court to take cognizance of it, regardless of the manner in which it is brought to the court's attention. Koike v. Atchison, T. & S. F. Ry. Co. (C. C. 1907) 157 Fed. 623; Pennsylvania Co. v. Bay (C.

C. 1905) 138 Fed. 203. In other words, a question of jurisdiction is fundamental, and may be raised at any time, in any mode, and at every step in the proceedings, either by the court of its own motion or by the parties, and such investigation may be instituted as shall be necessary to establish or defeat the court's jurisdiction. Kreider v. Cole (1907) 149 Fed. 647, 79 C. C. A. 339, reversing decree Cole v. Philadelphia & E. Ry. Co. (C. C. 1905) 140 Fed. 944.

A defect of jurisdiction appearing in the pleadings may be taken advantage of by motion in arrest of judgment or writ of error. Blachly v. Davis (C. C. 1839) Fed. Cas. No. 1,456.

Where want of jurisdiction appears upon the face of the pleadings, the objection should be taken by demurrer; otherwise by plea. Varner v. West (C. C. 1873) Fed. Cas. No. 16,885.

See, also, notes under § 991(1), ante, as to manner of raising objections to jurisdiction.

14. —— Time of raising.—In the courts of the United States it is never too late to consider the question of jurisdiction, and if at any time the want of jurisdiction should appear it is the duty of the court to arrest the proceeding. Spring v. Domestic Sewing Mach. Co. (C. C. 1882) 13 Fed. 446; Vannerson v. Leverett (C. C. 1887) 31 Fed. 376. A motion to dismiss for want of jurisdiction may be considered at any time before final judgment or decree. Blythe v. Hinckley (C. C. 1897) 84 Fed. 246, appeal dismissed (1899) 19 Sup. Ct. 497, 173 U. S. 501, 43 L. Ed. 783; Briggs v. Traders' Co. (C. C. 1906) 145 Fed. 254. Thus, when, during the trial it appears from the testimony that the controversy in the suit is not one between a citizen of a state of the United States and a citizen of a foreign state, as alleged in the declaration, but one between two aliens, and no question arising under the constitution or laws of the United States is involved, a motion, after verdict, to dismiss for want of jurisdiction will be granted. Hartog v. Memory (C. C. 1885) 23 Fed. 835, order reversed (1886) 6 Sup. Ct. 521, 116 U. S. 588, 29 L. Ed. 725.

Where a stockholder's suit for dissolution of a corporation, brought in a federal court, and of which such court had jurisdiction on the face of the record, had proceeded for 16 months, during which time a receiver had been appointed who had collected the assets of the corporation and made an advantageous sale of its property, and the claims of creditors had been proved, a nonparticipating creditor which in the meantime with knowledge of the suit proceeded in a state court and obtained a judgment against the corporation will not be permitted to intervene after such lapse of time to raise an issue of fact upon the question of jurisdiction in respect to which it does not claim to have any more knowledge or information than it had when the suit was commenced. Briggs v. Traders' Co. (C. C. 1906) 145 Fed. 254.

The question of jurisdiction may be raised on motion to dismiss the libel before the cause is reached on the calendar, although not raised by exceptions before answer. Wenberg v. Cargo of Mineral Phosphate (D. C. 1883) 15 Fed. 285.

Suit was brought by service of process on defendant's secretary in the state of New York March 16, 1911. On April 3d following, the case was removed to the federal Circuit Court, and on April 21st affidavits of defendant's officers, supporting a motion to dismiss, were made in Connecticut and forwarded to defendant's attorney in New York. Such attorney appeared specially on April 26th and moved to set aside the service; the papers being served on the 28th. Held, that the motion was not barred by laches. Phelps v. Connecticut Co. (C. C. 1911) 188 Fed. 765.

Neither this section nor rule 9 of the circuit court providing that, "when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, the matter so pleaded in abatement shall be deemed to be waived," authorizes a plea to the jurisdiction to be entered after answer to the merits, and after the commencement of taking testimony. Hewitt v. Story (C. C. 1889) 39 Fed. 158, bill dismissed (C. C. 1892) 51 Fed. 101.

15. —— Dismissal by court on its own motion.—Where dismissal of a suit for want of jurisdiction is proper the court may dismiss of its own motion. Cutler v. Rae (1849) 7 How. 729, 731, 12 L. Ed. 890; Morris v. Gilmer (1889) 9 Sup. Ct. 289, 292, 129 U. S. 315, 32 L. Ed. 690; Colburn v. Hill (1900) 101 Fed. 500, 506, 41 C. C. A. 467; Consolidated Rubber Tire Co. v. Ferguson (1910) 183 Fed. 756, 106 C. C. A. 330; Farmers' Oil & Guano Co. v. Duckworth Co. (1914) 217 Fed. 362, 133 C. C. A. 278; U. S. v. Wickersham (C. C. 1882) 10 Fed. 505, 511; Gage v. Riverside Trust Co. (C. C. 1906) 156 Fed. 1002, 1009. It is the duty of court, on its own motion, to inquire into the question of its jurisdiction. McEldowney v. Card (C. C. 1911) 193 Fed. 475; A. B. Andrews Co. v. Puncture Proof Footwear Co. (C. C. 1909) 168 Fed. 762; Harrington v. Great Northern Ry. Co. (C. C. 1909) 169 Fed. 714; Gundall v. Manhattan Ry. Co. (D. C. 1913) 205 Fed. 410. And to dismiss of its own motion, if jurisdiction does not affirmatively appear. Williams v. Nottawa Tp. (1881) 104 U. S. 209, 211, 212, 26 L. Ed. 719; El-

lenwood v. Marietta Chair Co. (1895) 15 Sup. Ct. 771, 772, 158 U. S. 105, 39 L. Ed. 913; Newcomb v. Burbank (1910) 181 Fed. 334, 104 C. C. A. 164; Spring v. Domestic Sewing Mach. Co. (C. C. 1882) 13 Fed. 446; Rae v. Grand Trunk Ry. Co. (C. C. 1882) 14 Fed. 401; U. S. v. Crawford (C. C. 1891) 47 Fed. 561; Bertha Zinc & Mineral Co. v. Carico (C. C. 1893) 61 Fed. 132, 137; Gage v. Riverside Trust Co. (C. C. 1906) 156 Fed. 1002; Risley v. City of Utica (C. C. 1910) 179 Fed. 875; Bucyrus Co. v. McArthur (D. C. 1914) 219 Fed. 266.

16. —— Motion of party.—Want of jurisdiction of a federal court, apparent on the face of a bill, may be taken advantage of by a motion to dismiss. Ladew v. Tennessee Copper Co. (C. C. 1910) 179 Fed. 245, decree affirmed (1910) 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069, and Wetmore v. Tennessee Copper Co. (1910) 31 Sup. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073; Municipal Inv. Co. v. Gardiner (C. C. 1894) 62 Fed. 954. Which motion may be based upon the proofs taken by a master to whom the cause has been referred. Steigleder v. McQuesten (1905) 25 Sup. Ct. 616, 198 U. S. 141, 49 L. Ed. 986.

Where the petition shows on its face that the court has not jurisdiction of the cause, the action may be dismissed on motion. The objection need not be first raised by demurrer. Connor v. Vicksburg & M. R. Co. (C. C. 1888) 36 Fed. 273, 1 L. R. A. 331.

The question of jurisdiction may be considered on motion to dismiss, though a plea to the jurisdiction is the better practice. Stichtenoth v. Central Stock & Grain Exch. of Chicago (C. C. 1900) 99 Fed. 1.

If a suit does not involve a dispute or controversy properly within the jurisdiction of the Circuit Court, on a motion to dismiss being filed it is the plain duty of that court to proceed no further therein, but to dismiss the suit. Kinney v. Mitchell (1905) 136 Fed. 773, 69 C. C. A. 493.

17. —— Plea to jurisdiction or in abatement.—A plea in abatement on the ground that parties were improperly or collusively joined to make the case cognizable in the federal courts raises no issue involving the construction or application of the constitution so as to make the case appealable directly from the circuit to the supreme court. Merritt v. President, etc., of Bowdoin College (1898) 18 Sup. Ct. 415, 417, 169 U. S. 551, 42 L. Ed. 850.

A plea to the jurisdiction of a federal circuit court, based upon the ground that the complainants had collusively made parties complainants and defendants for the purpose of showing the requisite diversity of citizenship, is insufficient in law if it does not specify what parties are alleged collusively to have been made. Helm v. Zarecor (1911) 32 Sup. Ct. 10, 11, 222 U. S. 32, 56 L. Ed. 77.

If a defendant wishes to contest the citizenship of the parties to an action in the national courts, he must do so by plea in abatement; and such a plea, if joined to one to the merits, may be stricken out, but is not liable to a demurrer. Wythe v. Myers (C. C. 1876) Fed. Cas. No. 18,119.

18, 19. —— Showing of grounds for dismissal.—An action will not be dismissed by a circuit court of appeals on the ground that the pleadings do not show the requisite diversity of citizenship to give the circuit court jurisdiction, on motion of the plaintiff, who brought the action in that court, where the requisite jurisdictional facts appear in the evidence embodied in his bill of exceptions. Jumeau v. Brooks (1901) 109 Fed. 353, 48 C. C. A. 397.

In an action by the assignee of a mechanic's lien, brought to foreclose the lien in the federal court, if there is no averment as to the citizenship of the original parties it will be presumed that they are citizens of the same state, and the bill will be dismissed for want of jurisdiction. Hampton v. Truckee Canal Co. (C. C. 1883) 19 Fed. 1.

When it appears from the plaintiff's own testimony that one of the causes of action pleaded never had any existence, and the remaining matters are not of sufficient value to support the jurisdiction, the case must be dismissed. Horst v. Merkley (C. C. 1894) 59 Fed. 502.

It is the duty of the court to consider affidavits showing its want of jurisdiction, although they are filed after the taking of testimony in the case has been closed. Anderson v. Bassman (C. C. 1905) 140 Fed. 10.

20. —— Proof as to grounds of objection.—Where a complaint contains proper jurisdictional allegations to justify dismissal of an action for want of jurisdiction under this section, evidence must be produced showing a legal certainty that such suit does not substantially involve a controversy within the jurisdiction. Per Amidon, District Judge. Hartog v. Memory (1886) 6 Sup. Ct. 521, 116 U. S. 588, 29 L. Ed. 725 (reversing order [C. C. 1885] 23 Fed. 835); Deputron v. Young (1890) 10 Sup. Ct. 539, 134 U. S. 241, 33 L. Ed. 923; Put-in-Bay Waterworks, Light & Ry. Co. v. Ryan (1901) 21 Sup. Ct. 709, 716, 181 U. S. 409, 45 L. Ed. 927; Wecker v. National Enameling & Stamping Co. (1907) 27 Sup. Ct. 184, 185, 204 U. S. 176, 51 L. Ed. 430, 9 Ann. Cas. 757; National Masonic Acc. Ass'n v. Sparks (1897) 83 Fed. 225, 28 C. C. A. 399; Adams v. Shirk (1902) 117 Fed. 801, 55 C. C. A. 25; Hill v. Walker (1909) 167 Fed. 241, 92 C. C. A. 633 (writ of certiorari denied [1909] 29 Sup. Ct. 698, 214 U.

S. 517, 53 L. Ed. 1064); Third Nat. Bank v. Town of Seneca Falls (C. C. 1883) 15 Fed. 783; Ninth Nat. Bank v. Ralls Co. (C. C. 1884) 20 Fed. 374; Simpson v. Phillipsdale Paper Mill Co. (D. C. 1915) 223 Fed. 661.

A suit cannot properly be dismissed as not substantially involving an amount sufficient to give jurisdiction, unless the facts when made to appear on the record create a legal certainty of that conclusion. Wetmore v. Rymer (1898) 18 Sup. Ct. 293, 298, 169 U. S. 115, 42 L. Ed. 682; Howe v. Howe & Owen Ball Bearing Co. (1907) 154 Fed. 820, 83 C. C. A. 536; Walker v. Flint (C. C. 1881) 7 Fed. 435.

21. Determination and scope of inquiry.—If the want of jurisdiction does not appear from the bill or record but the objection is based on alleged extrinsic facts, it is the duty of the court to exercise its discretion in determining whether or not in the then condition of the cause and in view of the relations existing between the parties by reason of the proceedings already taken therein, it will permit such issues of fact to be raised. Briggs v. Traders' Co. (C. C. 1906) 145 Fed. 254.

A consideration of the averments of an answer in determining whether the circuit court has jurisdiction of a suit commenced therein is necessitated. Excelsior Wooden Pipe Co. v. Pacific Bridge Co. (1902) 22 Sup. Ct. 681, 185 U. S. 282, 46 L. Ed. 910, reversing decree (1901) 109 Fed. 497, 48 C. C. A. 349.

Where jurisdiction depends on the subject-matter of the suit, the court may, if necessary, irrespective of the pleadings, retain the case until a trial of the facts before the jury or the court, and then, on the proof, determine the question of jurisdiction. Eaton v. Calhoun (C. C. 1880) 15 Fed. 155.

Under this section the court had authority to try the question of fact as to whether the amount of damages that fairly could be claimed was sufficient to give it jurisdiction. Globe Refining Co. v. Landa Cotton Oil Co. (1903) 23 Sup. Ct. 754, 757, 190 U. S. 540, 47 L. Ed. 1171.

On a motion to dismiss for want of jurisdiction, the court will not ordinarily enter into a consideration of the merits, but, if the case shows a bona fide claim within the jurisdiction of the courts, with a reasonable plausibility in support thereof, the question of jurisdiction will be passed until the cause is considered on the merits on formal pleadings. York County Sav. Bank v. Abbot (C. C. 1904) 131 Fed. 980.

Where a cause is removed as having been commenced against a federal officer for an act done under color of the United States revenue laws, the question whether the defendant was acting in performance of his duty as an officer of the customs under the revenue laws is a matter of fact involved in the merits of the case, which cannot be raised upon a motion to dismiss the suit. Wood v. Matthews (C. C. 1852) Fed. Cas. No. 17,955.

Where defendant properly raised a question of jurisdiction by plea in abatement alleging that both parties were citizens of the same state, there was no error in submitting the same to the jury as a separate issue, irrespective of the issue on the merits. Terry v. Davy (1901) 107 Fed. 50, 46 C. C. A. 141.

It seems that since Act March 3, 1875, the court is not concluded on the question of jurisdiction by the amount laid in the complaint; and if, at the trial, that amount should appear, from the testimony of plaintiff and his witnesses, to have been laid beyond his reasonable expectation of recovery, the action should be dismissed. Holden v. Utah & M. Machinery Co. (C. C. 1897) 82 Fed. 209, writ of error dismissed (1899) 97 Fed. 983, 38 C. C. A. 692.

Where a defendant after verdict and judgment for the first time raises the question of jurisdiction, on the ground that there was no evidence to support the jurisdictional allegations of plaintiff's pleading, which were put in issue by a general denial, it is competent for the court to set aside the judgment for the purpose of inquiring into the question, either with or without a jury, as it may see fit; and, unless it shall appear from the evidence adduced or from the record that it is without jurisdiction, it may re-enter the judgment on the verdict. Toledo Traction Co. v. Cameron (1905) 137 Fed. 48, 69 C. C. A. 28.

Complainant filed a bill as a citizen of Nevada against defendant, a citizen of California, in the circuit court for the district of California. Defendant filed a plea in abatement, alleging that complainant was a citizen of California, whereupon complainant filed a replication, and the issue of citizenship upon hearing was decided in favor of complainant. Defendant then filed an answer to the merits of the case, and also denied that complainant was a citizen of Nevada. A replication was filed and testimony taken, and subsequently, pending the examination of witnesses, defendant offered to show by affidavits that complainant was in fact a citizen of California. Held, that the determination of the issue as to citizenship on the plea in abatement was conclusive, and could not be raised and determined again on affidavits or upon the denials in the answer. Sharon v. Hill (C. C. 1885) 26 Fed. 722.

In an action begun in a state court, under a state statute giving that court jurisdiction of such actions brought against a foreign corporation, provided the plaintiff be a resident of the state, the answer averred, as an objection to the jurisdiction, that the plaintiff was not a resident of the state. The defendant, having removed the action to the United States circuit court, moved

regular term. Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C. 1888) 37 Fed. 3.

27. Remand in part.—Where a railroad company and an electric light company were joined as defendants in an action for tort, and the railroad company, claiming a separable controversy, removed the cause for diversity of citizenship, and a motion to remand was denied as to it but granted as to electric company, the court had jurisdiction to proceed to trial as against the railroad company alone. Chicago Great Western R. Co. v. Hulbert (1913) 205 Fed. 248, 125 C. C. A. 98.

Where it appears that any of the defendants are not entitled to removal, the cause as to them must be remanded. Field v. Lownsdale (C. C. 1867) Fed. Cas. No. 4,769.

Where a rule to show cause why defendant should not be attached for contempt for violating an injunction was granted by the state court before removal of the cause, held, that the federal court would remand the contempt proceedings while retaining the main cause for adjudication. Voorhees v. Albright (C. C. 1879) Fed. Cas. No. 16,-999.

28. Remand on consent.—Where a removable suit has been properly removed under the act of March 3, 1875, from a state court into a federal circuit court, the consent of parties cannot authorize that court to remand the cause to the state court. Lawton v. Blitch (C. C. 1887) 30 Fed. 641.

29. Effect of waiver of defects by defendant.—The failure to file a plea in abatement in the state court is a voluntary admission that the action was properly before that court, and the case comes into the federal court in the same condition in which it was in the state court. Wertheim v. Continental Ry. & Trust Co. (C. C. 1882) 11 Fed. 689, 20 Blatchf. 508.

A circuit court cannot declare void, in a collateral action, a judgment of the circuit court of appeals in a case removed from a state court, though the record fails to show facts necessary to warrant the removal. Dexter, Horton & Co. v. Sayward (C. C. 1897) 84 Fed. 296.

The rule of federal courts that a suit to set aside a fraudulent conveyance can only be maintained by judgment creditors if waived by defendant cannot be invoked by plaintiff to defeat jurisdiction on removal. Closser v. Strawn (D. C. 1915) 227 Fed. 139.

(B) Grounds for remand

30. Want of jurisdiction or of cause for removal.—The sufficiency of removal proceedings may be attacked in the federal court on any ground available in the state court. Cropsey v. Sun Printing & Publishing Ass'n (D. C. 1914) 215 Fed. 132. A suit removed to the federal court will be remanded where it is not within the jurisdiction of that court. Ryan v. Young (C. C. 1879) Fed. Cas. No. 12,188; Anderson v. Sharp (C. C. 1911) 189 Fed. 247. Where it is manifest on the face of an affidavit or petition for removal from a state to a federal court that a removal is improper. Cameron v. Hodges (1888) 8 Sup. Ct. 1154, 1156, 127 U. S. 322, 32 L. Ed. 132. And where a state is a party. New Jersey v. Babcock (C. C. 1823) Fed. Cas. No. 10,-163. Unless it has no real interest in the controversy, in which case remand will be refused. Ex parte Nebraska (1908) 28 Sup. Ct. 581, 209 U. S. 436, 52 L. Ed. 876. Where a suit is brought in a state court in a federal judicial district of which neither plaintiff nor defendant is a resident, unless the plaintiff consents to the suit proceeding in the district by appearance and pleading. George v. Tennessee Coal, Iron & R. Co. (C. C. 1911) 184 Fed. 951. Where sufficient grounds for the removal are not shown. Urtetiqui v. D'Arcy (1835) 9 Pet. 692, 701, 9 L. Ed. 276; Jackson v. Allen (1889) 10 Sup. Ct. 9, 132 U. S. 27, 33 L. Ed. 249. When it appears by the defendant's answer that no such defense as is alleged in the petition for removal is claimed or made. Magee v. Union Pac. R. Co. (C. C. 1873) Fed. Cas. No. 8,945. Where the action is a personal injury suit brought in a state court in Colorado by an alien against a corporation residing in Illinois and Iowa, and removed to the Colorado federal court, and plaintiff objects to the federal court taking jurisdiction. Sagara v. Chicago, R. I. & P. Ry. Co. (C. C. 1911) 189 Fed. 220. Where the case has been removed in the circuit court of the Southern district of New York on the allegation that plaintiff was a citizen of New York, and defendant a citizen of Massachusetts and it is not denied that plaintiff is an alien. Galvin v. Boutwell (C. C. 1872) Fed. Cas. No. 5,207. Where, after the removal of a cause wherein the requisite citizenship and the amount in controversy do not exist, it is found by the pleadings that the subject-matter is one in which a statute of the United States is only incidentally brought in question. Teas v. Albright (C. C. 1882) 13 Fed. 406. Where it appears that the action is under the Employers' Liability Act. Patton v. Cincinnati, N. O. & T. P. Ry. (D. C. 1913) 208 Fed. 29. And where the case has been removed on the ground that the suit arose under the constitution or laws of the United States, and the record fails to show that there will arise some contested point of law depending upon the constitution or laws of the United States, what the question is, and how it will arise. McFadden v. Robinson (C. C. 1884) 22 Fed. 10, 10 Sawy. 398.

A cause may be remanded where it

has been removed at the instance of defendants who have appeared, and the defendants do not all eventually appear. Ward v. Arredondo (C. C. 1825) Fed. Cas. No. 17,148. Where it does not really and substantially involve a dispute or controversy properly within the jurisdiction of the federal court. Ryan v. Young (C. C. 1879) Fed. Cas. No. 12,188. And though the action is against revenue officers of the United States and might have been brought into that court by certiorari. People's United States Bank v. Goodwin (C. C. 1908) 160 Fed. 727.

A cause will not be remanded, if one proper for removal under the statute in force at the time the motion is made, though the removal was not authorized by the statute under which the petition was filed. Burnham v. Chicago, D. & M. R. Co. (C. C. 1876) Fed. Cas. No. 2,174. Because a preliminary injunction has been granted by a state court previous to removal. Hunt v. Fisher (C. C. 1887) 29 Fed. 801. Because in a suit to quiet title, removed from a state court, the bill does not state a cause of action cognizable by a federal court of equity, where a crossbill has been filed, which does state such cause of action. Baum v. Longwell (D. C. 1912) 200 Fed. 450. Because, in the absence of fraud or collusion, a transfer was for the sole purpose of securing a tribunal where a more liberal rule of damages obtained than in the state court. In re Bensel (1913) 206 Fed. 369, 124 C. C. A. 251, affirming order In re Ashokan Dam (C. C. 1911) 190 Fed. 413. Because it does not really and substantially involve a controversy properly within the jurisdiction of the circuit court, where the removal was not collusive. Davies v. Lathrop (C. C. 1882) 13 Fed. 565, 21 Blatchf. 164. Nor when it is claimed that one defendant has been made a party solely to prevent removal of the cause, and he appears an unnecessary party. Shepherd v. Bradstreet Co. (C. C. 1895) 65 Fed. 142.

Where a petition for removal filed by one of two defendants shows that its codefendant has not been served with summons, and affirmatively alleges that he in no manner contributed to the injury sued for, and that it is not the plaintiff's intention to prosecute the action against him in good faith, but that he was fraudulently joined as a defendant for the sole purpose of defeating the jurisdiction of the federal court, if no issue is joined upon such allegations they are to be taken as true; and a motion to remand, which raises only the legal question of the sufficiency of the petition, should be overruled, where the petition is otherwise sufficient. Dishon v. Cincinnati, N. O. & T. P. Ry. Co. (1904) 133 Fed. 471, 66 C. C. A. 345, affirming judgment (C. C. 1903) 126 Fed. 194.

On the removal of a cause to obtain both equitable and legal relief, complainant filed amended pleadings, as required by Circuit Court rule 19, splitting the cause into two, one an action at law, and the other a suit in equity, after which it was held in the law action that the cause was improperly removed. Held, that the bill in equity so filed did not constitute the commencement of a separate and distinct suit, and hence on the reversal of a decree therein the suit should be remanded to the state court. Utah-Nevada Co. v. De Lamar (1906) 145 Fed. 505, 75 C. C. A. 1.

In a cause removed because it involved an act done under the authority of the president of the United States during the Rebellion, held, that the act of March 2, 1867, legalizing acts done by the president's authority, and providing that no person shall be held to answer for such acts in any court did not deprive the court of jurisdiction so as to require a remand. Lamar v. Dana (C. C. 1872) Fed. Cas. No. 8,005.

A creditors' bill was filed in chancery in New Jersey by a Pennsylvania corporation, owners and lessors of a railroad situated in Pennsylvania, against the lessee, a corporation of New Jersey. Upon an ex parte application an injunction was granted, and a receiver appointed to protect the property. The case was subsequently removed to the federal circuit court for the Western district of Pennsylvania. Held, upon a motion in the latter court to remand the cause, that the motion would be granted, as it appeared that the proceeding was under the local statute of New Jersey. Lehigh Coal & Nav. Co. v. Central R. Co. (C. C. 1877) Fed. Cas. No. 8,213.

The fact that defendant, a citizen of Louisiana, sued in the courts of that state by citizens of New York for an accounting as surviving partner, gave a bond in the probate court of that state as liquidated partner, is of no consequence in considering a motion to remand the suit to the state court after removal to the federal court on the application of defendant, though it might have affected the court's jurisdiction ratione materiæ to entertain the suit originally. Filer v. Levy (C. C. 1883) 17 Fed. 609.

An action for recovery of $2,000, with interest, commenced in a state court before the passage of the amendatory act of March 3, 1887, was removed to the United States court on application made after that act took effect. Held, that as the right to removal of such actions was limited by the act of March 3, 1887, to cases where the amount in dispute exceeds $2,000, exclusive of interest and costs, the federal court had no jurisdiction of the cause, and it should be remanded. Lazensky v. Supreme Lodge Knights of Honor (C. C. 1887) 32 Fed. 417.

An action was commenced in a state

regular term. Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C. 1888) 37 Fed. 3.

27. Remand in part.—Where a railroad company and an electric light company were joined as defendants in an action for tort, and the railroad company, claiming a separable controversy, removed the cause for diversity of citizenship, and a motion to remand was denied as to it but granted as to electric company, the court had jurisdiction to proceed to trial as against the railroad company alone. Chicago Great Western R. Co. v. Hulbert (1913) 205 Fed. 248, 125 C. C. A. 98.

Where it appears that any of the defendants are not entitled to removal, the cause as to them must be remanded. Field v. Lownsdale (C. C. 1867) Fed. Cas. No. 4,769.

Where a rule to show cause why defendant should not be attached for contempt for violating an injunction was granted by the state court before removal of the cause, held, that the federal court would remand the contempt proceedings while retaining the main cause for adjudication. Voorhees v. Albright (C. C. 1879) Fed. Cas. No. 16,-999.

28. Remand on consent.—Where a removable suit has been properly removed under the act of March 3, 1875, from a state court into a federal circuit court, the consent of parties cannot authorize that court to remand the cause to the state court. Lawton v. Blitch (C. C. 1887) 30 Fed. 641.

29. Effect of waiver of defects by defendant.—The failure to file a plea in abatement in the state court is a voluntary admission that the action was properly before that court, and the case comes into the federal court in the same condition in which it was in the state court. Wertheim v. Continental Ry. & Trust Co. (C. C. 1882) 11 Fed. 689, 20 Blatchf. 508.

A circuit court cannot declare void, in a collateral action, a judgment of the circuit court of appeals in a case removed from a state court, though the record fails to show facts necessary to warrant the removal. Dexter, Horton & Co. v. Sayward (C. C. 1897) 84 Fed. 296.

The rule of federal courts that a suit to set aside a fraudulent conveyance can only be maintained by judgment creditors if waived by defendant cannot be invoked by plaintiff to defeat jurisdiction on removal. Closser v. Strawn (D. C. 1915) 227 Fed. 139.

(B) Grounds for remand

30. Want of jurisdiction or of cause for removal.—The sufficiency of removal proceedings may be attacked in the federal court on any ground available in the state court. Cropsey v. Sun Printing & Publishing Ass'n (D. C. 1914) 215 Fed. 132. A suit removed to the federal court will be remanded where it is not within the jurisdiction of that court. Ryan v. Young (C. C. 1879) Fed. Cas. No. 12,188; Anderson v. Sharp (C. C. 1911) 189 Fed. 247. Where it is manifest on the face of an affidavit or petition for removal from a state to a federal court that a removal is improper. Cameron v. Hodges (1888) 8 Sup. Ct. 1154, 1156, 127 U. S. 322, 32 L. Ed. 132. And where a state is a party. New Jersey v. Babcock (C. C. 1823) Fed. Cas. No. 10,-163. Unless it has no real interest in the controversy, in which case remand will be refused. Ex parte Nebraska (1908) 28 Sup. Ct. 581, 209 U. S. 436, 52 L. Ed. 876. Where a suit is brought in a state court in a federal judicial district of which neither plaintiff nor defendant is a resident, unless the plaintiff consents to the suit proceeding in the district by appearance and pleading. George v. Tennessee Coal, Iron & R. Co. (C. C. 1911) 184 Fed. 951. Where sufficient grounds for the removal are not shown. Urtetiqui v. D'Arcy (1835) 9 Pet. 692, 701, 9 L. Ed. 276; Jackson v. Allen (1889) 10 Sup. Ct. 9, 132 U. S. 27, 33 L. Ed. 249. When it appears by the defendant's answer that no such defense as is alleged in the petition for removal is claimed or made. Magee v. Union Pac. R. Co. (C. C. 1873) Fed. Cas. No. 8,945. Where the action is a personal injury suit brought in a state court in Colorado by an alien against a corporation residing in Illinois and Iowa, and removed to the Colorado federal court, and plaintiff objects to the federal court taking jurisdiction. Sagara v. Chicago, R. I. & P. Ry. Co. (C. C. 1911) 189 Fed. 220. Where the case has been removed in the circuit court of the Southern district of New York on the allegation that plaintiff was a citizen of New York, and defendant a citizen of Massachusetts and it is not denied that plaintiff is an alien. Galvin v. Boutwell (C. C. 1872) Fed. Cas. No. 5,207. Where, after the removal of a cause wherein the requisite citizenship and the amount in controversy do not exist, it is found by the pleadings that the subject-matter is one in which a statute of the United States is only incidentally brought in question. Teas v. Albright (C. C. 1882) 13 Fed. 406. Where it appears that the action is under the Employers' Liability Act. Patton v. Cincinnati, N. O. & T. P. Ry. (D. C. 1913) 208 Fed. 29. And where the case has been removed on the ground that the suit arose under the constitution or laws of the United States, and the record fails to show that there will arise some contested point of law depending upon the constitution or laws of the United States, what the question is, and how it will arise. McFadden v. Robinson (C. C. 1884) 22 Fed. 10, 10 Sawy. 398.

A cause may be remanded where it

has been removed at the instance of defendants who have appeared, and the defendants do not all eventually appear. Ward v. Arredondo (C. C. 1825) Fed. Cas. No. 17,148. Where it does not really and substantially involve a dispute or controversy properly within the jurisdiction of the federal court. Ryan v. Young (C. C. 1879) Fed. Cas. No. 12,188. And though the action is against revenue officers of the United States and might have been brought into that court by certiorari. People's United States Bank v. Goodwin (C. C. 1908) 160 Fed. 727.

A cause will not be remanded, if one proper for removal under the statute in force at the time the motion is made, though the removal was not authorized by the statute under which the petition was filed. Burnham v. Chicago, D. & M. R. Co. (C. C. 1876) Fed. Cas. No. 2,174. Because a preliminary injunction has been granted by a state court previous to removal. Hunt v. Fisher (C. C. 1887) 29 Fed. 801. Because in a suit to quiet title, removed from a state court, the bill does not state a cause of action cognizable by a federal court of equity, where a crossbill has been filed, which does state such cause of action. Baum v. Longwell (D. C. 1912) 200 Fed. 450. Because, in the absence of fraud or collusion, a transfer was for the sole purpose of securing a tribunal where a more liberal rule of damages obtained than in the state court. In re Bensel (1913) 206 Fed. 369, 124 C. C. A. 251, affirming order In re Ashokan Dam (C. C. 1911) 190 Fed. 413. Because it does not really and substantially involve a controversy properly within the jurisdiction of the circuit court, where the removal was not collusive. Davies v. Lathrop (C. C. 1882) 13 Fed. 565, 21 Blatchf. 164. Nor when it is claimed that one defendant has been made a party solely to prevent removal of the cause, and he appears an unnecessary party. Shepherd v. Bradstreet Co. (C. C. 1895) 65 Fed. 142.

Where a petition for removal filed by one of two defendants shows that its codefendant has not been served with summons, and affirmatively alleges that he in no manner contributed to the injury sued for, and that it is not the plaintiff's intention to prosecute the action against him in good faith, but that he was fraudulently joined as a defendant for the sole purpose of defeating the jurisdiction of the federal court, if no issue is joined upon such allegations they are to be taken as true; and a motion to remand, which raises only the legal question of the sufficiency of the petition, should be overruled, where the petition is otherwise sufficient. Dishon v. Cincinnati, N. O. & T. P. Ry. Co. (1904) 133 Fed. 471, 66 C. C. A. 345, affirming judgment (C. C. 1903) 126 Fed. 194.

On the removal of a cause to obtain both equitable and legal relief, complainant filed amended pleadings, as required by Circuit Court rule 19, splitting the cause into two, one an action at law, and the other a suit in equity, after which it was held in the law action that the cause was improperly removed. Held, that the bill in equity so filed did not constitute the commencement of a separate and distinct suit, and hence on the reversal of a decree therein the suit should be remanded to the state court. Utah-Nevada Co. v. De Lamar (1906) 145 Fed. 505, 75 C. C. A. 1.

In a cause removed because it involved an act done under the authority of the president of the United States during the Rebellion, held, that the act of March 2, 1867, legalizing acts done by the president's authority, and providing that no person shall be held to answer for such acts in any court did not deprive the court of jurisdiction so as to require a remand. Lamar v. Dana (C. C. 1872) Fed. Cas. No. 8,005.

A creditors' bill was filed in chancery in New Jersey by a Pennsylvania corporation, owners and lessors of a railroad situated in Pennsylvania, against the lessee, a corporation of New Jersey. Upon an ex parte application an injunction was granted, and a receiver appointed to protect the property. The case was subsequently removed to the federal circuit court for the Western district of Pennsylvania. Held, upon a motion in the latter court to remand the cause, that the motion would be granted, as it appeared that the proceeding was under the local statute of New Jersey. Lehigh Coal & Nav. Co. v. Central R. Co. (C. C. 1877) Fed. Cas. No. 8,213.

The fact that defendant, a citizen of Louisiana, sued in the courts of that state by citizens of New York for an accounting as surviving partner, gave a bond in the probate court of that state as liquidated partner, is of no consequence in considering a motion to remand the suit to the state court after removal to the federal court on the application of defendant, though it might have affected the court's jurisdiction ratione materiæ to entertain the suit originally. Filer v. Levy (C. C. 1883) 17 Fed. 609.

An action for recovery of $2,000, with interest, commenced in a state court before the passage of the amendatory act of March 3, 1887, was removed to the United States court on application made after that act took effect. Held, that as the right to removal of such actions was limited by the act of March 3, 1887, to cases where the amount in dispute exceeds $2,000, exclusive of interest and costs, the federal court had no jurisdiction of the cause, and it should be remanded. Lazensky v. Supreme Lodge Knights of Honor (C. C. 1887) 32 Fed. 417.

An action was commenced in a state

court against nonresident defendants, by attachment. The cause was removed to the federal court on defendants' petition, and plaintiff moved to remand, on the ground that neither state nor federal court had obtained jurisdiction of the defendants. Held, that both through the attachment and defendants' appearance the state court had jurisdiction to which the federal court succeeded, and that the motion to remand should be denied. Long v. Long (C. C. 1895) 73 Fed. 369.

On a motion to remand, in an action against a nonresident and a resident defendant, the motive of the plaintiff in making the joinder is immaterial, and cannot make such joinder fraudulent where, tested by the allegations of the complaint, plaintiff had a legal right to sue jointly, and there is nothing substantially impugning his good faith. Shane v. Butte Electric Ry. Co. (C. C. 1906) 150 Fed. 801.

Where an action for injuries to a servant was removed to the federal court for a diversity in citizenship, but also involved a construction of a federal law, it was not subject to remand on it appearing at the trial that the parties were of the same citizenship; federal jurisdiction being shown by the fact that the suit involved the construction of a law of the United States. Colasurdo v. Central R. R. of New Jersey (C. C. 1910) 180 Fed. 832.

31. —— **Diversity of citizenship.**— Whenever the sole controversy in a suit removed to a federal court is one between citizens of the same state, the suit will be remanded, upon motion, to the state court. Iowa Homestead Co. v. Des Moines Nav. & R. Co. (C. C. 1881) 8 Fed. 97; Gribble v. Pioneer Press Co. (C. C. 1883) 15 Fed. 689, 5 McCrary, 73; Rumsey v. Call (C. C. 1886) 28 Fed. 769.

Where the jurisdiction of the circuit court is not clear as to whether one of the defendants, a citizen of the same state as the plaintiff, is a necessary or only a formal party, and there is no controversy wholly between citizens of different states which can be fully determined as between them, the case will be remanded. Evans v. Faxon (C. C. 1882) 10 Fed. 312.

Where the union of a controversy between citizens of the same state with an entirely independent one between the plaintiff and a third person, a citizen of a state other than that of the plaintiff, is due in no measure to the plaintiff, it seems that a federal court has no jurisdiction of the suit. Iowa Homestead Co. v. Des Moines Nav. & R. Co. (C. C. 1881) 8 Fed. 97, 3 McCrary, 95.

That party removed from Massachusetts to Illinois to enable himself to invoke federal jurisdiction held not to require a remand unless the change was only ostensible and without real intent to permanently reside in Illinois. Sullivan v. Lloyd (D. C. 1914) 213 Fed. 275.

Where the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the federal court, because the real controversy is between citizens of the same state and the name of plaintiff has been used collusively to create a case cognizable under the act of 1875, the cause should be remanded to the state court. Hayden v. Manning (1883) 1 Sup. Ct. 617, 106 U. S. 586, 27 L. Ed. 306.

In an ejectment instituted in a state court of Pennsylvania by A., a citizen of Pennsylvania, against B., also a citizen of that state, tenant in possession, C., a citizen of Maryland, after a judgment by default against B. was upon his petition admitted as defendant in the suit; the petition stating that B. was his tenant. The petition of the plaintiff further stated that the land in dispute was worth more than $500, and it prayed that the cause might be removed into the federal circuit court, which was granted. Held, that such federal court would remand the cause to the state court, on the ground of want of jurisdiction; C. being only a codefendant with B., who, as well as the plaintiff, was a citizen of Pennsylvania. Beardsley v. Torrey (C. C. 1822) Fed. Cas. No. 1,190.

When one of the plaintiffs resided in New Hampshire, and the other in Vermont, and the defendant in New York, the federal court of the United States had no jurisdiction of the case; and, where such suit was originally brought in the state court, the case could not be removed to this court, and, on motion, the same should be dismissed, and remanded to the state court. Hubbard v. Northern Railroad Co. (C. C. 1853) Fed. Cas. No. 6,818, 25 Vt. 715.

Where there is no allegation as to the citizenship of the orators other than the description contained in their original bill, the cause will be remanded, as there is nothing to sustain the jurisdiction of the circuit court. Sherman v. Windsor Mfg. Co. (C. C. 1881) 11 Fed. 852.

If a party, by virtue of his citizenship and bona fide ownership of bonds prior to the commencement of litigation, and before it was contemplated, had the right to sue in the circuit court, or to intervene in a suit in a state court and remove the cause to the circuit court, his intervention in such pending suit, with a view to its removal, is not collusive, although there may have been an understanding between him and resident bondholders that he should pursue this course, and that they would co-operate with him in the litigation, and participate in and contribute to the expenses of the legal proceedings. Pennsylvania R. Co. v. Allegheny Val. R. Co. (C. C. 1885) 25 Fed. 115.

In an action to quiet title, requiring each of several defendants to set up any claim or right he might have, and seeking for an accounting for rents and profits, a petition for removal was filed by a railroad company, one of the defendants, averring that petitioner was a corporation created under the laws of Wisconsin; that complainants were citizens of Massachusetts; that the other defendants were citizens of states other than Massachusetts; that petitioner was the sole owner of a part of the land in dispute, and was in sole possession thereof; and that none of the other defendants had or claimed any interest therein. Held, that dismissal of the suit as to the railroad company, and striking from the bill all portions asking an accounting with the defendants separately for rents and profits, do not entitle complainants to a remand, as the controversy is still within the jurisdiction of the court; the parties being citizens of different states. Bacon v. Felt (C. C. 1889) 38 Fed. 870.

In order to deprive a defendant of its right to remove a bill in equity filed in a state court to the Circuit Court of the United States on the ground of diversity of citizenship, the complainant must show that he has no remedy in equity in the federal court, that he has a remedy in equity in the state court, and that the existence of his remedy in the state court is based on a state statute, and not on a view of the ordinary jurisdiction of a court of equity different from that entertained by the federal court. Peters v. Equitable Life Assur. Soc. of the United States (C. C. 1906) 149 Fed. 290.

Where an action has been removed to the federal court for diversity of citizenship, the fact that plaintiff filed a bill of exceptions and appealed to the state Supreme Court from the order of removal was not ground for remand. Remesn v. C. F. Blanke Tea & Coffee Co. (C. C. 1911) 189 Fed. 418.

Action by insured for benefit of insurance company, removed to federal court, held not subject to remand on ground the insurance company and defendant were nonresidents of the district. Turk v. Illinois Cent. R. Co. (D. C. 1912) 193 Fed. 252.

Under the complaint, petition for removal and conflicting affidavits in action against railroad company, and its general manager, held that legal question was presented as to joint liability of defendants and the cause was not removable. Rountree v. Mt. Hood R. Co. (D. C. 1916) 228 Fed. 1010.

32. —— **Service of process.**—Where an alias summons has been quashed, the federal court having no power to issue process which will subject defendant to its jurisdiction, the action which has been removed to the federal court is within this section. Stowe v. Santa Fé Pac. R. Co. (C. C. 1902) 117 Fed. 368.

Case held to be remanded where there had been no service on defendant and the court had jurisdiction only to the extent of property for which citizens of the state summoned as trustees might be chargeable, as against an adverse claim interposed by another citizen of the state. Sullivan v. Lloyd (D. C. 1914) 213 Fed. 275.

33. —— **Separable controversy.**—The removal by one of two joint defendants of a cause which was not removable because of the absence of a separable controversy does not give the federal court jurisdiction, and the cause should be remanded at any stage, at the instance of any party or on the court's own motion, whenever such fact appears. International & G. N. R. Co. v. Hoyle (1906) 149 Fed. 180, 79 C. C. A. 128.

In action by state against state bank commissioner's surety for benefit of depositors in insolvent state bank, notwithstanding removal of separable controversy as to one cause of action, other causes of action held to be remanded. State of Idaho v. American Surety Co. of New York (D. C. 1914) 218 Fed. 678.

34. —— **Want of jurisdiction to give relief.**—Where the federal court could not proceed with the cause without acting directly on a decree rendered in the state court, in another case, and the equity claimed by the bill could not be given to plaintiffs without interfering with that decree, the federal court will decline to take jurisdiction. Sayer v. La Salle & P. Gaslight & Coke Co. (C. C. 1880) 14 Fed. 69, 9 Biss. 372.

The voluntary assignee of an insolvent, a citizen of Illinois, brought suit in the courts of that state to set aside an alleged fraudulent preference, which consisted in the insolvent, on the day he made the assignment, turning over to one J., also a citizen of Illinois, certain warehouse receipts to be held by him for the indemnity of a creditor residing in New York. Both J. and the creditor were made parties to the suit. A receiver was appointed, to whom J. turned over the receipts. Default was entered against J. for want of answer, and the creditor removed the cause to the federal court. Held, on motion to remand on the ground of the common citizenship of J. and the assignee, that, the only question left open being whether the creditor took title to the receipts as against the assignee, J. was not a necessary party, and that the case should be retained, the federal court being as competent as the state court, in the event of the dismissal of the bill, to order the return of the receipts to J. Judah v. Iowa Barb-Wire Co. (C. C. 1887) 32 Fed. 561.

Where a state court had jurisdiction in equity of a suit by a tontine policy

holder against the insurer for an accounting which was not possessed by a federal court sitting in equity in such state, and complainant could not obtain adequate relief in a suit at law in the federal court, the cause would be remanded to the state court. Peters v. Equitable Life Assur. Soc. of the United States (C. C. 1906) 149 Fed. 290.

Where all the property of a nonresident corporation in Louisiana had been placed in the custody of receivers appointed by the state courts, and any judgment recovered in an action removed to the federal Circuit Court for trial would have to be referred to the state court for payment, which might lead to a conflict of jurisdiction, the case should be remanded to the state court. Goldberg, Bowen & Co. v. German Ins. Co. of Freeport, Ill. (C. C. 1907) 152 Fed. 831.

An action removed from a state court on the ground of diverse citizenship will be remanded if the presence of other parties over whom the court is without jurisdiction is necessary to a complete determination of the controversy. Sullivan v. Lloyd (D. C. 1914) 213 Fed. 275.

35. —— **Transfers for purpose of removal.**—The courts of the United States have power to remand a case, if it appears that a colorable assignment has been made of a claim for the purpose of imposing on their jurisdiction; but they have no authority to take jurisdiction of a case, by removal from a state court, when a colorable assignment has been made to prevent such a removal. Oakley v. Goodnow (1886) 6 Sup. Ct. 944, 946, 118 U. S. 43, 30 L. Ed. 61.

A plaintiff who has been introduced into a controversy by an assignment or transfer, merely that he may acquire a standing and relation to the controversy, to enable him to prosecute it for the beneficial interests of the original party, is collusively made a party to the suit, and when the fact appears it is the duty of the court to remand the suit. Chandler v. Town of Attica (C. C. 1885) 22 Fed. 625.

A defendant cannot acquire the right to have his cause removed to the federal courts by the purchase of the interests of his codefendants. Temple v. Smith (C. C. 1880) 4 Fed. 392, 2 McCrary, 226.

A bona fide conveyance of the property in controversy, by a party to the suit, for the express purpose of conferring jurisdiction upon the federal court, will furnish no ground for remanding a cause to a state court. Hoyt v. Wright (C. C. 1880) 4 Fed. 168, 2 McCrary, 222.

Where a citizen of one state transfers mortgage notes held by him to a citizen of another state or to a foreigner for the purpose of giving the court jurisdiction, provided such transfer be not accompanied with an agreement to retransfer the property after termination of the litigation, the circuit court will take jurisdiction of the cause when removed, and will not inquire into the motives which induced the transfer. Marion v. Ellis (C. C. 1882) 10 Fed. 410.

Where a firm of attorneys, who had received a deed to certain valuable property from parties desiring to contest the title of other claimants thereto, in turn conveyed the same to the father-in-law of one of the members of the firm, a poor farmer living in another state, who knew nothing about the property, and who afterwards, as defendant in a suit to quiet title to it, had the cause removed to the United States court on the ground of his citizenship in such other state, and it appeared, upon all the evidence, that the conveyance was made to him collusively, for the mere purpose of giving the United States circuit court jurisdiction, that court should refuse to entertain jurisdiction. Little v. Giles (1886) 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269, reversing decree Giles v. Little (C. C. 1881) 13 Fed. 100, 2 McCrary, 370.

Where an assignment has been made to a nonresident by a debtor against whom an order of seizure and sale has been taken out, and is immediately followed by an injunction suit in the name of such assignee to restrain the execution of such order, and by an application to remove the cause to the federal court, such assignee will be regarded as a merely nominal and collusive party, representing no interest but that of the assignors, and an order of removal will be denied. Sachse v. Citizens' Bank (1885) 37 La. Ann. 364.

36. **Jurisdiction on removal doubtful.**—Where the question whether a case is removable to the federal court, as involving the construction of a federal statute, is doubtful, the case will be remanded to the state court. State v. Bradley (C. C. 1885) 26 Fed. 289; Fitzgerald v. Missouri Pac. Ry. Co. (C. C. 1891) 45 Fed. 812; Blue Bird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289; Largey v. Blue Bird Min. Co., Id. 292; Concord Coal Co. v. Haley (C. C. 1896) 76 Fed. 882; Plant v. Harrison (C. C. 1900) 101 Fed. 307; McKown v. Kansas & T. Coal Co. (C. C. 1901) 105 Fed. 657; Ernst v. American Spirits Mfg. Co. (C. C. 1902) 114 Fed. 981; Dodd v. Louisville Bridge Co. (C. C. 1904) 130 Fed. 186; Groel v. United Electric Co. of New Jersey (C. C. 1904) 132 Fed. 252; Nash v. McNamara (C. C. 1906) 145 Fed. 541; Thacker Coal & Coke Co. v. Norfolk & Western Ry. Co. (C. C. 1909) 171 Fed. 271; Wrightsville Hardware Co. v. Colwell (C. C. 1910) 180 Fed. 589.

The circuit court is justified in as-

suming cognizance of a cause on removal only when its jurisdiction is clear. Wolff v. Archibald (C. C. 1882) 14 Fed. 369, 4 McCrary, 581; Levy v. Laclede Bank (C. C. 1883) 18 Fed. 193.

Where an action was removed because of alleged fraudulent joinder of defendants, on the theory that one of them was not liable, but the law was fairly debatable, the case would be remanded. McGarvey v. Butte Miner Co. (D. C. 1912) 199 Fed. 671.

Jurisdiction of a removed cause should be retained only where the federal jurisdiction is clear, and, if there is any substantial doubt, the cause should be remanded. Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1912) 201 Fed. 932.

Where actions were instituted in a state court of New York, by an alien residing there, against a corporation organized and residing in New Jersey, and were removed by defendant to the Circuit Court for the Southern District of New York, the federal court's jurisdiction was doubtful, and the cases for that reason would be remanded. Kamenicky v. Catterall Printing Co. (C. C. 1911) 188 Fed. 400.

Where, owing to a general order of a state court extending the time to plead in a cause, without fixing any definite time, it is doubtful whether a petition for removal was filed within the time required by the statute, the federal court will decline to take jurisdiction. Kelly v. Virginia Bridge & Iron Co. (D. C. 1913) 203 Fed. 566.

Where, on a motion to remand a cause to the state court, the jurisdiction of the federal court is doubtful, the verdict should be resolved in favor of the state court having jurisdiction. Vanderbilt v. Kerr (C. C. 1911) 188 Fed. 537.

A cause removed to a federal court on the ground of diverse citizenship will be remanded when there is grave doubt as to whether the defendant is in fact a citizen of a different state from plaintiff. Hutcheson v. Bigbee (C. C. 1893) 56 Fed. 329.

Where the jurisdiction of the circuit court is not clear as to whether one of the defendants, a citizen of the same state as the plaintiff, is a necessary or only a formal party, and there is no controversy wholly between citizens of different states which can be fully determined as between them, the case will be remanded. Evans v. Faxon (C. C. 1882) 10 Fed. 312, 11 Biss. 175.

Whether the amount of a counterclaim set up by a removing defendant may be added to the plaintiff's claim to give the federal court jurisdiction of the cause is at least so doubtful under the authorities as to require that court to decline jurisdiction. Crane Co. v. Guanica Centrale (C. C. 1904) 132 Fed. 713.

An action removed from a state court on the ground of diverse citizenship would be remanded, where defendant's alleged citizenship in another state was not established as a fact free from doubt. Sullivan v. Lloyd (D. C. 1914) 213 Fed. 275.

Whether the Iowa prohibitory law is in violation of the constitution of the United States, therefore involving a question of which the federal courts have jurisdiction, is involved in so much doubt that the federal courts will not assume jurisdiction, but will remand the causes to the state courts. Kessinger v. Vannatta (C. C. 1886) 27 Fed. 890.

On an issue of fraudulent joinder to prevent removal of a cause to a federal court, it is not necessary that all doubts be resolved in favor of the state court's jurisdiction. Clark v. Chicago, R. I. & P. Ry. Co. (D. C. 1912) 194 Fed. 505.

A motion to remand to a state court will be denied in case the question of the jurisdiction of the federal court is doubtful. Heath v. Austin (C. C. 1874) Fed. Cas. No. 6,305; Deakin v. Lea (C. C. 1879) Fed. Cas. No. 3,695; Drainage Dist. No. 19, Caldwell County, Mo., v. Chicago, M. & St. P. Ry. Co. (D. C. 1912) 198 Fed. 253; Strother v. Union Pac. R. Co. (D. C. 1915) 220 Fed. 731; Mackey v. Mallory (N. Y. 1881) 61 How. Prac. 24.

Where a cause is removed on defendant's oath as to the jurisdictional fact of his residence and citizenship, it is not sufficient, to remand the case, for plaintiff to raise a doubt on the question. Heath v. Austin (C. C. 1874) Fed. Cas. No. 6,305.

On a motion to remand a cause commenced by a bill in a state court intended to invoke a special statutory jurisdiction of such court, which cannot be exercised by a federal court of equity, the court will not retain jurisdiction merely because the application of the statute to the facts alleged in the bill is in doubt; that being a question properly determinable by the state court on demurrer. Mathews Slate Co. v. Mathews (C. C. 1906) 148 Fed. 490.

37. Defects in proceedings for removal.—A cause will not be remanded because of mere irregularities in the manner of applying for or granting a removal. Osgood v. Chicago, D. & V. R. Co. (C. C. 1875) Fed. Cas. No. 10,604; Northern Pac. Terminal Co. v. Lowenberg (C. C. 1883) 18 Fed. 339. Particularly where they can be remedied and have worked no injury to the adverse party. Dennis v. Alachua County (C. C. 1877) Fed. Cas. No. 3,791; Cropsey v. Sun Printing & Publishing Ass'n (D. C. 1914) 215 Fed. 132. And the federal court would otherwise have jurisdiction. Kain v. Texas Pac. R. Co. (C. C. 1875) Fed. Cas. No. 7,596. Or been obviated by amendment. Edgerton v. Gilpin (C. C. 1878) Fed. Cas. No. 4,280. As where such proceedings were

taken under the improper statute. Bryant Bros. Co. v. Robinson (1906) 149 Fed. 321, 79 C. C. A. 259. Where the state court transferred the original papers and not copies. Miller v. Soule (D. C. 1915) 221 Fed. 493. Where the petition was not filed in time, or was not sworn to by the person properly authorized, or where the bond was not signed by the defendant corporation in its corporate capacity. Allen v. Ryerson (C. C. 1873) Fed. Cas. No. 235; Kain v. Texas Pac. R. Co. (C. C. 1875) Fed. Cas. No. 7,596.

Nor will a cause be remanded because a defendant bank has signed the removal bond as surety, and the other surety had no authority to sign, where the bond is otherwise ample. Chambers v. McDougal (C. C. 1890) 42 Fed. 694. Because of defective bond. Miller v. Soule (D. C. 1915) 221 Fed. 493. Because the surety on a removal bond, contrary to a rule of practice of the state court, was an attorney at law, where it is competent for the state court to accept him as surety notwithstanding such rule. Probst v. Cowen (C. C. 1898) 91 Fed. 929. Because on an application for removal the bond was executed by the attorney of defendant, who then had no power of attorney so to do, where before a motion to remand on the ground that the bond was void a power of attorney ratifying such act has been filed. Ashe v. Union Cent. Life Ins. Co. (C. C. 1902) 115 Fed. 234. Or because the bond filed under Act 1875, and duly accepted by the state court, was in terms as required by Act 1866. Baker v. Peterson (C. C. 1877) Fed. Cas. No. 776.

But the cause must be remanded on motion where the application to remove was made too late. Lehigh Coal & Navigation Co. v. Central R. Co. (C. C. 1877) Fed. Cas. No. 8,213; Kerting v. American Oleograph Co. (C. C. 1881) 10 Fed. 17; Minneapolis, St. P. & S. S. M. Ry. Co. v. Nestor (C. C. 1892) 50 Fed. 1. And where petitioner for removal has failed to comply with section 1011, ante, objection being duly made. Goins v. Southern Pac. Co. (D. C. 1912) 198 Fed. 432.

Where a written notice of a petition and bond for removal is not given to the adverse party prior to filing such instruments as required by section 1011, ante, the case will be remanded, though a copy of the petition and bond has been served. Loland v. Northwest Stevedore Co. (D. C. 1913) 209 Fed. 626.

Where action removed from state court involved separable controversy between defendant and one of the plaintiffs, cause held not to be remanded, though petition for removal was apparently not drawn on the theory of a separable controversy. State of Idaho v. American Surety Co. of New York (D. C. 1914) 218 Fed. 678.

Where, in an action for injunction to restrain the excavation of defendant's lot for a building, the petition on which the cause was removed from a state court alleges that matter in dispute exceeds, exclusive of interest and costs, the value of $2,000, and there is no direct averment in the pleadings, as to the value or means, by which the court can determine that it is less than $2,000, a motion to remand on the ground of insufficient value in controversy should be denied. Lord v. De Witt (C. C. 1902) 116 Fed. 713.

A federal court will not, upon motion to remand, enter upon inquiry as to the sufficiency of the sureties on a bond, conditioned as required by the removal act, and approved by the state court. Van Allen v. Atchison, C. & P. R. Co. (C. C. 1880) 3 Fed. 545, 1 McCrary, 598.

38. Failure to file copy of record or defects therein.—The cause will be remanded where the removing party fails, without other excuse than inadvertence, to file a copy of the record in the federal court until after the day named in the removal bond for such filing. McLean v. St. Paul & C. Ry. Co. (C. C. 1879) Fed. Cas. No. 8,892, affirmed St. Paul & C. R. Co. v. McLean (1883) 108 U. S. 212, 2 Sup. Ct. 498, 27 L. Ed. 703, holding that where, on the removal of a cause, the copy of the record is not filed within the time fixed by statute, it is within the discretion of the federal court to remand the cause. See Bright v. Milwaukee & St. P. R. Co. (C. C. 1877) Fed. Cas. No. 1,877.

Or the cause will be remanded where the removing party fails to file a copy of the record on the first day of the next session of the court after petition filed. Bright v. Milwaukee & St. P. R. Co. (C. C. 1877) Fed. Cas. No. 1,877.

A cause may be remanded prior to the beginning of the term at which the removing defendants are required to file the transcript in the federal court, when the party moving to remand gives proper notice, and himself files the transcript. Thompson v. Chicago, St. P. & K. C. Ry. Co. (C. C. 1894) 60 Fed. 773.

Though the law provides that the removing party shall file a bond to enter the case in the circuit court on the first day of the next session, and that, the record being so entered, the cause shall proceed as if begun in the circuit court, the other party may file a transcript of the record at an earlier day, and have the case remanded, if it appears on the face of the record that it was not one authorized to be removed. Mills v. Newell (C. C. 1890) 41 Fed. 529.

Plaintiff commenced suit in the New York supreme court to establish a will as a will of real estate. One of the defendants removed the cause into the

United States circuit court for the Southern district of New York, but did not enter the record. Held, that plaintiff could, without leave, enter a copy of the petition, order, and bond, and move to remand the cause under a rule of this circuit, adopted October 1, 1883, which provides that, when a cause has been removed from a state court either party may, forthwith, cause a copy of the record to be filed in this court, etc. Anderson v. Appleton (C. C. 1887) 32 Fed. 855.

Defendant having failed, through the inadvertence of his counsel, to have the record properly transmitted to the circuit court until 15 months had elapsed, plaintiff, for the purpose of a motion to remand, transmitted such record. Held, that plaintiff's motion should be granted for want of due prosecution under the removal. McGregor v. McGillis (C. C. 1887) 30 Fed. 388.

Under rule 79 of the circuit court for the ninth circuit, plaintiff may, at any time after defendant has filed and submitted to the state court his petition and bond for removal of the cause, procure a transcript of the record of cause from the state court, and file the same in the circuit court, and, after service of notice thereof, as prescribed in said rule, the circuit court will take jurisdiction of the case for all purposes. Delbanco v. Singletary (C. C. 1889) 40 Fed. 177.

On a failure to file a copy of the record on or before the first day of the next session of the federal court after the filing of the petition for removal, the federal court has discretion to remand the cause, or not, as seems most conducive to the ends of justice. Jackson v. Mutual Life Ins. Co. (C. C. 1878) Fed. Cas. No. 7,141.

The only necessary consequence of failure to file the record of a case removed from a state court, by the first day of the next term after the application for removal, or within 20 days after such application, is to create a liability on the bond. Unnecessary delay, amounting to laches, in filing such record, prejudicing the other party, may be ground for remanding the case; but the party is not entitled for such cause, as matter of right, to have it remanded. Kidder v. Featteau (C. C. 1880) 2 Fed. 616, 1 McCrary, 323.

Pending a suit in a state court to foreclose a mortgage, the plaintiff amended his complaint in order to reform the deed in technical particulars. One of the defendants thereupon filed his petition to remove to the federal court upon the ground that, by force of the amendment, a new and separable controversy had been added. The state court proceeded with the case, and the defendant did not enter the record in the federal court on the first day of the next term. The plaintiff subsequently entered the record, and moved to remand. Held, that the defendant had a sufficient excuse for not entering the record, and that the cause should not be remanded for that neglect. Winchell v. Coney (C. C. 1886) 27 Fed. 482.

The failure to file the record having caused no delay of the trial, and in nowise prejudicing the plaintiff, the fact that the motive for removing the cause was to delay the trial is immaterial, and it is the duty of the circuit court to retain the cause, without regard to the motive which impelled the removal. Hall v. Brooks (C. C. 1882) 14 Fed. 113, 21 Blatchf. 167.

On motion to remand a cause to the state court for failure to file the record in the federal court before the first day of the next term, defendant appeared and offered to file the record, and gave as excuse for not having done so that the information obtained at the clerk's office was understood to mean that the next term would be in December, when it actually began November 1st. Held, that the excuse was sufficient, and defendant must be allowed to file the record. Id.

Where a cause has been removed from a state to a federal court, a defect or omission in the transcript of the record of the state court can be cured by certiorari. It is not a ground for remanding the cause. Cook v. Whitney (C. C. 1877) Fed. Cas. No. 3,166; Dennis v. Alachua County (C. C. 1877) Fed. Cas. No. 3,791.

Alleged incompleteness of the record, in that it fails to show the action of the court in overruling a certain motion, is no ground for remanding the cause; the proper remedy being by suggestion of a diminution of the record. Probst v. Cowen (C. C. 1898) 91 Fed. 929.

Nor is it ground for remanding that the entire record has not been returned. Miller v. Soule (D. C. 1915) 221 Fed. 493.

39. Failure to give notice of filing.—Failure to give notice of the filing in the federal court of a transcript of the record of a case removed from a state court, as required by rule 79 of the circuit court for the district of Nevada, constitutes no ground for remanding the cause. Chiatovich v. Hanchett (C. C. 1897) 78 Fed. 193.

40. Elimination of grounds of removal.—A case should be remanded when, after the removal on the ground of local prejudice, the action is discontinued as to the only defendant not a citizen of the plaintiff's state. Bane v. Keefer (C. C. 1895) 66 Fed. 610. Where there was no longer any controversy except between citizens of the same state. Iowa Homestead Co. v. Des Moines Nav. & R. Co. (C. C. 1881) 8 Fed. 97, 3 McCrary, 95. Where a suit is removed by a defendant brought in by supplemental petition, on the sole ground of the

existence of a separate controversy between himself and plaintiff, a citizen of a different state, and, on motion of plaintiff, the suit is discontinued as to such defendant. Texas Transp. Co. v. Seeligson (1887) 122 U. S. 519, 7 Sup. Ct. 1261, 30 L. Ed. 1150. Where after removal by one of two or more defendants, who alone is a citizen of another state, on the ground of a separable controversy, the suit is dismissed as to such defendant. Youtsey v. Hoffman (C. C. 1901) 108 Fed. 699; Cassidy v. Atlanta & C. A. L. Ry. Co. (C. C. 1901) 109 Fed. 673. Where it appears that the nonresident party upon whose petition the cause was removed has parted with his interest, and the substantial controversy is between citizens of the same state. Ryan v. Young (C. C. 1879) Fed. Cas. No. 12,188. Where, after the filing of a petition for removal, but before the first day of the next term of the federal court to which the record is returnable, application is made to such court for extraordinary relief, such as the appointment of a receiver to preserve the property, and by leave the record is filed, and the court finds itself to be without jurisdiction when the first day of the next term arrives, especially if the suspension of jurisdiction until that time is likely to result in injury to the parties. Ryder v. Bateman (C. C. 1898) 93 Fed. 16. Where, after removal on the ground that a federal question is involved, the pleadings are so amended as to eliminate such question, and there is no other ground of jurisdiction. Fischer v. Star Co. (D. C. 1915) 227 Fed. 955. Where the federal court sustains a demurrer to the special plea interposed by defendant, and thereby disposed of the only federal question presented for decision. Hamblin v. Chicago, B. & Q. R. Co. (C. C. 1890) 43 Fed. 401. Though the court cannot on a motion to remand eliminate the federal question by a premature decision of it, and then remand the suit upon the theory that it no longer involves a federal question. Lowry v. Chicago, B. & Q. R. Co. (C. C. 1891) 46 Fed. 83. Where plaintiff files a supplemental pleading, alleging that there is a bona fide error in the account on which the complaint is based, which reduces the claim to less than the amount necessary to give the federal court jurisdiction. W. T. Hughes & Co. v. Peper Tobacco Warehouse Co. (C. C. A. 1903) 126 Fed. 687. And where the case is so changed by amendments under the direction of the court as to present only one indivisible controversy between the parties. Long v. Buford (C. C. 1885) 24 Fed. 241, 249. But a case removed on account of the alienage of plaintiff will not be remanded because the plaintiff has subsequently become a naturalized citizen of the United States. Haracovic v. Standard Oil Co. (C. C. 1900) 105 Fed. 785. Nor will a case be remanded because of any subsequent concession by the plaintiff. Hayward v. Nordberg Mfg. Co. (1898) 85 Fed. 4, 29 C. C. A. 438. Because after removal by reason of the citizenship of the parties new parties are admitted as cocomplainants who are residents of the same state as the defendants. Stewart v. Dunham (1885) 115 U. S. 61, 5 Sup. Ct. 1163, 29 L. Ed. 329. Because a defendant against whom affirmative relief was sought in the state court files a cross-bill after removal to the federal court. Jackson & Sharp Co. v. Pearson (C. C. 1892) 60 Fed. 113. Or because of the dismissal of the bill on complainant's own motion after a cross-bill has been filed, although the jurisdictional amount may no longer be in dispute. Kirby v. American Soda Fountain Co. (1904) 24 Sup. Ct. 619, 194 U. S. 141, 48 L. Ed. 911. Because complaint subsequently filed prays for damages in less than the jurisdictional amount. Coffin v. Philadelphia, W. & B. R. Co. (C. C. 1902) 118 Fed. 688.

Where a bill in a state court was dismissed for want of equity in 1874 and an appeal taken in 1876 to the state Supreme Court, and by that court reversed and remanded in 1877, and a petition for its removal to the United States Circuit Court filed the same year and granted, a motion to remand on the ground that the suit was not pending at the time of the passage of this act, and at the time the removal was effected the trial of the cause in the state court was in progress, is properly denied. Hewitt v. Phelps (1881) 105 U. S. 393, 394, 26 L. Ed. 1072.

Where both at the commencement of an action in the state court by attachment and at the time of its removal defendants were citizens of states other than that of which plaintiff was a citizen, the fact that, after removal on the ground of diverse citizenship, one of the defendants removed to the state where plaintiff resided, and became a citizen of such state, did not deprive the federal court of jurisdiction. Lebensberger v. Scofield (1905) 139 Fed. 380, 71 C. C. A. 476.

A voluntary change of residence by a party, so that jurisdiction on account of citizenship arises, even if made after the suit was brought, does not affect the right of removal, although such person removed for the purpose of conferring jurisdiction on the federal courts, where it appears that his citizenship in the state to which he has removed is real. Johnson v. Monell (C. C. 1869) Fed. Cas. No. 7,399.

Where an action is brought in a state court in Missouri by a citizen of Pennsylvania against a citizen of Missouri, who is in possession of real property, to recover such property, and the action is removed to the federal court by the defendant on the ground that the

plaintiff is a citizen of another state, and after such removal the defendant sets up that he is only a tenant, and moves to bring in the real owners of the property, as he has a right to do under 1 Rev. St. Mo. 1879, § 2244, and, after such owners are made defendants, plaintiff moves to remand the case on the ground that they are the real defendants in the action, and are citizens of the state of Pennsylvania, the motion to remand should not be granted. Phelps v. Oaks (1886) 117 U. S. 236, 6 Sup. Ct. 714, 29 L. Ed. 888.

A suit properly removed to the federal court before the Code took effect should not be remanded, on motion made in the District Court after it took effect, because it involved less than $3,000. Lincoln v. Robinson (D. C. 1912) 194 Fed. 571.

The consolidation of a suit, after removal into a federal court, with another suit between some of the same parties, subsequently commenced in said court, cannot affect the jurisdiction of the court over the cause removed, or its duty, or that of an appellate court, to remand such cause on determining that it was not properly removable. Colburn v. Hill (1900) 101 Fed. 500, 41 C. C. A. 467.

In an action to quiet title, requiring each of several defendants to set up any claim or right he might have, and seeking for an accounting for rents and profits, a petition for removal was filed by a railroad company, one of the defendants, averring that petitioner was a corporation created under the laws of Wisconsin; that complainants were citizens of Massachusetts; that the other defendants were citizens of states other than Massachusetts; that petitioner was the sole owner of a part of the land in dispute, and was in sole possession thereof; and that none of the other defendants had or claimed any interest therein. Held, that dismissal of the suit as to the railroad company, and striking from the bill all portions asking an accounting with the defendants separately for rents and profits, do not entitle complainants to a remand, as the controversy is still within the jurisdiction of the court; the parties being citizens of different states. Bacon v. Felt (C. C. 1889) 38 Fed. 870. Nor will the cause be remanded on the ground that there is ample remedy at law and the suit was brought in equity, as, the averments being that complainants are owners of an undivided two-thirds and that defendants are in possession of the whole tract, a suit in equity was necessary; also, if this were not so, the cause being brought properly in equity under the state statute, the pleadings could be reformed and the cause transformed into an action at law; and again, if this were not allowed, the bill would be dismissed rather than the cause remanded. Id.

After removal, the bill was demurred to on the ground that the heirs of P., who appeared in the caption as necessary parties, were not made parties; the bill containing no allegation that their names and residences were unknown, or that they were nonresidents. The demurrer was sustained, and the bill amended by setting out the names of the heirs, and their citizenship as of the same state as that of the complainant. There was no severable controversy. Held, the amendment being compulsory, the case should be remanded, and not dismissed. Perry v. Clift (C. C. 1887) 32 Fed. 801.

(C) Parties entitled to remand

41. In general.—Where an action is brought in a state court in Missouri by a citizen of Pennsylvania against a citizen of Missouri, who is in possession of real property, to recover such property, and the action is removed to the federal court by the plaintiff on the ground that he is a citizen of another state, and after such removal the defendant sets up that he is only a tenant, and moves to bring in the real owners of the property, as he has a right to do under the state statute, and, after such owners are made defendants, they move to remand the case on the ground that they are the real defendants in the action, and are citizens of the state of Pennsylvania, the motion to remand should not be granted. Phelps v. Oaks (1886) 6 Sup. Ct. 714, 715, 117 U. S. 236, 29 L. Ed. 888.

Plaintiff brought action in a state court, his complaint disclosing no federal question. Defendant, alleging that such a question was involved, secured a removal to a federal court, in which judgment was rendered for plaintiff. Defendant then moved to set the judgment aside, for want of jurisdiction in the federal court. Held, that the federal court had no jurisdiction, and the judgment must be vacated, and the cause remanded. Wabash R. Co. v. Barbour (1896) 73 Fed. 513, 19 C. C. A. 546, 43 U. S. App. 102.

A defendant which has removed a cause into a federal court on the ground of diversity of citizenship, its petition alleging that plaintiff is a citizen of the state of suit and defendant a corporation of another state, is not entitled to have the cause remanded because it is developed on the trial that plaintiff is an alien; the court having jurisdiction of the controversy either under the facts alleged in the petition for removal or under those shown by the evidence. Rones v. Katalla Co. (C. C. 1910) 182 Fed. 946.

Where a plaintiff sues in a state court in a district other than the residence of either of the parties and defendant attempts to remove the case into the federal court for that district, he thereby consents to be sued in the federal court for that district, but

plaintiff is entitled to remand to the state court unless he consents to the removal. H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C. 1911) 189 Fed. 224.

(D) Waiver of right to remand

42. **In general.**—The question of jurisdiction is considered as conclusively settled where there has been no appeal from a decision denying a motion to remand for want of jurisdiction. Turner v. Indianapolis, B. & W. Ry. Co. (C. C. 1878) Fed. Cas. No. 14,259.

That plaintiff, in a suit brought in Connecticut against a citizen of New York, described himself in the original writ as "of said New Haven" (Conn.), will not estop him from showing, in support of a motion to remand, that he is in fact a citizen of New York. Egerton v. Starin (C. C. 1899) 91 Fed. 932.

43. **Waiver by appearance.**—A general appearance by plaintiff in a federal Circuit Court after the cause has been removed from a state court does not waive an objection to jurisdiction founded on the total lack of any controversy of a federal nature. In re Winn (1909) 29 Sup. Ct. 515, 213 U. S. 458, 53 L. Ed. 873.

Where, on the removal of a cause to the federal court, plaintiff, simultaneously with the filing of the case in such court, moved to remand, he could not be held to have waived his right thereto by appearance or otherwise. Pepper v. Rogers (C. C. 1904) 128 Fed. 987.

A plaintiff, by appearing in the federal court after the removal of the cause, and obtaining leave to file an amended complaint, does not thereby waive his right to move to remand. Parkinson v. Barr (C. C. 1900) 105 Fed. 81.

The act of plaintiff's counsel in appearing in the federal court erroneously ordering the removal to it of an action commenced in a state court, and in moving to remand the cause to the state court, does not confer jurisdiction on the federal court, but the motion to remand is a challenge to the jurisdiction of the federal court. Higson v. North River Ins. Co. (1910) 68 S. E. 920, 153 N. C. 35.

Where, after an attempt has been made to remove a cause to the federal court, plaintiff's counsel entered a special appearance for the sole purpose of moving to retire the case from the docket, and insisting that the proceedings taken had been insufficient to remove the cause, there was no waiver of plaintiff's right on his objection being sustained to have the cause retired from the docket. Higson v. North River Ins. Co. (C. C. 1911) 184 Fed. 165.

The entry of a general appearance in the federal court by the plaintiff after a removal, and a delay of a year before making a motion to remand, is a waiver of the right to raise the objection that neither party is a resident of the district where, by reason of their citizenship in different states, the court has constitutional jurisdiction. Philadelphia & Boston Face Brick Co. v. Warford (C. C. 1902) 123 Fed. 843.

44. **Waiver by delay.**—After removal, and after the federal court, for a long time, has exercised control of the case, an irregularity or defect in the form of a removal bond will be deemed waived. Hervey v. Illinois Midland Ry. Co. (C. C. 1880) 3 Fed. 707.

Where the question is as to the right of removal, and not as to mere defects in the proceedings for removal, lapse of time and the taking of preliminary proceedings after removal are not a waiver of the right to a remand. Bronson v. St. Croix Lumber Co. (C. C. 1888) 35 Fed. 634.

A party is not guilty of laches affecting his right to move to remand because he did not in the first instance oppose the removal in the state court. McMurdy v. Connecticut Gen. Life Ins. Co. (C. C. 1877) Fed. Cas. No. 8,903.

Delay on part of plaintiff for 15 months in making his motion to remand held not a waiver of the right to object to defendant's failure to file, in the circuit court, a copy of the record of the cause removed. McGregor v. McGillis (C. C. 1887) 30 Fed. 388.

A delay of over a year, in the absence of explanation, held fatal to a motion to remand the case on the ground that the petition for removal was not filed in time. Miller v. Kent (C. C. 1882) 18 Fed. 561.

Although no motion be made to remand the cause to the state court until a full term has passed by since the filing of the motion for removal and the transcript of the proceedings in the state court, there is no waiver of the right so to do, nor will such conduct be deemed a submission to the jurisdiction of the United States court; no other proceedings being had therein than the filing of such transcript and motion. Young v. Andes Ins. Co. (C. C. 1876) Fed. Cas. No. 18,151.

Irregularities in the removal are no ground for remanding after several years, where all objection to the jurisdiction has been obviated by amendment. Edgerton v. Gilpin (C. C. 1878) Fed. Cas. No. 4,280.

45. **Waiver by conduct, pleading, or obtaining relief.**—A party loses his right to object to the removal of an action from a state court, when it has been removed on the ground of the diverse citizenship of the parties, by going to trial and trying the cause without raising the objection. Davies v. Lathrop (C. C. 1882) 13 Fed. 565. And, where a defendant has removed a cause, and plaintiff, at the time of appearing in the federal court, does not suggest to it that the time had elapsed for a removal, nor move to remand, but demands a trial, he waives his right to

raise the question in answer to defendant's bill to restrain the further prosecution of the suit in the state court. Baltimore & O. R. Co. v. Ford (C. C. 1888) 35 Fed. 170.

Where a federal court is without jurisdiction of a cause on removal, it is not conferred by the acts of the plaintiff in participating in steps taken in the suit after removal. Crane Co. v. Guanica Centrale (C. C. 1904) 132 Fed. 713. Nor where a case has been wrongfully removed does plaintiff waive his right to remand by once obtaining a continuance in the federal court. Southworth v. Reid (C. C. 1888) 36 Fed. 451.

Plaintiff, by proceedings taken after removal of cause to the United States District Court, held not to have lost right to move to remand to the state court, where it distinctly stated that such proceedings were taken without waiving its objection. Rubber & Celluloid Harness Trimming Co. v. John L. Whiting-J. J. Adams Co. (D. C. 1913) 210 Fed. 393.

Where a petition for removal was defective on its face in that it stated no facts showing a removable cause, the fact that plaintiff before moving to remand took the deposition of a witness under a notice headed "United States Circuit Court, District of Minnesota, Third Division," and that the deposition was filed in such court, no transcript from the state court having at that time been filed therein, did not waive plaintiff's right to have the cause remanded under the rule that where the petition states no ground for removal, a state court is not deprived of its jurisdiction, and that jurisdiction is not conferred by the mere filing of a petition and bond. Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994.

An order removing a cause from the Supreme Court to the federal Circuit Court being void for failure of the petition for removal to show the Circuit Court's jurisdiction, plaintiff is not estopped from challenging such jurisdiction because he appeared in the Supreme Court and opposed defendant's motion to vacate the order of removal on the ground that the motion should have been made in the Circuit Court, since neither consent nor estoppel can confer jurisdiction upon the federal courts. Tierney v. Helvetia Swiss Fire Ins. Co. (1908) 110 N. Y. S. 613, 126 App. Div. 446.

It is good practice to raise in limine, by petition to remand, the question of the alleged collusive joinder of a party for tue purpose of creating a case removable to the circuit court; and the right so to raise the question is not waived by reason of a prior unsuccessful motion to remand on jurisdictional grounds supposed to appear on the face of the record. Pennsylvania R. Co. v. Allegheny Valley R. Co. (C. C. 1885) 25 Fed. 113.

Making up the issues on the merits without objection waives the right to object, because of the nonresidence of both parties within the district, to the jurisdiction of a federal Circuit Court to which the cause has been removed from the state court for diverse citizenship. Kreigh v. Westinghouse, Church, Kerr & Co. (1909) 29 Sup. Ct. 619, 214 U. S. 249, 53 L. Ed. 984, reversing judgment (1907) 152 Fed. 120, 81 C. C. A. 338, 11 L. R. A. (N. S.) 684.

Plaintiff must be deemed to have consented to accept the jurisdiction of a federal court over a suit removed from a state court on defendant's petition, where, after the removal, plaintiff, instead of moving to remand, filed an amended petition in the federal court, signed a stipulation giving time to the defendant to answer, and entered with the defendant into successive stipulations for continuances. In re Moore (1908) 28 Sup. Ct. 585, 706, 209 U. S. 490, 52 L. Ed. 904, 14 Ann. Cas. 1164.

Where a removed cause was one within the general jurisdiction of the federal court and after complainant's motion to remand had been overruled he joined in a stipulation, filed additional pleadings, and set the case down for hearing on bill and answer, the question of defendant's right to remove cannot be again raised. Hagerla v. Mississippi River Power Co. (D. C. 1913) 202 Fed. 776.

Plaintiff, by noticing a demurrer for argument after the removal of cause, waives his right to remand. Enders v. Supreme Lodge Knights and Ladies of Honor (C. C. 1910) 176 Fed. 832.

Complainant, a corporation and citizen of Kentucky, sued defendant, a corporation and citizen of Maryland, in a Georgia state court. Defendant removed the cause to the United States Circuit Court for diversity of citizenship, where the cause was permitted to remain more than five years, during which complainant had the cause set down for hearing on demurrer, and twice filed amendments to its pleadings, and then moved to remand the cause to the state court on the ground that neither complainant nor defendant was a resident of the district. Held, that such objection had been waived by both parties, and that the court had jurisdiction. Proctor Coal Co. v. United States Fidelity & Guaranty Co. (C. C. 1907) 158 Fed. 211.

The defendant in a case brought in a court of a state of which neither party is a resident, however, submits himself to the jurisdiction of the federal court by filing a petition for removal; and where, after the removal, the plaintiff invokes or consents to an order of the court relating to matters in con-

troversy, he thereby waives the right to thereafter object to its jurisdiction. Foulk v. Gray (C. C. 1903) 120 Fed. 156.

Where, after removal, plaintiff pleads anew setting up the removal, he cannot ask to remand the cause on the ground that it was not within the act. Carrington v. Florida R. Co. (C. C. 1872) Fed. Cas. No. 2,447.

Where an action for injuries to a servant under the federal Employers' Liability Act, as amended in 1910, was improperly removed from a state to a federal court, plaintiff's filing a reply after such removal did not constitute a waiver of his right to move for remand nor confer federal jurisdiction. Burnett v. Spokane, P. & S. Ry. Co. (D. C. 1913) 210 Fed. 94.

Where, after a cause had been erroneously removed to the federal court over plaintiff's objection, that court sustained a demurrer to the complaint in so far as it affected the resident defendant, plaintiff, by amending his complaint and proceeding as against the nonresident defendant in the federal court, did not waive his objection that the cause had been erroneously removed. Thomas v. Great Northern Ry. Co. (C. C. A. 1906) 147 Fed. 83.

The fact that, subsequent to the removal of a cause, the parties have pleaded, and have taken depositions, does not affect the duty of the federal court to remand on discovering that the removal was improperly made; it being a matter for the determination of the state court what shall be done with the pleadings filed and the testimony taken. Broadway Ins. Co. v. Chicago G. W. Ry. Co. (C. C. 1900) 101 Fed. 507.

(E) Procedure for remand and review thereof

46. Remand by court on its own motion.—Where remand of a suit for want of jurisdiction is proper, to court may remand of its own motion. Cutler v. Rae (1849) 7 How. 729, 731, 12 L. Ed. 890; Colburn v. Hill (1900) 101 Fed. 500, 506, 41 C. C. A. 467; Consolidated Rubber Tire Co. v. Ferguson (1910) 183 Fed. 756, 106 C. C. A. 330; Katalla Co. v. Rones (1911) 186 Fed. 30, 108 C. C. A. 132, affirming judgment Rones v. Katalla Co. (C. C. 1910) 182 Fed. 946; Farmers' Oil & Guano Co. v. Duckworth Co. (1914) 217 Fed. 362, 133 C. C. A. 278; U. S. v. Wickersham (C. C. 1882) 10 Fed. 505, 511; Gage v. Riverside Trust Co. (C. C. 1906) 156 Fed. 1002, 1009.

Where a petition for removal is not filed at the time or before defendant is required by the state practice to plead to the declaration or complaint, the case must be remanded to the state court, whether motion to that effect be made or not. Keeney v. Roberts (C. C. 1886) 39 Fed. 629, 12 Sawy. 39; Bowers v. Supreme Council American Legion of Honor (C. C. 1891) 45 Fed. 81.

It is the duty of a federal court to remand, of its own motion, whenever on the face of the record a clear want of jurisdiction, either of the parties or subject-matter, is affirmatively shown. American Bridge Co. v. Hunt (1904) 130 Fed. 302, 64 C. C. A. 548; Indiana v. Tolleston Club of Chicago (C. C. 1892) 53 Fed. 18.

The federal court has the right to determine whether or not a cause has been properly removed to it immediately upon the filing of the record therein either by the removing defendant or the plaintiff, and to make such orders as may be required. Harrington v. Great Northern Ry. Co. (C. C. 1909) 169 Fed. 714.

Where, after the removal of a cause wherein the requisite citizenship and the amount in controversy do not exist, it is found by the pleadings that the subject-matter is one in which a statute of the United States is only incidentally brought in question, the court will of its own motion remand the cause. Teas v. Albright (C. C. 1882) 13 Fed. 406.

An action for divorce a vinculo and for alimony, removed from a state court, may be remanded by the federal court of its own motion, on suggestion of the party removing, on the ground of want of jurisdiction over actions of that character. Johnson v. Johnson (C. C. 1882) 13 Fed. 193.

47. Motion to remand.—A motion to remand a cause removed to the state court is in the nature of a demurrer, and goes only to matters apparent of record, being insufficient to present matters outside the record arising in pais, which can only be presented by plea in abatement, denying the facts relied on to establish federal jurisdiction. Gibson v. Chesapeake & O. Ry. Co. (C. C. A. 1914) 215 Fed. 24; Phillips v. Western Terra Cotta Co. (C. C. 1909) 174 Fed. 873; Bradshaw v. Bowden (D. C. 1914) 226 Fed. 323. It does not operate as a general denial of the allegations of the petition for removal. Phillips v. Western Terra Cotta Co. (C. C. 1909) 174 Fed. 873. But may be regarded as demurrer to petition for removal. Armstrong v. Kansas City Southern Ry. Co. (C. C. 1911) 192 Fed. 608.

When made on the ground of the alienage of both parties it will be denied in a case removed into a court where the jurisdiction is apparent on the record, because in such a case the jurisdiction can only be attacked by sworn plea or exception. Lacroix v. Lyons (C. C. 1886) 27 Fed. 403, 404.

On plaintiff's motion to remand the cause to the state court, his residence within the district was sufficiently shown by a recital in a declaration filed

by him the same day that the petition to remove was filed, describing himself as a citizen of a county within the district. Gruetter v. Cumberland Telephone & Telegraph Co. (C. C. 1909) 181 Fed. 248.

Upon motion to remand, the court may hear affidavits controverting the allegations of the petition for removal. Smith v. Crosby Lumber Co. (C. C. 1891) 46 Fed. 819, judgment affirmed Crosby Lumber Co. v. Smith (1892) 51 Fed. 63, 2 C. C. A. 97, following Amy v. Manning (C. C. 1889) 38 Fed. 868.

48. —— **Time for making motion.**—As to waiver of right to remand, by delay in making motion, see ante, this note, "Waiver of right to remand."

A motion to remand to the state court an indictment removed to a federal court can be made prior to the first day of the then next term of the federal court on production by the state of copies of the proceeding, notwithstanding R. S. § 641, ante, § 1013, gives the petitioners until the first day of the next term in which to produce and file a copy of such proceedings in the federal court. State of New Jersey v. Corrigan (C. C. 1905) 139 Fed. 758.

It is the settled practice in the circuit courts of the United States in the Second circuit to allow a motion to remand to be made at once on the removal of a cause from a state court, without waiting for the next term, and, unless the record is filed by the removing defendant within a reasonable time, to permit it to be filed by the plaintiff. Hartford & C. W. R. Co. v. Montague (C. C. 1899) 94 Fed. 227.

After removal, and the argument and overruling in the federal court of a demurrer to the complaint, the plaintiff may still move to remand on the ground that that court has no jurisdiction to hear and determine the cause. State of Indiana v. Lake Erie & W. Ry. Co. (C. C. 1898) 85 Fed. 1.

Where a cause is removed after the time prescribed, but plaintiff, being ignorant of the construction of the law, files an answer in the federal court, he may be permitted to withdraw it and file a motion to remand, where it appears that he had no purpose to speculate on his chances in the state court, and has not unreasonably delayed to assert his right after knowledge of the facts. Collins v. Stott (C. C. 1896) 76 Fed. 613.

A motion to remand on the ground that the removal was made after the case was to be treated as on trial under the state practice comes too late after more than a year has elapsed, and after the case has been transferred by consent to the equity docket, treated as an intervention in a pending receivership case, and referred to a special master; there being no question as to the jurisdiction of the federal court. Wyly v. Richmond & D. R. Co. (C. C. 1894) 63 Fed. 487.

Though the law provides that the removing party shall file a bond to enter the case in the circuit court on the first day of the next session, and that, the record being so entered, the cause shall proceed as if begun in the circuit court, the other party may file a transcript of the record at an earlier day, and have the case remanded, if it appears upon the face of the record that it was not one authorized to be removed. Mills v. Newell (C. C. 1890) 41 Fed. 529.

Under the removal acts of 1875 and 1887, requiring the party removing the cause to give bond for entering in the circuit court, on the first day of its next session, a copy of the record, and for appearing and entering bail, etc., and providing that such copy being entered, the cause shall proceed as commenced there, the circuit court has no power to remand a cause so removed, for want of jurisdiction before the return day, that being the next regular term after the removal. Kansas City & T. Ry. Co. v. Interstate Lumber Co. (C. C. 1888) 36 Fed. 9.

The want of an affidavit authorizing a removal appearing on the face of the record, the mere filing of a petition and affidavit of some person other than the party does not work a removal, under the statute; and, the record having been filed in the circuit court in such case, the motion to remand may be made after issue taken on the allegations of the petition for removal. Duff v. Duff (C. C. 1887) 31 Fed. 772, 12 Sawy. 502.

A delay of over a year, in the absence of explanation, is fatal to a motion to remand the case on the ground that the petition for removal was not filed in time. Miller v. Kent (C. C. 1883) 18 Fed. 561, 20 Blatchf. 508.

An objection to the removal, founded upon the citizenship of one of the parties to the suit, will not be favored after the expiration of 18 months. Hervey v. Illinois Midland Ry. Co. (C. C. 1880) 3 Fed. 707. And under such circumstances, an objection that the cause might have been tried at a term before that at which the application for removal was made will not be considered, if the fact does not appear affirmatively. Id.

A party is not guilty of laches who afterwards moves the federal court to remand a cause because he did not in the first instance oppose in the state court its removal. McMurdy v. Connecticut Gen. Life Ins. Co. (C. C. 1877) Fed. Cas. No. 8,903.

A motion to remand may be made before the trial, where there are no disputed facts. Magee v. Union Pac. R. Co. (C. C. 1873) Fed. Cas. No. 8,-945.

49. —— **Sufficiency of motion.**—Plaintiff, in order to controvert the facts

stated in a removal petition must make an issue with respect thereto in the federal court in which the issue must be tried. Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250.

Where a petition for the removal of a cause, filed February 13, 1902, alleging that defendant was required to appear within 42 days from December 3d, but that the time to plead was to be regulated by a rule of court, and that defendant's time to answer or plead did not expire until February 14, 1902, a motion to remand the case alleging that under the court rules of the state court defendant's time to plead had expired when its petition for removal was filed, but failing to set up the rules relied on, could not be sustained. Randall v. New England Order of Protection (C. C. 1902) 118 Fed. 782.

On a motion to remand a cause to the state court, a mere allegation by defendant in an answer filed to the rule that the case involves a construction of the Constitution or laws of the United States is not sufficient to show jurisdiction in the federal court, without a statement of facts showing how such question can arise, and the nature and character of it. City of New Castle v. Postal Telegraph-Cable Co. (C. C. 1907) 152 Fed. 572.

Motion held not to be denied because it did not specifically state the grounds of the motion. State of Idaho v. American Surety Co. of New York (D. C. 1914) 218 Fed. 678.

50. Pleading to jurisdiction or in abatement.—A petition for removal sufficient on its face gives the federal court jurisdiction only prima facie to try the case on its merits, and the truth of its essential allegations may be put in issue by any appropriate pleading, the filing of a plea to the jurisdiction being the better practice. The issue should be tried by the jury, subject to the right of the court to direct a verdict thereon when proper, and the burden of proof on the issue rests on the petitioner. State of Virginia v. Felts (C. C. 1904) 133 Fed. 85.

Allegations of fact in a petition for removal are taken as true prima facie, and are not put in issue merely by a motion to remand, but may be controverted by plea, answer, or other pleading appropriate to the particular case. Carlisle v. Sunset Telephone & Telegraph Co. (C. C. 1902) 116 Fed. 896.

An action having once been removed from the state to the federal court upon grounds which appear of record, and which are sufficient to give the federal court jurisdiction, the jurisdiction can be attacked only by sworn plea or exception. Lacroix v. Lyons (C. C. 1886) 27 Fed. 403.

After a cause was removed, defendant filed a plea alleging that the court had no jurisdiction, or, if it had, that it ought not to exercise it, for the reason that the cause could be tried with greater convenience in the state court. Held, that, as no controlling authority appeared to warrant such a proceeding, the plea should be overruled. Spies v. Chicago & E. I. R. Co. (C. C. 1887) 32 Fed. 713.

A party against whom a case has been removed from a state to a national court may contest any allegation of fact on which such removal was had, by a plea in the nature of a plea to the jurisdiction of the latter court; and this, whether such allegation is contained in the pleadings proper or the petition for removal. McDonald v. Salem Capital Flour Mills Co. (C. C. 1887) 31 Fed. 577, 12 Sawy. 492.

When the pleadings show jurisdiction, the question of citizenship can only be brought to the attention of the court by a plea duly filed and sworn to according to rule 31, rules of practice in equity. Filer v. Levy (C. C. 1883) 17 Fed. 609.

Where a petition for removal alleged fraudulent joinder of defendants, it was plaintiff's duty to appear and submit to the jurisdiction of the court on the merits or to plead in abatement, putting in issue the allegations of fact on which the removability of the cause depended, in which case the federal court would acquire jurisdiction to hear and determine the issue of such joinder. Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250.

A statement of jurisdictional facts, such as the citizenship of the parties, in a petition for removal, is sufficient prima facie, to establish such facts for the purpose of removal; but such statements may be traversed by the plaintiff by a pleading in the nature of a plea in abatement, in which case the court may receive evidence on the issue. A cause will not be remanded, however, merely on the filing of an affidavit by plaintiff controverting such statements. Weaver v. Northern Pac. Ry. Co. (C. C. 1903) 125 Fed. 155.

A plea in abatement to a petition to remove a case will not be tested by technical rules, but is sufficient if it sets out fairly and with sufficient certainty matters of fact which, if true, negative the jurisdiction of the federal court. Johnson v. Accident Ins. Co. (C. C. 1888) 35 Fed. 374.

The proper way in which to raise the objection that the circuit court has no jurisdiction of a cause removed from a state court is by plea in abatement. Clarkhuff v. Wisconsin, I. & N. R. Co. (C. C. 1885) 26 Fed. 465.

When the pleadings show jurisdiction, the question of citizenship can only be brought to the attention of the court by a plea duly filed and sworn to according to rule 31, rules of practice

in equity. Filer v. Levy (C. C. 1883) 17 Fed. 609.

Where there is reason to doubt the existence of jurisdictional facts, the parties may be examined upon the question, and the court may direct the proper pleadings to be filed to raise the issues involved in such question. Gribble v. Pioneer Press Co. (C. C. 1883) 15 Fed. 689, 5 McCrary, 73.

Want of jurisdiction must be pleaded, where an objection to the removal of a cause is made upon that ground, and such defect is not apparent upon the face of the record in the state court, or the petition for removal. Hoyt v. Wright (C. C. 1880) 4 Fed. 168, 2 McCrary, 222.

Affirmative jurisdictional averments in a petition for removal may be put in issue by a motion to remand, expressly denying the averments of the petition, or based on the grounds traversed, or negativing such averments, or supported by an affidavit denying them but not by general motion to remand only demurrer to petition. Jones v. Casey-Hedges Co. (D. C. 1913) 213 Fed. 43.

A petition to remand and remove a cause held to sufficiently put in issue the allegation of the petition to remove that the resident defendant was not liable to plaintiff and had been fraudulently joined to prevent a removal. Id.

A petition for removal tenders an issue of fact by its allegations of jurisdictional facts which, if controverted, must be tried by the federal court, notwithstanding such allegations are made on information and belief, since parties are not restricted in making issues to matters which can be alleged on personal knowledge. Carlisle v. Sunset Telephone & Telegraph Co. (C. C. 1902) 116 Fed. 896.

A petition for removal alleged that plaintiff, a citizen of the same state with defendant, was only a nominal party; that the claims sued on belonged to a corporation of another state, which assigned them to plaintiff by an instrument requiring him to collect them and hold the proceeds "in trust for the use and benefit of the parties owning the same." Held, on motion to remand, that, while this did not conclusively show that the assignment was merely colorable, yet the cause should be retained, with leave to plaintiff to plead that he was a bona fide trustee to sue and collect, and distribute the proceeds to numerous parties equitably entitled to share therein, on proof whereof the cause would be remanded. Goodnow v. Litchfield (C. C. 1882) 47 Fed. 753.

51. Trial, determination, and scope of inquiry.—There is no difference, in the method of determining whether a case can be removed from a state to a federal court, between cases in which the right to such removal depends on questions of fact and those in which it depends on questions of law arising on the record. Snohomish County v. Puget Sound Nat. Bank (C. C. 1897) 81 Fed. 518.

A motion to remand a case always raises some question of law arising upon the record, and a "speaking" motion is improper. Berry v. Mobile & O. R. Co. (D. C. 1915) 228 Fed. 395.

On motion to remand, the court is not bound to retain jurisdiction simply because the record shows that defendant asserts a defense under the laws of the United States, but may consider and decide all questions of law or fact that inhere in the jurisdictional question. State of Iowa v. Chicago, M. & St. P. Ry. Co. (C. C. 1887) 33 Fed. 391, appeal dismissed Chicago, M. & St. P. Ry. Co. v. State of Iowa (1892) 12 Sup. Ct. 978, 145 U. S. 632, 36 L. Ed. 857. When a petition for removal on the ground of local prejudice has been granted on an insufficient affidavit, the court will reconsider the sufficiency of the affidavit. Amy v. Manning (C. C. 1889) 38 Fed. 868.

But a federal court will not, upon motion to remand, enter upon inquiry as to the sufficiency of the sureties on a bond, conditioned as required by the removal act, and approved by the state court. Van Allen v. Atchison, C. & P. R. Co. (C. C. 1880) 3 Fed. 545. Nor can the question whether defendant had in fact a right to remove the suit be raised by a motion to remand, made before the trial. Dennistoun v. Draper (C. C. 1866) Fed. Cas. No. 3,-804. An act of congress should not be declared unconstitutional upon a motion to remand. Lamar v. Dana (C. C. 1872) Fed. Cas. No. 8,005.

Where, on application by a defendant in a suit in a state court to remove the cause, the state court, being of competent jurisdiction, has decided that on the face of the record the defendant is not entitled to such removal, he will not be permitted to contend for a contrary decision of the same point in the federal court upon a motion by plaintiff to remand the cause as not being removable. Beadleston v. Harpending (C. C. 1887) 32 Fed. 644.

Where plaintiff, in an action in a state court to set aside alleged fraudulent conveyances and subject the land conveyed to the satisfaction of judgments owned by him, removed the cause to a federal court on the grounds of diverse citizenship and local prejudice, filing an affidavit in support of the latter, and issue being joined, and reference made to a master, testimony was taken, and the cause was awaiting final argument before the master, held, that the court would not consider an application to remand on the grounds of the falsity of plaintiff's affidavit; the question raised being indelicate and inexpedient to pass on, the application too late, and the ground of diverse citizenship sufficient to support

the removal. Neale v. Foster (C. C. 1887) 31 Fed. 53.

Where an issue of fact is joined on the removal petition, application should be made to the court to determine whether the issue shall be tried on affidavit, oral testimony, depositions, or otherwise. Jones v. Casey-Hedges Co. (D. C. 1913) 213 Fed. 43.

Where a foreign and resident defendant are joined in an action in the state court, and the cause is removed to the federal court by the nonresident defendant before a motion to quash the service as to the resident defendant is heard, the fact that the federal court has no authority to pass on such motion, in determining a motion to remand the cause to the state court, does not preclude a consideration of the question whether such defendant was in court or not at the time limited for the filing of the petition for removal. Diday v. New York, P. & O. R. Co. (C. C. 1901) 107 Fed. 565.

52. —— **Jurisdiction.**—Where a case has been removed by a United States officer defendant from a state court into a federal circuit court, the latter will not determine on motion the question of jurisdiction and removal, but, as it cannot be raised on the pleadings, will postpone it till the trial. Dennistoun v. Draper (C. C. 1866) Fed. Cas. No. 3,804.

The question of jurisdiction may be tried, on motion to remand, at any time before the trial of the plenary issues in the case. Mackey v. Mallory (N. Y. 1881) 61 How. Prac. 24.

53. —— **Rights, interests, and joinder of parties.**—On a motion to remand a cause removed by one of a number of defendants, the merits of the controversy can be considered only for the purpose of ascertaining the real nature of the alleged cause or causes of action against the several defendants, and whether or not there has been a fraudulent joinder of parties defendant for the purpose of defeating the jurisdiction of the federal court. McGuire v. Great Northern Ry. Co. (C. C. 1907) 153 Fed. 434.

When, in suit sought to be removed, fraudulent joinder of defendants is charged, and issue is taken upon the charge in the petition, the issue must be determined by the federal court. Gustafson v. Chicago, R. I. & P. Ry. Co. (C. C. 1904) 128 Fed. 85; Lewis v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1910) 192 Fed. 654; Trana v. Chicago, M. & P. S. Ry. Co. (D. C. 1915) 228 Fed. 824. But, where an alleged fraudulent joinder of a resident with a nonresident defendant to prevent a removal does not otherwise appear and cannot otherwise be inferred, the inquiry as to fraudulent joinder cannot go to the trial of the whole case on the merits. Clark v. Chicago, R. I. & P. Ry. Co. (D. C. 1912) 194 Fed. 505. Where plaintiff has in good faith stated a joint cause of action against resident and nonresident defendants, the question is not for trial in the removal proceedings; the question of joinder being for the state court. Rountree v. Mt. Hood R. Co. (D. C. 1916) 228 Fed. 1010.

The question whether or not the cause is a suit in which there exists a controversy between citizens of different states is not an issue which can be raised and judicially determined on the trial of a motion to remand the case to the state court. Filer v. Levy (C. C. 1883) 17 Fed. 609.

The voluntary assignee of an insolvent, a citizen of Illinois, brought suit in the courts of that state to set aside an alleged fraudulent preference, which consisted in the insolvent, on the day he made the assignment, turning over to one J., also a citizen of Illinois, certain warehouse receipts to be held by him for the indemnity of a creditor residing in New York. Both J. and the creditor were made parties to the suit. A receiver was appointed, to whom J. turned over the receipts. Default was entered against J. for want of answer, and the creditor removed the cause to the federal court. Held, on motion to remand on the ground of the common citizenship of J. and the assignee, that, the only question left open being whether the creditor took title to the receipts as against the assignee, J. was not a necessary party, and that the case should be retained, the federal court being as competent as the state court, in the event of the dismissal of the bill, to order the return of the receipts to J. Judah v. Iowa Barb-Wire Co. (C. C. 1887) 32 Fed. 561.

A defendant who has had a suit removed from a state court on the ground that the plaintiffs are citizens of a state different from that of all the defendants but one, and that such defendant is only a nominal party, cannot resist a motion to remand by asserting that the removing defendant is the real party plaintiff; the controversy being between him and the other defendants, who are citizens of different states. Mayer v. Denver, T. & Ft. W. R. Co. (C. C. 1890) 41 Fed. 723.

Where a cause has been removed from a state to a federal court upon defendant's petition, alleging diverse citizenship, plaintiff's petition to remand, denying the allegation of diverse citizenship, will be treated as a traverse of the petition to remove, and the motion to remand will be decided upon the trial of the issue thus made. Curnow v. Phœnix Ins. Co. (C. C. 1890) 44 Fed. 305.

An averment in a petition for removal by a nonresident defendant on the ground of diversity of citizenship that a codefendant who is a citizen of the same state as plaintiff was joined for the sole purpose of preventing a removal, and that he in fact has no con-

nection with the cause of action sued on, supported by proofs, such as affidavits, tenders an issue of fact for trial by the federal court; and, if not controverted, such averment stands admitted. Kelly v. Chicago & A. Ry. Co. (C. C. 1903) 122 Fed. 286.

Where the complaint in an action in a state court states a joint cause of action for negligence against a nonresident corporation and its resident servant, a denial of the alleged joint negligence in a petition for removal filed by the corporation makes no issue of fraudulent joinder, nor will further allegations of facts, although, as the trial developed, there was no joint liability, be considered by the federal court on a motion to remand, where it would necessarily involve a trial of the cause on the merits. Shane v. Butte Electric Ry. Co. (C. C. 1906) 150 Fed. 801.

Where a resident defendant is joined with a nonresident to prevent a removal, the federal court on a proper petition will examine the merits sufficiently to determine whether the allegations against the resident defendant were made in good faith. Clark v. Chicago, R. I. & P. Ry. Co. (D. C. 1912) 194 Fed. 505.

Where a motion to remand, which includes a denial that a resident was fraudulently joined as defendant to prevent a removal to the federal court, is submitted upon the pleadings, the only question presented is whether the plaintiff's petition in the action states a joint cause of action against both defendants. Evans v. Sioux City Service Co. (D. C. 1913) 206 Fed. 841.

54. Record, pleadings, and effect thereof on inquiry.—A motion to remand is properly determinable on the facts appearing on the face of the record, but, where it controverts allegations of fact in the petition for removal necessary to sustain the jurisdiction of the court, it may by the practice of the court be treated as a plea to the jurisdiction and the parties required to take evidence on such issues. Harrington v. Great Northern Ry. Co. (C. C. 1909) 169 Fed. 714.

A cause removed into a federal court on the ground of diversity of citizenship will be remanded unless the jurisdiction of such court appears from the record, which includes for the purposes of such motion the petition for removal, and all pleadings and other papers previously properly filed in the suit in the state court. Helena Power Transmission Co. v. Spratt (C. C. 1906) 146 Fed. 310.

In cases removed from the state courts, the record and proceedings by which the transfer was effected must show affirmatively the facts necessary to give the federal court jurisdiction; and where it does not clearly appear from the pleadings and record that there is a distinct and separable controversy, as contemplated by the statute, a cause removed on that ground should be remanded. Long v. Buford (C. C. 1885) 24 Fed. 241.

On a record showing that a petition and bond were filed in the state court, and that subsequently a motion was made to strike the petition from the files, but not showing that any action was ever had on such motion, though other entries were afterwards made in the cause, it cannot be assumed that the petition and bond were never presented to the state court for approval. Probst v. Cowen (C. C. 1898) 91 Fed. 929.

55. —— Record.—On a motion to remand, the whole record as filed in the federal court is to be taken into consideration. Edwards v. Bates (C. C. 1893) 55 Fed. 436, 439, reversed (1896) 16 Sup. Ct. 967, 163 U. S. 269, 41 L. Ed. 155; Kyle v. Chicago, R. I. & P. Ry. Co. (C. C. 1909) 173 Fed. 238.

The question of the removability of a cause must be determined on the record at the time of removal, and cannot be affected by affidavits filed in support of a motion to remand. West Side R. Co. v. California Pac. R. Co. (D. C. 1913) 202 Fed. 331. As by ex parte affidavits relative to the amount in controversy. Smith v. Western Union Tel. Co. (C. C. 1897) 79 Fed. 132.

A finding that a removed suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court, must be based upon facts distinctly appearing on the record, and creating a legal certainty of the conclusion. Hayward v. Nordberg Mfg. Co. (1898) 85 Fed. 4, 29 C. C. A. 438.

Every fact that is essential to bring a cause within the limited jurisdiction of a Circuit Court of the United States must appear affirmatively upon the record; and if, therefore, a record that has been removed into such court from a state court would be fatally defective if the suit had been originally brought in the federal tribunal, it is none the less defective because it was originally brought in a state court. Goepfert v. Compagnie Générale Transatlantique (C. C. 1907) 156 Fed. 196.

In a suit to quiet title, where interveners, claiming to be nonresidents and owners of distinct portions of the tract, removed the suit on the ground that the controversy as to each of them was separable, plaintiff was not deprived of the decree in his favor on the merits on the ground that the cause was not rightfully removed, where the record did not show that there was not a separable controversy. Connell v. Smiley (1895) 15 Sup. Ct. 353, 354, 156 U. S. 335, 39 L. Ed. 443.

Plaintiffs sued defendant, a United States marshal, in the state court, for trespass in seizing and carrying away books of account belonging to them, but the declaration failed to allege that defendant acted in his official capacity.

Defendant demurred generally, and thereupon filed a petition for removal of the case to the federal court, alleging in his petition that he was a United States marshal, and acted under an attachment issued by the United States circuit court in making the alleged seizure, "if any seizure actually occurred," and that the suit was one arising under the laws of the United States, and involved the construction of such laws. Held, that the record did not present a case within the jurisdiction of the federal court, and that the cause was not removable. Rothschild v. Matthews (C. C. 1884) 22 Fed. 6.

A case removed to a federal court, on the ground that the suit arose under the constitution or laws of the United States, will be remanded to the state court when the record fails to show that there will arise some contested point of law depending upon the constitution or laws of the United States, what the question is, and how it will arise. McFadden v. Robinson (C. C. 1884) 22 Fed. 10.

A case removed from a state court on petition of defendant, by reason of difference of citizenship of the parties, will not be remanded on the ground that the cause of action has been assigned to one who is of the same citizenship as the defendant, when the record simply shows a motion in the state court, before the removal of the cause, for leave to substitute a new plaintiff, on which motion the court took no action. Smith v. Chicago, B. & Q. Ry. Co. (C. C. 1887) 30 Fed. 722.

It is not necessary that the residence and sufficiency of the surety on the removal bond should appear in the record, in order to sustain the jurisdiction of the federal court. In the absence of anything to show that the surety was a resident of the state in which the suit was pending, or of any action by the state court accepting or refusing to accept him as surety, the statement of the petition for removal that the petitioners "have made and herewith file a bond with good and sufficient surety" must be accepted as true, until the contrary is shown. Probst v. Cowen (C. C. 1898) 91 Fed. 929.

56. —— **Pleadings.**—The petition for removal of a cause from a state to the federal court is part of the record, and will be considered by the federal court in determining its jurisdiction. South Carolina v. Coosaw Min. Co. (C. C. 1891) 45 Fed. 804, decree affirmed Coosaw Min. Co. v. South Carolina (1892) 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537. And where, on looking into the petition, it finds that the cause of action attempted to be stated is one of which it has no jurisdiction, it must remand the cause. Anderson v. Appleton (C. C. 1887) 32 Fed. 855; Mystic Milling Co. v. Chicago, M. & St. P. Ry. Co. (C. C. 1904) 132 Fed. 289.

The ground of jurisdiction of the United States court must appear in the record as it actually exists, and the petition for removal can be taken as part of that record only so far as it states facts which may be regarded as legally consistent with the pleadings of the parties and within the purview of the issue, if one has been made between them. Rothschild v. Matthews (C. C. 1884) 22 Fed. 6.

But, when this petition fails to state all the facts, and refers to the pleadings for the same, the federal court will look to them. McLane v. Leicht (C. C. 1886) 27 Fed. 887.

On a motion to remand, a federal court will not inquire into the sufficiency of the plaintiff's pleading. Hax v. Caspar (C. C. 1887) 31 Fed. 499; Thresher v. Western Union Telegraph Co. (C. C. 1906) 148 Fed. 649; Smith v. Camas Prairie Ry. Co. (D. C. 1914) 216 Fed. 799.

Nor can inquiry be made into the truth of an averment that defendant has a defense arising under or by virtue of the constitution or laws of the United States. Texas v. Texas & P. R. Co. (C. C. 1879) Fed. Cas. No. 13,848. Or into whether there is a misjoinder of causes of action. Fogarty v. Southern Pac. Co. (C. C. 1903) 123 Fed. 973.

Nor can the matters raised by the application to remove, and passed upon by the state court, and made the subject of bills of exception by plaintiff be inquired into on a motion to remand, based alone upon the matters contained in the transcript sent from the state court. Greene v. Klingler (C. C. 1879) Fed. Cas. No. 5,767.

Where defendant's petition for removal of a cause distinctly alleges that a federal question is raised, his answer, filed after a motion to remand, and setting out more in detail the nature of the defense, may properly be considered on that motion. Kentucky v. Louisville Bridge Co. (C. C. 1890) 42 Fed. 241.

Where plaintiff's petition to remand informally joined issue on the allegations in the petition for removal that the resident defendant had been fraudulently joined, the cause would not be remanded on the pleadings, but defendant would be given an opportunity to try the issue on affidavits. Jones v. Casey-Hedges Co. (D. C. 1913) 213 Fed. 43.

Where a cause is removed before a declaration is filed in the state court, the nature of the cause of action is to be determined from the copy of the declaration exhibited with the affidavit of plaintiff's attorney in support of the motion to remand. Id.

Where a cause has been removed and a motion to remand is made, the controversy is to be judged of, in part, by the pleadings, if any, which had been put in, in the state court, before the filing of the petition for removal. Chi-

cago, St. L. & N. O. R. Co. v. McComb (C. C. 1879) Fed. Cas. No. 2,670.

A petition for removal alleged that plaintiff, a citizen of the same state with defendant, was only a nominal party; that the claims sued on belonged to a corporation of another state, which assigned them to plaintiff by an instrument requiring him to collect them and hold the proceeds "in trust for the use and benefit of the parties owning the same." Held, on motion to remand, that, while this did not conclusively show that the assignment was merely colorable, yet the cause should be retained, with leave to plaintiff to plead that he was a bona fide trustee to sue and collect, and distribute the proceeds to numerous parties equitably entitled to share therein, on proof whereof the cause would be remanded. Goodnow v. Litchfield (C. C. 1882) 47 Fed. 753.

Although certain pleadings in the state court have been taken out of the record by stipulation, they may be used in the United States court, when properly verified, to show what has been done in the state court, with a view to showing that the application for removal was made too late. Wilkinson v. Delaware, L. & W. R. Co. (C. C. 1885) 23 Fed. 562.

Upon a motion to remand an action before answer, where the averments of the complaint are so ambiguous as to make it doubtful whether certain defendants residing in the same state with the plaintiff are necessary parties, and especially where there are indications of a design to obstruct removal by the introduction of additional parties, the averments of the complaint should be rigidly scrutinized, and the whole record, including the plaintiff's affidavits, which form a part thereof, be looked at; and, if it therefrom appears probable that such defendants are not necessary parties, the cause should be retained without prejudice to subsequent remanding, should they afterwards appear to be necessary parties. City of New York v. New Jersey Steamboat Transp. Co. (C. C. 1885) 24 Fed. 817.

On a motion to remand a cause to the state court from which it was removed, the petition for removal is the basis of jurisdiction. It is not the province of the pleadings in the state court to aver the grounds of jurisdiction in the federal court. Kessinger v. Hinkhouse (C. C. 1886) 27 Fed. 883.

A removal to the United States court having been properly ordered by a state court, upon petition and bond being filed for that purpose, the petition showing both plaintiffs to be citizens of a different state from that of the only defendant who defended (the other defendants disclaiming), but, upon a trial of a plea in abatement filed in the United States court, the facts as to citizenship appearing differently, and not such as to give jurisdiction, the case should be remanded to the state court. Rumsey v. Call (C. C. 1886) 28 Fed. 769.

Where there is nothing in the pleadings by direct averment as to the amount or value of the matter in dispute, and no facts from which it can be ascertained that the sum or value is less than $2,000, and the petition for removal from the state to the federal court alleges that the matter in dispute exceeds the value of $2,000, which allegation is not controverted by special plea nor by affidavit, a motion to remand to the state court for want of federal jurisdiction must be denied. Langdon v. Hillside Coal & Iron Co. (C. C. 1890) 41 Fed. 609.

Where defendant's petition for removal of a cause distinctly alleges that a federal question is raised, his answer, filed after a motion to remand, and setting out more in detail the nature of the defense, may properly be considered on that motion. Commonwealth of Kentucky v. Louisville Bridge Co. (C. C. 1890) 42 Fed. 241.

To an action to restrain the prosecution of a suit in a state court because of the removal to the federal court of a previous suit based upon the same cause of action, which was still pending, defendant answered that, while in the writ filed in the first action his demand was placed at $2,500, it was his intention to claim only $1,500; that he paid the writ tax required by the laws of the state upon that sum only; and the first action was dismissed, and the second suit brought, because of a mistake in the form of the action. Held that, no declaration having been filed in the first action, the amount in controversy must be determined from defendant's answer herein, and, it appearing that this was but $1,500, the federal court was without jurisdiction thereof, and the same should be remanded to the state court, and the injunction restraining the second action dissolved. Western Union Tel. Co. v. White (C. C. 1900) 102 Fed. 705.

Distinct and unambiguous allegations of fact in a petition for removal, not denied by any pleading filed by plaintiff, except in so far as contradicted by the record, are to be taken as true, on a motion to remand, or other proceeding challenging the jurisdiction of the federal court. Commonwealth of Kentucky v. Powers (C. C. 1905) 139 Fed. 452, reversed Ex parte Commonwealth of Kentucky (1906) 26 Sup. Ct. 387, 201 U. S. 1, 50 L. Ed. 633.

A petition for removal filed by a water company, alleging that the suit against it involved its right under its franchise to establish a metered service and charge meter rates, and that the amount in controversy exceeded, exclusive of interest and costs, $3,000, sufficiently shows the amount in controversy within the jurisdiction of the federal court as against a motion to remand averring that the court has no

jurisdiction because the amount involved does not exceed $100. Martin v. City Water Co. of Chillicothe, Mo. (D. C. 1912) 197 Fed. 462.

57. Amendment of record or petition to prevent remand.—Where jurisdiction of the federal court of an action removed to it by state court does not exist, the cause must be remanded; but where jurisdiction exists and appears of record, the proceedings may be amended. Miller v. Soule (D. C. 1915) 221 Fed. 493.

If the record does not show, at the time of the application for removal, that the case is removable, the jurisdiction cannot be helped out by subsequent amendment in the appellate court to show that diversity of citizenship did exist, or by the fact that such diversity is shown by evidence preserved in the bill of exceptions, and by the bond filed with the petition for the writ of error. Grand Trunk Ry. Co. v. Twitchell (1894) 59 Fed. 727, 8 C. C. A. 237, 21 U. S. App. 45.

Although the petition for removal and the record, in a suit removed on the ground of diverse citizenship, do not show that the parties are citizens of different states, an amended transcript may be filed, where the record in the state court did in fact disclose the requisite citizenship, before the removal. Kaeiser v. Illinois Cent. R. Co. (C. C. 1880) 6 Fed. 1, 2 McCrary, 187.

Quære, whether the record of the state court can be so amended where the term has passed "at which by law the cause could be first tried" in the state court. Id.

Where the jurisdiction of a circuit court is challenged on the ground that the record does not show the value of the property in controversy to exceed $2,000, the point being made for the first time after a final hearing and decree the property being in fact of sufficient value, the court will not deny its jurisdiction, but will allow the omission in the record to be supplied by the filing nunc pro tunc of a proper affidavit. Carr v. Fife (C. C. 1891) 45 Fed. 209, decree affirmed (1895) 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508.

The amendment of the record to show jurisdiction in the circuit court must be made in the state court. Overman Wheel Co. v. Pope Mfg. Co. (C. C. 1891) 46 Fed. 577.

58. —— Amendment of petition.—While the amending of an application so as to show jurisdiction is a matter within the discretion of the court, and cannot be claimed by a party litigant as a right. McNaughton v. South Pac. C. R. Co. (C. C. 1884) 19 Fed. 881. And, where the petition for removal of a cause on the ground of citizenship is defective as filed in the state court, which for that reason refuses to grant the removal, an amendment in the United States circuit court so as to show diversity of citizenship is not a matter of right, and ought not to be permitted. Endy v. Commercial Fire Ins. Co. (C. C. 1885) 24 Fed. 657. Nor can a federal court allow a petition to be amended to show that the cause is in fact removable (Fife v. Whittell [C. C. 1900] 102 Fed. 537), where neither petition nor record show grounds for removal. Fitzgerald v. Missouri Pac. R. Co. (C. C. 1891) 45 Fed. 812; Murphy v. Payette Alluvial Gold Co. (C. C. 1899) 98 Fed. 321; Dinet v. City of Delavan (C. C. 1902) 117 Fed. 978; Dalton v. Milwaukee Mechanics' Ins. Co. (C. C. 1902) 118 Fed. 876; Dalton v. Germania Ins. Co. (C. C. 1902) 118 Fed. 936.

A petition for removal, which shows sufficient grounds therefor, may be amended by permission of the federal court after the cause has been filed therein. Woolridge v. McKenna (C. C. 1881) 8 Fed. 650; Northern Pac. Terminal Co. v. Lowenberg (1883) 18 Fed. 339, 9 Sawy. 348; Hall v. Chattanooga Agricultural Works (C. C. 1891) 48 Fed. 599; Powers v. Chesapeake & O. R. Co. (C. C. 1895) 65 Fed. 129, judgment affirmed (1898) 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673; Flynn v. Fidelity & Casualty Co. (C. C. 1906) 145 Fed. 265. Thus, where a removal petition sets forth the ultimate facts required by law, but does not allege in detail the facts constituting an alleged fraudulent joinder of parties defendant, it is amendable in the federal court in that regard. Donovan v. Wells Fargo & Co. (1909) 169 Fed. 363, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250. Where it contains a general statement of jurisdictional facts, but in an informal way, an amendment may be allowed to make the allegations of such facts specific. Vestal v. Ducktown Sulphur, Copper & Iron Co. (D. C. 1911) 210 Fed. 375.

An allegation that defendants are "residents" of certain states named, instead of "citizens," may, where such defect is the result of inadvertence, be amended to correspond with the actual facts, especially where such defect has not been discovered or objected to by the opposite party, and he has taken important steps in the cause, and prepared it for trial in the circuit court. Glover v. Shepperd (C. C. 1883) 15 Fed. 833, 11 Biss. 572. A petition which is sufficient to give it jurisdiction may be amended to correct a mistaken allegation as to plaintiff's citizenship, where plaintiff's own showing establishes the requisite diversity of citizenship to sustain the jurisdiction. Kerr v. Modern Woodmen of America (1902) 117 Fed. 593, 54 C. C. A. 655. A petition may be amended by supplying an averment of citizenship requisite to give jurisdiction, where it appears that its omission was inadvertent, and it is shown by stipulation of the parties

that the requisite diversity of citizenship in fact existed. Kansas City Southern Ry. Co. v. Prunty (1904) 133 Fed. 13, 66 C. C. A. 163.

On motion to remand, defects in the petition for removal cannot be supplied by affidavits. Camprelle v. Balbach (C. C. 1891) 46 Fed. 81.

Where an application to remove a cause to a federal court on the ground of local prejudice has been denied, a motion, made several months later, to amend the petition so as to set up another ground for the removal, is too late, and will be refused. Carson & Rand Lumber Co. v. Holtzclaw (C. C. 1891) 44 Fed. 785. Also, where a cause was removed on the theory that both defendants were nonresidents, a petition for removal could not be amended, after time to answer had expired, so as to allege that the petition showed a separable controversy between plaintiff and defendant railroad company. Thompson v. Ward (D. C. 1912) 199 Fed. 861. And leave to amend to show the citizenship of the plaintiffs may be granted after the filing of the removal papers, but before any action taken in the federal court on the merits, where there was a general averment of diverse citizenship, and the citizenship of defendant had been clearly stated, and it appeared from the face of the trust deed, which was the subject-matter in controversy, that the plaintiffs were, at the time of its execution, residents of another state. Kinney v. Columbia Savings & Loan Ass'n (1903) 24 Sup. Ct. 30, 191 U. S. 78, 48 L. Ed. 103, affirming decree (C. C. 1902) 113 Fed. 359.

In several cases the sufficiency of allegations to authorize amendments has been determined. Where the complaint in an action against a railroad company alleges the citizenship of plaintiff, and that defendant does, and did when the cause of action arose, operate a certain railroad, and a petition for removal by defendant alleges that it is a citizen of another state, it is a reasonable inference that it was such when the action was commenced, and the court may properly allow an amendment specifically stating such fact. Kyle v. Chicago, R. I. & P. Ry. Co. (C. C. 1909) 173 Fed. 238. Where a removal petition averred that the controversy was between citizens of different states, and that the amount in controversy, exclusive of interest and costs, exceeded the sum of $2,000, the federal Circuit Court to which the cause was removed had jurisdiction to permit the petitioner to amend the petition so as to disclose the citizenship of the parties. Thompson v. Stalmann (C. C. 1904) 131 Fed. 809. Where a petition for removal shows that the requisite amount is involved, and alleges that plaintiff and defendant are citizens of different states, it contains sufficient to give the federal court jurisdiction of the cause, and may be amended, by leave of court, by supplying more specific allegations going to establish the same jurisdictional facts, such as the citizenship of the parties. Stadlemann v. White Line Towing Co. (C. C. 1899) 92 Fed. 209.

Where the jurisdictional facts sufficiently appear from the removal petition, taken in connection with the laws defining citizenship in the states where the parties reside, of which the court takes judicial notice, a petition for removal alleging that the parties are respectively residents and citizens of certain cities in different states may be amended to show that they are respectively citizens of the states in which they reside. Tremper v. Schwabacher (C. C. 1898) 84 Fed. 413.

A general averment, in a petition for removal, that the controversy is between citizens of different states, is sufficient to authorize the federal court to allow amendment of a defective allegation, in a subsequent part of the petition, that plaintiff is a "resident" of a state named. Johnson v. F. C. Austin Mfg. Co. (C. C. 1896) 76 Fed. 616.

The petition for removal, though defective in containing mere conclusions of law, may be considered sufficiently amended by a subsequent answer setting forth facts which go to show the jurisdiction of the United States court. Carson v. Dunham (1887) 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992.

Where a case has been removed from a state court, no change of pleadings or in the relationship of the parties, by amendments in the circuit court, can give jurisdiction not disclosed by original proceedings in the state court. Walser v. Memphis, C. & N. W. R. Co. (C. C. 1883) 19 Fed. 152.

Where a petition for removal is granted by a state court, and the transcript is filed in the United States court, upon a motion to remand being made, an amendment of the petition will be allowed for the purpose of curing any defects therein. If the state court refuses an order for the removal of the cause, no amendments to the petition will be allowed. Winnemans v. Edgington (C. C. 1886) 27 Fed. 324.

An additional petition presented to the federal court with the removal papers, alleging facts not stated in the petition to the state court, cannot be looked to to confer jurisdiction. Waite v. Phœnix Ins. Co. (C. C. 1894) 62 Fed. 769.

Where a petition for removal is filed in a state court in due time, containing the requisite jurisdictional averments to authorize the removal, and accompanied by a proper bond, the removal is not defeated because, through a mistake, both petition and bond name the court to which the removal is sought as the district court of the United States, instead of the circuit court, and

the order of removal is to the district court. Such proceeding operates to transfer jurisdiction of the cause to the circuit court by virtue of the statute, notwithstanding the error, and that court may permit the proper correction to be made in the petition and bond by amendment. Hadfield v. Northwestern Life Assur. Co. (C. C. 1900) 105 Fed. 530.

When defendant's petition for removal of the cause contains a false allegation, and the admission of its falsity by defendant upon trial is incorporated in the record, the petition will be treated as if amended accordingly. Koshland v. Home Mut. Ins. Co. (1897) 49 P. 864, 31 Or. 321.

59. **Evidence.**—The want of jurisdiction may be shown at the trial. Kain v. Texas Pac. R. Co. (C. C. 1875) Fed. Cas. No. 7,596.

60. —— **Affidavits.**—In an action against a corporation on an issue as to citizenship of plaintiff, an affidavit of an officer of defendant that plaintiff is a nonresident, previously made in support of a motion for security for costs, is admissible in evidence. Chicago, & N. W. R. Co. v. Ohle (1886) 117 U. S. 123, 6 Sup. Ct. 632, 29 L. Ed. 837.

An issue of fact as to whether a nonresident defendant was wrongfully joined to prevent removal of the cause to the federal court is triable on affidavits and counter affidavits. Lewis v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1910) 192 Fed. 654.

The averment in a petition that the suit has been brought for a cause of action specified in the act of July 27, 1868, cannot be tried on affidavit on motion to remand. Fisk v. Union Pac. R. Co. (C. C. 1871) Fed. Cas. No. 4,828.

Upon motion to remand, the court may hear affidavits controverting the allegations of the petition for removal. Smith v. Crosby Lumber Co. (C. C. 1891) 46 Fed. 819.

61. —— **Sufficiency.**—Uncontradicted testimony that a resident employé sued jointly in tort with his nonresident employer was merely a draftsman, whose work was confined to making the necessary drawings based on the plans and ideas of others, and that he had nothing to do with planning the apparatus which is alleged to have been so defectively constructed as to have caused the injury complained of, is sufficient to support a conclusion of law that such employé was made a defendant for the sole purpose of preventing the exercise of the right of removal by the nonresident defendant. Wecker v. National Enameling & Stamping Co. (1907) 27 Sup. Ct. 184, 204 U. S. 176, 51 L. Ed. 430.

An action against a foreign corporation in a state court of Illinois, was removed by defendant to the Circuit Court of the United States on a verified petition alleging that defendant was a citizen of New York and that plaintiff was a citizen of Illinois. No issue was taken on such petition, but at the trial on the merits it was proved incidentally that plaintiff was a minor 15 years of age, that he was born and the family to which he belonged had lived in Sicily until the month prior to the accident, and that the family other than the father, who was then dead, sailed for the United States a month preceding the accident, and were on their way from New York to Chicago when the accident occurred. Held that, in the absence of evidence as to where the father died or that the father was not a citizen of Illinois, the evidence was insufficient to establish that plaintiff was not a citizen of Illinois at the time he was injured so as to defeat federal jurisdiction. Cucciarre v. New York Cent. & H. R. R. Co. (1908) 163 Fed. 38, 90 C. C. A. 220.

Evidence reviewed, and held sufficient to sustain the removal of a cause from a state to a federal court by a nonresident defendant on the ground of local prejudice. Parker v. Vanderbilt (C. C. 1905) 136 Fed. 246.

On motion to remand a cause for injuries to a servant, facts held insufficient to show, as a matter of law, that the resident defendant was not liable as well as the master, so as to show that his joinder was fraudulent to prevent a removal. Clark v. Chicago, R. I. & P. Ry. Co. (D. C. 1912) 194 Fed. 505.

A cause having been removed on the ground that both defendants were nonresidents and citizens of Illinois, evidence held insufficient to show that defendant W. was not a resident of Iowa, where he was served, at the time of service. Thompson v. Ward (D. C. 1912) 199 Fed. 861.

On a motion to remand to a Massachusetts state court an action against a former resident of Massachusetts, evidence held insufficient to show that his alleged change of residence to Illinois was in good faith, and with no intent of again changing his residence to Massachusetts when circumstances would permit. Sullivan v. Lloyd (D. C. 1914) 213 Fed. 275.

62. —— **Presumptions and burden of proof.**—Where the declaration alleges such citizenship of parties as gives the court jurisdiction, and defendant asserts want of jurisdiction by plea in abatement, the burden is on him to show that the residence of parties is such as to defeat the court's jurisdiction. Carson v. Dunham (1887) 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; Heath v. Austin (C. C. 1874) Fed. Cas. No. 6,305; Copeland v. Memphis & C. R. Co. (C. C. 1878) Fed. Cas. No. 3,209; Gilmer v. City of Grand Rapids (C. C. 1883) 16 Fed. 708; Swann v. Mutual Reserve Fund Life Ass'n (C. C. 1902) 116 Fed. 232; Fishblatt v.

Atlantic City (C. C. 1909) 174 Fed. 196.

Where a declaration states that property taken as the result of a trespass was of the value of $100, but the damages claimed for the trespass was $6,000, and the petition for removal to the federal court alleges the sum or value in dispute as the amount claimed for damages, it cannot be assumed that a less sum than the jurisdictional amount is involved. Smith v. Greenhow (1884) 3 Sup. Ct. 421, 422, 109 U. S. 669, 27 L. Ed. 1080.

On an issue of fraudulent joinder of resident defendants to prevent removal of a cause by the nonresident defendant, the burden of proof of fraudulent joinder is on the moving defendant. Enos v. Kentucky Distilleries & Warehouse Co. (C. C. A. 1911) 189 Fed. 342; Trivette v. Chesapeake & O. R. Co. (1914) 212 Fed. 641, 129 C. C. A. 177; Boatner v. American Exp. Co. (C. C. 1903) 122 Fed. 714; Armstrong v. Kansas City Southern Ry. Co. (C. C. 1911) 192 Fed. 608; Stevenson v. Illinois Cent. R. Co. (C. C. 1911) 192 Fed. 956; Clark v. Chicago, R. I. & P. Ry. Co. (D. C. 1912) 194 Fed. 505; Evans v. Sioux City Service Co. (D. C. 1913) 206 Fed. 841.

A plaintiff moving to remand a cause to the state court has the burden of proving that the amount involved is less than the jurisdictional amount. Martin v. City Water Co. of Chillicothe, Mo. (D. C. 1912) 197 Fed. 462.

On a motion to remand a cause to the state court where the amount in controversy in the suit is put in issue, the burden of proving that it is sufficient to give the federal court jurisdiction rests on the defendant, and the mere allegation of such fact in the petition for removal is not sufficient as against a sworn denial by the plaintiff. City of New Castle v. Western Union Telegraph Co. (C. C. 1907) 152 Fed. 569.

Where, on motion to remand after removal of an action of ejectment, the value of the land is traversed, it must be established by the removing party by proof. This, as the matter in controversy, is a jurisdictional fact, which cannot be left in doubt, as it must be where petition and answer contradict each other. Davies v. Wells (C. C. 1904) 134 Fed. 139.

Where the maintenance of rates by a water company for water supply is the subject of dispute, and the object of a bill is to restrain it from increasing its rates, the alleged amount in controversy in a petition for removal to the federal court must govern until the contrary is conclusively shown. Martin v. City Water Co. of Chillicothe, Mo. (D. C. 1912) 197 Fed. 462.

Where, on motion to remand suit for partnership accounting, plaintiff showed that amount claimed by him was less than $3,000, if defendant claimed anything from plaintiff, held, that it was incumbent on it to show this fact. Mull v. Parrott Bros. Co. (D. C. 1914) 218 Fed. 713.

Where the jurisdiction of the federal court over a case removed from a state court depends upon a question of fact, the existence of such fact must be pleaded in the petition for removal; and, if issue is joined thereon, the burden of proof is on the removing party to establish the existence of such jurisdictional fact. Board of Com'rs of Woodson County v. Toronto Bank (C. C. 1904) 128 Fed. 157.

Presumptions are in favor of federal jurisdiction in a case removed from a state court. Pittsburgh, C. & St. L. R. Co. v. Ramsey (1874) 22 Wall. 322, 327, 328, 22 L. Ed. 823.

Where a cause of action for a joint tort is stated against a noncitizen corporation and its resident servants, an inference of fraudulent joinder cannot be deduced from the fact that no cause of action is found to exist against any of the defendants. Stevenson v. Illinois Cent. R. Co. (C. C. 1911) 192 Fed. 956.

Where, in a suit by stockholders of a corporation, brought in a state court, relief was granted to the plaintiffs, their right to which was affirmed on appeal by the highest court of the state, on a subsequent removal of the cause, after the filing of supplemental pleadings, it will be assumed by the federal court, prima facie, at least, and for the purposes of a motion to remand, that, under the laws of the state, plaintiffs had the right to maintain the suit in their own names to enforce the rights asserted in their pleadings, and that the pleadings they were permitted to file in the state court were appropriate under the state practice. Dodd v. Louisville Bridge Co. (C. C. 1904) 130 Fed. 186.

The jurisdictional facts set out in a petition for removal must be presumed to be true on a motion to remand unless evidence is introduced to contradict them, or the record shows something to the contrary. Loop v. Winters' Estate (C. C. 1902) 115 Fed. 362.

Where defendant, who has removed a case to the federal court on the ground of diverse citizenship, was a permanent resident and citizen of another state down to the period shortly prior to the commencement of the suit, the presumption is that such permanent residence and citizenship continues until shown to be changed. Heath v. Austin (C. C. 1874) Fed. Cas. No. 6,305.

63. Order on application for remand.—Where a case in the federal court is remanded to a state court, the better practice is to enter an order of remand with the proceedings in the case taken in the federal court annexed thereto, leaving to the state court the determination of the effect of such proceedings.

Brown v. Fletcher (1913) 206 Fed. 461, 124 C. C. A. 367, modifying decree (D. C. 1912) 203 Fed. 70.

Where a cause remains in the state court during the pendency of a petition in the federal court for a removal, a remanding order is unnecessary on dismissal of such petition. Patten v. Cilley (1894) 42 A. 47, 67 N. H. 520.

Where a railroad company and an electric light company were joined as defendants in an action for tort, and the railroad company, claiming a separable controversy, removed the cause for diversity of citizenship, and a motion to remand was denied as to it but granted as to electric company, the court had jurisdiction to proceed to trial as against the railroad company alone. Chicago Great Western R. Co. v. Hulbert (1913) 205 Fed. 248, 125 C. C. A. 98.

That a former federal district judge overruled a motion to remand the cause to the state court does not preclude his successor from granting leave to renew the motion; the court's jurisdiction being always open to challenge. Gaugler v. Chicago, M. & P. S. Ry. Co. (D. C. 1912) 197 Fed. 79.

Plaintiff, a railroad switchman, brought suit for injuries, based on an alleged violation of defendant's duty to equip its cars with automatic couplers that would couple by impact, etc., as required by the federal safety appliance act. On removal to the federal court and the denial of a motion to remand, plaintiff dismissed the cause, and brought another suit in the state court at common law, alleging negligence in the operation and equipment of the engine that was being used at the time of his injury. Held, that the order denying defendant's motion to remand the first cause to the state court was not res judicata of the question of jurisdiction of the cause of action stated in plaintiff's second petition. Shohoney v. Quincy, O. & K. C. Ry. Co. (1909) 122 S. W. 1025, 223 Mo. 649.

The remanding by a federal Circuit Court of a suit against a firm to a state court whence it had been removed for diversity of citizenship must be deemed to have been ordered on the ground that, as under the local practice the firm had been sued as an entity without joining individual partners, there was no diversity of citizenship. McLaughlin Bros. v. Hallowell (1913) 33 Sup. Ct. 465, 228 U. S. 278, 57 L. Ed. 835, dismissing writs of error (1907) 111 N. W. 428, 136 Iowa, 279, and (1909) 121 N. W. 1039.

64. Review of order remanding cause.—See ante, § 1010, and notes.

65. Review of order denying remand.—In a foreclosure suit, removed to a federal court, wherein a motion to remand the cause, which was overruled before a final decree of sale, did not disclose affirmatively a want of jurisdiction, the supreme court on appeal merely from the order confirming the sale will not examine the record prior to such final decree to see whether the petition for removal was filed in proper time, or whether it makes a case of federal jurisdiction by reason of the presence in the suit of a controversy between citizens of different states. Turner v. Farmers' L. & T. Co. (1883) 1 Sup. Ct. 519, 106 U. S. 552, 27 L. Ed. 273.

Where a case is improperly removed from a state court, and a motion to remand is refused, the party, having saved his point in the record, may have the error corrected on appeal to the United States supreme court after final decree below. Edrington v. Jefferson (1884) 111 U. S. 770, 4 Sup. Ct. 683, 28 L. Ed. 594.

Where the state court refused to allow removal of a pending case to the federal court and the federal court upon a transcript of the record denied a motion to remand, the supreme court had jurisdiction to determine whether there was error on the part of the state court in retaining the case. Missouri, K. & T. R. Co. v. Hickman (1901) 22 Sup. Ct. 18, 20, 183 U. S. 53, 46 L. Ed. 78.

The action of the trial court in overruling a motion to remand made by the removing defendant will not be reviewed by the appellate court on the ground that the evidence showed that another defendant, who was a citizen of the same state as complainants, was an indispensable party to the controversy, where the evidence is not in the record, and the bill and petition for removal showed the cause to be removable. Wirgman v. Persons (1903) 126 Fed. 449, 62 C. C. A. 63, affirming decree Persons v. Beling (C. C. 1902) 116 Fed. 877.

A party who desires that a cause removed to a federal court should proceed in the state court, should move the federal court to remand it, and, if his motion is denied, he has a remedy by act of Congress whereby his rights can be determined by the Supreme Court of the United States. Le Roux v. Bay Circuit Judge (1881) 9 N. W. 154, 46 Mich. 189.

66. Remand on appeal or writ of error.—Where a case has been wrongfully removed, and a decree given from which an appeal is taken, there should be a reversal, and the cause should be remanded to the trial court, with directions to remand the cause to the state court. Graves v. Corbin (1890) 10 Sup. Ct. 196, 132 U. S. 571, 33 L. Ed. 464 (reversing decree Corbin v. Boies [C. C. 1888] 34 Fed. 692); Torrence v. Shedd (1892) 12 Sup. Ct. 726, 144 U. S. 527, 36 L. Ed. 528; Martin v. Snyder (1893) 13 Sup. Ct. 706, 148 U. S. 663, 37 L. Ed. 602; Juillard v. Barr (1910) 177 Fed. 921, 101 C. C. A. 201. The Supreme Court, on appeal from a decision on the merits, where it ap-

pears that the case was not a removable one, will, on its own motion, make such order as will prevent the Circuit Court from exercising jurisdiction. State of Minnesota v. Northern Securities Co. (1904) 24 S. Ct. 598, 194 U. S. 48, 48 L. Ed. 870.

Where the diverse citizenship of the parties and the amount involved entitle a cause to be removed, but the subject-matter of the controversy is not properly cognizable by the federal court, and jurisdiction of the cause is assumed by such court, the supreme court, on appeal, will remand the cause to the circuit court, with directions to remand it to the state court. Cates v. Allen (1893) 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804. When a cause has been removed and carried to the circuit court of appeals, the jurisdiction of the circuit court must appear affirmatively upon the record; otherwise the judgment will be reversed, with directions to remand. Southwestern Telegraph & Telephone Co. v. Robinson (1891) 48 Fed. 769, 1 C. C. A. 91, 2 U. S. App. 148.

Where the judgment in a cause removed on the ground of diverse citizenship is reversed by the supreme court because the record does not show the citizenship of the parties at the commencement of the action as well as at the time of the application for removal, the judgment of reversal will direct the circuit court to remand the cause without allowing the petition for removal and the record to be amended in the circuit court; as a cause is not removed unless at the time of the application for removal the record shows on its face that it is removable. Crehore v. Ohio & M. Ry. Co. (1889) 9 Sup. Ct. 692, 693, 131 U. S. 240, 33 L. Ed. 144. And, when a suit which has been removed from a state to a federal court is brought to the supreme court of the United States by appeal, and it does not appear on the face of the record that the citizenship of the parties was such as to give the circuit court jurisdiction upon the removal, the judgment or decree of the circuit court will be reversed without inquiry into the merits, and the cause sent back with instructions to remand it to the state court, from which it was improperly removed. Hancock v. Holbrook (1884) 112 U. S. 229, 5 Sup. Ct. 115, 28 L. Ed. 714, reversing decree (C. C. 1881) 9 Fed. 353, 4 Woods, 52.

Where the judgment of the circuit court, in a cause removed from a state court on the ground of diverse citizenship of the parties, is reversed by the supreme court because the record does not show the citizenship of the parties at the commencement of the action as well as at the time of the application for removal, the judgment of reversal will direct the circuit court to remand the cause to the state court, without allowing the petition for removal and the record to be amended in the circuit court, as a cause is not removed unless, at the time of the application for removal, the record shows on its face that it is removable. Cameron v. Hodges (1888) 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. Ed. 132; Crehore v. Ohio & M. Ry. Co. (1889) 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; Jackson v. Allen (1889) 132 U. S. 27, 10 Sup. Ct. 9, 33 L. Ed. 249.

Where it appears that the defendant in error procured the removal of the case from a state court upon a record which fails to support the jurisdiction of the federal court, the judgment will be reversed, with directions to remand, and defendant in error will be condemned to pay the costs both of the court below and the appellate court. Neel v. Pennsylvania Co. (1895) 15 Sup. Ct. 589, 590, 157 U. S. 153, 39 L. Ed. 654.

Where a cause is erroneously removed from a state court to the circuit court of the United States on the ground that there is a separable controversy as to one of the defendants, a receiver is appointed, and the case there proceeds to judgment, and certain property in controversy is directed to be sold, but on appeal it is discovered that there is a defect of jurisdiction, in that the matter in controversy between complainant and the petitioner for removal is a cause of action jointly against the latter and other defendants, and the decree is reversed, with directions to the circuit court to remand the cause, the latter court is without jurisdiction to confirm a sale made by the receiver under the order of the court directing it. Colburn v. Hill (1900) 103 Fed. 340, 43 C. C. A. 253.

On appeal to the Circuit Court of Appeals in an action removed from the state court it is the duty of the Court of Appeals to determine whether the record exhibits a case properly removable, regardless of whether any objection was taken to the jurisdiction of the federal court either in the court below or on appeal. Fred Macey Co. v. Macey (1905) 135 Fed. 725, 68 C. C. A. 363.

Where a case is removed from the state to the United States court, and a party is forced to a hearing in the latter, although the petition for removal was filed too late, and a motion to remand refused, the party, having saved his rights by record, may have the error corrected in the supreme court after final decree below. Edrington v. Jefferson (1884) 4 Sup. Ct. 683, 685, 111 U. S. 770, 28 L. Ed. 594.

In a suit for foreclosure, commenced in a state court, and removed to the circuit court of the United States, a motion to remand was overruled. Subsequently a final decree of sale was passed. Held, upon appeal merely from the order confirming the sale, the final decree not disclosing affirmatively a want of jurisdiction, that the su-

preme court will not examine the record, prior to such final decree, to see whether the petition for removal makes a case of federal jurisdiction, but will only examine the decree to ascertain whether the sale was had in conformity with its provisions. Turner v. Farmers' Loan & Trust Co. (1882) 106 U. S. 552, 1 Sup. Ct. 519, 27 L. Ed. 273.

An appellate federal court can and should consider of its own motion the question of the jurisdiction of the federal circuit court to which a cause has been removed from the state court, as presenting a separable controversy, although the plaintiff withdrew and did not renew his motion to remand to the state court, but went to trial in the federal court without objection. Chicago, B. & Q. Ry. Co. v. Willard (1911) 31 Sup. Ct. 460, 220 U. S. 413, 55 L. Ed. 521.

It is the duty of the circuit court of appeals, in considering a case which has been removed from a state court, to examine the record to see whether the removal was rightfully made, though no motion to remand was made. Barth v. Coler (1894) 60 Fed. 466, 9 C. C. A. 81, 19 U. S. App. 646.

67. Costs on remand.—Where a cause is removed from a federal court to a state court by the federal Supreme Court, the costs are cast on the party applying for the removal from the state court. Mansfield, C. & L. M. Ry. Co. v. Swan (1884) 4 Sup. Ct. 510, 514, 111 U. S. 379, 28 L. Ed. 462; Cates v. Allen (1893) 13 Sup. Ct. 883, 886, 977, 149 U. S. 451, 37 L. Ed. 804; Walker v. Collins (1897) 17 Sup. Ct. 738, 739, 167 U. S. 57, 42 L. Ed. 76, reversing judgment (1893) 59 Fed. 70, 8 C. C. A. 1. Where a cause is remanded to the state court because improperly removed, the supreme court will make such order as to the costs of the appeal as may be just. Hancock v. Holbrook (1884) 5 Sup. Ct. 115, 117, 112 U. S. 229, 28 L. Ed. 714, reversing decree (C. C. 1881) 9 Fed. 353.

Where a cause has wrongfully been removed, and the state court possessed jurisdiction of the cause, the federal court on remanding it may impose costs against the party procuring the removal under this section. Where there was a lack of jurisdiction from the beginning, there is no authority for awarding costs. Parks Co. v. Decatur (1905) 138 Fed. 550, 555, 70 C. C. A. 674.

Where a case has been wrongfully removed to a federal court, and a decree there given, from which an appeal is taken, there should be a reversal, with costs against appellants, and the cause should be remanded to the trial court, with directions to render judgment against them for costs in that court, and remand the cause to the state court whence it was removed. Graves v. Corbin (1890) 132 U. S. 571, 10 Sup. Ct. 196, 33 L. Ed. 464 (reversing decree Corbin v. Boies [C. C. 1888] 34 Fed. 692); Torrence v. Shedd (1892) 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528; Martin v. Snyder (1893) 148 U. S. 663, 13 Sup. Ct. 706, 37 L. Ed. 602.

The taxation to plaintiffs of the costs made in the District Court in a cause remanded to the state court on their motion, made eight years after removal, held proper. Vaughan v. McArthur Bros. Co. (C. C. A. 1915) 227 Fed. 364.

Where a case is remanded to the state court on the ground that the circuit court has no jurisdiction, the court may allow such attorney's fee as would ordinarily be allowed on the final disposition of the cause. Josslyn v. Phillips (C. C. 1886) 27 Fed. 481.

On remand of a cause, plaintiff is entitled to tax a docket fee of $10. Pellett v. Great Northern Ry. Co. (C. C. 1900) 105 Fed. 194, 195; Riser v. Southern Ry. Co. (C. C. 1902) 116 Fed. 1014; Acker v. Charleston & W. C. Ry. Co. (C. C. 1911) 190 Fed. 288; Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1913) 208 Fed. 581; Walsh's Adm'x v. Joplin & P. Ry. Co. (D. C.) 219 Fed. 345. But is not entitled to tax a docket or attorney's fee of more than $10. Bowens v. Chicago, M. & St. P. Ry. Co. (D. C. 1914) 215 Fed. 287.

Where a case has been wrongfully removed to a federal court and a decree there given for complainants, from which an appeal is taken, there must be a reversal with costs against appellants, and the case must be remanded to the trial court, with directions to render judgment against them for costs in that court and remand the case to the state court. Martin v. Snyder (1893) 13 Sup. Ct. 706, 148 U. S. 663, 37 L. Ed. 602.

Where a cause is remanded to the state court for want of jurisdiction in the federal court, judgment will not be entered against the surety on the removal bond for costs, in the absence of any stipulation therein that such judgment may be entered without the necessity of an action on the bond and in execution of such orders as the court may make in regard to the costs of the case. Colburn v. Hill (1900) 103 Fed. 340, 43 C. C. A. 253.

68. Mandamus to compel remand.—See note under § 1211, post.

CITED WITHOUT DEFINITE APPLICATION

Relfe v. Rundle (1880) 103 U. S. 222, 224, 26 L. Ed. 337; Hawes v. Contra Costa Water Co. (1881) 104 U. S. 450, 459, 26 L. Ed. 827; Call v. Palmer (1882) 1 Sup. Ct. 2, 106 U. S. 39, 27 L. Ed. 61; Turner v. Farmers' L. & T. Co. (1883) 1 Sup. Ct. 519, 521, 522, 106 U. S. 552, 27 L. Ed. 273; Loe's v. Trustees of Columbia Tp. (1900) 21 Sup. Ct. 174, 178, 179 U. S. 472,

45 L. Ed. 280; German Nat. Bank v. Speckert (1901) 21 Sup. Ct. 688, 181 U. S. 405, 45 L. Ed. 926; Ellison v. Louisville & N. R. Co. (1902) 112 Fed. 805, 50 C. C. A. 530 (writ of certiorari [1902] 22 Sup. Ct. 942, 186 U. S. 485, 46 L. Ed. 1260); Hanley v. Beatty (1902) 117 Fed. 59, 54 C. C. A. 445; Mexican Cent. Ry. Co. v. Robinson (1904) 128 Fed. 1020, case 3, 62 C. C. A. 681; Boatmen's Bank v. Fritzlen (1905) 135 Fed. 650, 68 C. C. A. 288 (writ of certiorari denied [1905] 25 Sup. Ct. 803, 198 U. S. 586, 49 L. Ed. 1174); Turnbull v. Ross (1905) 141 Fed. 649, 72 C. C. A. 609; Cleveland v. Cleveland, C., C. & St. L. Ry. Co. (1906) 147 Fed. 171, 77 C. C. A. 467; Juillard v. Barr (1910) 177 Fed. 921, 101 C. C. A. 201; Pike County, Pa., v. Spencer (1911) 192 Fed. 11, 112 C. C. A. 433; Dwight v. Central Vermont R. Co. (C. C. 1881) 9 Fed. 785, 792; Central Trust Co. v. Virginia, T. & C. Steel & Iron Co. (C. C. 1893) 55 Fed. 769, 772 (reversed [1894] 14 Sup. Ct. 288, 151 U. S. 129, 38 L. Ed. 98); Johnson v. Wells Fargo & Co. (C. C. 1899) 98 Fed. 3, 8; Reavis v. Reavis (C. C. 1900) 101 Fed. 19, 21; New Jersey v. Corrigan (C. C. 1905) 139 Fed. 758; Gaddie v. Mann (C. C. 1906) 147 Fed. 955 (reversed [1907] 158 Fed. 42, 88 C. C. A. 1); Smith Oyster Co. v. Darbee & Immel Oyster & Land Co. (C. C. 1906) 149 Fed. 555, 556; Logan & Bryan v. Postal Telegraph & Cable Co. (C. C. 1908) 157 Fed. 570; Davis v. Dixon (C. C. 1910) 184 Fed. 509.

§ 1020. (Jud. Code, § 38.) Proceedings in suits removed.

The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal.

Act March 3, 1875, c. 137, § 6, 18 Stat. 472. Act March 3, 1911, c. 231, § 38, 36 Stat. 1098.

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I. CONSTRUCTION AND OPERATION

1. Construction and operation in general.—See note in § 1018, ante.

II. JURISDICTION ON REMOVAL

2. Affirmative showing.—The federal court is justified in assuming cognizance of a cause on removal only when its jurisdiction is clear. Johnson v. Wells Fargo & Co. (C. C. 1899) 91 Fed. 1. And affirmatively appears in the record. Farmers' Oil & Guano Co. v. Duckworth Co. (1914) 217 Fed. 362, 133 C. C. A. 278. The record must show jurisdiction, so that the facts necessary to show diversity of citizenship, if relied on, are not left to argument or inference. Rife v. Lumber Underwriters (1913) 204 Fed. 32, 122 C. C. A. 346.

3. Acquiring of jurisdiction.—Jurisdiction cannot be conferred by a stipulation for removal unless the record shows the facts necessary to a removal. Kingsbury v. Kingsbury (C. C. 1871) Fed. Cas. No. 7,817. Nor can a federal court acquire jurisdiction by consent of parties. State of Minnesota v. Northern Securities Co. (1904) 24 Sup. Ct. 598, 194 U. S. 48, 48 L. Ed. 870; Lomax v. Foster Lumber Co. (C. C. A. 1909) 174 Fed. 959; Baldwin v. Pacific Power & Light Co. (D. C. 1912) 199 Fed. 291; First Nat. Bank v. Prager (1899) 91 Fed. 689, 34 C. C. A. 51. Or by failure to appeal from an order overruling motion to remand. Shohoney v. Quincy, O. & K. C. Ry. Co. (1909) 122

S. W. 1025, 223 Mo. 649. Where the petition filed in the state court does not show prima facie that there is a removable controversy, the jurisdiction of the federal court cannot be conferred by consent or by any appearance, or even by a trial therein. Illinois Cent. R. Co. v. Jones' Adm'r (1904) 80 S. W. 484, 118 Ky. 158, 26 Ky. Law Rep. 31.

The jurisdiction acquired by a federal court by removal is strictly limited to the statutory grounds, and rests solely on the state of facts and controversy of record as brought from the court of original cognizance, and neither acquiescence of the parties nor the action of the state court can enlarge the statutory jurisdiction of the federal court nor divest that of the state court. Willard v. Chicago, B. & Q. R. Co. (C. C. A. 1908) 165 Fed. 181.

4. Process.—Where an action against a foreign corporation has been removed from a state to a federal court, the question of the validity of the service of the summons and complaint on the defendant is to be determined according to the rules and practice of the federal courts, and not by the law of the state. Lowitz v. Kimmerle (1915) 221 Fed. 857, 137 C. C. A. 415 (certiorari denied [1915] 35 Sup. Ct. 941, 238 U. S. 639, 59 L. Ed. 1501); Case v. Smith, Lineaweaver & Co. (C. C. 1907) 152 Fed. 730; West v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1909) 170 Fed. 349.

Defendant, a resident of New York, held a mortgage on land in South Carolina, and was proceeding to sell the land under a power in the mortgage. The mortgagor brought suit in a state court to enjoin the sale and to recover damages for breach of contract, and served defendant by publication. Defendant removed the case to the federal court, and moved to set aside the service. Held, that the state court had jurisdiction of the property right claimed by defendant under the mortgage, and the service, accordingly, could not be set aside, but that no general judgment could be taken against defendant, and, in requiring him to plead, it should be declared that no judgment or decree rendered should affect any interest or property outside the state of South Carolina. Du Pont v. Abel (C. C. 1897) 81 Fed. 534.

A suit against a corporation of another state cannot be maintained in a federal court in the district of the plaintiff's residence, where jurisdiction depends on diversity of citizenship alone, where service was not made within the district of suit and defendant has no place of business therein, although it may have such place of business and be served in another district in the same state; and where such a suit has been properly removed into a federal court the service will be quashed. Wange v. Public Service Ry. Co. (C. C. 1908) 159 Fed. 189.

5. Extent of jurisdiction.—Act Aug. 13, 1888, § 1, ante, § 991, declaring the jurisdiction of federal courts, limits the jurisdiction as to actions removed from state courts, as well as to actions originally begun in the circuit court. Hyde v. Victoria Land Co. (C. C. 1903) 125 Fed. 970.

Where a cause of action is not within the original jurisdiction of the federal court, that court, on removal of the cause to it, only acquires such jurisdiction over the parties as the state court had. Goldstein v. City of New Orleans (C. C. 1889) 38 Fed. 626; Swift v. Philadelphia & R. R. Co. (C. C. 1893) 58 Fed. 858; Hale v. Continental Life Ins. Co. (C. C. 1882) 12 Fed. 359; Gier v. Gregg (C. C. 1847) Fed. Cas. No. 5,406; Zikos v. Oregon R. & Nav. Co. (C. C. 1910) 179 Fed. 893; Walser v. Memphis, C. & N. W. Ry. Co. (C. C. 1883) 19 Fed. 152. The jurisdiction relates back to the time of the original service of process. Owens v. Ohio Cent. R. Co. (C. C. 1884) 20 Fed. 10.

A federal Circuit Court has the right to determine the question of the right to remove a case from a state court independently of the jurisdiction and determination of the state courts. Chesapeake & O. Ry. Co. v. McCabe (1909) 29 Sup. Ct. 430, 213 U. S. 207, 53 L. Ed. 765, reversing judgment Maysville & B. S. R. Co. v. McCabe's Adm'x (1907) 100 S. W. 219, 30 Ky. Law Rep. 1009.

Where a Pennsylvania court has acquired jurisdiction of a suit by attachment against a foreign corporation under the state statute, a federal court has jurisdiction on removal of the cause by either the defendant or a garnishee. Greevy v. Jacob Tome Institute (C. C. 1904) 132 Fed. 408.

Where a state court in which a bill was filed to administer a trust in lands had jurisdiction to grant the relief as to all of such lands, although some of them were situated in each of the two divisions of the federal district, the federal court, into which the suit was properly removed, has equal jurisdiction as to the lands situated in the other division of the district. Memphis Sav. Bank v. Houchens (1902) 115 Fed. 96, 52 C. C. A. 176.

While the jurisdiction acquired by a federal court over a suit removed from a state court is, in a limited sense, derivative, so that such court acquires no jurisdiction where the state court had none over the subject-matter, yet, where the state court had jurisdiction of the cause of action stated in the declaration, the fact that the defendant, after removal, pleads a defense of which the state court could not have taken cognizance, because based on a statute which the courts of the United States are alone empowered to admin-

ister, does not deprive the federal court of jurisdiction. Lehigh Val. R. Co. v. Rainey (C. C. 1900) 99 Fed. 596.

Though an assignee cannot sue in the federal courts because of diverse citizenship, unless his assignor could have done so, yet, the action having been brought in the state court, and the assignee and the defendant being citizens of different states, the cause is removable, and having been removed, and having afterwards been continued for the purpose of enabling plaintiff to file a bill for a reformation, which was held necessary before he could maintain the action, the bill is auxiliary to the first action, and is properly brought in the federal court. Rosenbaum v. Council Bluffs Ins. Co. (C. C. 1889) 37 Fed. 724.

Where an action, instituted in the state court on behalf of an infant plaintiff by a guardian ad litem appointed by that court, has been removed to the United States District Court, the federal court acquires full jurisdiction over the guardian, to the exclusion of both the superior and the Supreme Court of the state. State v. Superior Court for King County (1913) 134 P. 172, 74 Wash. 559.

6. Jurisdiction as affected by pleadings.—Jurisdiction on removal depends on plaintiff's statement of his own claim. Mountain View Min. & Mill. Co. v. McFadden (1901) 21 Sup. Ct. 488, 180 U. S. 533, 45 L. Ed. 656, reversing judgment McFadden v. Mountain View Min. & Mill. Co. (1899) 97 Fed. 670, 38 C. C. A. 354.

To give a federal court jurisdiction of a cause on removal, it must affirmatively appear from the petition for removal, or from the accompanying record, that the suit was duly filed in the state court from which it purports to have been removed, and also, where no other ground of jurisdiction is shown, that the plaintiff and defendant were citizens of different states, both at the time the suit was instituted and when the petition for removal was filed. Wilson v. Giberson (C. C. 1903) 124 Fed. 701.

A federal court has no jurisdiction of a suit removed from the state court unless the jurisdictional facts appear on the face of the pleadings to have existed at the time the suit was commenced as well as at the time of the filing of the petition for removal. Huntington v. Pinney (C. C. 1903) 126 Fed. 237.

Where the bill of a stockholder complies with the requirements of equity rule 94, by proper allegations of demand on the company to bring the suit, and its refusal, the court cannot determine on demurrer that such action was collusive. Mills v. City of Chicago (C. C. 1904) 127 Fed. 731.

The cases removed from a state court, in which the petition filed by plaintiff in the state court is conclusive in the federal court on the question of its jurisdiction, are cases in which the question depends on the legal construction of plaintiff's petition as to the joint liability of defendants, or other questions of law. Board of Com'rs of Woodson County v. Toronto Bank (C. C. 1904) 128 Fed. 157.

Where a stockholder's suit was commenced in the state court and removed to the federal court, it immediately became subject to the rules governing the practice in that court, including equity rule 94, providing that the complainant, in order to maintain the bill, must have been a stockholder at the time of the transaction complained of, and that he must set forth with particularity the efforts made to secure relief from the managing officers of the corporation. Hitchings v. Cobalt Cent. Mines Co. (C. C. 1910) 189 Fed. 241.

Where, under the allegations of the petition in the action and the petition for removal, the cause is not removable to the federal court, that court acquires no jurisdiction, and its orders in the premises are void, notwithstanding plaintiff's appearance and motion to remand the case, and his participation in the trial after the motion is overruled. Pierce's Adm'r v. Illinois Cent. R. Co. (1905) 86 S. W. 703, 27 Ky. Law Rep. 801.

Where a cause is removed on the ground of nonresidence of defendant, the federal court has jurisdiction to pass on the issues raised by the pleadings. Fleitas v. Meraux (1895) 47 La. Ann. 232, 16 South. 848.

7. Jurisdiction in law and equity.—See note under § 1020, post.

8. Removal as waiver of jurisdictional objections.—The rule is well established that the appearance of a defendant in a case pending in a state court, for the purpose of filing a petition and bond for removal, does not constitute a general appearance. Parrott v. Alabama Gold Life Ins. Co. (C. C. 1881) 5 Fed. 391, 4 Woods, 353; Atchison v. Morris (C. C. 1882) 11 Fed. 582, 11 Biss. 191; Small v. Montgomery (C. C. 1883) 17 Fed. 865, 5 McCrary, 440; Perkins v. Hendryx (C. C. 1889) 40 Fed. 657; Clews v. Woodstock Iron Co. (C. C. 1890) 44 Fed. 31; Forrest v. Union Pac. R. Co. (C. C. 1891) 47 Fed. 1; O'Donnell v. Atchison, T. & S. F. R. Co. (C. C. 1892) 49 Fed. 689; Elliott v. Shuler (C. C. 1892) 50 Fed. 454; Brooks v. Dun (C. C. 1892) 51 Fed. 138; Garner v. Second Nat. Bank (C. C. 1895) 66 Fed. 369. Such as operates to waive a defective or illegal service of process. Goldey v. Morning News (1895) 15 Sup. Ct. 559, 562, 156 U. S. 518, 39 L. Ed. 517; Wabash Western Ry. v. Brow (1896) 17 Sup. Ct. 126, 164 U. S. 271, 41 L. Ed. 431 (reversing [1895] 65 Fed. 941, 13 C. C. A. 222); Cain v. Commercial Pub. Co. (1914) 34 Sup.

Ct. 284, 232 U. S. 124, 58 L. Ed. 534; Lowitz v. Kimmerle (1915) 221 Fed. 857, 137 C. C. A. 415 (certiorari denied [1915] 35 Sup. Ct. 941, 238 U. S. 639, 59 L. Ed. 1501); Small v. Montgomery (C. C. 1883) 17 Fed. 865, 5 McCrary, 440; Miner v. Markham (C. C. 1886) 28 Fed. 387; Ahlhauser v. Butler (C. C. 1892) 50 Fed. 705 (following Atchison v. Morris [C. C. 1882] 11 Fed. 582); Farmer v. National Life Ass'n of Hartford (C. C. 1892) 50 Fed. 829 (writ of error dismissed [1896] 163 U. S. 685, 16 Sup. Ct. 1201, 41 L. Ed. 318); Kinne v. Lant (C. C. 1895) 68 Fed. 436; Hawkins v. Peirce (C. C. 1897) 79 Fed. 452; Peterson v. Morris (C. C. 1899) 98 Fed. 48; Ostrander v. Deerfield Lumber Co. (D. C. 1913) 206 Fed. 540; Feister v. Hulick (D. C. 1916) 228 Fed. 821. Or want of a res to support service by publication. Ahlhauser v. Butler (C. C. 1892) 50 Fed. 705 (following Atchison v. Morris [C. C. 1882] 11 Fed. 582, 11 Biss. 191); Ashley v. Quintard (C. C. 1898) 90 Fed. 84. Or the right to contest the jurisdiction of the state court on the ground that the facts set forth in the complaint do not state a cause of action. De Lima v. Bidwell (1901) 21 Sup. Ct. 743, 744, 182 U. S. 1, 45 L. Ed. 1041. Or any right to object to the jurisdiction of the state court over defendant. Mecke v. Valley Town Mineral Co. (C. C. 1898) 89 Fed. 114; Corbitt v. Farmers' Bank of Delaware (C. C. 1902) 114 Fed. 602; Cady v. Associated Colonies (C. C. 1902) 119 Fed. 420; Davis v. Cleveland, C., C. & St. L. R. Co. (C. C. 1906) 146 Fed. 403. At least where it is stated that defendant appears specially for the sole purpose of presenting the petition. Goldey v. Morning News of New Haven (1895) 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517 (affirming judgment Golden v. Same [C. C. 1890] 42 Fed. 112); Cain v. Commercial Pub. Co. (1914) 34 Sup. Ct. 284, 232 U. S. 124, 58 L. Ed. 534; Hendrickson v. Chicago, R. I. & P. R. Co. (C. C. 1884) 22 Fed. 569; Kauffman v. Kennedy (C. C. 1885) 25 Fed. 785. See Spreen v. Delsignore (C. C. 1899) 94 Fed. 71; Webster v. Iowa State Traveling Men's Ass'n (C. C. 1904) 165 Fed. 367; Murphy v. Herring-Hall-Marvin Safe Co. (C. C. 1911) 184 Fed. 495. Even though the cause is actually removed to a federal court. De Lima v. Bidwell (1901) 21 Sup. Ct. 743, 182 U. S. 1, 45 L. Ed. 1041; Mechanical Appliance Co. v. Castleman (1910) 30 Sup. Ct. 125, 215 U. S. 437, 54 L. Ed. 272; International Text-Book Co. v. Heartt (1905) 136 Fed. 129, 69 C. C. A. 127; Bentlif v. London & Colonial Finance Corp. (C. C. 1890) 44 Fed. 667; McGillin v. Claflin (C. C. 1892) 52 Fed. 657; Collins v. American Spirit Mfg. Co. (C. C. 1899) 96 Fed. 133; Conley v. Mathieson Alkali Works (C. C. 1901) 110 Fed. 730 (affirmed [1903] 23 Sup. Ct. 728, 190 U. S. 406, 47 L. Ed. 1113); Tortat v. Hardin Min. & Mfg. Co. (C. C. 1901) 111 Fed. 426; Fountain v. Detroit, M. & T. S. L. Ry. Co. (D. C. 1913) 210 Fed. 982. Provided a special appearance only is made for that purpose. Greenleaf v. National Ass'n of Ry. Postal Clerks (C. C. 1904) 130 Fed. 209; Cavanagh v. Manhattan Transit Co. (C. C. 1905) 133 Fed. 818; Gebbie & Co. v. Review of Reviews Co. (C. C. 1905) 134 Fed. 150.

But this rule has not been without its qualifications and exceptions. It has been held that the actual removal of the cause to the federal court subjects the petitioner to the jurisdiction of that court, and is a waiver of pleas that the suit is not for the recovery of real property, the possession thereof, or for a trespass thereto, or that petitioners are not resident freeholders or householders in the county where the suit is brought, but of another county, which pleas are by the state statute pleas in abatement. Hinds v. Keith (1893) 57 Fed. 10, 6 C. C. A. 231, 13 U. S. App. 222, 314. That pleas to jurisdiction of state court were waived by defendants' applying to move case to a federal court and making general appearance in that court without reservation and pleading to the merits. Texas & P. R. Co. v. Hill (1915) 35 Sup. Ct. 575, 237 U. S. 208, 59 L. Ed. 918. That after removal on the application of the defendant, he cannot object to the service of the summons, since petitioning for removal amounts to a general appearance. Friezen v. Allemania Fire Ins. Co. (C. C. 1886) 30 Fed. 349; Tallman v. Baltimore & O. R. Co. (C. C. 1891) 45 Fed. 156, following Sayles v. Northwestern Ins. Co. (C. C. 1854) Fed. Cas. No. 12,421. Nor object to any want of jurisdiction. Bushnell v. Kennedy (1869) 76 U. S. (9 Wall.) 387, 19 L. Ed. 736; Ayres v. Watson (1885) 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093; Edwards v. Connecticut Mut. Life Ins. Co. (C. C. 1884) 20 Fed. 452. That, where a foreign corporation appears and removes the suit, it is too late to object to the jurisdiction of the state court, or to take any exception to the process by which the corporation was brought in; and it is not a valid objection that, not being an inhabitant or found within the district, the suit could not have been commenced in such court. Sayles v. Northwestern Ins. Co. (C. C. 1854) Fed. Cas. No. 12,421; Empire Min. Co. v. Propeller Tow-Boat Co. (C. C. 1901) 108 Fed. 900; Sagara v. Chicago, R. I. & P. Ry. Co. (D. C. 1911) 189 Fed. 220. That, when a party has procured a removal on an averment that the amount in controversy is over $2,000, he ought not to be heard, on appeal or error, to suggest that the court had no jurisdiction because the judgment finally ren-

dered is less than the jurisdictional amount. Eustis v. City of Henrietta (1896) 74 Fed. 577, 20 C. C. A. 537, 41 U. S. App. 182. And that, where defendants, who were not served with process in a suit in a state court, enter their appearance by counsel for the purpose of joining in a petition for a removal of the cause to the federal court, "and for no other purpose whatsoever," as stated when the appearance was made, and the cause is removed to the federal court, such appearance will give the federal court jurisdiction over such defendants, the same as though process had been personally served upon them. Deakin v. Lea (C. C. 1882) Fed. Cas. No. 3,696.

According to the settled rule of the sixth circuit, a defendant who removes a cause to a federal court will not there be heard to say that he was not properly brought before the state court, when he has failed to raise this point before applying for removal. New York Construction Co. v. Simon (C. C. 1891) 53 Fed. 1.

One who removes a suit brought on several causes of action, some of which were assigned to plaintiff, cannot object that the federal court has no jurisdiction of the assigned causes on the ground that the action could not have been maintained before the assignment. Morrison v. North American Transportation & Trading Co. (C. C. 1898) 85 Fed. 802, judgment reversed North American Transportation & Trading Co. v. Morrison (1900) 20 Sup. Ct. 869, 178 U. S. 262, 44 L. Ed. 1061.

The change of the time for removal of a cause from the time for entering appearance, fixed by the Judiciary Act of 1789, § 12, made by the acts of 1877, and of 1887 and 1888, did not change the effect of the filing of a petition to remove as a general appearance. Wabash Western Ry. v. Brow (1895) 65 Fed. 941, 948, 13 C. C. A. 222, reversing (1896) 17 Sup. Ct. 126, 164 U. S. 271, 41 L. Ed. 431.

One who removes a case from a state to the federal court is estopped from attacking the jurisdiction of the latter on any ground except that the court from which it was removed had no jurisdiction. Tootle v. Coleman (1901) 107 Fed. 41, 46 C. C. A. 132, 57 L. R. A. 120.

Where property is fraudulently decoyed within the jurisdiction of the state court, and seized on a writ of replevin, the defendant, by filing a petition for removal in such court, does not waive the fraud in seizing the property, and he may, after the removal of the cause to the federal court, move in the latter court to set aside the service of the writ. Moynahan v. Wilson (C. C. 1877) Fed. Cas. No. 9,897.

Where, in an action against a nonresident in a state court, its attorney was directed to appear solely for the purpose of removing the cause to the federal court, and on the last day for filing an answer in the cause such attorney filed a petition for removal and a removal bond, and applied to the judge for an order of removal, and when, over objection, the court postponed the hearing on the application for a removal to the following week, the attorney believing it necessary to sustain his right to removal, and, for that purpose only, orally asked for and obtained an extension of time to plead, such application for time should be construed as an application for an extension of time to appear for the purpose of pleading to the jurisdiction or otherwise, and therefore did not constitute an appearance sufficient to confer jurisdiction. Waters v. Central Trust Co. (1903) 126 Fed. 469, 62 C. C. A. 45.

Defendant, a foreign corporation, filed a petition and bond for the removal of the cause, which was ordered by the state court. Defendant thereafter caused a transcript to be filed in the federal court, which denied a motion to remand. On appeal the supreme court of the state reversed the order for removal, and defendant thereafter answered in the state court. Held, that the filing of such answer did not constitute an appearance and waiver of process affecting the case in the federal court, and was without prejudice to the right to move for dismissal in that court for want of proper service. Meeke v. Valley Town Mineral Co. (C. C. 1898) 89 Fed. 114.

The return of the sheriff of the state court is not conclusive upon the question of the validity of service of process, where the cause has been removed to a federal Circuit Court by a defendant who raises by plea to the jurisdiction the objection that it was a foreign corporation not doing business within the state, and that the person served with process was not its agent at that time. Mechanical Appliance Co. v. Castleman (1910) 30 Sup. Ct. 125, 215 U. S. 437, 54 L. Ed. 272.

The application of a defendant for the removal of a cause from a state to a federal court does not constitute a waiver of the use and service of proper process of summons or citation in the cause, where the first action of the defendant, in both the state and federal courts was to except to the process by which it was attempted to give those courts jurisdiction of his person. Parrott v. Alabama Gold Life Ins. Co. (C. C. 1881) 5 Fed. 391, 4 Woods, 353.

A suit is only removable after it has been regularly commenced by service of process on the defendant; and by appearing in the state court and filing a petition for removal, a defendant waives any objection to the sufficiency of the service upon him, notwithstanding the fact that his appearance was stated to be special, for the purpose of

the removal only. Ft. Wayne Electric Corp. v. Franklin Electric Light Co. (C. C. 1899) 91 Fed. 292.

Where defendant, by obtaining an order to show cause on a motion to dismiss for insufficiency of service of process, permits the record on removal of the cause to be completed by including a stipulation that the service made should have the same effect as if made on an officer of the defendant company within the state, provided that this should not be construed so as to prejudice defendant's rights in the federal court if the action should be removed to that court, and he contends that on removal plaintiff is limited to reliance on the actual service, but argues that, even if service were on an officer, dismissal could be demanded, the court will require defendant to elect which interpretation it will assert it intended. Mazieka v. North & Judd Mfg. Co. (C. C. 1910) 176 Fed. 747.

An action was commenced against a New York corporation, in a Tennessee state court, by service on one M., "as agent and adjuster" for such corporation. Held, that the question whether the defendant, by filing its petition for removal, unaccompanied by a plea in abatement, and without restricting the purpose of its appearance, waived the objection to the jurisdiction of the court for want of service, should be certified to the supreme court. National Acc. Soc. v. Spiro (1896) 71 Fed. 897, 18 C. C. A. 382, denied on certificate (1896) 164 U. S. 281, 17 Sup. Ct. 996, 41 L. Ed. 435, certiorari denied (1897) 168 U. S. 708, 18 Sup. Ct. 944, 42 L. Ed. 1211.

Defendant in a suit removed from the state court may not raise question of state court's jurisdiction by an amended answer, where after the case reached the federal court there were pleadings to the merits and action submitting to the jurisdiction. Texas & P. Ry. Co. v. Bigger (1915) 36 Sup. Ct. 127.

Where a noncitizen defendant removed a cause to the federal court, claiming a separable controversy between plaintiff and itself, whereupon plaintiff dismissed as to a citizen defendant and the parties proceeded to trial on the merits, defendant could not successfully claim on appeal that the controversy was inseparable and that the suit had been improperly removed. Toledo, St. L. & W. R. Co. v. Perenchio (1913) 205 Fed. 472, 123 C. C. A. 540.

A plaintiff cannot object to the jurisdiction of a federal court over a cause removed from a state court on the ground that the proceedings for bringing the defendants into the state court were irregular, where the defendants appeared, and, after removing the cause, filed answers. Callahan v. Hicks (C. C. 1898) 90 Fed. 539.

One by having case removed from state to federal court is not estopped from raising question of jurisdiction, on it appearing there was nothing to confer it on the federal court. German Savings & Loan Soc. v. Dormitzer (1902) 116 Fed. 471, 53 C. C. A. 639.

Where a case was removed to a federal court and there tried without objection to the jurisdiction, a new trial will not be granted to enable such objection to be made. Mulcahey v. Lake Erie & W. R. Co. (C. C. 1895) 69 Fed. 172.

A corporation does not, by joining with an individual codefendant who was personally served in a petition for the removal of the cause, generally appear, so as to preclude it from objection to the service. Garvey v. Compania Metalurgica Mexicana (D. C. 1915) 222 Fed. 732.

8½. Exercise of jurisdiction before term at which copy of record is to be filed.—While in case of a removal, the jurisdiction of the federal court is not complete, so as to hear and determine the cause, before the day prescribed by the statute, although a transcript has been filed. In re Barnesville & M. Ry. Co. (D. C. 1880) 4 Fed. 10, 2 McCrary, 216. It has jurisdiction in the interim to take any extraordinary proceedings required for the protection of any party to the cause. Goldberg, Bowen & Co. v. German Ins. Co. of Freeport Ill. (C. C. 1907) 152 Fed. 831; Hamilton v. Fowler (C. C. 1897) 83 Fed. 321. It may grant a provisional remedy, before the first day of the next term on which the party removing the cause is, by statute, required to enter a copy of the record. Commercial & Savings Bank v. Corbett (C. C. 1878) Fed. Cas. No. 3,057; Mahoney Min. Co. v. Bennett (C. C. 1877) Fed. Cas. No. 8,968. It has power, before the first day of its next term, to allow or modify an injunction. City of Portland v. Oregonian Ry. Co. (C. C. 1881) 6 Fed. 321, 7 Sawy. 122. But not to allow an application to dissolve an injunction before the return day, where such application involves the consideration of the cause as an entirety, and the dissolution cannot be granted without changing the status of the parties with reference to the thing to be finally adjudged. New Orleans City R. Co. v. Crescent City R. Co. (C. C. 1881) 5 Fed. 160.

Where it is the practice long established to consider the first term after a cause is commenced as the appearance term, and the next succeeding term as the trial term, and a cause is removed from a state court and the papers filed on the first day of a term, the defendant should not be forced to trial until the next term, even though the trial might have been had at an earlier date if the cause had not been removed from the state court. Knoblock v. Southern Ry. Co. (C. C. 1902) 112 Fed. 926.

Where an action was removed from

a state court, and before the first day of the next succeeding term, within which defendant was required to file the record and appear, plaintiff applied for a commission to take the deposition of a witness, merely alleged to be a necessary and important witness and residing at such a distance that it was impossible to have him present in person, without any showing of necessity for haste in the taking of the testimony before the time for filing the record had expired, the commission was erroneously granted, and the deposition taken thereon inadmissible. North American Transportation & Trading Co. v. Howells (1903) 121 Fed. 694, 58 C. C. A. 442.

Where proceedings against landowners for the condemnation of land under the eminent domain statutes of a state are removed by defendants into a federal court, the adverse party may file the record therein at any time, without waiting until the first day of the succeeding term; and thereupon it is competent for the judge to make such ex parte orders as are conformable to the state practice in like cases, such as fixing a time for the appointment of commissioners, etc. In re Newark & H. Traction Co. (C. C. 1901) 110 Fed. 25.

Though the statute requires the party removing the cause to file a copy of the record on the first day of the next session of the circuit court occurring after the removal, it may be filed by either party before that time; and when filed, and upon due notice, the circuit court will make such interlocutory orders in the case as may be necessary to preserve the property or protect the rights of the parties. Texas & St. L. R. Co. v. Rust (C. C. 1883) 17 Fed. 275, 5 McCrary, 348.

On removal of a suit in which a receiver has been appointed to wind up the affairs of a corporation, made on application of interveners, alleging fraud and collusion, and seeking to restrain the receiver from proceeding, and to set aside the order appointing him, a preliminary injunction, to restrain further proceedings by the receiver until there can be a hearing on the merits, follows as a matter of course. In re Iowa & M. Const. Co. (C. C. 1882) 10 Fed. 401, 3 McCrary, 310.

III. LEGAL AND EQUITABLE REMEDIES AND PROCEEDINGS

9. Remedies in general.—Where an action was maintainable as a legal action in the state court, it is equally so maintainable when removed. Thompson v. Central Ohio R. R. Co. (1867) 73 U. S. (6 Wall.) 134, 18 L. Ed. 765.

The equitable jurisdiction of the federal court on removal from a state court extends to a suit on behalf of the state to restrain a corporation from continuing to operate mines belonging to the state, and from interfering with the proper state agents in their control thereof. Coosaw Min. Co. v. South Carolina (1892) 12 Sup. Ct. 689, 693, 144 U. S. 550, 36 L. Ed. 537.

The removal of an action brought by a married woman cannot deprive her of the right secured to her by the local law to prosecute the suit in her own name and for her own benefit. Texas & P. R. Co. v. Humble (1901) 21 Sup. Ct. 526, 528, 181 U. S. 57, 45 L. Ed. 747.

An action by a payee of notes on a covenant by a vendee with his vendor to pay them will proceed as an action at law, as it would have done in the state court, and the jurisdiction is not affected by stipulations between the parties. North Alabama Development Co. v. Orman (1893) 55 Fed. 18, 5 C. C. A. 22, affirming judgment Orman v. North Alabama Development Co. (C. C. 1892) 53 Fed. 469.

A declaration filed in the federal court, after removal of a bill in equity from a state court, asking relief at law against some only of the defendants, if within the allegations of the complaint filed in the state court, will not be stricken from the files, nor will complainants be compelled to elect whether to proceed at law or in equity. Fisk v. Union Pac. R. Co. (C. C. 1871) Fed. Cas. No. 4,829.

The assignee of the cause of action having properly brought suit in his own name, in the state courts, can proceed with it after its removal only on the equity side of the circuit court; his right being strictly cognizable in his own name in a court of equity only. Benedict v. Williams (C. C. 1882) 11 Fed. 547.

A petition filed by an illegitimate child, in administration proceedings, claiming a share in the estate, and alleging that his paternity was acknowledged by deceased in conformity with the Nevada statute, which allegation is denied, presents an issue of fact, which, when the cause is removed to a federal court, must be tried, not as an equitable proceeding, but as an action at law, in which there is a right to a jury trial. In re Foley (C. C. 1896) 76 Fed. 390.

A suit brought in a state court, under a state statute, to quiet title against one in possession, is an equitable suit, which cannot, after removal to a federal court, be prosecuted therein, because there is an adequate remedy at law. Gombert v. Lyon (C. C. 1897) 80 Fed. 305.

A suit to enforce a mechanic's lien is essentially one in equity, and, on its removal to a federal court, is properly triable as such, although it was instituted as an action at law, as permitted by the state practice. Hooven, Owens & Rentschler Co. v. Featherstone (C. C. 1900) 99 Fed. 180, reversed Same v. John Featherstone's

Sons (1901) 111 Fed. 81, 49 C. C. A. 229.

The provision of equity rule 94 that a bill by a stockholder, founded on rights of the corporation, shall be verified by oath, cannot be applied to a bill filed in a state court, and from thence removed to a federal court. Maeder v. Buffalo Bill's Wild West Co. (C. C. 1904) 132 Fed. 280.

A federal court sitting in equity has no jurisdiction of a common-law cause removed from a state chancery court having statutory jurisdiction, under Acts Tenn. 1877, c. 97. City of Knoxville v. Southern Paving Const. Co. (D. C. 1914) 220 Fed. 236. But on its law side it has jurisdiction of a common-law action removed from a state chancery court, if the necessary jurisdictional facts are present. Id.

Where a case comes from a state court as one case, of which the circuit court has jurisdiction, that court does not lose jurisdiction because one part of the case has to be tried on the equity side, and the other part on the law side, of the court. Lacroix v. Lyons (C. C. 1886) 27 Fed. 403. But, if the suit unites both legal and equitable causes of action, both within federal jurisdiction on its law and equity sides, it should, after removal, be recast into two suits, and tried in accordance with the proper federal jurisdiction. City of Knoxville v. Southern Paving Const. Co. (D. C. 1914) 220 Fed. 236. Likewise where, by the statutes of a state, equitable defenses may be made to an action at law, and such an action is removed into the federal court, matters in law and matters in equity must be separated, and equitable relief must be sought in a separate suit. In re Foley (C. C. 1896) 76 Fed. 390.

Where a suit in chancery in a state court is removed to the equity side of the federal court, but it is purely a law action, and the federal court can grant full relief on its law side, it will be transferred. City of Knoxville v. Southern Paving Const. Co. (D. C. 1914) 220 Fed. 236.

Where the state court was competent to grant either legal or equitable relief, plaintiff may proceed in the federal court either at law or in equity; but, if he elects to proceed in equity, and no case for equitable relief is made, such court cannot retain and try the cause as an action at law. Union Stockyards Co. v. Nashville Packing Co. (1905) 140 Fed. 701, 72 C. C. A. 195.

Where, in an action for conversion, an equitable as well as a legal defense has been set up in a state court, on removal of the cause to a federal court the equitable defense is not available. Northern Pac. R. Co. v. Paine (1887) 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513.

10. Where distinctions abolished by state law.—Though state legislatures may abolish, in state courts, the distinction between actions of law and actions in equity, by enacting that there shall be but one form of action, which shall be called "a civil action," yet the distinction between the two sorts of proceedings cannot be thereby obliterated in the federal courts. Hence, if the civil action brought in the state courts is essentially, as hitherto understood, a suit at common law, the common-law form, and not an equitable one, must be pursued if the case is removed into a federal court. Nor does the fact that by statute in the state courts "the real parties in interest" must bring the suit, whereas in the federal courts, in a common-law suit, such as was presented in the civil action brought in the state courts, one party would sue to the use of another, change this rule. A plaintiff in the state court may remain plaintiff on the record in the federal court, and prosecute his suit in that court as he is authorized by state laws to prosecute it in the state courts. Thompson v. Central Ohio R. R. Co. (1867) 73 U. S. (6 Wall.) 134, 18 L. Ed. 765. Where the distinctions between legal and equitable procedure are done away with and an action is removed, it is removed to that side of the court where the appropriate relief can be obtained. Benedict v. Williams (C. C. 1882) 10 Fed. 208, 20 Blatchf. 276. While the plaintiff in such action will be required to show a cause of action, the federal court will not hold him to a technical observance of forms, so far as the mere title of the action is concerned. Toucey v. Bowen (C. C. 1855) Fed. Cas. No. 14,107.

Where the distinction between law and equity is not preserved, a case removed from a state court to a federal court becomes an action at law or a suit in equity, or, as to part the one and as to part the other, according to the nature of the cause of action and of the relief prayed. North Alabama Development Co. v. Orman (1893) 55 Fed. 18, 20, 5 C. C. A. 22.

A suit to enforce a mechanic's lien is essentially one in equity, and, on its removal to a federal court, is properly triable as such, although it was instituted as an action at law, as permitted by the state practice. Hooven, Owens & Rentschler Co. v. Featherstone (C. C. 1900) 99 Fed. 180.

Where an action brought in a state court under a code which abolishes forms of action is removed into a federal court, where different modes of procedure obtain in cases at law and in equity, it becomes necessary to determine the nature of the case, and to assign it to the law or equity side of the court accordingly, and to reframe the pleadings if necessary. Thus a bondholder of an insolvent railroad whose property has been sold in foreclosure proceedings, suing on behalf of himself and other bondholders, stockholders, and general creditors, cannot maintain

an action at law in a federal court to recover a judgment for damages against a former receiver for alleged fraudulent acts in depreciating the value of the property prior to the sale, and the rule is not changed by the fact that the action was instituted in a state court under a code which abolishes all forms of action, and adopts the equity rule as to parties and the joinder of causes of action. Fletcher v. Burt (1903) 126 Fed. 619, 63 C. C. A. 201.

11. Joinder and consolidation.—A union of legal and equitable causes of action in one suit, though allowed by the laws of the state where an action is brought, is not permissible on a removal of the cause. Hurt v. Hollingsworth (1879) 100 U. S. 100, 25 L. Ed. 569.

A mortgagor came into the federal court before default, alleged that it was going to default, and asked for and obtained the appointment of a receiver. The mortgagee filed a cross-bill to foreclose the mortgage, and also filed a bill in the state court to accomplish the same object. The complainant in the original bill, filed in the federal court, removed the suit in the state court to the federal court, and moved to consolidate both suits. Held, that the motion should be granted. Wabash. St. L. & P. Ry. Co. v. Central Trust Co. (C. C. 1885) 23 Fed. 513.

Where a suit, embracing both an equitable and legal cause of action, is instituted in a state court and removed to a federal court, and the equitable cause of action stated is held bad on demurrer, the bill will be dismissed, and the complainant left to pursue his remedy at law. Pilla v. German School Ass'n (C. C. 1885) 23 Fed. 700, appeal dismissed (1888) 131 U. S. 443, 9 Sup. Ct. 801, 33 L. Ed. 216.

Upon the application of parties interested in the subject-matter of a suit in equity, removed to the federal court, who have been intentionally omitted from the bill, the plaintiff will be compelled to amend, and bring them in, on pain of dismissal, or of remand to the state court, where the cause can be consolidated with others there pending to which the applicants are parties. Hunt v. Fisher (C. C. 1887) 29 Fed. 801.

Legal and equitable defenses may not be joined in a suit transferred to a federal court, where the practice in law and equity is not the same. Pettus v. Smith (C. C. 1902) 117 Fed. 967.

IV. PROCEEDINGS AFTER REMOVAL

12. Rules of procedure.—Where a suit in equity is removed, it must thereafter conform to the equity practice and rules in force in federal court, regardless of the forms of practice in equitable proceedings in the state court. Bryant Bros. Co. v. Robinson (1906) 149 Fed. 321, 79 C. C. A. 259.

On the removal of a cause of action, brought by a state against citizens thereof, the proceedings will be conducted in the same manner as in a suit between individuals. Abeel v. Culberson (C. C. 1893) 56 Fed. 329.

Equity rule 94, requiring certain allegations in a suit by a shareholder to enforce rights which the corporation itself might properly assert, has no technical force in cases removed from the state courts; and the question is whether the state court had jurisdiction, and whether the federal court has the same jurisdiction, in succession thereto. Evans v. Union Pac. Ry. Co. (C. C. 1893) 58 Fed. 497.

If a federal court takes jurisdiction of a case on removal, it must be conducted in that court and be there determined, unaffected by any steps that may be taken in any of the state courts. Jackson v. Alabama Great Southern R. Co. (1881) 58 Miss. 648. It must be made to conform substantially to the modes of procedure observed in the federal courts, as in original cases. Toucey v. Bowen (C. C. 1855) Fed. Cas. No. 14,107. And proceed in the circuit court as if it originated in that court. Wilcox & Gibbs Guano Co. v. Phœnix Ins. Co. (C. C. 1894) 61 Fed. 199, 200; Noyes v. Barnard (1894) 63 Fed. 782, 787, 11 C. C. A. 424.

Where a cause has been removed, it stands as though it had been originally commenced in the federal court. McLeod v. Duncan (C. C. 1852) Fed. Cas. No. 8,898. The rules of practice of the federal court govern. Henning v. Western Union Tel. Co, (C. C. 1889) 40 Fed. 658. Except where state statutes or rules of decision constitute rules of property to be enforced. Taylor v. Life Ass'n of America (C. C. 1882) 13 Fed. 493. Where plaintiff amends his complaint, he puts himself within a rule of practice of the federal court, allowing a defendant, "in all cases," to demand security for costs before answering, though the demand could not have been made in the state court where the action was commenced. Henning v. Western Union Tel. Co. (C. C. 1889) 40 Fed. 658.

The federal court cannot, after removal, but before its next term, hear an application to dissolve an order of the state court temporarily staying a sale under a mortgage, the purpose of the suit being to enjoin such sale. Hamilton v. Fowler (C. C. 1897) 83 Fed. 321.

13. Pleading.—Where the pleadings in a suit commenced in a state court have been framed in accordance with the practice prescribed by the Code of the state, the federal court, on the removal of the cause to it, will proceed to adjudicate the same from such pleadings and proof, where it is enabled to ascertain therefrom the matter in dispute between the parties, though such pleadings do not conform to the mode

of proceedings prescribed for the United States courts in equity suits. Gridley v. Westbrook (1859) 64 U. S. (23 How.) 503, 16 L. Ed. 412.

A foreign administrator suing in Illinois for the negligent killing of his intestate is not precluded from pleading to the jurisdiction of the federal court, on removal, by the state statute forbidding any nonresident to be appointed or to act as administrator. Patch v. Wabash R. Co. (1907) 28 Sup. Ct. 80, 81, 207 U. S. 277, 52 L. Ed. 204, 12 Ann. Cas. 518.

A federal court which has, by removal, acquired jurisdiction of a suit by a lessor, who is a citizen of the state, against an assignee of his lessee, the defendant being an alien, for a cancellation of the lease, has also jurisdiction to entertain a cross bill by defendant to enforce specific performance of the lease, which is merely ancillary to the original suit, although by reason of the fact that defendant's assignor is a citizen of the same state as complainant the cross bill could not have been maintained in that court as an original action. Brooks v. Laurent (1899) 98 Fed. 647, 39 C. C. A. 201.

The pleadings in a case removed from a state court must conform to the federal rules and practice. Boston Belting Co. v. Judson (C. C. 1852) Fed. Cas. No. 1,674. Thus a complaint in an action removed from a state court, which does not conform, as a bill in equity, to the rules of the supreme court governing federal practice, and is bad in form and substance as a declaration at law, is demurrable. Id.

A suit commenced in a state court was removed into the federal court, and the plaintiff then filed a bill naming as a party defendant a person who had not been a party to the suit in the state court. Held, that a motion to take the bill from the files must be granted. Fisk v. Union Pac. R. Co. (C. C. 1871) Fed. Cas. No. 4,829.

A complaint in a suit under R. S. § 2326, post, § 4623, in aid of an adverse claim filed to public lands, although filed in a state court, and framed to conform to the requirements of Code Civ. Proc. Cal. § 307, which provides for but one form of action, alleges, in effect, that plaintiff is in possession of the land in controversy, and contains all the essentials of a bill in equity to quiet title, which renders it sufficient on a removal of the cause into a federal court. Durgan v. Redding (C. C. 1900) 103 Fed. 914.

14. —— **Time to plead.**—Where a suit is removed from the state to the federal court upon motion of the defendant, and upon the issuance of a writ of certiorari from the federal court the clerk of the state court returns that there are no proceedings on file in his office in the suit, and a rule is entered in the federal court for the plaintiff to declare within a specified time, and the plaintiff fails to declare, a judgment, as in a case of nonsuit, may be entered against the plaintiff. Abranches v. Schell (C. C. 1859) Fed. Cas. No. 21.

In cases properly removed to the United States court, defendant is not in default for not having answered or pleaded in the state court before or at the time of filing his petition for the removal. Webster v. Crothers (C. C. 1870) Fed. Cas. No. 17,334.

If the cause commenced in the state court 30 days before the next session of the circuit court, and is not at issue when removed, the rule of the United States circuit court in the district of Minnesota gives until the fifth day of the term to make up the issue, and the case then stands for trial. Judge v. Anderson (C. C. 1884) 19 Fed. 885.

An action was begun in New York by complaint, and removed, 14 days after service of the complaint, into the United States circuit court, by the defendant, where it was filed. Nineteen days after the filing, a demurrer was served, which was refused on the ground that it came too late, whereupon a motion was made to compel plaintiff to accept it. Held, under the removal statutes, providing "that after the removal the cause shall then proceed in the same manner as if originally commenced in the said circuit court," the time for answering or demurring had expired; but the motion would be considered as an application to open a default and would be granted. Heidecker v. Red Star Line S. S. Co. (C. C. 1887) 32 Fed. 706.

Under the Missouri statute for the condemnation of land by railway companies, providing that a summons shall be issued to the owner, giving him 10 days' notice of hearing, where the cause is removed to the circuit court on the return day of the summons, the appointment of commissioners by the latter court to assess damages is a proceeding in the cause, and will not be made before the next regular term after the removal. Kansas City & T. Ry. Co. v. Interstate Lumber Co. (C. C. 1888) 36 Fed. 9.

Under the statute requiring that after the filing of the petition and bond for removal the petitioner shall file a copy of the record in the circuit court on the first day of the next term, and that the cause shall then proceed in the same manner as if it had been originally commenced in said circuit court, while the court's jurisdiction becomes vested when the petition and bond are filed, the time for pleading does not begin to run till the record is entered. Torrent v. S. K. Martin Lumber Co. (C. C. 1889) 37 Fed. 727.

The period allowed the defendant to answer or demur by Code S. C. is suspended by filing in the state court bond and petition for removal to the Unit-

ed States circuit court, and becomes current when the record is filed in that court; and, under the circuit court rules (Fourth circuit), the defendant will be in time if he serve his defense before the rule day next thereafter. Pelzer Mfg. Co. v. St. Paul Fire & Marine Ins. Co. (C. C. 1889) 40 Fed. 185.

In a cause removed to a federal circuit court from a state court which had refused to order the removal, plaintiff, after refusing to recognize the jurisdiction of the federal court, although he had due notice of its order docketing the cause, will not be heard in opposition to a motion to dismiss the cause because it has been pending three stated terms without prosecution. McMullen v. Northern Pac. R. Co. (C. C. 1893) 57 Fed. 16.

An order was entered in the state court February 5th, extending the time for answer to March 10th. The petition for removal was filed February 10th, the ground being diverse citizenship. The state court was not asked to approve the petition and bond until March 20th, when it was immediately done, and the record thereafter filed in the federal court. Held that, as the ground of removal was diverse citizenship alone, the mere filing of the petition and bond worked a change of jurisdiction, and that, as defendant had allowed the time for answer to expire before filing the record in the federal court, that court must hold him in default for answer. Wilcox & Gibbs Guano Co. v. Phœnix Ins. Co. of Brooklyn (C. C. 1894) 60 Fed. 929.

Failure of plaintiff after removal to prosecute an application for injunction on a day fixed by the state court is not an abandonment of the application, when such day comes before the next term of the federal court. Hamilton v. Fowler (C. C. 1897) 83 Fed. 321.

The time for answering a complaint in a case removed is fixed by ascertaining the number of days which had elapsed between the service of the complaint in the state court and the date of the removal, suspending the time between such removal and the date the record reaches the federal court, which then begins to run from the day of the entry in such court, and, as provided by the circuit court rules (Fourth Circuit), the defendant will be in time if he serves his answer on a rule day within 20 days thereafter. Bryce v. Southern Ry. Co. (C. C. 1904) 129 Fed. 966.

The removal of a cause to the federal court did not extend the time for answering the complaint. Id. But, where, after removal, a motion to remand is made, such motion extends the time to answer until the rule day next succeeding the determination thereof. Id. When a cause is removed during the running of defendant's time to answer under an order extending the time to a day certain, and the record is filed in the federal court after such day, it is proper for the federal court to require the defendant to answer forthwith. Phenix Ins. Co. v. Charleston Bridge Co. (1895) 65 Fed. 628, 13 C. C. A. 58, affirming judgment Wilcox & Gibbs Guano Co. v. Phœnix Ins. Co. (C. C. 1894) 60 Fed. 929.

The right of the party removing a cause to plead within 30 days includes a right to file a plea to the jurisdiction. Garvey v. Compania Metalurgica Mexicana (D. C. 1915) 222 Fed. 732.

15. —— **Amendments.**—A federal court, into which a cause has been removed, has power to permit such amendments of process or pleadings as justice requires and as are permissible under the state statutes, provided they do not offend the federal statutes or decisions on the subject. Stone v. Speare (C. C. 1910) 175 Fed. 584. It may grant the plaintiff leave to amend his declaration by inserting new counts for the same cause of action as that alleged in the original counts. West v. Smith (1879) 101 U. S. 263, 25 L. Ed. 809. And by setting out the citizenship of the parties and that the jurisdictional amount is in controversy. Ostrander v. Blandin (D. C. 1914) 211 Fed. 733.

Where the record, in an action against a Lloyds association, contained allegations in the language of the statute of the existence of the elements entitling defendant to a removal of the cause, it was not fatally defective by reason of its failure to show the legal status of the defendant, so as to preclude amendment in the federal court. Rife v. Lumber Underwriters (1913) 204 Fed. 32, 122 C. C. A. 346. But, when the nature of a suit as originally brought in a state court was not such as to give the court jurisdiction over a nonresident defendant brought in by substituted service, a federal court to which the suit is removed has no power to amend the pleadings so as to give jurisdiction over such a defendant. Adams v. Heckscher (C. C. 1897) 80 Fed. 742.

After removal of an action from a state to a federal court, and the setting aside of the service of summons in the latter court on motion of defendant, the court may permit plaintiff to file an amended petition and order summons to issue thereon. United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County (1906) 145 Fed. 144, 76 C. C. A. 114.

Where demurrers to a cross-bill are sustained, leave may be granted to amend, with directions to redraft pleadings so as to conform to the equity practice of the court. Hodder v. Kentucky & G. E. Ry. Co. (C. C. 1881) 7 Fed. 793, affirming decree Wright v. Kentucky & G. E. Ry. Co. (1886) 117 U. S. 72, 6 Sup. Ct. 697, 29 L. Ed. 821.

Where the chancery rules of a state

court provide that it may give relief to a defendant setting up, by answer, the facts on which his equity rests, to the same extent that relief might have been had on a cross-bill filed, defendant need not, on the removal of a cause to the federal circuit court after such an answer has been filed, reframe his pleading to conform to the federal equity rules, by filing a cross bill setting up the same facts, and praying for relief thereon. City of Detroit v. Detroit City Ry. Co. (C. C. 1893) 55 Fed. 569.

Where a federal court has jurisdiction over the parties and cause of action, it cannot be affected by any amendment of the pleadings changing the cause of action. Green v. Custard (1859) 23 How. 484, 485, 16 L. Ed. 471.

16. —— Repleading after removal.— On removal of an equitable cause, the complaint or bill should be redrafted to conform to the equity practice in the federal courts. Ætna Ins. Co. v. Weide (1869) 76 U. S. (9 Wall.) 677, 19 L. Ed. 810; La Mothe Mfg. Co. v. National Tube Works Co. (C. C. 1879) Fed. Cas. No. 8,033; Leo v. Union Pac. Ry. Co. (C. C. 1883) 17 Fed. 273; Perkins v. Hendryx (C. C. 1885) 23 Fed. 418; Phelps v. Elliott (C. C. 1886) 26 Fed. 881, 23 Blatchf. 470; Thornton N. Motley Co. v. Detroit Steel & Spring Co. (C. C. 1904) 130 Fed. 396; Stockton v. Oregon Short Line R. Co. (C. C. 1909) 170 Fed. 627.

On the transmission of the process or declaration, and the entry of the same in the federal court, the plaintiff must file a new declaration, according to the practice of that court, as if the suit was an original one there; and until such filing he cannot enter a rule to plead or a default for not pleading. Martin v. Kanouse (C. C. 1846) Fed. Cas. No. 9,162.

In the case of a removal, by one of two defendants, after the cause is at issue, in the state court, on pleadings, there is no need of any new pleadings in the federal court, provided they are in a proper shape for a trial, as between the plaintiff and such defendant. Dart v. McKinney (C. C. 1872) Fed. Cas. No. 3,583.

Where an action at law removed is at issue when removed, no other or different pleadings are necessary than those in the state court. Merchants' & Manufacturers' Nat. Bank v. Wheeler (C. C. 1875) Fed. Cas. No. 9,439.

Where an action was commenced by summons and complaint in the state court, further pleading on the part of the plaintiff is not necessary after the removal of the cause to the federal court. Bills v. New Orleans, St. L. & C. R. Co. (C. C. 1876) Fed. Cas. No. 1,409.

The defendant in a case removed from a state to a federal court as one arising under the constitution or laws of the United States will be confined substantially to the ground of defense indicated in the petition for removal. Houser v. Clayton (C. C. 1878) Fed. Cas. No. 6,739.

A counterclaim which might have been interposed in the state court may be set up after removal of the cause to the federal court. Frank v. Chetwood (C. C. 1879) Fed. Cas. No. 5,051.

Where a suit at common law has been removed from a state court in which it has been conducted under the forms of procedure belonging to a court of equity, the constitution and laws of the United States require that there must be a repleading to conform to the practice of the federal court, as a court of law. Whittenton Mfg. Co. v. Memphis & O. R. Packet Co. (C. C. 1883) 19 Fed. 273. This repleading may require more than one suit, and on both sides of the docket, but this is unavoidable in a jurisdiction keeping up as persistently as the federal laws do the distinctions between law and equity; and the force and effect of the proceedings in the state court are preserved by molding them to suit the requirements of the case in the process of distribution between the two jurisdictions. Id. It is only by this construction of the removal acts that the distinctions between law and equity jurisdiction can be observed in practice, and that uniformity secured which it is plainly their intention to enforce. There cannot be one practice for causes removed from the state courts and another for suits originally commenced in the federal court. Id.

Where a complaint asking both damages and equitable relief against a vendor's fraudulent sale of real and personal property is removed to a federal court, and a bill in equity is filed therein for the equitable relief, and is tried, the action at law is not abandoned by the repleader, but remains on the common-law side of the court. Schneider v. Foote (C. C. 1886) 27 Fed. 581, 23 Blatchf. 511.

Where the chancery rules of a state court provide that it may give relief to a defendant setting up, by answer, the facts on which his equity rests, to the same extent that relief might have been had on a cross bill filed, defendant need not, on the removal of a cause to the federal circuit court after such an answer has been filed, reframe his pleading to conform to the federal equity rules, by filing a cross bill setting up the same facts, and praying for relief thereon. City of Detroit v. Detroit City Ry. Co. (C. C. 1893) 55 Fed. 569.

In an action at law on a policy of insurance, brought in a state court, it appeared from the petition that the person named in the policy as the assured was not the real party in interest. A demurrer on this ground was sustained, after removal of the

cause to the United States circuit court, but the court granted leave to plaintiffs to file a bill in equity for reformation of the contract, and continued the action at law, pending the proceedings in equity. Held, that such order was not contrary to the provision of the policy that no action could be maintained thereon unless brought within six months after the happening of the loss. Had the cause remained in the state court, the petition could have been amended, and the defendant could not complain of the proceeding in equity rendered necessary by its removal of the cause to the federal court. Rosenbaum v. Council Bluffs Ins. Co. (C. C. 1888) 37 Fed. 7, 3 L. R. A. 189.

16½. Amendment of return on summons.—The sheriff cannot amend his return on a summons after removal into a federal court. Hawkins v. Peirce (C. C. 1897) 79 Fed. 452; Tallman v. Baltimore & O. R. Co. (C. C. 1891) 45 Fed. 156.

17. Criminal prosecutions.—Upon the trial of a criminal case removed to the federal court, the right of parties to challenge jurors is regulated by the law of the United States. Georgia v. O'Grady (C. C. 1876) Fed. Cas. No. 5,-352.

Where defendants were charged in justice court with the offense of murder, and after being taken in custody the proceeding was removed to the federal court, the question for determination by the federal court was simply whether there was sufficient evidence to make it reasonably appear that defendants were guilty. Georgia v. Port (C. C. 1880) 3 Fed. 124, 129.

The state authorities are the proper parties to continue the prosecution of officers of the United States, against whom a prosecution was commenced in a state court for an act done under the provisions of title 26, "The Elective Franchise," of the Revised Statutes, and removed by them. Delaware v. Emerson (C. C. 1881) 8 Fed. 411. It is the duty of the attorneys of the United States to act as counsel for such defendants. Id.

Where the state fails or refuses to prosecute after removal, the proper course is for the court to impanel a jury and direct a verdict of not guilty. State of Virginia v. Felts (C. C. 1904) 133 Fed. 85. Where defendant is convicted and sentenced in accordance with the state law, either to be executed or imprisoned, he should be delivered to the proper officer of the state for the execution of the sentence; if a fine is imposed, which is paid, it should be transmitted to the clerk of the court from which the cause was removed. Id. No procedure is prescribed by the statute, but the offense charged being against the state law, and prosecuted by the state, the state practice should be followed in substantive matters, at least in felony cases, such as in the impaneling and charging of the jury, the number of challenges allowed, in determining the competency of witnesses, and in confining the jurors during the trial, where that is required by the law of the state. Id.

18. Appearance by parties not removing cause.—Where part of the defendants have removed the cause regularly into the circuit court, the others cannot enter an original appearance in that court. Ward v. Arredondo (C. C. 1825) Fed. Cas. No. 17,148.

19. Discontinuance of cause.—A discontinuance filed by plaintiff in a federal court after removal was ineffective to dismiss the action, where that court was without jurisdiction, and the state court had denied the petition for removal. Nichols v. Chesapeake & O. Ry. Co. (C. C. A. 1912) 195 Fed. 913, 115 C. C. A. 601.

A plaintiff has the right to dismiss his action at any time before trial as against one of two or more defendants upon whose application the cause was removed into a federal court on the ground of a separable controversy; and the fact that plaintiff is a receiver of a state court, suing by leave or direction of such court, does not require him to show its authority for such dismissal before the federal court will entertain his motion; nor can the dismissal be prevented by a motion by such defendant for leave to file an amended answer pleading a set-off, made after the motion for leave to dismiss has been made and taken under advisement. Youtsey v. Hoffman (C. C. 1901) 108 Fed. 699.

When a suit is removed from a state to a federal court, and is there, on the voluntary motion of the plaintiff, dismissed at his costs, such dismissal has the effect of completely extinguishing all jurisdiction and power of the federal court over the parties, as well as the cause of action and the case. Cleveland, C., C. & St. L. Ry. Co. v. Reese (1901) 93 Ill. App. 657.

20. Trial.—Where a case is removed after it has been put on the calendar and noticed for trial in the state court, it stands ready for trial in the circuit court immediately upon the record being filed therein. Waldman v. Pennsylvania R. Co. (D. C. 1882) 13 Fed. 801; Waldman v. Pennsylvania R. Co. (N. Y. 1882) 64 How. Prac. 198.

The questions whether the removal is in violation of the constitution, and whether the case is one arising under the constitution, may be raised at the trial. Murray v. Patrie (C. C. 1866) Fed. Cas. No. 9,967.

A cause will not be for hearing until the next regular term of the United States court occurring after the removal, though a party may bring up and file in the federal court a copy of

the record at any time before the return day. Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C. 1888) 36 Fed. 9, 10.

21. **Witnesses.**—After removal of a cause witnesses incompetent to testify in the state court may testify, if competent under a federal statute. King v. Worthington (1881) 104 U. S. 44, 50, 26 L. Ed. 652.

22. **Interrogatories and depositions.**—Upon removal of an action at law from an Iowa court, defendant cannot be compelled to file answers to interrogatories attached to the petition, as allowed under the Iowa statute. Ex parte Fisk (1885) 113 U. S. 713, 5 Sup. Ct. 724, 28 L. Ed. 1117; Pierce v. Union Pac. R. Co. (C. C. 1891) 47 Fed. 709.

Where depositions taken to be used in an action in a state court that has been dismissed would be admissible as evidence under the statute of the state in another suit subsequently brought, and such second suit, after being brought, has been removed from the state court, such depositions are admissible in the federal court. Gravelle v. Minneapolis & St. L. R. Co. (C. C. 1882) 16 Fed. 435, 3 McCrary, 385.

23. **Right to jury trial.**—Where an ordinary suit in equity is removed from a state court to the federal court in a district, where by state statute a jury is required to find contested facts, the federal court may not resort to a jury. Surgett v. Lapice (1850) 8 How. 48, 65, 12 L. Ed. 982.

Plaintiffs cannot deprive defendant of a trial by jury by transferring what was really an action at law into a suit in equity. Thompson v. Central Ohio R. R. Co. (1867) 73 U. S. (6 Wall.) 134, 18 L. Ed. 765.

Where a receiver appointed by a federal court is sued in a state court as authorized by act of congress, and removes the suit into the federal court, plaintiff is entitled to a trial by jury, if he would have been so entitled in the state court. Vany v. Receiver of Toledo, St. L. & K. C. Ry. Co. (C. C. 1895) 67 Fed. 379.

23½. **Injunction.**—If a cause has been removed from a state to the federal court, and an objection be raised to the jurisdiction of the latter court in the given case, the federal court will protect the rights of all parties during the interval, and prior to the decision of that question; and, if land be the subject of the controversy, will, if necessary, award an injunction restraining waste. Warren v. Ives (C. C. 1874) Fed. Cas. No. 17,197.

24. **Judgment.**—Where, in a suit against C. to quiet title, T. and L. intervened, claiming to be nonresidents and owners of distinct portions of the tract, and removed the suit on the ground that the controversy as to each of them was separable, plaintiff will not be deprived of the decree in his favor on the merits on the ground that the cause was not rightfully removed, it not being disclosed by the record that there was not a separable controversy. Connell v. Smiley (1895) 15 S. Ct. 353, 156 U. S. 335, 39 L. Ed. 443.

The decision of a judge that the interests of the only defendant who is a citizen of the same state as plaintiff are identical with those of plaintiff, and that, therefore, the suit is removable as one between citizens of different states, is not reviewable collaterally. If in any case the final decree of a federal court can, in a collateral proceeding, be held void, it can only be where it is shown beyond controversy that on the record the court could not have had jurisdiction. Evers v. Watson (1895) 15 Sup. Ct. 430, 432, 156 U. S. 527, 39 L. Ed. 520.

The judgment of a federal court in a suit of which it is without jurisdiction under the statutes, or which has not been removed from a state court in the statutory manner, is a nullity. First Nat. Bank v. Prager (1899) 91 Fed. 689, 34 C. C. A. 51.

For the purpose of a motion for judgment on default of a defendant, the court will compute the terms as if the action had continued in the state court. Dunn v. Duncan (C. C. 1876) Fed. Cas. No. 4,175.

A judgment of a federal court, rendered in a cause removed from a state court, is not void because of the insufficiency of averment of jurisdictional facts in the petition for removal, where, as in this case, the plaintiff on a motion to remand had by his answer put in issue the truth of the allegations made in the petition for removal and upon the answer and the evidence the issue was decided against him. Illinois Cent. R. Co. v. Sheegog (C. C. 1910) 177 Fed. 756.

24½. **New Trial.**—Where a case was removed to a federal court and there tried without objection to the jurisdiction, a new trial will not be granted to enable such objection to be made. Mulcahey v. Lake Erie & W. R. Co. (C. C. 1895) 69 Fed. 172.

25. **Execution.**—Where a cause is removed from a state to the United States court, the time in which an execution can issue on a judgment there rendered depends on the laws of the United States, and not of the state. Nims v. Spurr (1885) 138 Mass. 209.

26. **Review.**—Where a case removed from a state court is taken to a circuit court of appeals for review, either on a writ of error or by appeal, the petition for removal is an essential part of the record to enable the court to determine its own jurisdiction, without which it will not proceed to a final ad-

judication. Larned v. Jenkins (1901) 109 Fed. 100, 48 C. C. A. 252.

Where a case is removed from a state court to the United States Circuit Court and the jurisdiction is sustained, the question of jurisdiction cannot be reviewed on a writ of error to the Circuit Court of Appeals. Pennsylvania Lumberman's Mut. Fire Ins. Co. v. Meyer (1903) 126 Fed. 352, 61 C. C. A. 254.

On the removal of a cause instituted as one at law to recover a judgment for damages, but which is not maintainable as such in the federal court, where a demurrer on that ground was rightly sustained, and the plaintiff declined to amend his pleading to bring the case into the equity side of the court, but sued out a writ of error, he is bound by his election, and the judgment dismissing his action will be affirmed. Fletcher v. Burt (1903) 126 Fed. 619, 63 C. C. A. 201.

Where a proceeding to condemn real estate, or an easement therein, under the power of eminent domain, is removed from a state court into a Circuit Court of the United States, and after compensation has been ascertained a writ of error is prosecuted from the judgment, any supersedeas obtained should be modified so that the petitioner shall have the same rights as though the proceedings had remained in the state court; and, where the state statute provides that the proposed work shall not be delayed by appellate proceedings in case the amount of compensation awarded is paid into court, the supersedeas in the federal court will be modified to conform to such provision. Broadmoor Land Co. v. Curr (1904) 133 Fed. 37, 66 C. C. A. 143.

Where a removed cause is taken to the Circuit Court of Appeals by writ of error, it is the duty of that court, on its own motion, to determine whether the record exhibits a removable cause, regardless of whether any objection was taken to the jurisdiction of the federal court, either in the trial court or on appeal. Rife v. Lumber Underwriters (1913) 204 Fed. 32, 122 C. C. A. 346, following Fred Macey Co. v. Macey (1905) 135 Fed. 725, 68 C. C. A. 363.

27. Costs.—Under Pub. St. Mass. c. 161, § 24, providing that "original writs * * * in which the plaintiff is not an inhabitant of the commonwealth shall, before entry thereof, be indorsed by some sufficient person who is such inhabitant," who shall be liable for costs, the indorser of a writ is liable for costs incurred in a federal court after removal to it of a suit from a state court, as well as for the costs in the state court. Washburn v. Pullman's Palace Car Co. (1896) 76 Fed. 1005, 21 C. C. A. 598, affirming Pullman's Palace Car Co. v. Washburn (C. C. 1895) 66 Fed. 790.

Where the judgment is reversed by the Circuit Court of Appeals on the ground that the cause was improperly removed from a state court, costs should be awarded against the removing party. Kansas City Southern Ry. Co. v. Prunty (1904) 133 Fed. 13, 66 C. C. A. 163.

On removal to the federal court of an appeal in admiralty before the passage of this act, the fee for removal is not taxable. Dedekam v. Vose (C. C. 1853) Fed. Cas. No. 3,730.

The acts of congress in relation to costs apply only to such costs as accrue after the removal. Wolf v. Connecticut Mut. Life Ins. Co. (C. C. 1874) Fed. Cas. No. 17,924.

A party after the removal is not entitled to any costs, except such as are taxable under section 1378, post, though such items would have been taxable in his favor in the state court. Clare v. National City Bank (C. C. 1878) Fed. Cas. No. 2,793.

In an action at law originally brought in a state court, and removed by defendant, the amount ultimately recovered by plaintiff, although, exclusive of costs, less than $500, would have entitled him to costs in the state court. Held, that plaintiff was entitled to costs, although, if the action had been commenced originally in the federal court, no costs could have been recovered. Kreager v. Judd (C. C. 1880) 5 Fed. 27.

Where a case is removed from a state to a federal court, interest on the judgment accruing during the stay of the judgment by motion for a new trial in the latter court may be included in the taxation of costs, since it is within the equity of R. S. § 996, post, § 1645, providing that all judgments in the United States courts shall bear the same rate of interest as judgments in the courts of the states where they are rendered. Gunther v. Liverpool, L. & G. Ins. Co. (C. C. 1882) 10 Fed. 830.

In an action for the recovery of excessive customs duties illegally exacted, which is brought in a state court and removed by defendant, and in which plaintiffs recover less than $50, neither plaintiffs nor defendant is entitled to costs. Richter v. Magone (C. C. 1889) 47 Fed. 192.

28. —— Costs incurred in state court.—Where a case has been improperly removed by defendants, all costs from the time of removal must be paid by them. Walker v. Collins (1897) 17 S. Ct. 738, 167 U. S. 57, 42 L. Ed. 76, reversing judgment (1893) 59 Fed. 70, 8 C. C. A. 1.

Costs accruing prior to removal are taxable on final judgment in the federal court. The Garden City (C. C. 1886) 27 Fed. 234; Cleaver v. Traders' Ins. Co. (C. C. 1889) 40 Fed. 863.

Under R. S. § 4284, post, § 8022, providing that, where goods shipped by water are owned by different freighters

and are lost, if the whole value of the vessel is insufficient to compensate the freighters, the latter may recover compensation of the owner of the vessel in proportion to their losses, and the owner may sue to apportion the sum among them; but where the owner delays to do so till 16 months after the loss, and 11 months after suit by the freighters to recover, the question being thereupon transferred to the federal court, the freighters are entitled to recover, as part of the damages, their costs incurred in the suits in the state court before the owner's proceeding was begun. The Garden City (C. C. 1886) 27 Fed. 234.

Where a cause is removed from a state court to a federal court, on the ground that it is a controversy between a citizen of the state where the action is brought and a corporation created under the laws of another state, the state court loses jurisdiction immediately upon the filing of the petition for removal, and costs for witness fees in the state court for witnesses subpœnaed thereafter will not be allowed. Young v. Merchants' Ins. Co. (C. C. 1886) 29 Fed. 273. But costs of witnesses attending at the taking of depositions issued out of the state court will be allowed if the depositions were issued before the removal of the cause, even if they were not used because of the presence of the witnesses, or because the facts testified to were admitted at the trial. Id.

After removal a party cannot, on recovering judgment, be allowed the costs prescribed by the state statutes up to the time of removal, unless such items are taxable under R. S. §§ 823, 824, post, §§ 1375, 1378. Chadbourne v. German-American Ins. Co. (C. C. 1887) 31 Fed. 625.

29. —— **Stay for nonpayment of costs.**—A state court is without jurisdiction to award costs in an action, or to make any order whatever, after the cause is duly removed to the United States circuit court; and therefore a motion for stay of proceedings in the circuit court, because such costs have not been paid, will be denied. Penrose v. Penrose (C. C. 1880) 1 Fed. 479.

After the filing by defendant, in a suit in a state court, of a proper petition and bond for removal of the cause, the suit was prosecuted to judgment in plaintiff's favor, and the judgment was affirmed on appeal to the highest court of the state, from which a writ of error was taken to the United States supreme court, which held that the state courts had no jurisdiction after the filing of the petition and bond for removal, gave costs in that court to defendant, and remanded the suit to the state court, with instructions to accept the bond, and proceed no further in the suit. The mandate did not authorize the state court to award costs. Thereafter the state court awarded costs to defendant, which not being paid, this application was made by defendant to stay proceedings in the circuit court until the payment by plaintiff. Held that, although the state court had no authority to award costs, the application for a stay being in the discretion of the court, and the proceedings not having been vexatious in any way, and the highest court of the state having held that plaintiff was right in continuing his proceedings there, the stay should not be granted, and plaintiff might continue his action on payment to defendant of the costs awarded in the supreme court of the United States. Tugman v. National S. S. Co. (C. C. 1887) 30 Fed. 802, judgment affirmed National S. S. Co. v. Tugman (1892) 143 U. S. 28, 12 Sup. Ct. 361, 27 L. Ed. 87.

CITED WITHOUT DEFINITE APPLICATION

Fidelity Trust Co. v. Gill Car Co. (C. C. 1885) 25 Fed. 737, 740; New York, I. & P. Co. v. Milburn Gin & Machine Co. (C. C. 1888) 35 Fed. 225, 229; Lewicki v. John C. Wiardi & Co. (D. C. 1914) 213 Fed. 647.

§ 1021. (Jud. Code, § 39.) Time for filing record; return of record, how enforced.

In all causes removable under this chapter, if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter,

or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

Act March 3, 1875, c. 137, § 7, 18 Stat. 472. Act March 3, 1911, c. 231, § 39, 36 Stat. 1099.

Notes of Decisions

Determination of right to removal.—A federal court may determine the right to remove a case from a state court independently of the jurisdiction and determination of the state courts in view of this section and section 1011, ante. Chesapeake & O. R. Co. v. McCabe (1909) 29 Sup. Ct. 430, 434, 213 U. S. 207, 53 L. Ed. 765.

Order by state court to certify record.—In Noble v. Massachusetts Ben. Ass'n (C. C. 1891) 48 Fed. 337, it was held that, in view of the provisions of this section, a removal might be effected by simply filing the petition and bond, without presenting it to a judge of the state court, or in open court for approval.

But see, contra, cases in notes to § 1011, ante.

An order of a state court directing its clerk to certify the record in a cause to a federal court, entered after the latter court has ordered a removal of the cause, is not appealable, since he was bound to do it without direction, as required by this section. Mayo v. Dockery (1900) 37 S. E. 62, 127 N. C. 1.

Necessity for and office of certiorari.—A writ of certiorari is not required for the removal of a cause from the state to the federal court. Such writs are issued for the purpose of bringing up the record and other proceedings from the state court, and to notify the latter court that the cause has been removed so that no further proceedings may be had therein. Abranches v. Schell (C. C. 1859) Fed. Cas. No. 21.

A certiorari is not necessary where the record of the state court is already before the federal court. Scott v. Clinton & S. R. Co. (C. C. 1876) Fed. Cas. No. 12,527.

Where, by stipulation of the parties, certain pleadings in the state court have been taken out of the case, upon removal the circuit court will not grant a certiorari to order the clerk of the state court to add such pleadings to the record. Wilkinson v. Delaware, L. & W. R. Co. (C. C. 1885) 23 Fed. 562.

That the entire record of a cause removed to a federal court has not been returned does not justify remanding cause, but remedy of party complaining is by mandamus or certiorari. Miller v. Soule (D. C. 1915) 221 Fed. 493.

Cited without definite application, Knoblock v. Southern Ry. Co. (C. C. 1902) 112 Fed. 926.

CHAPTER FOUR

District Courts—Miscellaneous Provisions

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§ 1022. (Jud. Code, § 40.) Capital cases; where triable.

The trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

R. S. § 729. Act March 3, 1911, c. 231, § 40, 36 Stat. 1100.

Notes of Decisions

Scope and intent of this chapter in general.—The scope and intent of this chapter and chapters 2, 3, ante, must be ascertained by construing them as an entirety, and they treat of parties and subjects-matter within the jurisdiction of district courts, and also of places where suits shall be instituted. Smith v. Farbenfabriken of Elberfeld Co. (1913) 203 Fed. 476, 121 C. C. A. 598.

Inconvenience warranting trial in another county.—The court's decision that "great inconvenience" prevented the trial being held in the county where the crime was committed is conclusive after verdict. Case of Fries (C. C. 1799) Fed. Cas. No. 5,126.

The prisoner may be tried at a regular session without any express adjudication by the court that there would be inconvenience in having the trial at a special session, where neither the prisoner nor the United States makes any application to the court upon the subject, or any objection to the time or place of trial. U. S. v. Cornell (C. C. 1820) Fed. Cas. No. 14,868.

—— **County in state of insurrection.**—Where nearly the whole county is in a state of insurrection, and is occupied by a military force, a trial for treason may be held in another county. Case of Fries (C. C. 1799) Fed. Cas. No. 5,126.

Cited without definite application, Rosecrans v. U. S. (1897) 17 Sup. Ct. 302, 304, 165 U. S. 257, 41 L. Ed. 708.

§ 1023. (Jud. Code, § 41.) Offenses on the high seas, etc., where triable.

The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

R. S. § 730. Act March 3, 1911, c. 231, § 41, 36 Stat. 1100.

Notes of Decisions

1. "Offenses" within the statute.
2. "High seas" defined.
3. "Out of the jurisdiction of any particular state or district" within the statute.
4. "District" within the statute.
5. "Found" or "brought," within the statute.
6. Jurisdiction of courts.
7. District court having jurisdiction.
8. Drawing of grand jury.
9. Indictment.
10. Finding of jurisdictional facts.

1. "Offenses" within the statute.—Offenses, means offenses against the United States. (1893) 20 Op. Atty. Gen. 590. Death as well as the mortal stroke must happen on the high seas in order to constitute murder there. When the death happens on shore the offense is not cognizable under the statute. U. S. v. McGill (C. C. 1806) Fed. Cas. No. 15,676, 4 Dall. 426, 429, 1 L. Ed. 894.

2. "High seas" defined.—The waters inclosed between the shore and the

government breakwaters in Lake Erie at the port of Buffalo, without as well as within the line designated on the government chart as "Buffalo Harbor Line," constitute a "haven," and not "high seas," and an assault with a dangerous weapon committed on a vessel belonging to the United States or citizens thereof anchored in such waters is within the state, and not the federal, jurisdiction. Ex parte O'Hare (1910) 179 Fed. 662, 103 C. C. A. 220, reversing order (D. C. 1909) 171 F. 290.

And see notes under section 10445, post.

3. **"Out of the jurisdiction of any particular state or district" within the statute.**—The words "out of the jurisdiction of any particular state "mean out of the jurisdiction of any particular state of the United States. U. S. v. Furlong (1820) 5 Wheat. 184, 200, 204, 5 L. Ed. 64. If the officers of a foreign vessel, sailing from a United States port, which, after passing the three-mile limit, took aboard men and arms for an expedition in violation of the neutrality law, had prepared for sailing, and had taken aboard extra boats while in port, with knowledge of the proposed expedition, they were guilty of the crime in the district from which they sailed. Wiborg v. U. S. (1896) 16 S. Ct. 1127, 163 U. S. 632, 41 L. Ed. 289, modifying judgment U. S. v. Wiborg (D. C. 1896) 73 Fed. 159. A homicide committed on board of the hospital ship Relief while stationed at Olongapo, P. I., by the acting master of the vessel, who committed this act by order of the commanding officer of the ship, occurred "out of the jurisdiction of any particular State or district," and the parties accused may be tried in any judicial district either in a State or a Territory of the United States into which they shall be first brought. (1909) 28 Op. Atty. Gen. 24.

A vessel was en route to Alaska, and the prisoner was delivered to the United States marshal at Cordova, Alaska, the first American port touched after the affray. On motion of the United States District Attorney for a warrant to remove the prisoner to the Western District of Washington for trial, held, under this section, the defendant is triable in the district court of Alaska. U. S. v. Murphy (1910) 4 Alaska, 275.

This section does not exclude the jurisdiction of the consular tribunal in Japan given by treaty to try offenses committed in that country, where the offense was committed on an American vessel in the waters of such country. In re Ross (1891) 11 Sup. Ct. 897, 140 U. S. 453, 35 L. Ed. 581, affirmed In re Ross (C. C. 1890) 44 Fed. 185.

The criminal jurisdiction of the courts of the United States extends to the island of Navassa, and an indictment for murder committed there may be tried in the district into which the offender is first brought, as provided by this section in cases of offenses committed on the high seas, or elsewhere, out of the jurisdiction of any particular state or district. Jones v. U. S. (1890) 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; Smith v. Same (1890) 137 U. S. 224, 11 Sup. Ct. 88, 34 L. Ed. 700.

Jurisdiction over strip of territory known as "No Man's Land" considered in (1887) 19 Op. Atty. Gen. 66; (1890) 19 Op. Atty. Gen. 477.

4. **"District" within the statute.**—A district is a judicial district defined by act of Congress pursuant to the constitutional requirements that criminal prosecutions shall be in the state and district in which the offense shall have been committed, which district shall have been previously ascertained by law, but when the offense was not committed within any state the trial shall be at such place or places as the Congress shall have directed. U. S. v. Newth (D. C. 1906) 149 Fed. 302. The word "district" includes every territory within which there are courts regularly organized and having jurisdiction over offenses against the United States. (1909) 28 Op. Atty. Gen. 24. And see In re Bollman (1807) 4 Cranch, 75, 135, 2 L. Ed. 554, holding that the act of 1790 not containing the words "or district" did not apply to offenses committed outside of a state but within territories having regularly established courts competent to try those offenses. And see Homicide Committed on Hospital Ship (1909) 28 Op. Atty. Gen. 24, holding that it was probably as a result of such decision that the words "or district" were added.

5. **"Found" or "brought," within the statute.**—To be "brought" into a district, within this section, one must be first apprehended, and it is not enough that he merely "arrive" in the district. Thus, where an offense was committed on the high seas, and the offender was not taken into custody until he was found and apprehended in one of the districts of California, he must be tried in that district, although the vessel on which the offense was committed had previously touched at Hawaii, and a complaint was filed and a warrant of arrest—which was returned unexecuted because of the offender's departure from the district of Hawaii before its attempted service—was issued there. Kerr v. Shine (1905) 136 Fed. 61, 69 C. C. A. 69.

An offender is "found" within this section, where, having committed an offense on the high seas, he is apprehended after coming into port, while the word "brought" means taken into custody on the ship and carried into port. U. S. v. Townsend (D. C. 1915) 219 Fed. 761.

6. **Jurisdiction of courts.**—To give the court jurisdiction the offense must

have been committed out of the jurisdiction of any particular state or district. U. S. v. Newark Meadows Imp. Co. (C. C. 1909) 173 Fed. 426. It must appear that accused was first apprehended in the district and that the offense was committed without the jurisdiction of any state and not within any other district of the United States. U. S. v. John (1861) 1 Black, 484, 486, 17 L. Ed. 225; U. S. v. Bird (D. C. 1855) Fed. Cas. No. 14,597.

The courts of the United States have jurisdiction of an assault with a dangerous weapon committed on a vessel of a citizen of the United States when in the Detroit river out of the jurisdiction of any state and within Canada. U. S. v. Rodgers (1893) 14 Sup. Ct. 109, 110, 150 U. S. 249, 37 L. Ed. 1071. This section does not exclude the jurisdiction of the consular tribunal in Japan given by treaty to try offenses committed in that country where the offense was committed on an American vessel on the waters of such country. Ross v. McIntyre (1891) 11 Sup. Ct. 897, 902, 140 U. S. 453, 35 L. Ed. 581. The district court has no jurisdiction of an assault committed on the high seas unless committed on an American vessel as provided in R. S. § 5346, incorporated with modifications in Crim. Code, § 276, post, section 10449. U. S. v. Lewis (D. C. 1888) 36 Fed. 449. The seizure of an American vessel within the territorial jurisdiction of a foreign power is an offense against that power and the Supreme Court can take no cognizance of it. The Richmond v. U. S. (1815) 9 Cranch, 102, 3 L. Ed. 670. And see U. S. v. Brush (C. C. 1820) Fed. Cas. No. 14,677a, holding that the American members of a crew of a foreign privateer, who mutinied, and secured control of the vessel, may be tried in the United States, where the case is one of general piracy.

Acts alleged to have been done in furtherance of a conspiracy to defraud the United States held to constitute overt acts committed within the jurisdiction of the court. U. S. v. Burke (D. C. 1914) 218 Fed. 83.

A captain of a ship who assaulted a member of his crew on the high seas, and brought the ship to her pier in the borough of Brooklyn, Eastern district of New York, was not subject to prosecution in the Southern district of New York, under Judicial Code, § 41. U. S. v. Townsend (D. C. 1915) 219 Fed. 761.

7. District court having jurisdiction.—The circuit court of the Arkansas district, in the absence of any statute attaching the Indian country west of Arkansas thereto, has no jurisdiction over such Indian country, and cannot punish an offense committed therein. U. S. v. Alberty (C. C. 1844) Fed. Cas. No. 14,426.

This section gives the rule by which to locate the jurisdiction in criminal cases where the offenses are committed outside of any district. U. S. v. Wan Lee (D. C. 1890) 44 Fed. 707. An offense committed without the limits of the United States, on the high seas, must be tried in the district where the offender is apprehended, or into which he may be first brought in legal custody. Charge to Grand Jury, Treason and Piracy (C. C. 1861) Fed. Cas. No. 18,277; U. S. v. Bird (D. C. 1855) Id. 14,597; Charge to Grand Jury, Treason (D. C. 1863) Id. 18,274. Jurisdiction to try the offense attaches either to the district into which the offender is first brought or that in which he is apprehended. U. S. v. Thompson (C. C. 1832) Fed. Cas. No. 16,492. One who, on a vessel owned by citizens of the United States, committed on the high seas the offense of assault with a dangerous weapon, and who was put in irons for safe-keeping, and who, on the arrival of the vessel at the lower quarantine in the Eastern District of New York, was delivered to officers of the state of New York, and who was by them carried into the Southern District and there delivered to the marshal of the United States for that district, to whom a warrant to apprehend and bring him to justice was first issued, was triable in the Southern district. U. S. v. Arwo (1873) 19 Wall. 486, 490, 22 L. Ed. 67. An indictment for murder committed on a guano island may be tried in the district into which the offender is first brought as provided by this section. Jones v. U. S. (1890) 11 Sup. Ct. 80, 88, 137 U. S. 202, 34 L. Ed. 691.

Under this section an offender is to be tried in the district where he is apprehended, unless he is taken into custody while at sea, in which case he is to be tried in the district into which he is first brought. But to be "brought" into a district, within the meaning of the statute, one must be first apprehended, and it is not enough that he merely "arrive" in the district. Thus, where an offense was committed on the high seas, and the offender was not taken into custody until he was found and apprehended in one of the districts of California, he must be tried in that district, although the vessel on which the offense was committed had previously touched at Hawaii, and a complaint was filed and a warrant of arrest—which was returned unexecuted because of the offender's departure from the district of Hawaii before its attempted service—was issued there. Kerr v. Shine (1905) 136 Fed. 61, 69 C. C. A. 69. A District Court of the United States is not deprived of jurisdiction to try a defendant, arrested within the district, charged with the commission of an offense on board an American vessel on the high seas, under this section because such defendant was first arrested in Alaska, the

courts of which are not vested with jurisdiction to try offenses not committed within their territorial jurisdiction. U. S. v. Newth (D. C. 1906) 149 Fed. 302. The District Court of the Eastern District of Wisconsin has no jurisdiction of an indictment for an assault committed on a vessel on Lake Huron within the boundary of the Eastern District of Michigan. U. S. v. Peterson (D. C. 1894) 64 Fed. 145.

The district court for the district of Oregon has jurisdiction to try a person charged with the commission of a crime in Alaska, where such person is found in the district of Oregon, or first brought there. U. S. v. Carr (D. C. 1875) Fed. Cas. No. 14,730. The jurisdiction of the district court for the district of Oregon over offenses committed in Alaska does not extend to the crime of distilling spirits therein without paying a tax therefor. Act July 27, 1868, § 7. U. S. v. Seveloff (D. C. 1872) Fed. Cas. No. 16,252. The district court of the Eastern district of Wisconsin has no jurisdiction of an indictment for an assault committed on a vessel on Lake Huron within the boundary of the jurisdiction of the Eastern district of Michigan. U. S. v. Peterson (D. C. 1894) 64 Fed. 145.

The high seas are within the jurisdiction of the district and circuit courts of the United States; and if American citizens violate the neutrality laws thereon, such courts will take notice of the offense in any district where the offenders may be found. (1795) 1 Op. Atty. Gen. 58.

Piracy committed on the high seas, or out of the jurisdiction of a particular state, should be prosecuted in the district where the offender is apprehended or first brought. (1815) 1 Op. Atty. Gen. 185. Americans who have participated in the slave trade in foreign ports are indictable in any district of the United States in which they may be found. (1851) 5 Op. Atty. Gen. 454. And see U. S. v. Baker (C. C. 1861) Fed. Cas. No. 14,501, holding that a person captured on the high seas by a public armed vessel of the United States for an offense committed on the high seas, and transferred at Hampton Roads to another vessel, destined to New York, may be tried in either district, under Act March 3, 1825, § 14.

Upon the preliminary examination of defendant for aiding a military expedition in violation of Rev. St. § 5286, where there was evidence that the steamship of which defendant was captain, left New York and passed outside Sandy Hook, stopped two or three miles from shore; that two tugs approached, and put on board 35 men, with several boxes and three boats; that the boxes were opened, and guns and other arms taken out; that during the voyage the men so taken on board were constantly drilled; that said men spoke Spanish, and some of them said they were going to Cuba to fight; that the steamer approached the coast of Cuba at night, with her lights extinguished; that the men disembarked there, taking their arms with them, and using their own three boats and one lent by the steamer; and that, after their landing, the steamer proceeded on her voyage to Jamaica. Held, that all the acts constituting such offense were committed on the high seas,—the taking on of provisions at New York, in addition to those required for the crew, not constituting an overt act in furtherance of the enterprise, or evidence of intention to commit such an act,—and that defendant must be tried in the district where he was arrested, and could not be removed thence to the Southern district of New York. U. S. v. Hughes (D. C. 1895) 70 Fed. 972.

8. Drawing of grand jury.—This section does not affect the question whether the act admitting Washington and prescribing the jurisdiction of the district court and the divisions thereof, requires the grand jury in one of the divisions to be drawn from the whole state or only from the division. U. S. v. Wan Lee (D. C. 1890) 44 Fed. 707, 709.

9. Indictment.—The indictment charged the piracy to have been committed "on the high seas, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state." Held, that this was sufficient without any further specification of place. U. S. v. Gibert (C. C. 1834) Fed. Cas. No. 15,204.

To give the court jurisdiction, the offense must have been committed out of the jurisdiction of any particular state or district, and an indictment which alleges that a designated district is the one in which accused was found and into which he was first brought and apprehended for the offense charged makes this section applicable and involves the assertion that the offense charged was committed on the high seas or elsewhere out of the jurisdiction of any particular state or district. U. S. v. Newark Meadows Imp. Co. (C. C. 1909) 173 Fed. 426.

The indictment charges the defendant with exacting excessive rates for carrying freight from Skagway, Alaska, to Dawson, in Yukon territory, across British Columbia territory. On demurrer, held that, since the indictment does not charge that the exaction was wholly in American territory, the court is without jurisdiction, and the demurrer is sustained. U. S. v. Pacific & A. Ry. & Nav. Co. (1912) 4 Alaska, 518, 587.

10. Finding of jurisdictional facts.—Where the crew of an American vessel sailing on a whaling voyage were convicted of endeavoring to mutiny and

revolt, and no objection was made at the trial, that no proof had been adduced in support of the averment in the indictment that the Southern district of New York was the district court in which the prisoners were first brought and apprehended, held, that although such objection might have availed on the trial, it was too late on a motion in arrest. U. S. v. Crawford (C. C. 1843) Fed. Cas. No. 14,890.

That a criminal committed the offense in a ship on a voyage to a port in a particular judicial district, and that the prisoner is in custody in such port, will warrant the jury in the absence of proof to the contrary, in finding that he was first brought into that district. U. S. v. Mingo (C. C. 1854) Fed. Cas. No. 15,781.

Cited without definite application, Cook v. U. S. (1891) 11 Sup. Ct. 268, 274, 138 U. S. 157, 34 L. Ed. 906; U. S. v. Williams (C. C. 1880) 2 Fed. 61, 63; East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 608, 613, 15 L. R. A. 109; U. S. v. Dixon (D. C. 1890) 44 Fed. 401, 403.

§ 1024. (Jud. Code, § 42.) Offenses begun in one district and completed in another.

When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein.

R. S. § 731. Act March 3, 1911, c. 231, § 48, 36 Stat. 1100.

Notes of Decisions

1. "Judicial circuit" in Revised Statutes.
2. Place of bringing prosecution in general.
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1. "Judicial circuit" in Revised Statutes.—The words "judicial circuit" in R. S. § 731, are probably a clerical error for "judicial district" in this section. Horner v. U. S. (1892) 12 Sup. Ct. 407, 409, 143 U. S. 207, 36 L. Ed. 126.

2. Place of bringing prosecution in general.—There is no principle of constitutional law which entitles one to be tried for a criminal offense in the district where he resides. Haas v. Henkel (1910) 30 Sup. Ct. 249, 216 U. S. 462, 54 L. Ed. 569, 17 Ann. Cas. 1112, affirming order (C. C. 1909) 166 Fed. 621.

An offense against the United States committed in more than one district is under this section cognizable in either district. Haas v. Henkel (1910) 30 Sup. Ct. 249, 251, 216 U. S. 462, 54 L. Ed. 569, 17 Ann. Cas. 1112.

The jurisdiction of federal courts in criminal cases is confined to offenses committed in the district where the courts sit, if committed on land, and the indictment should distinctly show on its face that the offense was committed within the jurisdiction of the court. U. S. v. Wood (C. C. 1818) Fed. Cas. No. 16,757.

The rule that, where a statute creates an offense, to the commission of which two acts are essential, one of which it is contemplated will be done outside and the other within the state, an indictment lies in the state in which the domestic part of the transaction is performed, is recognized by this section. U. S. v. Craig (C. C. 1886) 28 Fed. 795, 800.

In a prosecution in a federal District Court sitting in Nebraska, the evidence, in order to warrant a conviction, must show that the offense charged was committed within that state; the limits of the district of Nebraska being coextensive with the boundaries of the state. U. S. v. Richards (D. C. 1906) 149 Fed. 443.

The district court of the United States for the district of Wisconsin has no jurisdiction over offenses against the laws of the United States committed in the district of Michigan. Bagnall v. Ableman (1855) 4 Wis. 163.

3. —— Bribery.—The crime of bribing a public officer, when begun by mailing a letter otaining the money in one federal district and completed by

the receipt of the letter in another district, is triable in the latter district. Benson v. Henkel (1905) 25 Sup. Ct. 569, 573, 198 U. S. 1, 49 L. Ed. 919.

4. —— **Bringing into and landing in United States aliens not entitled to admission.**—The offense of bringing into and landing in the United States an alien not lawfully entitled to admission, made a misdemeanor by section 4253, post, can be prosecuted only in the district where he is landed, and that a person who unlawfully brought in a child under 16, unaccompanied by one or both of her parents, afterward took her into another district, does not confer jurisdiction on the court in such district. U. S. v. Capella (D. C. 1909) 169 Fed. 890.

5. —— **"Bucket shop" law of District of Columbia.**—Persons accused of conspiring to violate the "bucket shop" law (Act March 1, 1909, c. 233, 35 Stat. 670) in the District of Columbia may be tried there, if they participate in overt acts there, though the unlawful agreement was made elsewhere, since participation may be proved by evidence of their conduct elsewhere. U. S. v. Campbell (D. C. 1910) 179 Fed. 762.

6. —— **Conspiracy to commit any offense against the United States or to defraud the United States.**—The doing of the overt act prescribed by section 10201, post, as necessary to a conspiracy to defraud the United States, renders applicable, where the place of the act and of the entry into the unlawful combination were in different federal districts, provisions of this section. Hyde v. U. S. (1912) 32 Sup. Ct. 793, 799, 225 U. S. 347, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, affirming judgment (1910) 35 App. D. C. 451.

If a conspiracy is entered into within the jurisdiction of the trial court, the indictment will lie there, though an overt act is shown to have been committed in another jurisdiction, or even in a foreign country. Hyde v. Shine (1905) 25 Sup. Ct. 760, 761, 199 U. S. 62, 50 L. Ed. 90.

Facts held to warrant an inference that a conspiracy to defraud the United States by making excessive coal entries in the names of dummy entrymen was formed in Wyoming, and that the defendants were properly triable in that state. U. S. v. Wells (1912) 192 Fed. 870, 113 C. C. A. 194, writ of certiorari denied Wells v. U. S. (1912) 32 Sup. Ct. 842, 225 U. S. 714, 56 L. Ed. 1269.

Where conspirators had been doing business together in the judicial district in which they were tried prior to and at the time of the crime, and there was no evidence that they had been together outside of the district, the jury could find the conspiracy to have been in that district. Marrash v. U. S. (1909) 168 Fed. 225, 93 C. C. A. 511.

A charge of conspiracy to commit an offense against the United States, under section 10201, post, may be prosecuted in any district where an overt act was committed. Robinson v. U. S. (1909) 172 Fed. 105, 96 C. C. A. 307; U. S. v. Rindskopf (D. C. 1874) Fed. Cas. No. 16,165; U. S. v. Reddin (D. C. 1912) 193 Fed. 798.

A conspiracy to do an unlawful act, formed in one district, and in part executed there, is punishable in that district, though it was consummated in other parts of the United States. U. S. v. Noblom (C. C. 1878) Fed. Cas. No. 15,896.

Where an indictment charged a conspiracy to defraud the United States by mailing old newspapers for the purpose of fraudulently increasing the weight of mail matter, if the fraudulent mailing was committed within the judicial district charged in the indictment, it was immaterial where the alleged conspiracy was formed, or whether or not the parties thereto, or either of them, were ever within such district. U. S. v. Newton (D. C. 1892) 52 Fed. 275.

Laying the venue of the trial of a conspiracy to commit an offense against the United States, under R. S. § 5480, post, § 10385, by using the mails to defraud, in the state and federal judicial district where the overt act is performed, satisfies Const. Amend. 6, that all crimes be tried in the state and district where committed. Brown v. Elliott (1912) 32 Sup. Ct. 812, 225 U. S. 392, 56 L. Ed. 1136.

It is not necessary to the conviction of persons charged with a conspiracy that they should have resided within the jurisdiction of the court trying the indictment at the time the conspiracy was formed, if the conspiracy was entered into, and had its headquarters, in that jurisdiction. U. S. v. Howell (D. C. 1892) 56 Fed. 21.

Where a conspiracy to defraud the United States of public lands was originally formed in one federal district, but was carried out by means of false and fraudulent entries of such lands in another district, made with the knowledge and consent of all the conspirators, each of such overt acts constituted a renewal of the conspiracy in the latter district, and the offense may be prosecuted in either district. Arnold v. Weil (D. C. 1907) 157 Fed. 429.

Persons who had not been in Wyoming until after consummation of an alleged conspiracy to defraud the government by unlawfully obtaining public coal lands, and who had not been in direct or indirect communication with any one there, should not be removed to that state for trial on that charge, since any offense by them was committed elsewhere. Ireland v. Henkle (C. C. 1910) 179 Fed. 993.

7. —— **Eight-Hour Law, violations.**—In a prosecution of government contractors under section 8919, post, for

"unlawfully, intentionally, and knowingly requiring or permitting a laborer or mechanic, employed on public work," to wit, a dam, to work more than eight hours in a single calendar day, the offense is not the working overtime but is on the part of the contractor in requiring and permitting such overtime work to be done; and hence, where the work is directed, required, or permitted from the Ohio side of the river, the federal court for the Southern District of Ohio has jurisdiction over the offense, notwithstanding some or all of the work may have been performed south of the line which divides the states of Ohio and Kentucky. U. S. v. Sheridan-Kirk Contract Co. (D. C. 1906) 149 Fed. 809.

8. —— **Embezzlement.** — Embezzlement is a continuing offense, which may be prosecuted in any jurisdiction where the accused may be, and where there is a continued liability, and a failure to account and pay over the money, and the fact that an officer or agent of a corporation having its office in one of the states took funds of the corporation to Alaska for investment, and failed to there invest them, or to account for them after his return, does not vest the courts of Alaska with exclusive jurisdiction to try him for embezzlement, nor is an indictment averring such facts alone sufficient to charge the offense in that jurisdiction, under the rule which requires the utmost particularity in indictments for embezzlement. In re Richter (D. C. 1900) 100 Fed. 295.

9. —— **False claim against government.**—Where a false claim and voucher against the United States are made in one state and transmitted from there to the appropriate department in the city of Washington for approval and allowance, the offense of presenting the false claim may be prosecuted in the state where the papers were made. Bridgeman v. U. S. (1905) 140 Fed. 577, 72 C. C. A. 145.

10. —— **False pretenses.**—An indictment cannot be sustained in one place for obtaining money by false pretenses made in another place. U. S. v. Plympton (C. C. 1833) Fed. Cas. No. 16,057.

11. —— **Food and Drugs Act, violations.**—Under Food and Drugs Act, § 2, post, § 8718, jurisdiction of a prosecution for shipping adulterated drugs existed in the federal court of the district from which the shipment was made, though defendant resided in another district. U. S. v. J. L. Hopkins & Co. (D. C. 1912) 199 Fed. 649. Food and Drugs Act, § 10, post, § 8726, held not to determine the venue of a criminal proceeding for violation of the act. U. S. v. J. L. Hopkins & Co. (D. C. 1912) 199 Fed. 649.

12. —— **Forgery.**—The place where forged papers are inclosed and sealed up with a letter and put in the post office is the place where they are uttered, and not the place of their destination. U. S. v. Wright (C. C. 1822) Fed. Cas. No. 16,773; Same v. Plympton (C. C. 1833) Fed. Cas. No. 16,058.

An offense under act March 3, 1823, § 1, post, § 10193 of transmitting false papers from Vermont to the city of Washington in support of certain applications to the pension office was committed in Vermont. U. S. v. Bickford (C. C. 1859) Fed. Cas. No. 14,591.

13. —— **Fraud.**—Where a person by fraud procures money to be deposited to his credit, and draws against the same, the offense is complete in a place where the draft is drawn and discounted, and at the time when it is paid. U. S. v. Watkins (C. C. 1829) Fed. Cas. No. 16,649.

14. —— **Importation of aliens for immoral purposes.**—Under Const. art. 3, § 2, cl. 3, and Const. Amend. 6, a federal court within the Northern district of Illinois had no jurisdiction to try accused for importing a female alien, a citizen of the Republic of France, to the United States for prostitution; the offense being complete at the Atlantic seaport where the alien first landed and entered the United States. The offense of importing a female alien for prostitution in violation of section 4247, post, as originally enacted, is committed and is complete the moment the immigrant is landed in the United States at which point the offense is triable, under Const. art. 3, § 2, cl. 3, and the sixth amendment. Ex parte Lair (D. C. 1910) 177 Fed. 789.

Accused imported a female alien, who was a prostitute, from British Columbia into the Northern district of California, in March, 1908, visited her in San Francisco occasionally, where she continued to practice prostitution, but after the spring of 1908 their relations were interrupted until 1910, when defendant again met her in Seattle, in the Western district of Washington, and renewed illicit relations with her. Held that as such relations had in Washington, were not "pursuant to the illegal importation," there being no continuity of association, defendant could not be convicted of keeping or maintaining in the Washington district, but was only guilty of importing for which he was only subject to prosecution in the Northern district of California. U. S. v. Lavoie (D. C. 1910) 182 Fed. 943.

Where an indictment charged an illegal importation into the United States of an alien woman for an immoral purpose, prohibited by section 4247, post, and showed that the importation was complete at the port where the alien was landed, the venue was in that district, and could not be laid in another district to which accus-

ed and the alien thereafter went. U. S. v. Krsteff (D. C. 1911) 185 Fed. 201.

15. —— Interstate Commerce Act, violations.—Section 10, par. 3, of the interstate commerce law (Act March 2, 1889, c. 382, 25 Stat. 858), makes it a misdemeanor for any person, for himself, or as officer or agent of any corporation or company, who shall deliver property for transportation to any common carrier, subject to the provisions of the act, or for whom as consignor or consignee any such carrier shall transport property, to obtain transportation for such property at less than the regular rates, by means of false billing, classification, or weighing, or false representation of the contents of the package, etc., and provides for the prosecution of the offense in any court of the United States of competent jurisdiction "within the district in which such offense was committed." Held, that such offense is not one which requires the transportation of the property to its destination before it is complete, and which may therefore, under this section, be prosecuted either in the district where the shipment is made or in that where it terminates, but that the gist of the offense is the fraudulent act by means of which the lower rate is obtained, and the offense is complete where such act has been committed, the property delivered for transportation, and the contract for the illegal rate secured, and can only be prosecuted in that district. Davis v. U. S. (1900) 104 Fed. 136, 43 C. C. A. 448.

Elkins Act Feb. 19, 1903, § 1, post, § 8597, provided that every violation of Interstate Commerce Act, post, § 8563, should be prosecuted in the district in which the violation was committed or through which the transportation may have been conducted. Held, that the last clause of such provision had no application to a carrier's violation of the act by failing to file a rate schedule with the Interstate Commerce Commission; transportation being no element of such offense. It also provided that, if a violation of the act occurs in one federal district and is completed in another, it may be dealt with in either jurisdiction, as though the offense had been actually and wholly committed therein. It was held applicable only to a "continuing offense," viz., a continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy, and did not apply to a violation of the act by the carrier's failure to file a rate schedule with the Interstate Commerce Commission. Under the Interstate Commerce Act, post, § 8569, in force in and prior to 1904, requiring the filing of schedules of interstate rates with the Interstate Commerce Commission, and Elkins Act Feb. 19, 1903, § 1, post, § 8597, making the willful failure to comply therewith a misdemeanor punishable in any federal court having jurisdiction of crimes within the district in which the offense was committed, the offense of failing to file a rate schedule with a commission is committed in Washington, where the commission has its office, and hence must be prosecuted there. New York Cent. & H. R. R. Co. v. U. S. (1908) 166 Fed. 267, 92 C. C. A. 331, reversing judgment U. S. v. New York Cent. & H. R. R. Co. (D. C. 1907) 153 Fed. 630.

The signing of a "line voucher" by a freight claim agent at Philadelphia, in the Third circuit, relating to the payment of freight in the Eighth circuit, if an offense punishable under section 8574, post, is not begun in one judicial circuit and completed in another, within this section, and is therefore not cognizable in a district court in the Eighth circuit. U. S. v. Fowkes (1892) 53 Fed. 13, 3 C. C. A. 394, distinguishing In re Palliser (1890) 136 U. S. 257, 10 Sup. Ct. 1034, 34 L. Ed. 514, and Horner v. U. S. (1892) 143 U. S. 207, 12 Sup. Ct. 407, 36 L. Ed. 126.

Under the interstate commerce act, section 8574, post, making it an offense to secure the transportation of property by any carrier subject to the act at less than the regular rates by means of false billing, weights, or representations as to the contents of any package delivered to the carrier for transportation, which shall subject the offender to a fine and imprisonment on conviction in any court of the United States of competent jurisdiction "within the district in which such offense was committed," the offense is fully committed by a consignor at the place where the property is delivered for transportation, the false billing made, and the illegal rate secured; and a court of another district, where the property is delivered to the consignee, has no jurisdiction of such offense. In re Belknap (D. C. 1899) 96 Fed. 614.

The requirement that the prosecution of crimes against the United States be had in the state or district where the offense was committed, which is made by Const. Amend. 6, is not violated by the provision of Elkins Act Feb. 19, 1903, post, § 8597, under which the offense of obtaining transportation of goods from Kansas City to New York City at less than the carrier's published rates may be tried in any federal district through which such transportation was conducted. Armour Packing Co. v. U. S. (1908) 28 Sup. Ct. 428, 209 U. S. 56, 52 L. Ed. 681 (affirming judgment [1907] 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. [N. S.] 400); Chicago, B. & Q. Ry. Co. v. Same (1908) 28 Sup. Ct. 439, 209 U. S. 90, 52 L. Ed. 698 (affirming judgment [1907] 157 Fed. 830, 85 C. C. A. 194).

The offense of obtaining transportation of property in interstate or foreign commerce at less than the carrier's published rates, created by Elkins Act

Feb. 19, 1903, post, § 8597, is made triable in any federal district through which such transportation is had by the provision of that act that violations shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted. Id.

Under the provisions of the interstate commerce act, section 8574, post, making it an offense to secure the transportation of property by any carrier subject to the act at less than the regular rates by means of false billing, weights, or representations as to the contents of any package delivered to the carrier for transportation, which shall subject the offender to a fine and imprisonment on conviction in any court of the United States of competent jurisdiction "within the district in which such offense was committed," the offense is fully committed by a consignor at the place where the property is delivered for transportation, the false billing made, and the illegal rate secured; and a court of another district, where the property is delivered to the consignee, has no jurisdiction of such offense. In re Belknap (D. C. 1899) 96 Fed. 614.

16. —— Intoxicating liquor.—An indictment charging that the defendant exported intoxicating liquors from a port of the United States to a port of Alaska, and there landed the same, charges an offense under section 14 of the act providing a civil government for Alaska, which prohibits the importation of intoxicating liquors into the territory; and the exportation of such liquors with intent to import them into Alaska constitutes a part of the offense, which, having been begun in the United States and completed in Alaska, is cognizable in the courts of either jurisdiction, the act of congress creating the crime being a part of the supreme law of both. U. S. v. Murphy (D. C. 1898) 91 Fed. 120.

17. —— Larceny.—A person who steals goods in one jurisdiction, and brings them into another, is guilty of larceny in the latter place. U. S. v. Tolson (C. C. 1803) Fed. Cas. No. 16,-530; Same v. Haukey (C. C. 1812) Fed. Cas. No. 15,328; Same v. Mason (C. C. 1823) Fed. Cas. No. 15,738.

Where defendant was charged with larceny of the United States mails committed in Park county, in the First judicial district, he may be indicted and tried in Arapahoe county, in the same district. Beery v. U. S. (1873) 2 Colo. 186.

18. —— Libel.—This section has been held not to apply to a libel published in another district. U. S. v. Comerford (C. C. 1885) 25 Fed. 902, 903.

Defendants were publishers of a newspaper at Indianapolis, Ind., which was their residence. Copies of such paper were deposited in the post office in Indianapolis for subscribers at Washington, D. C. Held, that an alleged criminal libel printed in such paper was published in Indiana only, and not in the District of Columbia within the sixth constitutional amendment. U. S. v. Smith (D. C. 1909) 173 Fed. 227.

19. —— Murder.—If this section is applicable to the crime of murder, it could not apply if the stroke were given in one district, and the death ensued in some other country than the United States. Ball v. U. S. (1891) 11 Sup. Ct. 761, 767, 140 U. S. 118, 35 L. Ed. 377.

The place where the death happens, and not that where the mortal stroke is given, determines the jurisdiction of the court on an indictment for manslaughter; otherwise where the indictment is for assault and battery. U. S. v. Bladen (C. C. 1809) Fed. Cas. No. 14,605.

In the case of a homicide by shooting, the place where the shot takes effect, and not that from which it is fired, determines the jurisdiction of the offense, and, where a shot from an American vessel in a foreign harbor kills a person on board of a foreign vessel lying in such harbor, the jurisdiction of the offense belongs to the foreign government, and not to the courts of the United States, under Act 1790, c. 36, § 12. U. S. v. Davis (C. C. 1837) Fed. Cas. No. 14,932.

Evidence held, on a motion for a new trial, on the ground of the insufficiency of the evidence to prove that the crime was committed within the jurisdiction of the court, sufficient to sustain the conclusion of the jury. U. S. v. Clein (D. C. 1911) 189 Fed. 201.

20. —— Perjury.—Section 10295, post, defining perjury, is not confined in its operation to places within the exclusive jurisdiction of the United States, but is of universal application within the territorial limits thereof; and the crime is punishable in the district court of the district in which it is committed. Caha v. U. S. (1894) 14 Sup. Ct. 513, 152 U. S. 211, 38 L. Ed. 415.

21. —— Postal offenses.—One who mailed a letter containing an offer for a purchase of postage stamps on credit, in a state and district other than the state and district where the letter was received, was triable in the latter district. Palliser v. U. S. (1890) 10 Sup. Ct. 1034, 1036, 136 U. S. 257, 34 L. Ed. 514, affirming order In re Palliser (C. C. 1889) 40 Fed. 575.

The offense of delivering lottery matter through the mails is distinct from that of depositing it in the mails and is committed at the place of the delivery, and, where it was alleged that defendant deposited a lottery circular in the mail at New York, and in another count

that he caused it to be delivered through the mails to a person in Illinois, the district judge for the Southern District of New York properly issued a warrant for the removal of the defendant to Illinois for trial. Horner v. U. S. (1892) 12 Sup. Ct. 407, 409, 143 U. S. 207, 36 L. Ed. 126. Under section 10383, post, an indictment having been found in the Southern district of Illinois against defendant containing five counts, the first four of which alleged deposit of lottery matter in the mails by defendant at New York, and the last that he knowingly caused such matter to be delivered, by mail, to a person in the Southern district of Illinois, and that he had previously deposited such matter in the mails in New York, for such delivery, the offense charged in the fifth count was not completed except upon the delivery of the prohibited matter in Illinois; and the offense was, therefore, consummated and "committed" there, though begun in New York, and was, therefore, an offense legally triable in Illinois. U. S. v. Horner (D. C. 1891) 44 Fed. 677, order affirmed Horner v. U. S. (1892) 12 Sup. Ct. 407, 143 U. S. 207, 36 L. Ed. 126.

The offense of depositing obscene matter in the mails is completed by the act of depositing, and the indictment and prosecution must be had in the district where the matter was mailed. U. S. v. Comerford (D. C. 1885) 25 Fed. 902.

Violations of R. S. § 3894, post, § 10383, by depositing lottery circulars in the mail, or by sending them by mail, are complete without transmission or delivery of such matter, and an indictment therefor can be tried only in the district in which the matter is mailed; and so much of that section as, amended by Act Sept. 19, 1890, provides for the trial of those offenses in another district, to which such matter is carried by mail for delivery, conflicts with Const. art. 3, § 2, and also with the sixth amendment. But the offense of causing the prohibited matter to be delivered by mail, not being complete until such delivery, may be tried and punished in the district in which delivery is made. U. S. v. Conrad (C. C. 1894) 59 Fed. 458, explaining Horner v. U. S. (1892) 12 Sup. Ct. 522, 143 U. S. 570, 36 L. Ed. 266.

A prosecution under section 10385, post, prohibiting the use of the post office for promoting a scheme to defraud, can only be instituted in the district in which the fraudulent matter was placed in the post office. U. S. v. Sauer (D. C. 1898) 88 Fed. 249.

22. —— **Receiving pay by senator or member of congress in violation of law.**—In a transaction whereby a United States Senator in Washington received checks sent from St. Louis, Mo., for services rendered in violation of section 10283, post, the payment was in Washington, and there was no beginning of the offense in Missouri, so as to bring the case within this section. Burton v. U. S. (1905) 25 Sup. Ct. 243, 245, 248, 196 U. S. 283, 49 L. Ed. 482.

The physical absence of accused from Missouri when the acceptance by a St. Louis corporation of an offer to render services in consideration of the compensation forbidden by section 10283, post, was sent by mail or telegram does not deprive the circuit court for the Eastern district of Missouri of jurisdiction of the offense. Burton v. U. S. (1906) 26 Sup. Ct. 688, 702, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 392.

23. —— **Receiving stolen goods.**—The receiving of stolen goods in one jurisdiction with knowledge that they were stolen in another is an offense in the former jurisdiction. U. S. v. Mortimer (C. C. 1845) Fed. Cas. No. 15,821; Same v. Montgomery (D. C. 1875) Fed. Cas. No. 15,800.

24. —— **Violation of revenue laws.**—Upon an indictment for removing whisky from a distillery in Pekin, Ill., and sending it to St. Louis, under a false inspector's brand, and without paying the tax, defendant contended that the whisky was taken from Illinois to St. Louis by government officials after seizing it, and that the district court for the Eastern district of Missouri therefore had no jurisdiction of the offense. Held, that if the whisky was not taken from the possession of the railroad company by which it was shipped, before it arrived in St. Louis, the court had jurisdiction. U. S. v. Sperry (D. C. 1869) Fed. Cas. No. 16,369.

25. **Objection to prosecution in wrong district.**—An objection that defendant corporation was indicted in the wrong district could not be raised by plea based on the wording of the information. U. S. v. J. L. Hopkins & Co. (D. C. 1912) 199 Fed. 649.

Cited without definite application, Putnam v. U. S. (1896) 16 Sup. Ct. 923, 931, 162 U. S. 687, 40 L. Ed. 1118; Thomas v. U. S. (1907) 156 Fed. 897, 901, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720; U. S. v. Ehrgott (C. C. 1910) 182 Fed. 267; U. S. v. Albert Steinfeld & Co. (D. C. 1913) 209 Fed. 904, 906.

§ 1025. (Jud. Code, § 43.) Suits for penalties and forfeitures, where brought.

All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found.

R. S. § 732. Act March 3, 1911, c. 231, § 43, 36 Stat. 1100.

Notes of Decisions

Applicability of statute in general.—This section is applicable to a multitude of penalties and forfeitures concerning which there is no other provision unless to the place where the suit may be brought. Pentlarge v. Kirby (D. C. 1884) 19 Fed. 501, 506. And merely affirms the common-law rule applicable to all actions ex contractu that they may be brought wherever the defendant is found and repeals pro tanto the Statutes of Elizabeth and James the First, which confine the jurisdiction in actions for penalties solely in the county where the cause of action arose. U. S. v. Craig (C. C. 1886) 28 Fed. 795, 800.

District in which action may or must be brought.—Neither Const. art. 3, § 2, nor the sixth amendment, relating to venue in criminal cases, requires an action for a penalty incurred out of the limits of a state under the 28-hour law (Act June 29, 1906, post, §§ 8651–8654), to be brought or tried in the district where the violation occurs, and the action may be tried in the district where the defendant resides or carries on business, as provided by, post, section 8654 of that act. St. Louis & S. F. R. Co. v. U. S. (1909) 169 Fed. 69, 94 C. C. A. 437.

An action of debt to recover a penalty for violation of the embargo laws (1807–1808) may be brought in any district where the offender may be found. Act Feb. 28, 1839. U. S. v. Woolsey (D. C. 1845) Fed. Cas. No. 16,762.

Any court, within whose territorial jurisdiction the vessel may be at the time of the commencement of a suit for penalties under sections 8229, 8239, post, and the attachment of the vessel by the marshal, has jurisdiction. Pollock v. The Sea Bird (D. C. 1880) 3 Fed. 573.

No suit for a penalty can be maintained except in the district where the act of stamping was committed, and this section does not apply to suits under, post, § 9447. Pentlarge v. Kirby (D. C. 1884) 19 Fed. 501. An action for the penalty provided for by section 9447, post, may be brought in the district court where the offense is committed; and the jurisdiction of the court does not depend on the residence of the parties. Winne v. Snow (D. C. 1884) 19 Fed. 507. And this section is limited by section 9447, post, to the district where the offense was committed, though applicable when the defendant is found within the district where the offense was committed. Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co. (D. C. 1887) 31 Fed. 294, 296.

Cited without definite application, U. S. v. Matthews (1899) 19 Sup. Ct. 413, 415, 173 U. S. 381, 43 L. Ed. 738; Davey v. U. S. (1913) 208 Fed. 237, 125 C. C. A. 437; U. S. v. Payne (D. C. 1884) 22 Fed. 426, 427.

§ 1026. (Jud. Code, § 44.) Suits for internal-revenue taxes, where brought.

Taxes accruing under any law providing internal revenue may be sued for and recovered either in the district where the liability for such tax occurs or in the district where the delinquent resides.

R. S. § 733. Act March 3, 1911, c. 231, § 44, 36 Stat. 1100.

Notes of Decisions

Statute enlarging or affecting general jurisdiction of the court.—This section extended the part of Act of May 4, 1858, which is embodied in R. S. § 741, incorporated in Jud. Code, § 54, post, § 1036, to the case of a defendant residing out of the state, but interested in property of a local nature within the jurisdiction which plaintiff was seeking to subject to a lien, but did not otherwise enlarge or affect the general jurisdiction of the court in a suit of a local nature. East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 608, 15 L. R. A. 109.

District in which suit may be brought.—A suit will not lie to recover a tax in a district other than that in which the tax accrues, or that in which the delinquent resides, although he may be found and served with process therein. U. S. v. New York, N. H. & H. R. Co. (D. C. 1878) Fed. Cas. No. 15,874.

§ 1027. (Jud. Code, § 45.) Seizures, where cognizable.

Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any dis-

trict into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided.

R. S. § 734. Act March 3, 1911, c. 231, § 46, 36 Stat. 1100.

Notes of Decisions

1. "High seas" defined.
2. Lawful seizure essential to jurisdiction.
3. Jurisdiction on restoration of property.
4. District in which proceedings may be brought.
5. District Court of Alaska.
6. Intervention by state authority.
7. Property subject to statute.
8. Procedure.
9. Trial by jury.
10. Appeal.

1. "High seas" defined.—The part of the sea below low-water mark, and not within the body of any country, is the "high seas" within Act 1789, § 9. The Abby (C. C. 1818) Fed. Cas. No. 14; Gedney v. L'Amistad (D. C. 1840) Fed. Cas. No. 5,294a; Johnson v. Twenty-One Bales, etc. (C. C. 1814) Fed. Cas. No. 7,417; The Martha Anne (D. C. 1843) Fed. Cas. No. 9,146; Thackarey v. The Farmer of Salem (D. C. 1835) Fed. Cas. No. 13,852; U. S. v. The Julia Lawrence (D. C. 1871) Fed. Cas. No. 15,502. And see notes under post, § 10445.

2. Lawful seizure essential to jurisdiction.—Lawful seizure is essential to sustain jurisdiction. U. S. v. Larkin (1908) 28 Sup. Ct. 417, 419, 208 U. S. 333, 52 L. Ed. 517.

3. Jurisdiction on restoration of property.—Where a seizure is voluntarily abandoned, and the property is restored before the libel or information is filed and allowed, the district court has no jurisdiction of the cause. The Ann (1815) 9 Cranch, 289, 290, 3 L. Ed. 734.

4. District in which proceedings may be brought.—The trial of seizures under Act Feb. 18, 1793, post, § 8135, is to be in the judicial district in which the seizure was made without regard to the district where the forfeitures accrued. Keene v. U. S. (1809) 5 Cranch, 304, 3 L. Ed. 108.

This provision, as originally enacted in section 9 of the Judiciary Act of 1789, c. 20, marks out the general jurisdiction of the district courts and of the several district courts in relation to each other in cases of seizures on waters of the United States, and, if made within the waters of one district, the jurisdiction attaches to the court of that district, but where the seizure is made on the high seas, the jurisdiction is conferred on no particular district court, and it may be exercised by the court of any district into which the property is carried and there proceeded against. The Merino (1824) 9 Wheat. 391, 401, 6 L. Ed. 118.

Jurisdiction of a seizure on the high seas belongs to the court of the district into which the property is brought. The Abby (C. C. 1818) Fed. Cas. No. 14; The Peterhoff (D. C. 1863) Fed. Cas. No. 11,024, citing The Merino, 22 U. S. (9 Wheat.) 391.

A vessel lying, when seized, a half mile from shore off Colloden Point, Long Island, though in Long Island Sound, is on the high seas, and the court into whose district she is first carried has jurisdiction. The fact that persons were temporarily on shore at the time does not affect the jurisdiction. Gedney v. L'Amistad (D. C. 1840) Fed. Cas. No. 5,294a.

Where an American vessel is seized within the territorial jurisdiction of a foreign power, the law does not connect that trespass with a subsequent seizure by the civil authority under the process of the district court, so as to annul the proceedings of that court against the vessel. The Richmond v. U. S. (1815) 9 Cranch, 102, 104, 3 L. Ed. 670.

A libel in rem in the case of seizure and forfeiture of a vessel for violating the laws relating to the slave trade may be prosecuted in any district of the United States where the property is found. The Slavers (1864) 2 Wall. 383, 401, 17 L. Ed. 911; The Washington (D. C. 1855) Fed. Cas. No. 17,222.

The place of seizure, and not the place of committing the offense, gives the court jurisdiction in cases of forfeiture in rem. The Octavia (C. C. 1813) Fed. Cas. No. 10,422; U. S. v. Three Hundred and Ninety-Six Barrels of Distilled Spirits (D. C. 1866) Fed. Cas. No. 16,502.

In a case of seizure, the place of seizure, and not that of the commission of the act on account of which the seizure is made, determines the jurisdiction; and the clause in section 4499 of the Revised Statutes, post, § 8275, that vessels offending in certain ways "may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense," does not change this rule; the court in whose district a seizure is made acquiring thereby jurisdiction of the subject-matter or cause of suit. The Idaho (D. C. 1886) 29 Fed. 187.

The district court has no jurisdiction in cases of libel for seizures made in another district from that where the proceedings are instituted. The Little Ann (C. C. 1810) Fed. Cas. No. 8,397.

5. District Court of Alaska.—Under R. S. § 563 (ante, § 991), and this section, defining the admiralty jurisdiction

of the district courts, and Act May 17, 1884, establishing the district of Alaska, the district court of Alaska has jurisdiction to declare a forfeiture of vessels guilty of taking fur seal in violation of R. S. § 1956, post, § 8850, in any of the navigable waters acquired from Russia by the treaty of March 30, 1867, over which the United States may lawfully exercise dominion. Ex parte Cooper (1892) 12 Sup. Ct. 453, 459, 143 U. S. 472, 36 L. Ed. 232.

6. Intervention by state authority.—United States courts have exclusive jurisdiction of all seizures under laws of the United States, and any intervention of a state authority is unlawful which might obstruct the exercise of this jurisdiction by taking the thing seized out of the hands of the United States officer. Slocum v. Mayberry (1817) 2 Wheat. 1, 9, 4 L. Ed. 169.

7. Property subject to statute.—Act Aug. 6, 1861, extended to all property. Union Ins. Co. v. U. S. (1867) 6 Wall. 759, 763, 18 L. Ed. 879. A vessel begun to be fitted and equipped for a slave voyage in a port of the United States, then going to a foreign port, to evasively complete the fitting and equipping, and so completing it, and from such port continuing the voyage, is liable to seizure and condemnation when driven in its subsequent course into a port of the United States. The Slavers (1864) 2 Wall. 383, 395, 17 L. Ed. 911.

8. Procedure.—Though the proceedings may be shaped in general conformity to the practice in admiralty, they do not necessarily constitute a "cause in admiralty." Proceedings as to trial by jury and exceptions to evidence held required to conform to the course of proceedings by information on the common-law side of the court. Union Ins. Co. v. U. S. (1867) 6 Wall. 759, 766, 18 L. Ed. 879.

9. Trial by jury.—Issues of fact, on demand of either party, held triable by jury. Union Ins. Co. v. U. S. (1867) 6 Wall. 759, 764, 18 L. Ed. 879.

10. Appeal.—Where a proceeding to enforce forfeiture was carried on in a circuit court by libel monition, claim interposed, and testimony taken in conformity with admiralty practice, and without a jury anywhere, jurisdiction was taken by the supreme court on appeal only to reverse the decree as irregular and direct a new trial. Union Ins. Co. v. U. S. (1867) 6 Wall. 759, 765, 18 L. Ed. 879.

§ 1028. (Jud. Code, § 46.) Capture of insurrectionary property, where cognizable.

Proceedings for the condemnation of any property, captured, whether on the high seas or elsewhere out of the limits of any judicial district, or within any district, on account of its being purchased or acquired, sold or given, with intent to use or employ the same, or to suffer it to be used or employed, in aiding, abetting, or promoting any insurrection against the Government of the United States, or knowingly so used or employed by the owner thereof, or with his consent, may be prosecuted in any district where the same may be seized, or into which it may be taken and proceedings first instituted.

R. S. § 735. Act March 3, 1911, c. 231, § 46, 36 Stat. 1100.

Notes of Decisions

Property subject to proceedings.—Act Aug. 6, 1861, extended to all property. Union Ins. Co. v. U. S. (1867) 6 Wall. 759, 763, 18 L. Ed. 879.

Procedure.—See notes under ante, § 1027.

Cited without definite application, Titus v. U. S. (1874) 20 Wall. 475, 22 L. Ed. 400.

§ 1029. (Jud. Code, § 47.) Certain seizures cognizable in any district into which the property is taken.

Proceedings on seizures for forfeiture of any vessel or cargo entering any port of entry which has been closed by the President in pursuance of law, or of goods and chattels coming from a State or section declared by proclamation of the President to be in insurrection into other parts of the United States, or of any vessel or vehicle conveying such property, or conveying persons to or from such State or section, or of any vessel belonging, in whole or in part, to any inhabitant of such State or section, may be prosecuted in any district into which the property so seized may be taken and proceedings instituted; and the district court thereof shall have as

full jurisdiction over such proceedings as if the seizure was made in that district.

R. S. § 564. Act March 3, 1911, c. 231, § 47, 36 Stat. 1100.

§ 1030. (Jud. Code, § 48.) Jurisdiction in patent cases.

In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpœna upon the defendant may be made by service upon the agent or agents engaged in conducting such business in the district in which suit is brought.

Act March 3, 1897, c. 395, 29 Stat. 695. Act March 3, 1911, c. 231, § 48, 36 Stat. 1100.

Notes of Decisions

1. Repeal of prior statutes.
2. Applicability of statute to inhabitants and aliens.
3. Inhabitant within statute.
4. Regular and established place of business.
5. Jurisdiction of injunction suit.
6. Making foreign corporations a party.
7. District in which suit may or must be brought.
8. Joinder of causes of action as affecting jurisdiction.
9. Burden of proof of jurisdictional facts.
10. Sufficiency of proof of jurisdictional facts.
11. Waiver of limitations as to jurisdiction.
12. —— Acts constituting waiver.
13. —— Time and manner of raising objections to court's jurisdiction.
14. Service of process.
15. Return of service of process as showing jurisdictional facts.
16. Pleading, requisites of bill to show jurisdiction.
17. —— To authorize service of process on agent.
18. Order vacating service of process as appealable.
19. Decisions under general statute defining venue.

1. Repeal of prior statutes.—This section did not repeal prior statutes, so as to oust the courts of jurisdiction in pending cases not falling within the jurisdictional limits prescribed. Westinghouse Air Brake Co. v. Great Northern Ry. Co. (1898) 88 Fed. 258, 31 C. C. A. 525.

The requirements of this section are unaffected by the Judiciary Acts of 1887, 1888. Cheatham Electric Switching D. Co. v. Transit D. Co. (C. C. 1911) 191 Fed. 727.

2. Applicability of statute to inhabitants and aliens.—This section applies only to defendants who are inhabitants of some district within the United States, and does not affect patent suits against aliens, which may be brought in any district where the defendant may be found. United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co. (C. C. 1904) 133 Fed. 930.

3. Inhabitant within statute.—A corporation not incorporated in Colorado is not an inhabitant of the district of Colorado. Weller v. Pennsylvania R. Co. (C. C. 1902) 113 Fed. 502.

4. Regular and established place of business.—Foreign corporation, employing Eastern representative in New York City to solicit orders to be filled from home office, held not to have a regular place of business in Southern district of New York, within Act March 3, 1897, giving federal District Court jurisdiction of patent infringement suits in the district in which defendant has such a place of business. W. S. Tyler Co. v. Ludlow-Saylor Wire Co. (1915) 35 Sup. Ct. 458, 236 U. S. 723, 59 L. Ed. 808, affirming decree (1914) 212 Fed. 156, 129 C. C. A. 12.

The temporary occupation by a corporation of another state of space in an exposition for the exhibition of its wares does not make such place a "regular and established place of business" of the corporation, within this section, so as to give a court in that district jurisdiction of a suit against it for infringement of a patent. L. E. Waterman Co. v. Parker Pen Co. (C. C. 1900) 100 Fed. 544.

Where a manufacturing corporation of Ohio, which there manufactures articles alleged to infringe, consigns them to a second corporation, doing business in New York, which is given the exclusive right to sell the same within a given territory, being charged therewith at a fixed price, but privileged to return any part of the same and receive credit therefor, and the manufacturing corporation pays the cost of advertising, furnishes catalogues, etc., the latter is a participator in the sales of such articles for use in New York, and the office of the second corporation is its regular, established place of business. Thomson-Houston Electric Co. v. Bullock Electric Co. (C. C. 1900) 101 Fed. 587.

A railroad company which maintains

an office in the district of Colorado, but whose agent there has authority to solicit business only, and who makes no contracts for the carriage of freight or passengers, has no "regular and established place of business" in the district. Weller v. Pennsylvania R. Co. (C. C. 1902) 113 Fed. 502.

To confer jurisdiction in a suit for infringement of a patent filed against a foreign corporation it is not necessary that the defendant should have had a regular and established place of business within the district at the time the alleged acts of infringement were committed therein, but it is sufficient if it had such place at the time of bringing suit. Underwood Typewriter Co. v. Fox Typewriter Co. (C. C. 1908) 158 Fed. 476.

A corporation held to have a "place of business' in New York, and was therefore subject to suit there. Chadeloid Chemical Co. v. Chicago Wood Finishing Co. (C. C. 1910) 180 Fed. 770.

An office of a sales agent on commission, maintained at his own expense, held not to be a "regular and established place of business" of a nonresident corporation, which subjected it to suit for infringement in that district, under this section. General Electric Co. v. Best Electric Co. (D. C. 1914) 220 Fed. 347.

5. **Jurisdiction of injunction suit.**—So much of a bill as charges defendants with inducing patent licensees from plaintiff to sell devices embodying the patents in a manner not permitted by their licenses and praying for an injunction presents a case arising under the patent laws of which a federal court has jurisdiction under Judicial Code, §§ 24, 48, and 256 (this compilation, §§ 991, 1030, 1233). Geneva Furniture Mfg. Co. v. S. Karpen & Bros. (1915) 35 Sup. Ct. 788, 238 U. S. 254, 59 L. Ed. 1295.

6. **Making foreign corporations a party.**—Under this section and section 1032, post, foreign corporation, which had assumed defense of patent infringement suit against user of its alleged infringing device, held to be made a party to the record. Dicks Press Guard Mfg. Co. v. Bowen (D. C. 1916) 229 Fed. 193.

7. **District in which suit may or must be brought.**—This section restricts the jurisdiction of the circuit courts. United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co. (C. C. 1904) 133 Fed. 930. And a suit can be maintained only in the district of which the defendant is an inhabitant, or in a district in which the defendant has committed acts of infringement, and has a regular and established place of business. Shaw v. American Tobacco Co. (1901) 108 Fed. 842, 48 C. C. A. 68; Bowers v. Atlantic, G. & P. Co. (C. C. 1900) 104 Fed. 887. A court has jurisdiction in a district where defendant has an established place of business from which it sold the alleged infringing articles, and in which it also assembled the different parts of such articles. American Stoker Co. v. Underfeed Stoker Co. of America (C. C. 1910) 182 Fed. 642, decree affirmed (1911) 188 Fed. 314, 110 C. C. A. 292.

To sustain the jurisdiction of the court of a suit for infringement of a patent in a district wherein neither party resides or is a citizen under this section, there must have been a completed act of infringement by defendant in such district. Consolidated Rubber Tire Co. v. Republic Rubber Co. (D. C. 1912) 195 Fed. 768, decree reversed (C. C. A. 1913) 202 Fed. 1021. The infringement must not only have been committed within the district, but the defendant must also have, at the time the suit is commenced, a regular and established place of business within the district. The fact that defendant had such place of business when the infringement was committed is insufficient, where for any cause it was abandoned prior to the service of process on its former agent. Feder v. A. B. Fiedler & Sons (C. C. 1902) 116 Fed. 378.

The court for the Southern district of New York has jurisdiction of a suit for infringement of a patent against a corporation of another state under this section, where defendant has a regular and established place of business in New York City, where its agent, acting under his general authority, accepted an offer and completed a contract of sale for an infringing article, which was recognized by defendant as valid. Chicago Pneumatic Tool Co. v. Philadelphia Pneumatic Tool Co. (C. C. 1902) 118 Fed. 852.

Defendant corporation was organized under the laws of New Jersey, and its manufacturing plant and general offices were in Massachusetts. It maintained an office in New York City, where orders were taken for goods, which were forwarded to the general office, and, if accepted, the goods were there delivered on board cars for shipment to the purchaser. Held, that a suit for infringement of a patent by machines so made and sold by defendant through its New York office, and shipped to the purchasers in New York City for use there, could be maintained in the Southern District of New York. Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. (C. C. 1903) 121 Fed. 101.

A defendant not a resident of the district in which he is sued must both have a place of business and have infringed the patent in such district. United States Consol. Seeded Raisin

Co. v. Phœnix Raisin Seeding & Packing Co. (C. C. 1903) 124 Fed. 234.

To confer jurisdiction in a suit against a foreign corporation it is not necessary that the defendant should have had a regular and established place of business within the district at the time the alleged acts of infringement were committed therein, but it is sufficient if it had such place at the time of bringing suit. Underwood Typewriter Co. v. Fox Typewriter Co. (C. C. 1908) 158 Fed. 476.

Where infringing articles are in use in the district in which the owner of the patent resides, though made elsewhere, he is not subject to criticism for exercising his legal right to sue the users in that district instead of going to the district of the manufacture and there bringing suit against the maker. Ryder v. Townsend (C. C. 1911) 188 Fed. 792.

Where one of two nonresident defendants, each of whom had an established place of business in the district of suit, had, prior to such suit, constructed an infringing machine for the other, and assisted the latter in installing the same for use by a third defendant within the district, there was such a completed act of infringement, or threatened infringement, by each defendant within the district, as to give the court jurisdiction. Edison v. Allis-Chalmers Co. (C. C. 1911) 191 Fed. 837.

Suit for infringement of patent held not maintainable in district where no sales had been made, except by taking orders and mailing them to the defendant to accept or reject. United Autographic Register Co. v. Egry Register Co. (D. C. 1915) 219 Fed. 637.

Foreign corporation did not infringe complainant's patent in Southern district of New York, within Act March 3, 1897, where its local representative in New York received and forwarded to its home office in Missouri order for the infringed articles thereafter shipped to New York. W. S. Tyler Co. v. Ludlow-Saylor Wire Co. (1915) 35 S. Ct. 458, 236 U. S. 723, 59 L. Ed. 808, affirming decree (1914) 212 Fed. 156, 129 C. C. A. 12. And see Westinghouse Air Brake Co. v. Great Northern Ry. Co. (1898) 88 Fed. 258, 31 C. C. A. 525, holding that prior to this section a suit for infringement could be brought in any district where valid service could be had.

8. Joinder of causes of action as affecting jurisdiction.—A claim for damages for conspiracy to injure complainant in his property rights cannot be joined in a suit in equity for an injunction and accounting for infringement of a patent for the purpose of obtaining jurisdiction over a defendant who could not be sued in the district for the infringement. Cheatham Electric Switching Device Co. v. Transit Development Co. (C. C. 1911) 191 Fed. 727.

9. Burden of proof of jurisdictional facts.—The burden rests on complainant in a suit for infringement of a patent to establish, not only that the infringement occurred within the territorial jurisdiction of the court, but also that defendant was regularly engaged in business therein. Underwood Typewriter Co. v. Fox Typewriter Co. (C. C. 1910) 181 Fed. 541.

A defendant, not an inhabitant of the district where an infringement suit is instituted, must affirmatively be shown to have committed an act of infringement and have a regularly established place of business therein. Edison v. Allis-Chalmers Co. (C. C. 1911) 191 Fed. 837.

10. Sufficiency of proof of jurisdictional facts.—A return of service of process at "the place of business" of defendant is not conclusive that such place is a regular and established place of business. L. E. Waterman Co. v. Parker Pen Co. (C. C. 1900) 100 Fed. 544.

In an action brought in the Southern district of New York against a New Jersey corporation which has a regular and established place of business in such district, proof that representatives of defendant, who had no power to bind it to terms of sale, solicited proposals for machines manufactured by it in another state, which proposals were invariably forwarded to the factory, where the sales were completed and delivery made, does not show completed acts of infringement in such district, so as to give such court jurisdiction to issue an injunction against defendant. Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. (C. C. 1902) 116 Fed. 641.

Defendant corporation was organized under the laws of New Jersey, and its manufacturing plant and general offices were in Massachusetts. It maintained an office in New York City, where orders were taken for goods, which were forwarded to the general office, and, if accepted, the goods were there delivered on board cars for shipment to the purchaser. Held, that a suit for infringement of a patent by machines so made and sold by defendant through its New York office, and shipped to the purchasers in New York City, for use there, could be maintained in the Southern District of New York. Westinghouse Electric & Mfg. Co. v. Stanley Electric Mfg. Co. (C. C. 1903) 121 Fed. 101.

Infringement within the district of suit required to sustain the suit, under this section, is not made out by proof that an infringing article sold in another state bore a label with the name of defendant and the words "New York" thereon, in the absence of evidence that defendant made, used, or sold the article, or attached the label, or was engaged in the manufacture of similar ar-

ticles in New York. Rumford Chemical Works v. Egg Baking Powder Co. (C. C. 1906) 145 Fed. 953.

11. Waiver of limitations as to jurisdiction.—The court of the United States having full jurisdiction of patent cases, the limitation in respect to the district of residence of a defendant or of place of business and acts of infringement may be waived. General Electric Co. v. Wagner Electric Mfg. Co. (C. C. 1903) 123 Fed. 101, decree affirmed (1904) 130 Fed. 772, 66 C. C. A. 82.

This section affects only the proceedings taken to bring the defendant within the jurisdiction of the court, and is a matter of personal privilege. United States Consol. Seeded Raisin Co. v. Phœnix Raisin Seeding & Packing Co. (C. C. 1903) 124 Fed. 234.

12. —— Acts constituting waiver.—The personal privilege granted by this section is waived by defendant's appearance and failure to object to the jurisdiction before answer. United States Consol. Seeded Raisin Co. v. Phœnix Raisin Seeding & Packing Co. (C. C. 1903) 124 Fed. 234.

Where a federal court in which suit was brought was without jurisdiction, because neither plaintiff nor defendant resided in the state or district, and such want of jurisdiction was raised by demurrer, defendant did not waive the objection either by appearing at the taking of depositions and cross-examining witness without declaring its intent to insist on its objection to the jurisdiction, or by stipulating during the taking of such depositions that copies of letters and telegrams might be used by either party in lieu of the originals. Stonega Coal & Coke Co. v. Louisville & N. R. Co. (C. C. 1905) 139 Fed. 271.

The objection that a court is without jurisdiction of a suit for infringement of a patent because not brought in the district of which defendant is an inhabitant or a district in which infringement was committed, and defendant has a regular and established place of business, if apparent on the face of the pleadings, is waived by the filing of a general demurrer or any other act which constitutes a general appearance. Thomson-Houston Electric Co. v. Electrose Mfg. Co. (C. C. 1907) 155 Fed. 543.

13. —— Time and manner of raising objections to court's jurisdiction.—In a suit against a corporation of another state, the question whether it has been shown that the article complained of, conceding it to be an infringement, was sold by defendant within the district, so as to give the court jurisdiction, may be presented by a motion to dismiss made at the close of plaintiff's proofs. Streat v. American Rubber Co. (C. C. 1902) 115 Fed. 634.

The court having full jurisdiction of patent cases, the limitation in respect to the district of residence of a defendant or a place of business and acts of infringement may be waived, and objection cannot be made after the case has proceeded beyond the pleadings, and into the taking of testimony. General Electric Co. v. Wagner Electric Mfg. Co. (C. C. 1903) 123 Fed. 101, decree affirmed (1904) 130 Fed. 772, 66 C. C. A. 82.

14. Service of process.—Where a suit was commenced for an infringement of a patent right, and process was served by attaching property of an absent defendant, this was not sufficient to give the court jurisdiction. Chaffee v. Hayward (1857) 20 How. 208, 215, 15 L. Ed. 804.

This section is permissive only, and service on a corporation may be made on an officer found in the district. National Electric Signaling Co. v. Telefunken Wireless Telegraph Co. (D. C. 1912) 194 Fed. 893.

Under this section a service of process in a suit against a nonresident corporation, on one shown only to be the designated agent of the corporation under a state statute, is not sufficient to give the court jurisdiction. United States Gramophone Co. v. Columbia Phonograph Co. (C. C. 1901) 106 Fed. 220.

In a suit against a corporation, in order to authorize service on an agent, the complaint must show the place of incorporation, so as to show that defendant is not an inhabitant of the district. Weller v. Pennsylvania R. Co. (C. C. 1902) 113 Fed. 502.

15. Return of service of process as showing jurisdictional facts.—A return of service of process at "the place of business" of defendant is not conclusive that such place is a regular and established place of business, where the defendant is not an inhabitant of the district, dependent on the defendant having a regular and established place of business therein. L. E. Waterman Co. v. Parker Pen Co. (C. C. 1900) 100 Fed. 544.

16. Pleading, requisites of bill to show jurisdiction.—An undenied allegation, in a bill for infringement against a nonresident corporation, that defendant "has a regular and established place of business" within the district, relates to the date of the suit, and establishes such fact for jurisdictional purposes. Streat v. American Rubber Co. (C. C. 1902) 115 Fed. 634.

A court is without jurisdiction where the bill shows that defendant is a nonresident of the district, and it is not alleged that any act of infringement was committed within the district, or that defendant has an office or place of business within the district, with an agent in charge on whom service could

properly be made. International Wireless Telegraph Co. v. Fessenden (C. C. 1903) 131 Fed. 491.

It is not essential that the bill should use the words, "regular and established," in characterizing defendant's place of business, if it appears that it is such from the facts alleged. Thomson-Houston Electric Co. v. Electrose Mfg. Co. (C. C. 1907) 155 Fed. 543.

A bill against a foreign corporation, in order to confer jurisdiction on the court, must allege both acts of infringement in the district where filed, and that the defendant has at the time of suit a regular and established place of business there. Underwood Typewriter Co. v. Fox Typewriter Co. (C. C. 1908) 158 Fed. 476. And see Weller v. Pennsylvania R. Co. (C. C. 1902) 113 Fed. 502, holding that an averment that defendant is incorporated in a certain other state named is sufficient to show that it is not an inhabitant of Colorado.

Act March 3, 1897, c. 395, 29 Stat. 695, provides that in suits for infringement of patents the circuit courts shall have jurisdiction in the district where defendant is an inhabitant, or where the infringement is committed and defendant had an established place of business, and that in the latter case service may be made on the agent conducting the business. Held, that in a suit against a corporation, in order to authorize service on an agent, the complaint must show the place of incorporation, so as to show that defendant is not an inhabitant of the district. Weller v. Pennsylvania R. Co. (C. C. 1902) 113 Fed. 502.

17. —— To authorize service of process on agent.—In a suit against a corporation, in order to authorize service on an agent, the complaint must show the place of incorporation, so as to show that defendant is not an inhabitant of the district. Weller v. Pennsylvania R. Co. (C. C. 1902) 113 Fed. 502.

18. Order vacating service of process as appealable.—Where it did not appear from an order sustaining a motion to set aside process served on a foreign corporation in an action for infringement of patent, on the ground that the place where it was served was not defendant's place of business, that defendant did not have a place of business within the district in which the suit was brought, the order vacating the service was not a final decision or decree from which an appeal would lie to the circuit court of appeals. L. E. Waterman Co. v. Parker Pen Co. (1901) 107 Fed. 141, 46 C. C. A. 203.

19. Decisions under general statute defining venue.—See post, § 1033, and notes thereunder.

Cited without definite application, Cely v. Griffin (C. C. 1902) 113 Fed. 981; International Wireless Telegraph Co. v. Fessenden (C. C. 1904) 131 Fed. 493; Lederer v. Ferris (C. C. 1906) 149 Fed. 250, 251; Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co. (C. C. 1910) 181 Fed. 974; Kentucky Coal Lands Co. v. Mineral Development Co. (C. C. 1911) 191 Fed. 899; McGill v. Sorensen (D. C. 1913) 209 Fed. 876.

§ 1031. (Jud. Code, § 49.) Proceedings to enjoin Comptroller of the Currency.

All proceedings by any national banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to national banking associations, shall be had in the district where such association is located.

R. S. § 736. Act March 3, 1911, c. 231, § 49, 36 Stat. 1100.

Notes of Decisions

Effect of appointment of receiver.—The power given in this section to apply to a federal court to enjoin further proceedings is evidence tending to refute the theory that a bank after the appointment of a receiver ceases to exist. Bank of Bethel v. Pahquioque Bank (1871) 14 Wall. 383, 398, 20 L. Ed. 840.

Cited without definite application, Butterworth v. Hill (1885) 5 Sup. Ct. 796, 798, 114 U. S. 128, 29 L. Ed. 119.

§ 1032. (Jud. Code, § 50.) When a part of several defendants can not be served.

When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as

aforesaid, shall not constitute matter of abatement or objection to the suit.

R. S. § 737. Act March 3, 1911, c. 231, § 50, 36 Stat. 1101.

Notes of Decisions

1. Construction of statute in general.
2. Equity principles or practice unaffected by statute.
3. Privilege of nonresidents to appear.
4. Corporation as inhabitant.
5. Removal of causes.
6. Parties indispensable or necessary to exercise of jurisdiction in general.
7. —— In particular cases.
8. Parties not indispensable or necessary to exercise of jurisdiction in general.
9. —— In particular cases.
10. Nominal parties.
11. Joinder or nonjoinder of formal or improper parties.
12. Parties too numerous for joinder.
13. Bringing in foreign corporation.
14. Bringing in parties to ancillary suit.
15. Time and manner of raising objection to absence of party.
16. Parties on appeal.
17. Jurisdictional question on appeal.
18. Federal question.

1. Construction of statute in general.—The incapacity imposed on circuit courts to proceed against any person residing within the United States, but not within the district for which the court may be held, justifies them in dispensing with parties merely formal. Russell v. Clark (1812) 7 Cranch, 69, 98, 3 L. Ed. 271.

This section provides for a case where there are several defendants, and one or more may be outside of the district. Dick v. Foraker (1894) 15 Sup. Ct. 124, 127, 155 U. S. 404, 39 L. Ed. 201.

This statute is controlling in the federal courts to the exclusion of state legislation inconsistent therewith on the same subject; for section 1537, post, does not apply in respect to matters on which congress has prescribed a definite rule. Allnut v. Lancaster (C. C. 1896) 76 Fed. 131.

This section is but a legislative affirmation of the rule that a nonjoinder of persons who are not inhabitants of the district, but are mere formal parties, or even necessary parties whose interests are separable from those before the court, will not prevent the court from proceeding to final trial and adjudication, as between the parties before it, when it can proceed to a decree and do complete and final justice without affecting the rights of others, but the court cannot proceed without the presence of indispensable parties. McAulay v. Moody (C. C. 1911) 185 Fed. 144.

2. Equity principles or practice unaffected by statute.—The general rule in equity that all persons legally or beneficially interested in a subject-matter before the court must be made parties has been so modified by this statute and the rules of the Supreme Court as to authorize courts in equity to dispense with proper and even necessary parties to a suit under the circumstances specified in the statute and rules. Long v. Buford (C. C. 1885) 24 Fed. 241, 246. The general rule that equity will require all parties in interest to be brought in, to the end that one suit may end the litigation, is one of convenience, and is not to be enforced when it would work injury to the rights of the parties before the court. Smith v. Lee (C. C. 1896) 77 Fed. 779. And, notwithstanding Act 1839, incorporated into this section, and rule 47 for the equity practice of the circuit courts, passed in pursuance thereof, relieving plaintiff in equity from the obligation of making persons in interest parties when the effect of their joinder would oust the court of jurisdiction, no decree can be made between the parties, before the court, involving the rights of such omitted party. Hamilton v. Savannah, F. & W. Ry. Co. (C. C. 1892) 49 Fed. 412. But see Hyams v. Old Dominion Co. (D. C. 1913) 204 Fed. 681, holding that this section was not intended to change the principles of equity, or of equity practice.

3. Privilege of nonresidents to appear.—Act Feb. 28, 1839, incorporated into this section, by implication, confers jurisdiction over nonresidents of the district where a suit is brought if they voluntarily appear therein, and a suit can proceed against such nonresidents if they voluntarily appear, or without them if they are not necessary parties. Jones v. Andrews (1870) 10 Wall. 327, 332, 19 L. Ed. 935. The effect of Act Feb. 28, 1839, is to permit a person, nonresident of the district or circuit to come in of his own motion and submit to the jurisdiction. If he stays away, his rights are not concluded by anything that may be done in the suit. McPike v. Wells (1876) 54 Miss. 136.

4. Corporation as inhabitant.—A corporation created by a state and transacting business therein is to be deemed an inhabitant of the state for all purposes of suing and being sued, and an averment of the fact of its creation and the place of its doing business is sufficient to give the circuit courts jurisdiction. Louisville, C. & C. R. Co. v. Letson (1844) 2 How. 497, 556, 11 L. Ed. 353.

5. Removal of causes.—This section does not relate to the removal of causes. Patchin v. Hunter (C. C. 1889) 38 Fed. 51, 53; Ames v. Chicago, S. F. & C. Ry. Co. (C. C. 1889) 39 Fed. 881.

6. Parties indispensable or necessary to exercise of jurisdiction in general.—Where no relief can be given without

taking an account between an absent party and one before the court, though the defect of parties may not defeat the jurisdiction, strictly speaking, yet the court will make no decree in favor of the complainant. It is proper, however, to make a prior incumbrancer, who holds the legal title, a party to a bill to set aside a fraudulent conveyance in order that the whole title may be sold under the decree; but the court may order a sale subject to the incumbrance, without having such prior incumbrancer before it. If the prior incumbrancer is out of the jurisdiction, or cannot be joined without defeating it, it is proper to dispense with his presence and order a sale subject to his incumbrance, which will not be affected by the decree. Hagan v. Walker (1852) 14 How. 29, 36, 14 L. Ed. 312.

Where a person will be directly affected by a decree, he is an indispensable party, but a person interested in the controversy, but who will not be directly affected by decree, is not an indispensable party, but he should be made a party, if possible, and the court will not proceed to a decree without him if he can be reached, and where one has only an interest in the subject-matter of a litigation which may be settled in the suit, he may be made a party or not at the option of the complainant. Williams v. Bankhead (1873) 19 Wall. 563, 571, 22 L. Ed. 184.

Where a decree was entered in favor of a complainant in a suit in which because of the absence of an indispensable party whose rights were directly affected the court was not warranted in granting any relief, the defect of parties cannot be waived by the parties before the court, and the fact that no objection was made on that ground cannot prevent the consideration of the question by an appellate court. McConnell v. Dennis (1907) 153 Fed. 547, 82 C. C. A. 501.

Persons who, if within the jurisdiction of the court, might be regarded as proper and necessary parties to a suit in equity, will not, when beyond the jurisdiction of the court, be regarded as indispensable parties, so that their absence would defeat the jurisdiction, if the rights of the complainant and of the respondents before the court can be determined without them, and they will not be in any manner affected by the decree. Union Mill & Mining Co. v. Dangberg (C. C. 1897) 81 Fed. 73.

"Indispensable party" defined. O'Neil v. Wolcott Mining Co. (1909) 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200.

This section does not contemplate a change in the jurisdiction of the federal courts as regards the character of the parties. Each of the plaintiffs must be capable of suing, and each of the defendants capable of being sued. Commercial & Railroad Bank of Vicksburg v. Slocomb (1840) 14 Pet. 60, 65, 10 L. Ed. 354. It enlarges jurisdiction as to the character of the parties, but the clause exempting absent defendants from operation of the judgment or decree is an exception to such enlargement, and must be strictly applied. Louisville, C. & C. R. Co. v. Letson (1844) 2 How. 497, 556, 11 L. Ed. 353. It has reference to instances of mere formal parties, or where the cause may be determined, without essentially affecting the interests of absent parties, as where their interests are separable from those before the court. Greer, Mills & Co. v. Stoller (C. C. 1896) 77 Fed. 1, 5. It cannot be construed so as to convert real and necessary parties into no parties at all. Morgan v. Kansas Pac. R. Co. (C. C. 1882) 15 Fed. 55, 57. It does not enable a federal court to make a decree in equity, in the absence of an indispensable party whose rights must necessarily be affected thereby. Russell v. Clark (1812) 7 Cranch, 69, 72, 3 L. Ed. 271; Shields v. Barrow (1854) 17 How. 130, 139, 15 L. Ed. 158; Coiron v. Millaudon (1856) 19 How. 113, 15 L. Ed. 575; Barney v. Baltimore (1867) 6 Wall. 280, 18 L. Ed. 825; Gregory v. Stetson (1890) 10 Sup. Ct. 422, 133 U. S. 579, 33 L. Ed. 792; Swan Land & Cattle Co. v. Frank (1893) 13 Sup. Ct. 691, 694, 148 U. S. 603, 37 L. Ed. 577; Greeley v. Lowe (1894) 15 Sup. Ct. 24, 26, 155 U. S. 58, 39 L. Ed. 69; Hazard v. Durant (C. C. 1884) 19 Fed. 471; Goldsmith v. Gilliland (C. C. 1885) 24 Fed. 154, 157.

This section held not to apply to partition between part owners or tenants in common, but to refer, among others, to suits at law against joint obligors in contract, verbal or written. Barney v. Baltimore (1867) 6 Wall. 280, 285, 18 L. Ed. 825.

A suit can proceed without nonresidents not necessary parties. Jones v. Andrews (1870) 10 Wall. 327, 332, 19 L. Ed. 935.

The act of 1839, incorporated into this section, and rule of the Supreme Court on the subject held not to warrant dispensing with parties whose presence was before indispensable. Ribon v. Chicago, R. I. & P. R. Co. (1872) 16 Wall. 446, 450, 21 L. Ed. 367.

The federal court has jurisdiction of a suit in equity of a local nature where a citizen of one state prosecutes citizens of other states in a district where the property is situated and of which one of the defendants is an inhabitant, and, if all defendants are served with process in the district, the decree will bind all. Ober v. Gallagher (1876) 93 U. S. 199, 204, 23 L. Ed. 829.

If the rights of parties not before the court are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the

rights of the absent parties, the peculiar constitution of the circuit court forms no ground for dispensing with such parties. Mallow v. Hinde (1827) 12 Wheat. 193, 197, 6 L. Ed. 599.

The act does not apply to a case brought by an Indiana corporation against a Michigan corporation in the circuit court for the district of Michigan to restrain the Michigan corporation from constructing a road in Indiana pursuant to an agreement with another Indiana corporation not made a party. Northern Indiana R. Co. v. Michigan Cent. R. Co. (1853) 15 How. 233, 246, 14 L. Ed. 674.

Where a bill is filed against several defendants, all of whom are residents of another state and are necessary defendants, and some of them refuse to appear, and no service is made on them, the court acquires no jurisdiction, and the bill must be dismissed as to those who appear and move for dismissal. Herndon v. Ridgway (1854) 17 How. 424, 425, 15 L. Ed. 100.

Whenever a decree cannot be made without prejudice to one not a party, the bill must be dismissed. Fourth Nat. Bank v. New Orleans & C. R. Co. (1870) 11 Wall. 624, 631, 20 L. Ed. 82.

The rights of an adverse claimant who is beyond the jurisdiction of the court held involved to such a degree that equity rule 47 and this section are inapplicable, and no decree can be rendered until such adverse claimant is made a party. Gregory v. Stetson (1890) 10 Sup. Ct. 422, 133 U. S. 579, 33 L. Ed. 792, affirming Gregory v. Swift (C. C. 1889) 39 Fed. 708.

One having a claim for unliquidated damages for fraud in a sale, against a corporation which has sold its assets, distributed its corporate funds among its stockholders, and suspended business, but which has not been legally dissolved, cannot maintain a suit in equity in a federal court against part of the stockholders to subject to his claims the assets received by them without making the corporation a party, though it has no officers or agents on whom personal service can be made by the statutes of the state of incorporation. Swan Land & Cattle Co. v. Frank (1893) 13 Sup. Ct. 691, 694, 148 U. S. 603, 37 L. Ed. 577.

A federal court cannot make a decree affecting persons not parties to a suit, or a decree which so involves the rights of such parties that final judgment cannot be had between the parties present without affecting those rights, though equity rule 47 and this section give the court discretion to proceed in the absence of proper parties when an effective judgment can be rendered as to the parties present without prejudice to the rights of the absentees. Collins Mfg. Co. v. Ferguson & Hutter's Trustee (C. C. 1893) 54 Fed. 721, following Fourth Nat. Bank of City of New York v. New Orleans & Carrollton Railroad Co. (1870) 11 Wall. 624, 20 L. Ed. 82, and Hagan v. Walker (1852) 14 How. 29, 14 L. Ed. 312.

It is the absence of indispensable parties only that is fatal to the jurisdiction. O'Neil v. Wolcott Mining Co. (1909) 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200. So held in a suit under the Meat Inspection Act. St. Louis Independent Packing Co. v. Houston (1914) 215 Fed. 553, 132 C. C. A. 65, reversing order (D. C. 1913) 204 Fed. 120.

The rights of a nonresident who does not submit to the jurisdiction of the court are not concluded by anything done in the suit. McPike v. Wells (1876) 54 Miss. 136.

7. —— **In particular cases.**—Under this section and Act 1875, § 8, post, § 1039, a federal court has jurisdiction of a suit to remove a cloud from a title to land situated in the district where suit is brought, though defendant is a citizen of another state. Dick v. Foraker (1894) 15 Sup. Ct. 124, 127, 155 U. S. 404, 39 L. Ed. 201.

Where a citizen of Illinois filed a bill for accounting against citizens of Wisconsin, executors of an estate, and alleged that one L. was also executor, but was a citizen of Illinois, outside the jurisdiction, and therefore not made a defendant, L., having qualified and acted as executor, was such an indispensable party that a demurrer for his nonjoinder must be sustained, notwithstanding the statute. Conolly v. Wells (C. C. 1887) 33 Fed. 205.

This section does not require a court to entertain jurisdiction of a bill for an account against three partners, two of whom are nonresidents, were not served, and do not appear. Duchesse d'Auxy v. Porter (C. C. 1890) 41 Fed. 68.

Notwithstanding this section, the court cannot proceed to final decree in a suit by a beneficiary against four of nine trustees of an unincorporated association, charging an abuse of their powers, and seeking to restrain an alleged attempt to wind up the trust. Wall v. Thomas (C. C. 1890) 41 Fed. 620.

This section does not give the court jurisdiction of a suit to foreclose a mortgage given by an executor under a power in the will on land devised to testator's children, where some of the devisees are nonresidents, and are neither made parties defendant, nor appear to answer. Detweiler v. Holderbaum (C. C. 1890) 42 Fed. 337.

Where a bill charged that a firm and its individual members wholly failed to perform a contract with complainant, to complainant's damage in a sum stated, it alleged a cause of action against the firm and the individuals composing it; their liability being joint and several. U. S. v. Hughes (C. C. 1908) 161 Fed. 1021.

Defendants M., citizens of Oregon, executed their demand note to A. Bros., formerly engaged in business in Ore-

gon as partners. The firm consisted of three brothers, two of whom, who were subjects of Great Britain, filed a bill in the federal Circuit Court for the District of Oregon, alleging that one of them owned 43⅓ per cent. of the note; that the other owned 13⅓ per cent.; that the other brother, who was a citizen and resident of Montana, owned 43⅓ per cent.; and that, by reason of his refusal to join complainants in any action or suit thereon, complainants were unable to maintain an action at law against the defendants M. Defendant A. did not appear, and defendants M. demurred on the ground that the court was without jurisdiction because he was an indispensable party and could not be sued within the district. Held, that, since no decree could be rendered without an adjudication of the rights of defendant A., he was an indispensable party, and, not being subject to suit in a federal court sitting in Oregon, the court could not entertain jurisdiction under this section. McAulay v. Moody (C. C. 1911) 185 Fed. 144.

8. Parties not indispensable or necessary to exercise of jurisdiction in general.—Where a distinct interest vested in a party so that substantial justice, so far as he was concerned, could be done without affecting the other defendants, the jurisdiction of the court might be exercised as to him alone. Cameron v. M'Roberts (1818) 3 Wheat. 591, 593, 4 L. Ed. 467.

The rule requiring all the parties in interest to be brought before the court does not affect jurisdiction, but is subject to the discretion of the court, and, where a case in the federal courts may be completely decided as between the parties, an interest existing in some other person whom the process of the court cannot reach will not prevent a decree on the merits. Elmendorf v. Taylor (1825) 10 Wheat. 152, 166, 6 L. Ed. 289.

Where the defendants have distinct interests, so that substantial justice can be done by decreeing for or against one or more of them over whom the court has jurisdiction, without affecting the interest of others, its jurisdiction may be exercised as to them. If a case can be decided on its merits between those who are regularly before the federal courts, the fact that other persons not within their jurisdiction may be collaterally or incidentally concerned will not expel other suitors who have a constitutional and legal right to submit their case to the federal courts where to join such persons would deprive the courts of jurisdiction. Vattier v. Hinde (1833) 7 Pet. 252, 262, 8 L. Ed. 675.

Where four persons contracted with a citizen of Ohio and suit was brought in Indiana against three of them who were citizens thereof, the nonjoinder of the fourth was held justified by this section. Clearwater v. Meredith (1858) 21 How. 489, 490, 16 L. Ed. 201.

A plea of nonjoinder will be overruled where it appears that the parties omitted are not inhabitants of the federal district, and do not voluntarily appear. Gray v. National Steamship Co. (C. C. 1879) Fed. Cas. No. 5,726, affirmed (1885) 115 U. S. 116, 5 Sup. Ct. 1166, 29 L. Ed. 309.

When effectual relief can be given against the parties actually appearing, the courts of the United States will not dismiss a bill because of the absence of other parties whose appearance would be required if they were within the jurisdiction of the court. Hazard v. Durant (C. C. 1884) 19 Fed. 471.

Where one of the defendants lives in the district where suit is brought, and the other defendant and the plaintiff live in different districts, the action will be dismissed as to the nonresident, but not as to the resident, defendant. Bensinger Self-Adding Cash Register Co. v. National Cash Register Co. (C. C. 1890) 42 Fed. 81.

9. —— In particular cases.—In a suit by heirs to set aside a conveyance obtained from their ancestor, a final decree for the sale of the property cannot be pronounced until all the heirs are brought before the court if they are within the jurisdiction. If all of them cannot be brought before the court, the undivided interest of those who are made parties may be sold. Harding v. Handy (1826) 11 Wheat. 103, 133, 6 L. Ed. 429.

In an action against the stockholders of a voluntary association formed for the purpose of engaging in banking, it is not necessary as a condition to a decree that all the stockholders be brought in. Mandeville v. Riggs (1829) 2 Pet. 482, 488, 7 L. Ed. 493.

Where a nuisance has been erected and is maintained by several persons or corporations, those who are not within the jurisdiction of the court need not be joined as defendants in a bill to abate it. Mississippi & M. R. Co. v. Ward (1862) 2 Black, 485, 492, 17 L. Ed. 311.

All persons materially interested in the subject-matter of the suit should be made parties to it, but the rule will yield when it must yield to accomplish the ends of justice. In a bill in equity in a circuit court of the United States by one distributee of a decedent's estate against the administrator, it is not indispensable that the other distributees should be made parties where the court is able to proceed to a decree without injury to absent parties equally interested. Payne v. Hook (1868) 7 Wall. 425, 431, 19 L. Ed. 260.

A nonresident is not such an indispensable party defendant that his absence will defeat the jurisdiction of a federal court of chancery over a suit brought by an heir against the execu-

tor and other heirs, to determine her interest in an alleged lapsed legacy and the consequent increase in the residuary estate, in view of this section, and of equity rule 47, which permit the court to proceed with the trial and adjudication of a suit as between the parties who are properly before it, and preserve the rights of parties not voluntarily appearing, providing their rights are not prejudiced by the decree to be rendered. Waterman v. Canal-Louisiana Bank & Trust Co. (1909) 30 Sup. Ct. 10, 14, 215 U. S. 33, 54 L. Ed. 80.

A bill to set aside a purchase of land as obtained by fraud is not demurrable for nonjoinder of the agent, who made the sale, who is a resident of a different district from defendants, under this section, and equity rule 47, which authorizes the court to proceed without parties, otherwise necessary, who cannot be joined because they are out of the jurisdiction of the court. Gross v. George W. Scott Mfg. Co. (C. C. 1891) 48 Fed. 35.

The fact that the principal debtor in a creditors' bill is a nonresident, and cannot be served, does not oust the jurisdiction of the court to decree against resident defendants such relief as may be proper as against them alone. Plume & Atwood Mfg. Co. v. Baldwin (C. C. 1898) 87 Fed. 785.

In an ancillary suit for the distribution of a fund, held that a partial distribution could be decreed between the parties before the court. American Surety Co. v. Lawrenceville Cement Co. (C. C. 1899) 96 Fed. 25, 31.

The fact that a summons describes the defendants named therein as "partners" will not prevent the action from proceeding against one, who alone was served, where the declaration does not show a joint-cause of action. Mason v. Connors (C. C. 1904) 129 Fed. 831.

Where suit was brought to recover profits made by one of three trustees, there being no claim that defendant shared the gains and profit sought to be recovered with his co-trustees, they were not necessary parties to the bill, as provided by this section and Equity Rules 22, 47, and 53. Bay State Gas Co. of Delaware v. Rogers (C. C. 1906) 147 Fed. 557.

Under this section and Code Iowa 1897, § 3465, providing that "where two or more parties are bound by contract * * * or statute whether jointly only, or jointly and severally, or severally only, * * * the action thereon may at the plaintiff's option be brought against any or all of them" and section 3410, providing that "in an action against several executors or administrators they shall be considered one person, and judgment may be taken and execution issued against all as such although only a part were served with notice," a federal court had jurisdiction of a suit against executors appointed in Iowa to establish a claim against the estate of their testator, and its jurisdiction was not affected by the fact that one of the executors joined was a citizen and resident of another state and was not served, such executor not being an indispensable party under the Iowa statute. Farmers' Bank of Cuba City, Wis., v. Wright (C. C. 1908) 158 Fed. 841.

Under this section and Code Civ. Proc. N. Y. § 1932, providing that, where a complaint is against two or more defendants alleged to be jointly indebted, and the summons is served on one or more, but not on all, plaintiff may proceed against the defendants served unless the court otherwise directs, and may take final judgment against such defendants, which is conclusive of their liability, etc., plaintiff may make all of several joint debtors parties to the suit, though he can obtain service on only one of them, and may proceed and recover judgment against the one served without reference to the others. Ostrander v. Blandin (D. C. 1914) 211 Fed. 733.

Code Iowa 1897, § 3465, provides that "where two or more parties are bound by contract * * * or statute whether jointly only, or jointly and severally, or severally only, * * * the action thereon may at the plaintiff's option be brought against any or all of them." Section 3410 provides that "in an action against several executors or administrators they shall be considered one person, and judgment may be taken and execution issued against all as such although only a part were served with notice." Held, in view of this section, that, under such statute, a federal court had jurisdiction of a suit against executors appointed in Iowa to establish a claim against the estate of their testator, and that its jurisdiction was not affected by the fact that one of the executors joined was a citizen and resident of another state and was not served; such executor not being an indispensable party under the Iowa statute. Farmers' Bank of Cuba City, Wis., v. Wright (C. C. 1908) 158 Fed. 841.

10. Nominal parties.—Where persons not made parties have a nominal interest as defendants and reside beyond the jurisdiction of the court, it is error for the Circuit Court to dismiss the bill because they were not made parties, but the court should go on to decree against the actual defendants; they all having a beneficial interest. Union Bank v. Stafford (1851) 12 How. 327, 341, 13 L. Ed. 1008.

Where the controversy is between citizens of different states who are in court, inability to make service upon another named as a defendant, whose interest is merely ministerial, will not deprive the court of jurisdiction under this section. Slater Trust Co. v. Randolph-Macon Coal Co. (C. C. 1908) 166 Fed. 171.

11. Joinder or nonjoinder of formal or improper parties.—The court is not ousted of its jurisdiction by the joinder or nonjoinder of merely formal parties not entitled to sue, or liable to be sued, in the United States courts. Wormley v. Wormley (1823) 8 Wheat. 421, 451, 5 L. Ed. 651.

The joinder of improper parties as citizens of the same state does not affect the jurisdiction of the courts in equity as between the parties properly before the court where a decree may be rendered as between the parties not citizens of the same state. Carneal v. Banks (1825) 10 Wheat. 181, 187, 6 L. Ed. 297.

In cases within the statute, the omission of a party not found is not a matter of objection to the suit but the statute does not enable the court to proceed in the absence of indispensable parties. Vincent Oil Co. v. Gulf Refining Co. of Louisiana (1912) 195 Fed. 434, 115 C. C. A. 336.

12. Parties too numerous for joinder.—Where the parties interested are very numerous, and it would be almost impossible to bring them all before the court, the court will, notwithstanding a plea of want of parties, proceed to a decree. In re Dennett (1915) 221 Fed. 350, 136 C. C. A. 422, certiorari denied Dennett v. Sawtelle (1915) 35 S. Ct. 791, 238 U. S. 628, 59 L. Ed. 1496.

13. Bringing in foreign corporation.—Under section 1030, ante, and this section, foreign corporation, which had assumed defense of patent infringement suit against user of its alleged infringing device, held to be made a party to the record. Dicks Press Guard Mfg. Co. v. Bowen (D. C. 1916) 229 Fed. 193.

14. Bringing in parties to ancillary suit.—A federal court held to have jurisdiction of a suit on the ground that it was ancillary to a prior suit, notwithstanding the fact that new parties were brought in. Ferguson v. Omaha & S. W. R. Co. (1915) 227 Fed. 513, 142 C. C. A. 145.

15. Time and manner of raising objection to absence of party.—The court can make no decree in the absence of a party whose rights will be affected, and the objection may be taken on the hearing or in the appellate court. Coiron v. Millaudon (1856) 19 How. 113, 115, 15 L. Ed. 575.

Want of parties may be objected to at any time, even in the appellate court. Carson v. Robertson (C. C. 1869) Fed. Cas. No. 2,466.

An objection for want of proper parties defendant, not made by demurrer, plea, or answer, will be held too late, where a decree can be made granting the relief sought without affecting the rights of absent parties; otherwise not, though they are beyond the jurisdiction of the court. Florence Sewing Mach. Co. v. Singer Mfg. Co. (C. C. 1870) Fed. Cas. No. 4,884.

A demurrer as to parties must be considered as setting up what would be termed "matters in abatement," and perhaps the better practice in a federal court would be to set up such matters by a plea in abatement. Noyes v. Barnard (1894) 63 Fed. 782, 787, 11 C. C. A. 424.

Nonresidents, only, can object to the jurisdiction when residents and nonresidents of the district are joined in one suit. Smith v. Atchison, T. & S. F. R. Co. (C. C. 1894) 64 Fed. 1.

16. Parties on appeal.—One who is named as a party, but who is not served with process, and does not appear, is not a party to the record, and cannot be heard on appeal. Cook v. Lasher (1896) 73 Fed. 701, 704, 19 C. C. A. 654.

17. Jurisdictional question on appeal.—A decree of a federal court on removal from a state court, dismissing a suit for defect of parties, unaffected by this section or equity rule 47, where a nonresident corporation had not been served, does not present any question of jurisdiction under Act March 3, 1891, § 5, post, § 1215. Bogart v. Southern Pac. Co. (1913) 33 Sup. Ct. 497, 228 U. S. 137, 57 L. Ed. 768, dismissing appeal Lawrence v. Southern Pac. Co. (C. C. 1910) 180 Fed. 822.

18. Federal question.—A decree of a federal circuit court, in a case removed from a state court for diversity of citizenship, dismissing the suit as the result of applying the general rule as to indispensable parties, unaffected by this section, or equity rule 47, where a certain nonresident corporation which it found was such a party had not been served, and had not appeared or waived service, does not present any question of the jurisdiction of the court as a Federal tribunal which, under the act of March 3, 1891, § 5, post, § 1215, will sustain an appeal to the federal Supreme Court. Bogart v. Southern Pac. Co. (1913) 33 Sup. Ct. 497, 228 U. S. 137, 57 L. Ed. 768.

Cited without definite application, Rundle v. Delaware & Raritan Canal Co. (1852) 14 How. 80, 95, 14 L. Ed. 335 (separate opinion); Butterworth v. Hill (1885) 5 Sup. Ct. 796, 798, 114 U. S. 128, 29 L. Ed. 119; Hicklin v. Marco (1893) 56 Fed. 549, 553, 6 C. C. A. 10; Pond v. Sibley (C. C. 1881) 7 Fed. 129, 137; Coann v. Atlanta Cotton Factory Co. (C. C. 1882) 14 Fed. 4; Martin v. Meyer (C. C. 1891) 45 Fed. 435, 436; U. S. v. McGlashen (C. C. 1895) 66 Fed. 537, 538; City Water Supply Co. v. Ottumwa (C. C. 1903) 120 Fed. 309; Froment v. Duclos (D. C. 1887) 30 Fed. 385, 386; Revett v. Clise (D. C. 1913) 207 Fed. 673, 676, 677.

§ 1033. (Jud. Code, § 51.) Civil suits; where to be brought.

Except as provided in the five succeeding sections, no person shall be arrested in one district for trial in another, in any civil action before a district court; and, except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

R. S. § 739. Act March 3, 1875, c. 137, § 1, 18 Stat. 470. Act March 3, 1887, c. 373, § 1, 24 Stat. 552. Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433. Act March 3, 1911, c. 231, § 51, 36 Stat. 1101.

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I. CONSTRUCTION AND OPERATION OF STATUTE

1. Construction in general.—This section does not affect the general juris-

diction of the court, but merely confers a personal privilege or exemption on defendant. Gracie v. Palmer (1823) 8 Wheat. 699, 5 L. Ed. 719; Toland v. Sprague (1838) 12 Pet. 300, 330, 9 L. Ed. 1093; Ex parte Schollenberger (1877) 96 U. S. 369, 378, 24 L. Ed. 853; St. Louis & S. F. Ry. Co. v. McBride (1891) 11 Sup. Ct. 982, 983, 141 U. S. 127, 35 L. Ed. 659; Camp v. Bousal (1913) 203 Fed. 913, 122 C. C. A. 207; Jewett v. Bradford Sav. Bank & Trust Co. (C. C. 1891) 45 Fed. 801; Gray v. Quicksilver Min. Co. (C. C. 1884) 21 Fed. 288; U. S. v. American Bell Tel. Co. (C. C. 1886) 29 Fed. 17, 34; Cooley v. McArthur (C. C. 1888) 35 Fed. 372; Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C. 1888) 37 Fed. 3; Purcell v. British Land & Mortgage Co. (C. C. 1890) 42 Fed. 465; Smith v. Atchison, T. & S. F. R. Co. (C. C. 1894) 64 Fed. 1; Marks v. Marks (C. C. 1896) 75 Fed. 321; Fosha v. Western Union Tel. Co. (C. C. 1902) 114 Fed. 701; Pepper v. Rogers (C. C. 1904) 128 Fed. 987; Von Voight v. Michigan Cent. R. Co. (C. C. 1904) 130 Fed. 398; Mahr v. Union Pac. R. Co. (C. C.) 140 Fed. 921, judgment affirmed (1909) 170 Fed. 699, 96 C. C. A. 19; Peale v. Marian Coal Co. (C. C. 1909) 172 Fed. 639; Fribourg v. Pullman Co. (C. C. 1910) 176 Fed. 981; Irving v. Joint Dist. Council of New York and Vicinity of United Brotherhood of Carpenters, etc. (C. C. 1910) 180 Fed. 896; Gearlds v. Johnson (C. C. 1911) 183 Fed. 611; H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C. 1911) 189 Fed. 224; McEldowney v. Card (C. C. 1911) 193 Fed. 475; Shutts v. First Nat. Bank (D. C. 1899) 98 Fed. 705, 709; Smellie v. Southern Pac. Co. (D. C. 1912) 197 Fed. 641; Trinity & S. Ry. Co. v. Brown (1898) 45 S. W. 793, 91 Tex. 673; State v. Frost (1902) 89 N. W. 915, 113 Wis. 623.

By this act congress only invested circuit courts with jurisdiction of cases where the suit is between a citizen of the state where the suit is brought and a citizen of another state, and no civil suit can be brought before such a court against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he should be found at the time of serving the writ. Jones v. Andrews (1870) 10 Wall. 327, 331, 19 L. Ed. 935.

A civil suit cannot be brought by original process in the federal court in any other district than that of which defendant is an inhabitant, or in which he is served with process. Nazro v. Cragin (C. C. 1874) Fed. Cas. No. 10,062.

The venue of all cases is governed by this act, except admiralty cases, and cases governed by special statutes, like patent cases, forfeitures, seizures on land, commerce cases. Harding v. Standard Oil Co. (C. C. 1909) 170 Fed. 651.

In a suit in a federal court against numerous defendants on a contract binding them jointly and severally, the jurisdiction of the court is not defeated because some of the defendants are not inhabitants of nor served within the district, but the case may proceed against those who have been served. Richmond Cedar Works v. Buckner (C. C. 1910) 181 Fed. 424.

In Turk v. Illinois Cent. R. Co. (D. C. 1912) 193 Fed. 252, it is held that a plaintiff who sues in the wrong district expressly consents to the court's jurisdiction, and a defendant who does not object impliedly consents, and this consent has regard to venue only.

Federal jurisdiction in the sense of the place of suit can no longer be sustained in a particular district because a defendant may be found therein. Dinzy v. Illinois Central R. Co. (C. C. 1894) 61 Fed. 49, 52.

The limitation as to place of bringing suit is applicable only to cases whereof the state and federal courts have concurrent jurisdiction. In re Hohorst (1893) 14 Sup. Ct. 221, 150 U. S. 653, 37 L. Ed. 1211; Van Patten v. Chicago, M. & St. P. R. Co. (C. C. 1896) 74 Fed. 981, following Atkins v. Disintegrating Co. (1873) 18 Wall. 272, 21 L. Ed. 841; Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co. (C. C. 1910) 181 Fed. 974; Lederer v. Ferris (C. C. 1906) 149 Fed. 250.

This section applies only to suits commenced in the federal court; and it is no bar to the jurisdiction of the court of a case removed to it from a state court that defendant was not a resident of the district, and that the state court had acquired jurisdiction by foreign attachment, without any personal service. Crocker Nat. Bank v. Pagenstecher (C. C. 1890) 44 Fed. 705; Richmond v. Brookings (C. C. 1891) 48 Fed. 241. It does not apply to suits brought by the federal government, since it is present everywhere within the territorial limits of the United States. The only restriction with respect to such suits is that they shall be brought in the district of which the defendant is an "inhabitant." U. S. v. Southern Pac. R. Co. (C. C. 1892) 49 Fed. 297; Same v. Central Pac. R. Co., Id. 304. But see Stone v. U. S. (1897) 17 Sup. Ct. 778, 779, 167 U. S. 178, 42 L. Ed. 127, holding that an action by the United States to recover the value of timber taken from public lands may be brought in any jurisdiction in which defendant can be served with process.

Restriction as to venue is not applicable to local actions, and hence ejectment can be brought in a federal court in the district where the land lay, though both plaintiff and defendant are foreign corporations and nonresidents of the state. Elk Garden Co. v. T. W. Thayer Co. (C. C. 1910) 179 Fed. 556. It does

not affect the jurisdiction of the court in local actions to enforce a lien or claim on real estate or personal property within the district. Lancaster v. Asheville St. Ry. Co. (C. C. 1898) 90 Fed. 129. A failure by a plaintiff to comply with the provision that suit shall be brought only in the district of the residence of either the plaintiff or the defendant, where the jurisdiction is founded only on diversity of citizenship, does not affect the general jurisdiction of the court over the cause. Van Doren v. Pennsylvania R. Co. (1899) 93 Fed. 260, 35 C. C. A. 282. Provision that suits can be maintained only in the district where either plaintiff or defendant resides is not jurisdictional, but its enforcement is a mere matter of privilege to defendant. Bogue v. Chicago, B. & Q. R. Co. (D. C. 1912) 193 Fed. 728. It confers a mere privilege, and courts have jurisdiction over controversies wholly between citizens of different states, though neither plaintiff nor defendant is a resident of the district in which the court to which the action was removed is sitting. Burch v. Southern Pac. Co. (C. C. 1905) 139 Fed. 350. It does not apply to or repeal statutes as to service of process in suits of which the federal courts have exclusive jurisdiction. Lederer v. Ferris (C. C. 1906) 149 Fed. 250.

The proviso that no civil action shall be brought against any person in any other district than that of which he is an inhabitant does not apply to actions against aliens or foreign corporations, and they may be sued in any district in which they may be found. Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co. (1912) 196 Fed. 340, 116 C. C. A. 160.

Section 1039, post, when construed with this section, applies to a bill brought to enforce various liens upon part of a railroad lying in the district, as against the lien of a general mortgage, which is about to be foreclosed in the same court by a suit ancillary to another suit in a different district and state. McBee v. Marietta & N. G. Ry. Co. (C. C. 1891) 48 Fed. 243, decree reversed Same v. Central Trust Co. (1893) 57 Fed. 753, 6 C. C. A. 539.

R. S. § 739, embodied herein did not mean to distinguish between those who are inhabitants of or found within the district and persons domiciled abroad, so as to protect the first and leave the others not within the protection, but that often in regard to those who were within the United States they should not be liable to process of the circuit courts unless in one or the other predicament stated in the clause. Toland v. Sprague (1838) 12 Pet. 300, 329, 9 L. Ed. 1093. And is substantially the jurisdiction clause in the old act of 1789 and inhibits the suing of any defendant in any other district than that in which he resides. Lovejoy v. Hartford Fire Ins. Co. (C. C. 1882) 11 Fed. 63, 64.

The substitution in Act March 3, 1875, c. 137, § 1, of the words "against any person" for the words "against an inhabitant of the United States" in Act 1789, § 11, incorporated into R. S. § 739, and embodied herein, has been assumed to be an immaterial change, but, if the act of 1875 could have been treated as extending the provision to suits against aliens, it could only be by virtue of the clause permitting defendants to be sued in the district in which they were found. That clause having been stricken out in the acts of 1887 and 1888, the provision is therefore inapplicable to an alien or to a foreign corporation. In re Hohorst (1893) 14 Sup. Ct. 221, 224, 150 U. S. 653, 31 L. Ed. 1211.

Act March 3, 1887, providing that suit, when jurisdiction is founded on diverse citizenship, must be brought in the district either of the residence of the plaintiff or of the defendant, and, omitting the provision that the defendant could be sued in any district in which he should be found at the time of serving the writ, by no means intended to discard the long-established doctrine that the defendant must be legally found and served in the district in which he is sued. Harland v. United Lines Tel. Co. (C. C. 1889) 40 Fed. 308, 312, 6 L. R. A. 252.

See McMicken v. Webb (1837) 11 Pet. 25, 38, 9 L. Ed. 618, holding that the residence of a party in another district of a state than that in which the suit is brought in a federal court does not exempt him from its jurisdiction. The division of a state into two or more districts cannot affect the jurisdiction on account of citizenship. If the party is found in the district in which he is sued, the case is out of the prohibition that "no civil suit shall be brought in the courts of the United States against a defendant by any original process in any other district whereof he is an inhabitant, or in which he shall be found at the time of serving the writ," contained in R. S. § 739, embodied herein.

And see Goddard v. Mailler (C. C. 1897) 80 Fed. 422, holding that R. S. § 740, post, § 1034, was not repealed, expressly or by implication, by the provision that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant.

And see, also, Lederer v. Ferris (C. C. 1906) 149 Fed. 250, on the history of the legislation and the modifications made in the judiciary act of 1789, § 11, incorporated into R. S. § 739, embodied herein.

2. Effect on statutes conferring exclusive jurisdiction on federal courts.—Where exclusive jurisdiction is created and conferred on the courts of the United States by special acts passed prior to acts of March 3, 1887, and August 13, 1888, incorporated into this

section, the jurisdiction so conferred is not affected by the provisions of those acts, limiting the place of bringing suit to the district whereof one of the parties is an inhabitant. Van Patten v. Chicago, M. & St. P. R. Co. (C. C. 1896) 74 Fed. 981, following In re Hohorst (1893) 14 Sup. Ct. 221, 150 U. S. 653, 37 L. Ed. 1211.

The inhibition that no suit shall be brought against any person by any original process or proceeding in any other district than that whereof he is an inhabitant is ineffective and inapplicable in instances in which exclusive jurisdiction over particular cases or classes of cases has been conferred on the federal courts by special acts of Congress. Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n (1908) 165 Fed. 1, 91 C. C. A. 39; Union Pac. R. Co. v. Oregon & Washington Lumber Mfrs.' Ass'n (1908) 165 Fed. 13, 91 C. C. A. 51; U. S. v. Standard Oil Co. of New Jersey (C. C. 1907) 152 Fed. 290.

In view of the provision that no civil suit involving a federal question shall be brought in the federal courts against any person in any other district than that whereof he is an inhabitant, R. S. § 2103, post, § 4087, which provides that suits to recover moneys paid by Indians on contracts made in violation of the statute may be brought "in any court of the United States," must be construed as meaning any court of the United States within the territorial jurisdiction of which defendant is an inhabitant. U. S. v. Crawford (C. C. 1891) 47 Fed. 561.

Under Act Feb. 24, 1905, amending Act Aug. 13, 1894, requiring suits on federal contractors' bonds to be brought in the district where the contract was to be performed, a federal court in such district had jurisdiction to order the service of process on a defendant residing in another district, notwithstanding General Jurisdiction Act, § 1. Baker Contract Co. v. U. S. (1913) 204 Fed. 390, 122 C. C. A. 560.

3. Effect on removal of causes.—An action in a state court may be removed by defendant to the federal court; though neither party is a resident of the district. Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C. 1888) 37 Fed. 3. CONTRA, Harold v. Iron Silver Min. Co. (C. C. 1888) 33 Fed. 529. And see Turk v. Illinois Cent. R. Co. (D. C. 1912) 193 Fed. 252, holding that an action removed on motion of defendant to the federal court of a district in which neither party resides, should, on plaintiff's motion, be remanded.

An action brought by a citizen and resident of the Eastern district of Texas against a citizen of another state, in a state court in the Western district, is removable to the circuit court of the latter district. Burck v. Taylor (C. C. 1889) 39 Fed. 581, judgment affirmed (1894) 14 Sup. Ct. 696, 152 U. S. 634, 38 L. Ed. 578. The requirement that suits in federal courts shall be brought in the district where defendant lives has no application to a suit removed from a state court to the federal court by defendant. Baltimore & O. R. Co. v. Meyers (1894) 62 Fed. 367, 10 C. C. A. 485. If a case in a state court might have been brought originally in a federal court, it may be removed to the federal court of the district wherein it is pending, when the facts bring it within the statute, though neither party reside in such district. Long v. Long (C. C. 1896) 73 Fed. 369; Duncan v. Associated Press (C. C. 1897) 81 Fed. 417.

An action under federal employers' liability act between citizens of Wisconsin brought in the state court of Minnesota was not removable by defendant over plaintiff's protest to the federal court in the district of Minnesota. Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994.

Under this section an action is not removable to a federal court, unless it could have been originally commenced there. Waterman v. Chesapeake & O. Ry. Co. (D. C. 1912) 199 Fed. 667.

A suit not within the exceptions contained in this section is not removable on the ground that it is one arising under the Constitution or laws of the United States, where none of the defendants are inhabitants of the district, unless plaintiff consents to the jurisdiction or waives objection thereto. Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1912) 201 Fed. 932.

The "proper district" to which, under Judicial Code, §§ 28, 29, ante, §§ 1010, 1011, a cause brought in a state court may be removed, is that where the suit is pending, and not that where, under this section, it could have been brought originally. Pavick v. Chicago, M. & St. P. Ry. Co. (D. C. 1914) 225 Fed. 395.

4. Effect of state legislation.—See § 1537, and notes.

Act March 3, 1887, and a state statute, held, not to give a federal court jurisdiction in rem against the property of a nonresident defendant, who has not been personally served, notwithstanding the conformity act (sections 1537, 1539, post). Harland v. United Lines Tel. Co. (1889) 40 Fed. 308, 6 L. R. A. 252.

5. District of Columbia, applicability of statute to.—The general restrictions of the Constitution of the United States which govern the exercise of jurisdiction by the courts of the United States within the states have no operation in the District of Columbia; and the conditions of jurisdiction existing therein are so different that this section is locally inapplicable. Under Code D. C. § 1537, which re-enacts with amplification R. S. D. C. § 790, an action by a nonresident corporation against another nonresident corporation is maintainable in this district when the

defendant does business and has a place of business therein, this section not applying to or being in force in the District of Columbia. Guilford Granite Co. v. Harrison Granite Co. (1903) 23 App. D. C. 1.

6. **"Civil suit" defined.**—A proceeding by a citizen of New York for the seizure and sale of mortgaged land in Louisiana is a civil suit inter partes, and, where the parties are citizens of different states, is within the jurisdiction conferred by Congress on the United States circuit court. Fleitas v. Richardson (1893) 13 Sup. Ct. 429, 432, 147 U. S. 538, 37 L. Ed. 272 (citing Toland v. Sprague [1838] 12 Pet. 300, 9 L. Ed. 1093); Levy v. Fitzpatrick (1841) 15 Pet. 167, 10 L. Ed. 699; Chaffee v. Hayward (1857) 20 How. 208, 15 L. Ed. 804, 851; Marin v. Lalley (1872) 17 Wall. 14, 21 L. Ed. 596.

The word "suit" includes an action at law as well as a proceeding in equity. Elk Garden Co. v. T. W. Thayer Co. (C. C. 1910) 179 Fed. 556; Clarke v. New Jersey Steam Nav. Co. (C. C. 1841) Fed. Cas. No. 2,859; Dyer v. National Steam Nav. Co. (C. C. 1878) Fed. Cas. No. 4,225; Bouysson v. Miller (D. C. 1802) Fed. Cas. No. 1,709.

The words "civil suit" do not embrace admiralty proceedings, and a libel may be filed against a person not residing in the district or not found therein, or against a foreign corporation, and property within the district attached to compel appearance. Atkins v. Fibre Disintegrating Co. (D. C. 1867) Fed. Cas. No. 600; Casey v. Leary (D. C. 1868) Fed. Cas. No. 2,497; Cushing v. Laird (D. C. 1870) Fed. Cas. No. 3,508; Manchester v. Hotchkiss (D. C. 1871) Fed. Cas. No. 9,004. CONTRA, Atkins v. Fibre Disintegrating Co. (C. C. 1870) Fed. Cas. No. 602; Wilson v. Pierce (D. C. 1852) Fed. Cas. No. 17,826; New England Ins. Co. v. Detroit & C. Steam Nav. Co. (D. C. 1871) Fed. Cas. No. 10,154; The L. B. X. (D. C. 1898) 88 Fed. 290.

7. **"Citizen," "inhabitant," or "resident" defined.**—See, also, Const. art. 3, § 2, cl. 1, and notes thereunder.

The words "inhabitant," "resident," and "citizen," as used in Judicial Code, §§ 51, 52, this section and post, § 1034, contemplate the same condition, and all include the idea of domicile. U. S. v. Gronich (D. C. 1914) 211 Fed. 548. This section requires no more to constitute residence than is required in the residence element of citizenship, and the provision as to the district in which the action shall be brought does not touch the general jurisdiction of the court over the case, but affects only the mode of bringing the defendant within the jurisdiction. Marks v. Marks (C. C. 1896) 75 Fed. 321.

A resident of Kentucky who is temporarily in Chicago in charge of an exhibit at the World's Columbian Exposition is an "inhabitant" of Kentucky, and not of Illinois. Bicycle Stepladder Co. v. Gordon (C. C. 1893) 57 Fed. 529, distinguishing U. S. v. Southern Pac. R. Co. (C. C. 1892) 49 Fed. 297, and following Ex parte Shaw (1892) 12 S. Ct. 935, 145 U. S. 444, 36 L. Ed. 768.

One whose place of business is in a certain judicial district, and who lives there six months in each year in his own house, served by his own domestics, but who leaves during the unhealthy season for reasons of health only, is a resident of the district, and may prosecute a claim against the United States therein. King v. U. S. (C. C. 1893) 59 Fed. 9, appeal dismissed U. S. v. King (1896) 17 S. Ct. 1001, 164 U. S. 703, 41 L. Ed. 1182.

Plaintiff, who had previously been a citizen and resident of West Virginia, removed with his family into Virginia, where he bought a house, in which he resided with his family, paid taxes, and voted for some three or four years, after which he determined to return to West Virginia, and rented a house there, but before his actual removal he commenced an action in the circuit court of the United States in West Virginia against a corporation of California. Held, on a plea by defendant to the jurisdiction, that, even conceding that plaintiff had not lost his domicile in West Virginia by his removal, he had lost his residence, which was only regained by his actual return to the state to reside, and that at the time of the commencement of the action he was not a resident of the state, so as to give the court jurisdiction under this section. Pacific Mut. Life Ins. Co. of California v. Tompkins (1900) 101 Fed. 539, 41 C. C. A. 488.

The word "inhabitant" as used in the federal jurisdiction act of 1789 means "citizen." Ex parte Shaw (1892) 12 Sup. Ct. 935, 145 U. S. 444, 36 L. Ed. 768.

When defendant left Chicago a suit against him was being tried, the result of which he must have understood would be adverse, and which was of such a character that execution under the judgment would run against his person and result in his imprisonment. He came to New York, entered into business, took a lease of an office for a year and a half, and of apartments for nine months. Though he left his wife and child in Chicago, he had for several years, whenever absent from Chicago, traveled with his mistress. Since the entry of the Illinois decree against him he had been in Chicago but a single day, a Sunday. Held, that defendant had become a resident of the New York district, and could be sued therein. Canadian Pac. Ry. Co. v. Wenham (C. C. 1906) 146 Fed. 207.

A federal court has no jurisdiction

over a defendant served with process while temporarily in a district in which he does not reside. Smith v. Tuttle (C. C. 1870) Fed. Cas. No. 13,120.

A corporation is not a citizen, inhabitant, or resident of a state in which it has not been incorporated. In re Keasbey & Mattison Co. (1895) 160 U. S. 221, 16 S. Ct. 273, 40 L. Ed. 402; Rust v. United Waterworks Co. (1895) 70 Fed. 129, 17 C. C. A. 16; Eaton v. St. Louis Shakspear Mining & Smelting Co. (C. C. 1881) 7 Fed. 139; Jessup v. Illinois Cent. R. Co. (C. C. 1888) 36 Fed. 735; Filli v. Delaware, L. & W. R. Co. (C. C. 1888) 37 Fed. 65; Booth v. St. Louis Fire Engine Mfg. Co. (C. C. 1889) 40 Fed. 1; Myers v. Murray, Nelson & Co. (C. C. 1890) 43 Fed. 695, 11 L. R. A. 216; National Typographic Co. v. New York Typographic Co. (C. C. 1890) 44 Fed. 711; Miller v. Wheeler & Wilson Mfg. Co. (C. C. 1891) 46 Fed. 882.

A corporation is, for jurisdictional purposes to be regarded as a citizen of the state under the laws of which it is organized. Eaton v. St. Louis Shakspear Mining & Smelting Co. (C. C. 1881) 7 Fed. 139. A corporation is an "inhabitant" only of the state under which it was incorporated, and is not suable elsewhere without its consent. U. S. v. Northern Pac. R. Co. (1905) 134 Fed. 715, 67 C. C. A. 269, reversing decree (C. C. 1903) 120 Fed. 546. That it does business in a state other than that of its incorporation does not make it an inhabitant of that state for the purposes of jurisdiction. Shaw v. Quincy Min. Co. (1892) 145 U. S. 444, 12 S. Ct. 935, 36 L. Ed. 768; Shaw v. Quincy Min. Co. (1892) 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; Southern Pac. Co. v. Denton (1892) 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Eaton v. St. Louis Shakspear Mining & Smelting Co. (C. C. 1881) 7 Fed. 139; Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co. (C. C. 1888) 34 Fed. 818; Connor v. Vicksburg & M. R. Co. (C. C. 1888) 36 Fed. 273, 1 L. R. A. 331; Preston v. Fire Extinguisher Mfg. Co. (C. C. 1888) 36 Fed. 721; Filli v. Delaware, L. & W. R. Co. (C. C. 1888) 37 Fed. 65; Booth v. St. Louis Fire Engine Mfg. Co. (C. C. 1889) 40 Fed. 1; Bensinger Self-Adding Cash Register Co. v. National Cash Register Co. (C. C. 1890) 42 Fed. 81; Miller v. Eastern Oregon Gold Min. Co. (C. C. 1891) 45 Fed. 345; U. S. v. Southern Pac. R. Co. (C. C. 1892) 49 Fed. 297; U. S. v. Central Pac. R. Co. (C. C. 1892) 49 Fed. 304; East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 608, 15 L. R. A. 109; Gilbert v. New Zealand Ins. Co. (C. C. 1892) 49 Fed. 884, 15 L. R. A. 125; Campbell v. Duluth S. S. & A. Ry. Co. (C. C. 1892) 50 Fed. 241; St. Louis R. Co. v. Pacific Ry. Co. (C. C. 1892) 52 Fed. 770; Central Trust Co. of New York v. Virginia T. & C. Steel & Iron Co. (C. C. 1893) 55 Fed. 769; Palmer v. Chicago Evening Post Co. (C. C. 1895) 70 Fed. 886; Ware-Kramer Tobacco Co. v. American Tobacco Co. (C. C. 1910) 178 Fed. 117.

It is not an inhabitant or resident of another state in which it has a usual place of business. U. S. v. S. P. Shotter Co. (C. C. 1901) 110 Fed. 1. Or does business and has agents. Henning v. Western Union Tel. Co. (C. C. 1890) 43 Fed. 97, following Fales v. Chicago, M. & St. P. Ry. Co. (C. C. 1887) 32 Fed. 673. But a foreign corporation which was organized for the express purpose of purchasing, owning, and operating a mine in Oregon, and which is present there in the person of its officers and agents working the mine, is an "inhabitant" of the district, and may be sued there. Miller v. Eastern Oregon Gold Min. Co. (C. C. 1891) 45 Fed. 345, writ of error dismissed Eastern Oregon Gold-Min. Co. v. Miller (1895) 15 S. Ct. 1039, 159 U. S. 252, 40 L. Ed. 140. And a corporation is an inhabitant of the state or district in which its principal offices are and its corporate business is transacted, and the fact that it is doing business in a state or district other than that in which it has its residence does not make it an inhabitant of such state or district. A. L. Wolff & Co. v. Choctaw, O. & G. R. Co. (C. C. 1904) 133 Fed. 601; Hume v. Pittsburgh, C. & St. L. R. Co. (C. C. 1877) Fed. Cas. No. 6,865. Compliance by a corporation with a statute of another state requiring a foreign corporation, as a condition of doing business therein, to appoint an attorney in that state on whom processes may be served, and to agree that any process against it which is served on said attorney shall be of the same legal force and validity as if served on the company, does not make such corporation a citizen or resident of the state, or constitute an agreement or consent that it may be sued in a federal court of that district by a plaintiff who is a resident of another district, where the jurisdiction is founded only on diversity of citizenship. Platt v Massachusetts Real-Estate Co. (C. C. 1900) 103 Fed. 705. But a foreign insurance company which, in compliance with the laws of a state, has appointed an agent therein on whom service may be made, is an "inhabitant" of the state, and may be sued therein in the federal courts. Shainwald v. Davids (D. C. 1895) 69 Fed. 704.

Where a corporation, created by the laws of one state, by its officers or agents, comes into a judicial district of another state, and there carries on business, and has there an agent on whom, under the laws of the latter state, process may be served, it is an inhabitant of said district, and is suable in the court of the United States of said district. Riddle v. New York,

L. E. & W. R. Co. (C. C. 1889) 39 Fed. 290.

The residence of an attorney appointed to accept service for a foreign corporation is the "residence" of the corporation. Lemon v. Imperial Glass Co. (D. C. 1912) 199 Fed. 927.

A steamship company incorporated under the laws of, and having its principal office in, a European country, between which and the port of New York City its vessels ply, and whose piers for the lading and unlading of its cargoes are in New Jersey, where its office for the transaction of its industrial operations in America is kept, but whose financial and monetary operations are conducted at the office of its agents in New York City, which office it advertises as its New York office, is not suable in New York, under this section. Hohorst v. Hamburg-American Packet Co. (C. C. 1889) 38 Fed. 273, appeal dismissed (1893) 13 S. Ct. 590, 148 U. S. 262, 37 L. Ed. 443.

A railway company incorporated under the laws of a state and having its principal offices within one district of such state is an inhabitant of that district. Galveston. H. & S. A. Ry. Co. v. Gonzales (1894) 14 Sup. Ct. 401, 402, 151 U. S. 496, 38 L. Ed. 248.

A railroad company is an inhabitant of any district in which it operates its road through authorized agents. East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 608, 15 L. R. A. 109, following U. S. v. Southern Pac. R. Co. (C. C. 1892) 49 Fed. 297.

This section authorizes an action against a railroad corporation only in the state by whose laws it was created, though the greater part of its railway and its principal office are in another state, where its annual elections are held, and most of its officers and stockholders reside, and of which most of its directors are citizens. Filli v. Delaware, L. & W. R. Co. (C. C. 1888) 37 Fed. 65.

Where plaintiff is a citizen of Massachusetts, and defendant a corporation created by the law of Rhode Island as well as by the law of Massachusetts, the suit may be brought in the federal court for the Rhode Island district. For the purposes of the suit, defendant is to be deemed a citizen of Rhode Island. Page v. Fall River, W. & P. R. Co. (C. C. 1887) 31 Fed. 257, judgment reversed Fall River, W. & P. R. Co. v. Page (1891) 12 S. Ct. 980, 145 U. S. 637, 36 L. Ed. 851. But a steamship company incorporated under the laws of, and having its principal office in, a European country, between which and the port of New York City its vessels ply, and whose piers for the lading and unlading of its cargoes are in New Jersey, where its office for the transaction of its industrial operations in America is kept, but whose financial and monetary operations are conducted at the office of its agents in New York City, which office it advertises as its New York office, is not suable in New York. Hohorst v. Hamburg-American Packet Co. (C. C. 1889) 38 Fed. 273, appeal dismissed (1893) 13 S. Ct. 590, 148 U. S. 262, 37 L. Ed. 443.

The circuit court in Illinois had no jurisdiction of a civil suit brought by a corporation of that state against a corporation of Connecticut, having its principal office in Massachusetts, and doing business in Illinois; a corporation, being an inhabitant of the place where it has its principal place of business, where its corporate offices and records are kept, and its corporate meetings are held, and there being no statute in Illinois making it a condition of foreign corporations doing business in the state that they appoint agents upon whom process may be served. Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co. (C. C. 1888) 34 Fed. 818.

A Pennsylvania corporation which has filed with the Auditor General of the state a certificate designating its office and place of business, pursuant to Act Pa. June 7, 1879 (P. L. 112), must be deemed a resident of the federal district within which such place is situated, and cannot be sued in another district of the state, although its operations may extend into such district. Weed v. Centre & C. St. Ry. Co. (C. C. 1904) 132 Fed. 151.

Where defendant railroad company was a Pennsylvania and Ohio corporation located entirely in the Western district of Pennsylvania, without property or an office in the Eastern district, it was not a resident of such district so as to subject it to suit there because it was a member of a fast freight association which maintained an office in the Eastern district in charge of a chief clerk. Colosino v. Pittsburgh & L. E. R. Co. (D. C. 1914) 210 Fed. 550. And see Minford v. Old Dominion S. S. Co. (C. C. 1891) 48 Fed. 1, holding that, when the jurisdiction of the circuit court arises only from the fact that the plaintiff and defendant are citizens of different states, suit may be brought in the circuit court of the district in which either the plaintiff or the defendant resides; and, where the defendant is a corporation organized under the law of another state, but maintaining an office in the state wherein the plaintiff resides, suit may be brought in the circuit court of the latter state. And Gormully & Jeffrey Mfg. Co. v. Pope Mfg. Co. (C. C. 1888) 34 Fed. 818, holding that the circuit court in Illinois had no jurisdiction of a civil suit brought by a corporation of that state against a corporation of Connecticut, having its principal office in Massachusetts, and doing business in Illinois; a corporation, being an inhabitant of the place where it has its principal place of business, where its

corporate offices and records are kept, and its corporate meetings are held, and there being no statute in Illinois making it a condition of foreign corporations doing business in the state that they appoint agents upon whom process may be served.

See, also, Gale v. Southern Building & Loan Association of Alabama (C. C. 1902) 117 Fed. 732, holding that suit may be maintained against a foreign corporation in the district of plaintiff's residence, where there has been service of process on the corporation's agent, appointed under Code Va. 1887, § 1104, requiring a foreign corporation doing business in the state to appoint a resident of the state on whom process may be served.

8. —— **Proof of inhabitancy.**—Under Act Feb. 18, 1888, § 8 (25 Stat. 35), evidence that plaintiff lived with his wife in his house in the territory of the Choctaw Nation when the cause of action arose, and for a year thereafter, is sufficient proof of inhabitancy to give the circuit court for the Western district of Arkansas jurisdiction of a suit wherein the Choctaw Coal & Railway Company is defendant, whether plaintiff dwelt there rightfully or wrongfully. Gowen v. Harley (1893) 56 Fed. 973, 6 C. C. A. 190.

Though the question whether a person, who has removed himself from one district to another, has thereby become an inhabitant or resident of the district where he is living and doing business when served with process is to be determined principally by his intent, his own declaration as to his intent, especially when made after he has become appreciative of the consequences of a change of domicile are not controlling. Canadian Pac. Ry. Co. v. Wenham (C. C. 1906) 146 Fed. 207.

9. **"Found" within prior statute.**—See, also, post, § 1039, and notes thereunder.

A circuit court of the United States for the district of Kentucky had jurisdiction of a suit in equity brought by a citizen of Virginia against a citizen of Kentucky to compel the latter to convey to the former certain land in Ohio, the defendant having obtained the legal title with notice of plaintiff's equitable title, and having been found within the district. Massie v. Watts (1810) 6 Cranch, 148, 157, 3 L. Ed. 181.

Defendant must either be an inhabitant of, or be found within, the district in which the suit was commenced at the time of serving the writ. Picquet v. Swan (C. C. 1828) Fed. Cas. No. 11,134; Hollingsworth v. Adams (C. C. 1798) Fed. Cas. No. 6,611.

A foreign corporation, filing with a state auditor, pursuant to the state laws, a stipulation that service on the auditor will bind the company, is not, by virtue thereof, an "inhabitant" of, or "found" within, the state, under Act March 3, 1875. Southern & A. Tel. Co. v. New Orleans, M. & T. R. Co. (C. C. 1874) Fed. Cas. No. 13,185; Stillwell v. Empire Fire Ins. Co. (C. C. 1877) Fed. Cas. No. 13,449.

In an action by a Canadian corporation in the circuit court of the United States in Michigan, held, that service upon defendant as a citizen of Michigan, in which state he was found, when in fact he was a citizen of Illinois, is good. Commercial Bank of Commerce v. Green (C. C. 1878) Fed. Cas. No. 3,059.

A defendant corporation "is found" within the district where sued if it does business there by authority of law. Blackburn v. Selma, M. & M. R. Co. (C. C. 1879) Fed. Cas. No. 1,467.

A foreign corporation may exercise its franchises and transact business within the state on such conditions as the laws of the state may impose, and may consent to be "found" within the state, within R. S. § 739, embodied herein. Robinson v. National Stockyard Co. (C. C. 1882) 12 Fed. 361. A railroad corporation, organized and having its road in one state, and an office and an agent in another for the purpose of soliciting business, is "found," and service of process on the agent in charge of the office is sufficient. Block v. Atchison, T. & S. F. R. Co. (C. C. 1884) 21 Fed. 529. A foreign corporation is "found within" another state when it transacts its ordinary business and has a local agent there, on whom by the state law original process may be served. Schollenberger v. Forty-Five Foreign Insurance Companies (C. C. 1878) Fed. Cas. No. 12,475a; Williams v. Empire Transp. Co. (C. C. 1878) Fed. Cas. No. 17,720; Mohr & Mohr Distilling Co. v. Insurance Cos. (C. C. 1882) 12 Fed. 474; McCoy v. Cincinnati, I., St. L. & C. R. Co. (C. C. 1882) 13 Fed. 3; Merchants' Mfg. Co. v. Grand Trunk Ry. Co. (C. C. 1882) 13 Fed. 358; Angerhoefer v. Bradstreet Co. (C. C. 1884) 22 Fed. 305; Wotherspoon v. Massachusetts Ben. Ass'n (C. C. 1889) 38 Fed. 625; Spencer v. Kansas City Stockyards Co. (C. C. 1893) 56 Fed. 741; Elk Garden Co. v. T. W. Thayer Co. (C. C. 1910) 179 Fed. 556; Merchants' Mfg. Co. v. Grand Trunk Ry. Co. (N. Y. 1882) 63 How. Prac. 459; Merchants' Mfg. Co. v. Grand Trunk Ry. Co. (N. Y. 1882) 11 Abb. N. C. 183. Service upon a foreign corporation, made in New York upon a "managing agent," is a valid service on the corporation, under the state law, as upon a person "found" within the district. Hat-Sweat Mfg. Co. v. Davis Sewing-Mach. Co. (D. C. 1887) 31 Fed. 294. But a foreign corporation is not "found" within a district when its president comes temporarily into such district on the business of the corporation, such corporation having no office or place of business

therein, and not having transacted any business therein except that which the president came to settle. A corporation is not "found" unless it is so far constructively present at the place where its agent is served with process that a judgment against it would be respected everywhere and be given full force and efficacy in other jurisdictions. Good Hope Co. v. Railway Barb Fencing Co. (C. C. 1884) 22 Fed. 635. The presence of the chief officers of a corporation in a state other than that of its creation does not change the residence of the corporation, nor does the fact that the officers carry into such state property of the corporation, for the purpose of exhibition and advertisement, bring the corporation into the state as an "inhabitant," or so that it can be said to be "found" there, within the meaning of the act of congress. Carpenter v. Westinghouse Air-Brake Co. (C. C. 1887) 32 Fed. 434.

A foreign corporation which has ceased to do business within a state cannot be "found" therein, so that general service may be effected upon it, merely because it has property within the jurisdiction of the court. De Castro v. Compagnie Francaise du Telegraphe, de Paris à New York (C. C. 1896) 76 Fed. 425. And see Runkle v. Lamar Ins. Co. (C. C. 1880) 2 Fed. 9, holding that a foreign insurance company is subject to the jurisdiction of a circuit court in a district court other than that of which it is an inhabitant, when, in accordance with the state statute, it has duly authorized an agent in that state to acknowledge service of process, and has consented that the service on such agent shall be taken and held to be valid as if served on the company. And see Hat-Sweat Mfg. Co. v. Davis Sewing-Mach. Co. (D. C. 1887) 31 Fed. 294, holding that R. S. § 739, embodied herein, recognizes the jurisdiction of the courts over persons found therein, and service on a foreign corporation made in New York under a managing agent is a valid service on it as on a person found within the district.

A foreign corporation doing business in Illinois is "found" there, within the meaning of the statutes which provide that no suit shall be brought against any person in any district other than that in which he is an inhabitant, or where he is found. Sayles v. Erie Ry. Co. (C. C. 1879) Fed. Cas. No. 12,418; Wilson Packing Co. v. Hunter (C. C. 1879) Fed. Cas. No. 17,852.

10. "Original process or proceeding" defined.—A subpœna or notice, issued on the filing of a bill in equity to enjoin an action at law, is not an original process or proceeding within this section, nor within rule 13 in equity. Cortes Co. v. Thannhauser (C. C. 1881) 9 Fed. 226.

Plaintiff, who was a resident of Missouri, brought an action in the United States circuit court of New Jersey for specific performance of defendant corporation's contract to sell certain smelting ores to him, and judgment was rendered as prayed therein, and defendant was enjoined from disposing of the ores to any other persons, and from interfering in any manner with the product of the mines. Defendant disregarded the order, and its officers and directors were adjudged guilty as of a contempt. Afterwards a supplemental bill was filed, alleging that one of the directors, a resident of Pennsylvania, who was not a party to the original bill, although he was one of those adjudged in contempt, had commenced legal proceedings in a foreign state, where the mines were located, to enforce the collection of a debt due him from the corporation, and had procured the appointment of a receiver and an order of sale in satisfaction of the debt, and that such proceedings were instituted to evade, the decree for specific performance of the contract previously rendered. Held that, the supplemental bill being between different parties, and introducing a new controversy, the court had no jurisdiction thereof, under this section. Mexican Ore Co. v. Mexican Guadalupe Min. Co. (C. C. 1891) 47 Fed. 351.

A bill filed on the equity side of a federal court to enjoin the further prosecution of an action at law therein, by the defendant in such action, who is a nonresident of the state, against the plaintiff therein and a nonresident corporation, which is not a party to the law action, is not ancillary in such sense as to give the court jurisdiction over the corporation defendant by service on its attorneys within the district, or on such defendant outside of the district, but is an original suit, within this section. Manning v. Berdan (C. C. 1904) 132 Fed. 382.

A subpœna to appear and answer in a suit in equity brought by an assignee to restrain the foreclosure of a mortgage is an original process in a civil suit, within the judiciary act of 1789 (section 11), and cannot be served on the defendant in another district, as no authority for such service appears in Act 1867. Jobbins v. Montague (D. C. 1871) Fed. Cas. No. 7,329.

As to any relief claimed in a cross bill which is not strictly in the nature of a defense to the original bill, the cross bill is an original bill, so that no decree can be rendered in a United States court against a defendant as to such matters, if defendant is not an inhabitant of the district in which suit was brought, or cannot be found therein. Bates v. Delavan (N. Y. 1835) 5 Paige, 299.

11. "Jurisdiction is founded only" defined.—This section authorizes the bringing of suit in the district of the residence of either the plaintiff or defendant, where federal jurisdiction is

founded on diversity of citizenship alone. Schultz v. Highland Gold Mines Co. (C. C. 1907) 158 Fed. 337.

An action in a federal court on a cause of action arising under a law of the United States, though the parties are citizens of different states, is not one in which "jurisdiction is founded only" on diversity of citizenship, and, unless the objection is waived, can only be brought in the district of which defendant is an inhabitant. Cound v. Atchison, T. & S. F. Ry. Co. (C. C. 1909) 173 Fed. 527.

12. "Only" defined.—The word "only" means solely. Whittaker v. Illinois Cent. R. Co. (C. C. 1910) 176 Fed. 130.

13. Change of boundaries of district.—Pending causes are not affected by act transferring counties from one judicial district to another, where act is silent as to such causes. Culver v. Woodruff County (C. C. 1878) Fed. Cas. No. 3,469.

II. DISTRICT IN WHICH SUIT MAY OR MUST BE BROUGHT

(A) Venue dependent on diversity of citizenship or federal question in general

14. In general.—Where a federal court has jurisdiction on the ground of diverse citizenship, suit must be brought in the district of the residence of either plaintiff or defendant, but, where jurisdiction is founded on the fact that the suit arises under a federal law, the suit must be brought in the district of which defendant is an inhabitant. Cound v. Atchison, T. & S. F. Ry. Co. (C. C. 1909) 173 Fed. 527; Mexican Cent. R. Co. v. Eckman (1903) 23 Sup. Ct. 211, 213, 187 U. S. 429, 47 L. Ed. 245; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. (C. C. 1887) 33 Fed. 385; Hollingsworth v. Adams (C. C. 1798) Fed. Cas. No. 6,611; N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co. (1892) 54 Fed. 420, 422, 4 C. C. A. 403, 38 L. R. A. 271; Dinzy v. Illinois Central R. Co. (C. C. 1894) 61 Fed. 49, 50; Pacific Mut. Life Ins. Co. v. Tompkins (1900) 101 Fed. 539, 541, 41 C. C. A. 488; A. L. Wolff & Co. v. Choctaw, O. & G. R. Co. (C. C. 1904) 133 Fed. 601; Tice v. Hurley (C. C. 1906) 145 Fed. 391; Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994; Southern Pac. Co. v. Arlington Heights Fruit Co. (1911) 191 Fed. 101, 111 C. C. A. 581; Waterman v. Chesapeake & O. Ry. Co. (D. C. 1912) 199 Fed. 667; United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan. (1906) 145 Fed. 144, 76 C. C. A. 114. But an action within the jurisdiction of the federal courts, both on the ground of diversity of citizenship and because founded on a law of the United States, can be brought only in the district of which defendant is an inhabitant. Whittaker v. Illinois Cent. R. Co. (C. C. 1910) 176 Fed. 130.

This section authorizes suit in the district of the residence of either plaintiff or defendant, where federal jurisdiction is founded on diversity of citizenship alone. United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan. (1906) 145 Fed. 144, 76 C. C. A. 114; Short v. Chicago, M. & St. P. Ry. Co. (C. C. 1887) 33 Fed. 114; Minford v. Old Dominion S. S. Co. (C. C. 1891) 48 Fed. 1; Evansville Courier Co. v. United Press (C. C. 1896) 74 Fed. 918, 919; Schultz v. Highland Gold Mines Co. (C. C. 1907) 158 Fed. 337; Bank of Winona v. Avery (D. C. 1887) 34 Fed. 81.

Excepting cases where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit must be brought in the district of which the defendant is an inhabitant. Zambrino v. Galveston, H. & S. A. R. Co. (C. C. 1889) 38 Fed. 449, 450.

A defendant, to give jurisdiction on the ground of residence in a certain district, must be a real, and not merely a nominal, party to the suit. Sackett's Harbor Bank v. Barry (C. C. 1857) Fed. Cas. No. 12,204.

A case involving federal questions can be brought only in the district of defendant's residence. Southern Pac. Co. v. Arlington Heights Fruit Co. (1911) 191 Fed. 101, 111 C. C. A. 581; Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994; City of Memphis, Tenn., v. Board of Directors of St. Francis Levee Dist. (D. C. 1916) 228 Fed. 802.

Where there is no change of parties, a jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit. Conolly v. Taylor (1829) 2 Pet. 556, 565, 7 L. Ed. 518.

(B) Venue dependent on citizenship, residence or character of parties

15. Local actions in general.—Under Judiciary Act 1875, §§ 1, 8, as amended by Act March 3, 1887, and Act Aug. 13, 1888, § 1, this section, and section 1039, post, a federal court of the district in which the property is situated, where the necessary diverse citizenship exists, has jurisdiction of a local action described in said section 8, without regard to the residence of the parties. Kentucky Coal Lands Co. v. Mineral Development Co. (1914) 219 Fed. 45, 133 C. C. A. 151. reversing judgment (C. C. 1911) 191 Fed. 899.

In determining whether an action is local or transitory, the law of the forum governs. Potomac Milling & Ice Co. v. Baltimore & O. R. Co. (D. C. 1914) 217 Fed. 665.

16. United States as plaintiff.—An action by the United States to recover

the value of timber taken from public lands is transitory, and may be brought in any jurisdiction in which the defendant can be served with process. Stone v. U. S. (1897) 17 Sup. Ct. 778, 779, 167 U. S. 178, 42 L. Ed. 127, affirming judgment (1894) 64 Fed. 667, 12 C. C. A. 451. But see U. S. v. Southern Pac. R. Co. (C. C. 1892) 49 Fed. 297, holding that suits by the United States must be brought in the district of which defendant is an inhabitant.

The limitation to the federal court of the district wherein a contract for a public work is to be performed of an action brought by the United States against the principal and sureties on the bond of a public contractor, given conformably to Act Feb. 24, 1905, amending Act Aug. 13, 1894, post, § 6923, for his failure to pay certain designated subcontractors for labor and materials used in construction, operates pro tanto to displace the provisions upon that subject in General Jurisdictional Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433, and amply authorizes the court for the district wherein the action is required to be brought to obtain jurisdiction of the persons of the defendants through the service upon them of its process in whatever district they may be found. U. S. v. Congress Const. Co. (1911) 32 Sup. Ct. 44, 222 U. S. 199, 56 L. Ed. 163.

17. Aliens.—The statute which prohibits suit in any federal court, save that in the district whereof defendant is an inhabitant, applies to suits by aliens, but not to suits against them. Hall v. Great Northern Ry. Co. (D. C. 1912) 197 Fed. 488. The statute which provides that when jurisdiction is founded on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either plaintiff or defendant, does not apply to aliens. In re Hohorst (1893) 14 Sup. Ct. 221, 224, 150 U. S. 653, 37 L. Ed. 1211; Jarowski v. Hamburg-American Packet Co. (1910) 182 Fed. 320, 104 C. C. A. 548; Id. (1911) 186 Fed. 332, 108 C. C. A. 410; Barlow v. Chicago & N. W. Ry. Co. (C. C. 1909) 172 Fed. 513 (denying rehearing [C. C. 1908] 164 Fed. 765); Hall v. Great Northern Ry. Co. (D. C. 1912) 197 Fed. 488. And see Miller v. New York Cent. & H. R. R. Co. (C. C. 1906) 147 Fed. 771, holding that this provision relates only to suits between citizens of different states of the Union.

The circuit courts have jurisdiction of a suit begun in a state court by a resident citizen against a nonresident alien defendant, notwithstanding the provision that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." Jurisdiction exists by virtue of the citizenship of plaintiff and alienage of defendant, and the provision that defendant shall not be sued in any other district is only a privilege, of which he may or may not avail himself. Cooley v. McArthur (C. C. 1888) 35 Fed. 372.

18. —— Suits by aliens.—A railway company incorporated under the laws of a state, and having its principal offices within one district of such state, is an "inhabitant" of that district, and cannot be sued by an alien in a circuit court of the United States held in another district of the same state, through which it operates its road, and in which it maintains freight and ticket offices and depots, notwithstanding a statute of the state makes it liable to be sued in any county through or into which its railway extends or is operated, especially where other statutes of the state provide that the public office which every such corporation is required to maintain shall be considered its domicile. Justices Jackson and Harlan dissenting. Galveston, H. & S. A. Ry. Co. v. Gonzales (1894) 14 Sup. Ct. 401, 402, 151 U. S. 496, 38 L. Ed. 248. Under this section citizens or subjects of foreign states can sue citizens of the United States in the federal courts only in the district in which the latter reside. Campbell v. Duluth, S. S. & A. Ry. Co. (C. C. 1892) 50 Fed. 241; H. G. Baker & Bro. v. Pinkham (D. C. 1914) 211 Fed. 728. And, if there are several codefendants, each defendant must be liable to be sued in the district in which the action is brought. McAulay v. Moody (C. C. 1911) 185 Fed. 144. An alien, though resident in a state, can maintain a suit against a citizen of the United States only in the district of defendant's residence. Miller v. New York Cent. & H. R. R. Co. (C. C. 1906) 147 Fed. 771. A suit by Italian aliens for death of their son against a corporation of Pennsylvania and Ohio must be brought in the federal district where the corporation is a legal resident. Colosino v. Pittsburgh & L. E. R. Co. (D. C. 1914) 210 Fed. 550. Where the principal place of business of defendant corporation, as provided by its articles, was in B. county, which was not in the Northern federal district of Ohio, it was not subject to suit in that district for a wrongful death of a servant brought by aliens who also did not reside in such district. Grabsky v. Belmont Coal Mining Co. (D. C. 1913) 210 Fed. 553. Aliens held not entitled to sue a New York corporation, though carrying on its business in Pennsylvania, in one of the districts of Pennsylvania. Adzenoska v. Erie R. Co. (D. C. 1914) 210 Fed. 571.

A nonresident citizen of the United States, having no local habitation, cannot be sued in the circuit court by an alien, although he has attachable property within the district, if he is not

found therein. Picquet v. Swan (C. C. 1828) Fed. Cas. No. 11,134.

Under this section a citizen of Mexico cannot sue a Connecticut corporation in the circuit court for the Southern district of California, though the corporation has an office and managing agent in that district. Denton v. International Co. (C. C. 1888) 36 Fed. 1.

Where aliens file a bill against citizens, and join as plaintiff a citizen as between whom and one of the defendants the court has no jurisdiction, the bill may be amended by omitting him as plaintiff and joining him as defendant. Conolly v. Taylor (1829) 2 Pet. 556, 565, 7 L. Ed. 518.

A suit between citizens of France and an Illinois corporation, where federal jurisdiction depended on diversity of citizenship, could not be brought over defendant's protest in the federal Circuit Court for the district of North Carolina, where neither plaintiff nor defendant resided. Fribourg v. Pullman Co. (C. C. 1910) 176 Fed. 981.

An action was brought in a state court of Colorado, in which plaintiff was an alien, and defendant a New York corporation. On application to docket the cause in the circuit court for the district of Colorado, held that, under the act of 1887, which provides that a suit between citizens of different states shall be brought only in the district where either the plaintiff or defendant resides, the case was not transferable. Harold v. Iron Silver Min. Co. (C. C. 1888) 33 Fed. 529.

19. —— By assignees of aliens.—Where plaintiff, a citizen of New York, brought an action in the Circuit Court of the Southern district of New York, as assignee of a British corporation against defendant corporation, a citizen of New Jersey, the court had no jurisdiction to entertain the suit over defendant's protest. Consolidated Rubber Tire Co. v. Ferguson (1910) 183 Fed. 756, 106 C. C. A. 330.

Where plaintiff's assignor was an alien, and defendant a citizen, so that the federal court had jurisdiction, and suit might have been brought in the Southern district of New York, if no assignment had been made, had defendant waived right to object because it was an inhabitant of New Jersey, the controversy, after assignment to a New York citizen, became one between citizens of different states and suit was properly brought in the district where assignee resided. Ferguson v. Consolidated Rubber Tire Co. (C. C. 1909) 169 Fed. 888.

20. —— Suits by citizens against aliens.—The provision that, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant, does not apply to a suit brought by a citizen of one state against an alien or a foreign corporation. In re Hohorst (1893) 14 Sup. Ct. 221, 224, 150 U. S. 653, 37 L. Ed. 1211; Barrow S. S. Co. v. Kane (1898) 18 Sup. Ct. 526, 528, 170 U. S. 100, 42 L. Ed. 964; Sherwood v. Newport News & M. Val. Co. (C. C. 1893) 55 Fed. 1, 3; H. G. Baker & Bro. v. Pinkham (D. C. 1914) 211 Fed. 728.

A suit by a citizen can only be maintained in a district in which valid service can be made on the defendant. Tierney v. Helvetia Swiss Fire Ins. Co. (C. C. 1908) 163 Fed. 82; Vestal v. Ducktown Sulphur, Copper & Iron Co. (D. C. 1911) 210 Fed. 375. But the court has no jurisdiction of an action by citizens of the district against an alien temporarily therein. Meyer v. Herrera (C. C. 1889) 41 Fed. 65. It has jurisdiction of a suit begun in a state court by a resident citizen against a nonresident alien defendant. Jurisdiction exists by virtue of the citizenship of plaintiff and alienage of defendant. Cooley v. McArthur (C. C. 1888) 35 Fed. 372.

Under Judicial Code, § 28, ante, § 1010, and this section, suit against alien held maintainable wherever service can be made, and removable to the district in which it is pending in a state court. Bradshaw v. Bowden (D. C. 1914) 226 Fed. 323.

A foreign or alien corporation, operating an Atlantic steamship line, could be sued for injuries to a passenger, who was a citizen of New Jersey, in a federal court sitting in New York; the provisions of the judiciary act as to the district of suit having no application to a suit against an alien or foreign corporation, which may be sued by a citizen in any state where valid service can be had. Jarowski v. Hamburg-American Packet Co. (1910) 182 Fed. 320, 104 C. C. A. 548, motion to vacate denied (1911) 186 Fed. 332, 108 C. C. A. 410.

21. Citizens of different states.—The parties being citizens of different states, suit may be brought in the district in which either plaintiff or defendant resides. Short v. Chicago, M. & St. P. Ry. Co. (C. C. 1887) 33 Fed. 114; St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co. (C. C. 1887) 33 Fed. 389; Bank of Winona v. Avery (D. C. 1887) 34 Fed. 81. An action by two citizens of different states against a citizen of a third state may be brought in the district of the latter's residence. Sweeney v. Carter Oil Co. (1905) 26 Sup. Ct. 55, 199 U. S. 252, 50 L. Ed. 178. Where the jurisdiction is dependent on the diversity of citizenship, and the plaintiff is a nonresident, all the defendants must be residents of the district in which the suit is brought. Freeman v. American Surety Co. of New York (C. C. 1902) 116 Fed. 548.

When jurisdiction depends solely on citizenship, plaintiff may bring the action in the district wherein he resides, without reference to the residence of defendant, if he resides in a different state. Bostwick v. American Finance Co. (C. C. 1890) 43 Fed. 897. But the suit can only be brought in the district where all the plaintiffs reside, or in the district where all the defendants reside who are indispensable or necessary parties. Lengel v. American Smelting & Refining Co. (C. C. 1901) 110 Fed. 19; Turk v. Illinois Cent. R. Co. (1914) 218 Fed. 315, 134 C. C. A. 111.

A suit to enjoin collection of a tax, on the ground that it violates the United States constitution, must be dismissed as to such defendants as are nonresidents of the district in which it is brought. United States Exp. Co. v. Allen (C. C. 1889) 39 Fed. 712, decree reversed Shelton v. Platt (1890) 11 S. Ct. 646, 139 U. S. 591, 35 L. Ed. 273. And see Bensinger Self-Adding Cash Register Co. v. National Cash Register Co. (C. C. 1890) 42 Fed. 81, holding that where, on motion to dismiss for want of jurisdiction, it appears that the jurisdiction is dependent wholly on diverse citizenship, and that one of the defendants lives in the district where suit is brought, and the other defendant and the plaintiff live in different districts, the action will be dismissed as to the nonresident, but not as to the resident, defendant. And see Richmond Cedar Works v. Buckner (C. C. 1910) 181 Fed. 424, holding that the jurisdiction is not defeated because some of the defendants are not inhabitants of nor served within the district, but the case may proceed against those who have been served. And see, ante, § 1032, and notes thereunder.

A suit by two persons on a contract entered into by them as partners cannot be maintained in a district of which the defendant and one of the plaintiffs are nonresidents. Greely v. Lowe (1894) 15 Sup. Ct. 24, 26, 27, 155 U. S. 58, 39 L. Ed. 69; Smith v. Lyon (C. C. 1889) 38 Fed. 53, judgment affirmed (1890) 10 Sup. Ct. 303, 133 U. S. 315, 33 L. Ed. 635.

An action by a nonresident against a partnership, whose members are residents of different states and districts, may be brought in the district of the residence of one of them. Rawitzer v. Wyatt (C. C. 1889) 40 Fed. 609. A court has no jurisdiction of a suit by residents of other districts than that for which the court sits, against several defendants, only one of whom is a resident of that district. Excelsior Pebble Phosphate Co. v. Brown (1896) 74 Fed. 321, 20 C. C. A. 428.

In a bill in equity, brought in the United States circuit court, by one complainant against several defendants, in which the only basis of jurisdiction was diversity of citizenship, the complainant was a citizen and resident of a state other than that of the district in which the suit was brought, some of the defendants were citizens and residents of the state constituting the district in which the suit was brought, and one of the defendants was a citizen and resident of a state other than that of such district, and other than that of which the complainant was a citizen and resident. Service was secured on all the defendants within the district where the suit was brought. Held, that the court had no jurisdiction over the last-named defendant. Jenkins v. York Cliffs Imp. Co. (C. C. 1901) 110 Fed. 807.

Since the provision that, when jurisdiction is founded on diverse citizenship, suit shall be brought only in the district of the residence of the plaintiff or defendant, confers a mere privilege on the defendant, which it may waive, federal courts have jurisdiction over controversies wholly between citizens of different states, though neither plaintiff nor defendant is a resident of the district in which the court to which the action was removed is sitting. Burch v. Southern Pac. Co. (C. C. 1905) 139 Fed. 350. Under this section, where federal jurisdiction depended on diverse citizenship alone, plaintiff could sue in the district of his residence, but was not required, under post, § 1035, to sue in the division of the district in which he resided. Reich v. Tennessee Copper Co. (D. C. 1913) 209 Fed. 880.

A court cannot entertain a personal action by joint plaintiffs who are citizens of different states against a defendant who is not an inhabitant of the district where the action is brought, but this section does not affect the jurisdiction of the court in local actions to enforce a lien or claim upon real estate or personal property within the district. Lancaster v. Asheville St. Ry. Co. (C. C. 1898) 90 Fed. 129.

Defendants M., citizens of Oregon, executed their demand note to A. Bros., formerly engaged in business in Oregon as partners. The firm consisted of three brothers, two of whom, who were subjects of Great Britain, filed a bill in the federal Circuit Court for the District of Oregon, alleging that one of them owned 43⅓ per cent. of the note; that the other owned 13⅓ per cent.; that the other brother, who was a citizen and resident of Montana, owned 43⅓ per cent.; and that, by reason of his refusal to join complainants in any action or suit thereon, complainants were unable to maintain an action at law against the defendants M. Defendant A. did not appear, and defendants M. demurred on the ground that the court was without jurisdiction because he was an indispensable party and could not be sued within the district. Held, that, since no decree could be rendered without an adjudication of the rights of defendant A., he was an

indispensable party, and, not being subject to suit in a federal court sitting in Oregon, the court could not entertain jurisdiction under R. S. § 737, embodied herein. McAulay v. Moody (C. C. 1911) 185 Fed. 144.

A citizen of a territory is not a citizen of a state so as to confer jurisdiction on the ground of diverse citizenship. Hepburn v. Ellzey (1805) 2 Cranch, 445, 2 L. Ed. 332; New Orleans v. Winter (1816) 1 Wheat. 91, 4 L. Ed. 44; Barney v. Baltimore (1867) 6 Wall. 280, 18 L. Ed. 825; Cameron v. Hodges (1888) 8 Sup. Ct. 1154, 127 U. S. 325, 32 L. Ed. 132; Clark v. Southern Pac. Co. (C. C. 1909) 175 Fed. 122.

Where a minority stockholders' bill was brought by citizens of three states against citizens of two other states, in a state where part of the defendants resided, but was not local in character, jurisdiction on the ground of diversity of citizenship attached as to all the complainants and as to all the defendants who were citizens of the state in which the suit was instituted, but not as to the defendants who were citizens of another state. Schultz v. Highland Gold Mines Co. (C. C. 1907) 158 Fed. 337.

22. Suit in name of state on relation of individual.—A suit brought in the name of the United States under Act Aug. 13, 1894, post, § 6923, on the bond of a public contractor, for the benefit of a person furnishing materials and labor for the construction of a public work, is governed by this act. Davidson Bros. Marble Co. v. U. S. (1909) 29 S. Ct. 324, 213 U. S. 10, 53 L. Ed. 675.

The restriction as to the place of suit when persons holding unpaid demands for labor or materials bring an action in the name of the United States, on the bond of a public contractor, given conformably to Act Feb. 24, 1905, amending Act Aug. 13, 1894, post, § 6923, to the federal court for the district in which said contract is to be performed, "and not elsewhere," governs as well where the action is brought by the United States against the principal and sureties on the bond, for the failure to pay certain designated subcontractors for labor and materials used in the construction of the work. U. S. v. Congress Const. Co. (1911) 32 S. Ct. 44, 222 U. S. 199, 56 L. Ed. 163.

A suit in the name of a state, on relation, is to be treated for the purpose of determining the jurisdiction of a federal court, as though the relators were alone the complainants. Jack v. Williams (C. C. 1902) 113 Fed. 823, decree affirmed State of South Carolina v. Jack (1906) 145 Fed. 281, 76 C. C. A. 165.

A suit under section 6923, post, on a bond brought in the name of the United States for the use and benefit of others, even conceding it to be a suit by the United States for the purpose of conferring jurisdiction on a federal court under this provision, regardless of the citizenship of the parties, cannot be maintained in such court on that ground in any district other than the one of which the defendant is an inhabitant. U. S. v. O'Brien (C. C. 1903) 120 Fed. 446.

23. Corporations.—A corporation incorporated in one state only cannot be compelled to answer in another state in which it has a place of business and of which the plaintiff is not a citizen. Empire Coal & Transp. Co. v. Empire Coal & Min. Co. (1893) 14 Sup. Ct. 66, 67, 150 U. S. 159, 37 L. Ed. 1037.

A suit between corporations organized in different states may be brought in the district in which the plaintiff is incorporated. N. K. Fairbank & Co. v. Cincinnati, N. O. & T. P. Ry. Co. (1892) 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271.

Where, in a suit by a citizen of New York against a Delaware corporation operating a coal washery in Pennsylvania, federal jurisdiction depended solely on diversity of citizenship, the proper forum was in New York or Delaware. Marian Coal Co. v. Peale (1913) 204 Fed. 161, 122 C. C. A. 397, modifying decree (C. C. 1911) Peale v. Marian Coal Co., 190 Fed. 376.

An action cannot be begun in the federal courts against a corporation which, having no agent or place of business within the jurisdiction, cannot be found there, by an attachment of its property. A foreign trading corporation may be sued in the circuit court for the district of Massachusetts, although the property of the defendant has not been attached, where such corporation is doing business within the state, and the summons has been duly served upon an officer of the company. Hayden v. Androscoggin Mills (C. C. 1880) 1 Fed. 93, 96.

A railroad corporation organized and having its road in one state and an office in another for the purpose of soliciting business, and having an agent in charge of such office, employed for the purpose of furthering the business of the company, may be sued in the district where such office is located. Block v. Atchison, T. & S. F. R. Co. (C. C. 1884) 21 Fed. 529.

It is not sufficient to give the federal courts jurisdiction in personam over a foreign corporation that it has property rights, however extensive, within the district, or that it has pecuniary interests, however valuable, in business managed and conducted by others. U. S. v. American Bell Tel. Co. (C. C. 1886) 29 Fed. 17.

A New York corporation, having its principal office in that state, and doing business in Illinois, cannot be sued in the federal courts in Illinois. Preston

v. Fire Extinguisher Mfg. Co. (C. C. 1888) 36 Fed. 721.

A citizen of Mexico cannot sue a Connecticut corporation in the federal court for the Southern district of California, though the corporation has an office and managing agent in that district. Denton v. International Co. (C. C. 1888) 36 Fed. 1.

This section authorizes an action against a railroad corporation only in the state by whose laws it was created, though the greater part of its railway and its principal office are in another state, where its annual elections are held, and most of its officers and stockholders reside, and of which most of its directors are citizens. Filli v. Delaware, L. & W. R. Co. (C. C. 1888) 37 Fed. 65.

Jurisdiction of a suit between two foreign corporations cannot be conferred by consent. St. Louis R. Co. v. Pacific Ry. Co. (C. C. 1892) 52 Fed. 770.

To a suit to establish and enforce the right of a purchaser of a newspaper to the Associated Press dispatches, under a franchise or contract held by the former publisher, the Associated Press is an indispensable party, as no decree could be effective which did not bind that corporation; and such a suit cannot be maintained in a federal court in a district of which neither the complainant nor such corporation is a resident or citizen. Lawrence v. Times Printing Co. (C. C. 1898) 90 Fed. 24.

A corporation cannot be required without its consent to answer in a federal court other than that of the district in which it was incorporated to a civil action brought by a citizen of a different state, though it may be rightfully doing business in the district where sued, and have a general agent there. Baldwin v. Pacific Power & Light Co. (D. C. 1912) 199 Fed. 291.

A corporation may be sued in the district of its residence, that is, in the district in which it is chartered, or in the district of plaintiff's residence if service can be had there. Noel Const. Co. of Baltimore City v. George W. Smith & Co. (C. C. 1911) 193 Fed. 492.

In the absence of a voluntary appearance, three conditions must concur to give the federal courts jurisdiction in personam over a corporation created without the territorial limits of the state in which the court is held, viz.: (1) It must appear, as a matter of fact, that the corporation is carrying on its business in such foreign state or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such state; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition express or implied of doing business in the state. U. S. v. American Bell Tel. Co. (C. C. 1886) 29 Fed. 17; Mecke v. Valley Town Mineral Co. (C. C. 1898) 89 Fed. 114.

A railroad corporation formed by the consolidation of several corporations chartered by different states, which bears the same name in all the states, and, under one management, is operated as an entirety, in the absence of statutory provision to the contrary, may transact its business in one state for all; and the contracts it enters into in one state are binding on it in all, and may be enforced against it in either when the action is transitory. Fitzgerald v. Missouri Pac. Ry. Co. (C. C. 1891) 45 Fed. 812.

In so far as diverse citizenship was concerned, an action by a citizen of Massachusetts was properly brought in the circuit court for the New Hampshire district for the death of a resident of the former state against a railroad company incorporated by the concurrent action of several states, including those named. Boston & M. R. Co. v. Hurd (1901) 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, writ of certiorari denied Hurd v. Boston & M. R. Co. (1902) 22 S. Ct. 939, 184 U. S. 700, 46 L. Ed. 765.

Under this section a suit by Italian aliens for death of their son against a corporation of Pennsylvania and Ohio must be brought in the federal district where the corporation is a legal resident. Colosino v. Pittsburgh & L. E. R. Co. (D. C. 1914) 210 Fed. 550.

Where the operation of a street railroad by a competing company was continuous and nonseparable, part of such operation being in the eastern district of New York, the court of that district had jurisdiction at the instance of receivers of another company injured thereby to enjoin the same. Brady v. South Shore Traction Co. (D. C. 1912) 197 Fed. 669.

A corporation of one state cannot be affected by an order or writ of injunction issued by a federal court in another state. Averill v. Southern Ry. Co. (C. C. 1896) 75 Fed. 736.

24. —— **Federal corporations as affecting venue.**—A corporation created by an act of congress may be sued in the federal courts in any district where it is doing business, and has an agent on whom service can be made, notwithstanding its principal office is in another state. Van Dresser v. Oregon Ry. & Nav. Co. (C. C. 1891) 48 Fed. 202.

An action against a corporation created by an act of Congress is one arising under the laws of the United States, and, under this section, can only be brought in a federal court of the district in which it has its principal offices, regardless of the residence of plaintiff. A. L. Wolff & Co. v. Choctaw, O. & G. R. Co. (C. C. 1904) 133 Fed. 601.

25. —— **Domicile of corporation as affecting venue.**—In the absence of any charter provision on the subject, the principal office and domicile of a railroad corporation, for the purposes of a suit in a federal court, are in the district where its stockholders' and directors' meetings are held, and the records thereof kept, together with the stock certificate book, and where the principal officers have their offices, rather than in a different district, where the general administrative offices of the heads of its departments are located. Texas & P. R. Co. v. Interstate Commerce Commission (1896) 16 Sup. Ct. 666, 669, 162 U. S. 197, 40 L. Ed. 940.

The fact that a corporation is resident in Richmond, and has its office for the transaction of all its business there, cannot be implied from the mere use, in the bill, of the word "Richmond" as a part of its corporate name. Harvey v. Richmond & M. Ry. Co. (C. C. 1894) 64 Fed. 19.

A federal court does not acquire jurisdiction over a corporation of another state, domiciled therein, which maintains no regular or established place of business or agent within the district where the suit is brought, by service of process on a person not in fact its agent within the district. Westinghouse Mach. Co. v. Press Pub. Co. (C. C. 1901) 110 Fed. 254.

Where a corporation was organized under the laws of Delaware, the fact that its principal place of business was within the middle federal district of Pennsylvania did not give the corporation a domicile there for the purpose of determining the jurisdiction of the federal courts. Peale v. Marian Coal Co. (C. C. 1909) 172 Fed. 639.

Where a Virginia corporation maintained an office in Philadelphia, where its president and treasurer were located, and all its executive, administrative, and official operations were carried on, it was subject to suit there. Real Estate Trust Co. of Philadelphia v. Washington-Virginia Ry. Co. (D. C. 1913) 204 Fed. 678.

Where federal jurisdiction was based entirely on diversity of citizenship, suit by a citizen of Colorado in a federal District Court in Washington against two residents of Washington, two individual citizens of New York, a New Jersey corporation, and a Washington corporation, seeking judgment in personam, held not maintainable against the objection of the nonresident defendants, under this section. Revett v. Clise (D. C. 1913) 207 Fed. 673.

Where defendant railroad company was a Pennsylvania and Ohio corporation located entirely in the Western district of Pennsylvania, without property or an office in the Eastern district, it was not a resident of such district so as to subject it to suit there because it was a member of a fast freight association which maintained an office in the Eastern district in charge of a chief clerk. Colosino v. Pittsburgh & L. E. R. Co. (D. C. 1914) 210 Fed. 550.

A company incorporated under the laws of two different states may sue or be sued as inhabitant of that state where its principal place of business is situated, and its records kept. Culbertson v. Wabash Nav. Co. (C. C. 1849) Fed. Cas. No. 3,464.

A federal court of equity will not entertain jurisdiction of a suit to wind up a corporation or appoint a general receiver therefor, where neither the domicile nor property of the corporation are within the state or district and the residence of the stockholders is immaterial. Kirwin v. Boston & O. Mining Co. (C. C. 1908) 171 Fed. 900.

A suit in a federal court to enjoin a railroad company from enforcing an interstate rate, a federal question being involved, can only be brought in the state of defendant's incorporation and the district of which it is an inhabitant, unless such objection is waived. Imperial Colliery Co. v. Chesapeake & O. Ry. Co. (C. C. 1909) 171 Fed. 589.

26. —— **Transaction of business as affecting venue.**—Soliciting through its district freight and passenger agent in Philadelphia freight and passenger traffic for a railway company incorporated in Iowa and having its eastern terminal at Chicago is not doing business within the eastern district of Pennsylvania in such a sense that process can be served upon the corporation there. Green v. Chicago, B. & Q. Ry. Co. (1907) 27 Sup. Ct. 595, 205 U. S. 530, 51 L. Ed. 916, affirming judgment (C. C. 1906) 147 Fed. 767.

A Canadian railroad corporation must be considered as being within the state, and subject to the jurisdiction of the federal court at the suit of a citizen of the district, by operating a railroad therein under a lease ratified by the legislature. Cummings v. Grand Trunk Ry. Co. (C. C. 1876) Fed. Cas. No. 3,475.

A railroad corporation organized and having its road in one state and an office in another for the purpose of soliciting business, and having an agent in charge of such office, employed for the purpose of furthering the business of the company, may be sued in the district where such office is located. Block v. Atchison, T. & S. F. R. Co. (C. C. 1884) 21 Fed. 529.

Where the defendant is a corporation organized under the law of another state, but maintaining an office in the state wherein the plaintiff resides, suit may be brought in the federal court of the latter state. Minford v. Old Dominion S. S. Co. (C. C. 1891) 48 Fed. 1.

A corporation, which is a citizen of New York and carries on its business through an agent in the Southern District of Georgia, may be sued there by

a citizen of Georgia who resides in the district. Barnes v. Western Union Tel. Co. (C. C. 1903) 120 Fed. 550.

Where service is made upon an officer or agent of a foreign corporation temporarily within the state or district of suit, in order to give a federal court jurisdiction to render a personal judgment against the corporation, it must appear that it was actually and substantially engaged in business in such state or district, its business must have been transacted by some agent or manager representing the corporation, and it must also appear that the local statute provides for suit against such foreign corporation which has been permitted to transact business within the state. A corporation of another state, which had no place of business within the state of suit, but merely solicited and obtained orders for goods therein by correspondence by agent, is not within the rule. Buffalo Glass Co. v. Manufacturers' Glass Co. (C. C. 1905) 142 Fed. 273.

A federal court does not acquire jurisdiction of a corporation of another state by service of process on an officer or agent of the corporation within the state where the court is held unless it appears from some part of the record or by the return that the corporation is doing business in such state. Green v. Chicago, B. & Q. Ry. Co. (C. C. 1906) 147 Fed. 767, judgment modified (1907) 27 Sup. Ct. 595, 205 U. S. 530, 51 L. Ed. 916.

The presence of an officer of a corporation in another state than that of its domicile, for the purpose of discussing a proposed adjustment of a single controversy, does not constitute a doing of business within the state by the corporation such as to subject it to the jurisdiction of a federal court therein by service of process on such officer. Wilkins v. Queen City Sav. Bank & Trust Co. (C. C. 1907) 154 Fed. 173.

A corporation having its principal place of business in Paris held not doing business in a district in such sense that a federal court there obtained jurisdiction over it by service on the local agent. Goepfert v. Compagnie Générale Transatlantique (C. C. 1907) 156 Fed. 196.

A Pennsylvania corporation maintained a permanent office in Detroit, with its name and the name of a person as manager on the door. It paid the rent of the office, and the salary of the manager from the home office, and the business it did in Michigan was substantial, amounting to a large sum per annum. It advertised its presence in the general city directory of Detroit, and in the telephone directory, and its general sales agent came frequently to Detroit to consult with the local manager and to meet customers. In the main the manager solicited orders for goods which were forwarded to the home office for acceptance, but he frequently closed contracts with customers for small orders which were filled by the company without objection. Held, that the corporation was doing business in Michigan in such sense as to be subject to suit in a federal court in that state. Michigan Aluminum Foundry Co. v. Aluminum Castings Co. (C. C. 1911) 190 Fed. 879.

A Pennsylvania corporation held not suable in a federal court in Maryland on a contract made in that state to be performed in Illinois, where it was not at the time doing business in Maryland. Noel Const. Co. of Baltimore City v. Geo. W. Smith & Co. (C. C. 1911) 193 Fed. 492.

A federal court acquires no jurisdiction over a foreign corporation unless it is served with process within the jurisdiction, and is doing business within the state, without a waiver. Chinn v. Foster-Milburn Co. (D. C. 1912) 195 Fed. 158, judgment affirmed Foster Milburn Co. v. Chinn (C. C. A. 1913) 202 Fed. 175.

While the extent to which a foreign corporation must do business in a state to justify the service of process upon it there is not clearly defined, the transaction of some substantial business must be established. A foreign corporation held on the facts shown not doing business in a state in such sense as to subject it to service of process upon it therein to give jurisdiction to a federal court. Cody Motors Co. v. Warren Motor Car Co. (D. C. 1912) 196 Fed. 254.

Where the operation of a street railroad by a competing company was continuous and nonseparable, part of such operation being in the eastern district of New York, the court of that district had jurisdiction at the instance of receivers of another company injured thereby to enjoin the same. Brady v. South Shore Traction Co. (D. C. 1912) 197 Fed. 669.

The fact that a foreign corporation maintains an office and has a resident agent with limited authority for particular purposes in the federal district in which it is sued is not sufficient to justify the inference that the corporation is within the district, so as to authorize service on it there. Real Estate Trust Co. of Philadelphia v. Washington-Virginia Ry. Co. (D. C. 1913) 204 Fed. 678, judgment affirmed Washington-Virginia R. Co. v. Real Estate Trust Co. of Philadelphia (1915) 35 S. Ct. 818, 59 L. Ed. 1262.

Where the principal place of business of defendant corporation, as provided by its articles, was in B. county, which was not in the Northern federal district of Ohio, it was not subject to suit in that district for a wrongful death of a servant brought by aliens who also did not reside in such district. Grabsky v. Belmont Coal Mining Co. (D. C. 1913) 210 Fed. 553.

Under this section aliens held not entitled to sue a New York corporation, though carrying on its business in Penn-

sylvania, in one of the districts of Pennsylvania. Adzenoska v. Erie R. Co. (D. C. 1914) 210 Fed. 571.

27. —— **Local laws and compliance therewith as affecting venue.**—A federal court has no jurisdiction over a foreign corporation, in the absence of local law conferring jurisdiction on the state courts, though the corporation does business through an agent and has an office within the district where the court is held. Eaton v. St. Louis Shakspear Mining & Smelting Co. (C. C. 1881) 7 Fed. 139.

A foreign corporation, which under the Constitution and statutes of the state can be sued in the state courts only in counties in which it does business, is not suable in a federal court in the state unless it does business in some one of the counties within the territorial jurisdiction of such court. Kibbler v. St. Louis & S. F. R. Co. (C. C. 1906) 147 Fed. 879.

When a foreign corporation, in pursuance of the laws of a state in which it carries on business, designates a person upon whom process may be served, it thereby consents to be sued in the district embracing such state, and waives the exemption granted to it under this statute. Runkle v. Lamar Ins. Co. (C. C. 1880) 2 Fed. 9; Gray v. Quicksilver Min. Co. (C. C. 1884) 21 Fed. 288; Consolidated Store Service Co. v. Lamson Consol. Store Service Co. (C. C. 1890) 41 Fed. 833; Gilbert v. New Zealand Ins. Co. (C. C. 1892) 49 Fed. 884, 15 L. R. A. 125. CONTRA, Rowbotham v. George P. Steele Iron Co. (C. C. 1896) 71 Fed. 758.

But compliance by a corporation with a statute of another state requiring a foreign corporation, as a condition of doing business therein, to appoint an attorney in that state upon whom all lawful processes in any action or proceedings against it may be served, and to agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the company, does not make such corporation a citizen or resident of the state, or constitute an agreement or consent that it may be sued in a federal court of that district by a plaintiff who is a resident of another district, where the jurisdiction is founded only on diversity of citizenship, but it may insist on the right to be sued only in the district where it is incorporated, or that in which plaintiff resides. Platt v. Massachusetts Real Estate Co. (C. C. 1900) 103 Fed. 705.

The facts that an alien corporation is authorized to do business in a state, and that under the state law service of process in any suit against such corporation may be made on an officer of the state, do not give a federal court within the state jurisdiction of a suit against such corporation, where it does not appear that service was made, or could have been made, within the district of such court, and the fact that defendant is authorized to do business in the district is not sufficient to authorize service to be made therein, unless it is actually so doing business. Tierney v. Helvetia Swiss Fire Ins. Co. (C. C. 1908) 163 Fed. 82.

The fact that a foreign corporation which had maintained an office in Minnesota, and there contracted a liability, before suit brought in a court of the state to enforce such liability had withdrawn its local office, does not exempt it from being subjected to a personal judgment in such suit, on service made on its president within the state in the mode prescribed by Gen. St. Minn. 1894, § 5200. McCord Lumber Co. v. Doyle (1899) 97 Fed. 22, 38 C. C. A. 34.

A Pennsylvania corporation which has filed with the Auditor General of the state a certificate designating its office and place of business, pursuant to Act Pa. June 7, 1879 (P. L. 112), must be deemed a resident of the federal district within which such place is situated, and cannot be sued in another district of the state, although its operations may extend into such district. Weed v. Centre & C. St. Ry. Co. (C. C. 1904) 132 Fed. 151.

The residence of an attorney appointed to accept service for a nonresident corporation under Code W. Va. § 2313, fixes the residence of the corporation for the purpose of determining the district of federal jurisdiction in a suit against the corporation. Lemon v. Imperial Window Glass Co. (D. C. 1912) 199 Fed. 927.

Under Act 1875 and Rev. St. Tex. arts. 1223, 4120, and section 1198, subd. 21, an action by a citizen of Mexico against a Texas railroad corporation, whose principal office was in the Eastern district of Texas, but whose railroad extended into the Western district, in which it had agents to transact its ordinary business, might be brought in the Western district. Zambrino v. Galveston, H. & S. A. Ry. Co. (C. C. 1889) 38 Fed. 449.

A corporation created by an act of Congress which, having designated Dallas, Texas, where its senior vice president lives, as its general office, maintains an office in Dallas county, and has all the acts of its board of directors taken in New York City, affirmed by a meeting of the board at Dallas, is suable in the Northern district of Texas, under act March 11, 1902, post, §§ 1095, 1364, and Tex. Sayles' Ann. Civ. St. 1897, arts. 1222, 1223, as being a resident of, and doing business in, that district, and having an agent there upon whom service can properly be made. In re Dunn (1909) 29 Sup. Ct. 299, 212 U. S. 374, 53 L. Ed. 558.

28. —— **District of plaintiff's residence as affecting venue.**—Under this section, as corrected by Act Aug. 13,

1888, a corporation incorporated in one state only and having a usual place of business in another state cannot be sued in a circuit court of the United States held in the latter state by a citizen of still a third state. Ex parte Shaw (1892) 12 Sup. Ct. 935, 936, 145 U. S. 444, 36 L. Ed. 768.

A corporation organized in one state only cannot be sued in a federal court for any other state except by a citizen of the latter state, unless it waive its privilege. Rust v. United Waterworks Co. (1895) 70 Fed. 129, 17 C. C. A. 16.

Federal court will take jurisdiction when plaintiff is a resident of the district wherein he brings suit, and defendant a corporation created by laws of a foreign state. Rawley v. Southern Pac. R. Co. (C. C. 1887) 33 Fed. 305.

When the jurisdiction arises only from the fact that the plaintiff and defendant are citizens of different states, suit may be brought in the court of the district in which either the plaintiff or defendant resides; and, where defendant is a corporation organized under the law of another state, but maintaining an office in the state wherein the plaintiff resides, suit may be brought in the court of the latter state. Minford v. Old Dominion S. S. Co. (C. C. 1891) 48 Fed. 1.

The federal courts have jurisdiction, on the ground of diverse citizenship under this section of an action against a foreign corporation, brought in the district in which the plaintiff resides, when such corporation is subjected by statute to the jurisdiction of the courts of the state in which the district is located. Dinzy v. Illinois Cent. R. Co. (C. C. 1894) 61 Fed. 49.

A corporation, which is a citizen of New York and carries on its business through an agent in the Southern District of Georgia, may be sued there by a citizen of Georgia who resides in the district. Barnes v. Western Union Tel. Co. (C. C. 1903) 120 Fed. 550.

An action by a citizen of Pennsylvania may be properly brought against a foreign corporation doing business in Pennsylvania in the federal district of plaintiff's residence. Hagstoz v. Mutual Life Ins. Co. of New York (C. C. 1910) 179 Fed. 569.

29. —— **Determination by court.**—Under R. S. § 739, embodied herein, providing, in substance, that no civil suit shall be brought against a citizen of the United States in any other district than that of which he is an inhabitant, "or in which he is found at the time of serving the writ," it is always for the federal court to determine whether a nonresident corporation sued therein has transacted business to such an extent within the district, and has such a representative or agent therein, that jurisdiction to render a personal judgment against the corporation may be acquired by service on that agent. St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co. (C. C. 1887) 32 Fed. 802.

30. **Assignment of cause of action.**—See, also, notes under §§ 991 (1), 1019.

Where the assignor of a cause of action before the assignment could have prosecuted the action in a federal Circuit Court, the assignee, if the requisite diversity of citizenship exists, can prosecute the action in such court in the district of which he is a resident or in that of the defendant, and in the former case it is not required that the assignor should have also been a resident of the same district so that he might have brought suit therein. Stimson v. United Wrapping Mach. Co. (C. C. 1907) 156 Fed. 298.

31. **Allegations in pleadings.**—It is not necessary to aver on the record that defendant in the circuit court was an inhabitant of the district or was found therein at the time of serving the writ. Gracie v. Palmer (1823) 8 Wheat. 699, 700, 5 L. Ed. 719.

When the jurisdiction of the Circuit Court depends upon the citizenship of the parties, it is not enough that it does not appear that they are citizens of the same state, but the facts necessary to give the Circuit Courts jurisdiction must be distinctly alleged. Gates v. Osborne (1869) 9 Wall. 567, 574, 19 L. Ed. 748.

The jurisdiction of the federal courts depends on service of process or inhabitancy in the district, one of which should appear of record. Knowles v. Logansport Gaslight & Coke Co. (1873) 19 Wall. 58, 61, 22 L. Ed. 70.

Where the original bill alleged that one of the parties defendant was a corporation, and the amended bill alleged that the individual defendants were doing business under a pretended corporation of the same name, but expressly included therein the allegations of the original bill, and prayed that the parties to the original bill be made parties to the amended bill, and it appeared that the defendant corporation was incorporated in the same state as plaintiff corporation, the federal courts have no jurisdiction on ground of diverse citizenship. Empire Coal & Transp. Co. v. Empire Coal & Min. Co. (1893) 14 Sup. Ct. 66, 68, 150 U. S. 159, 37 L. Ed. 1037.

An averment of the citizenship of the defendant is indispensable. Jackson v. Twentyman (1829) 2 Pet. 136, 7 L. Ed. 374.

The jurisdiction of the court is not affected by the venue laid, or a wrong one, or by the entire omission to lay one. Cage v. Jeffries (C. C. 1839) Fed. Cas. No. 2,287.

A venue in the body of the declaration is sufficient without being stated in the margin. Dwight v. Wing (C. C. 1841) Fed. Cas. No. 4,219.

The venue, if substantially laid, is

sufficient. Gassett v. Palmer (C. C. 1842) Fed. Cas. No. 5,265.

Where the absence of a venue in one count may be supplied by necessary inference from the venue in others, the count is not bad. Noe v. Prentice (C. C. 1845) Fed. Cas. No. 10,284a.

Where a cause of action is local, a reference to the "district aforesaid," named in any preceding count, is a sufficient designation of the place. Jones v. Van Zandt (C. C. 1851) Fed. Cas. No. 7,505.

If a foreign corporation sues a citizen of one of the United States in a federal court of a district within which he is found and served with process, it does not affect the jurisdiction of the court that he is described as a citizen of the state where found, whereas he is a citizen of another state. Commercial Bank of Commerce v. Green (C. C. 1878) Fed. Cas. No. 3,059.

Where the jurisdiction of the circuit court is founded only on the fact of diverse citizenship, the complaint must show that either plaintiff or defendant resides within the district in which the action is brought. Laskey v. Newtown Min. Co. (C. C. 1892) 50 Fed. 634.

A bill was filed in the circuit court of Virginia, alleging that complainant was a corporation under the laws of New York, and that the defendant was a corporation under the laws of New Jersey, and a citizen and resident of that state, having a principal place of business at Bristol, Va., in said district. Held, that the court had not jurisdiction of the suit by reason of the diversity of citizenship of the parties, neither of them being a resident of the district, as required by this section. Central Trust Co. of New York v. Virginia, T. & C. Steel & Iron Co. (C. C. 1893) 55 Fed. 769, decree reversed Central Trust Co. v. McGeorge (1894) 14 S. Ct. 286, 151 U. S. 129, 38 L. Ed. 98.

As a bill must give jurisdiction in the district in which the suit is brought, a bill is demurrable which sets out merely that defendant is a resident of Virginia, since there are two judicial districts in Virginia. Harvey v. Richmond & M. Ry. Co. (C. C. 1894) 64 Fed. 19.

Where the only ground of jurisdiction of a federal court is the diversity of citizenship of the parties, and it is shown that the defendant is a citizen and resident of another state, it must appear from the declaration, not only that the plaintiff is a citizen of the state, but that he is a resident of the district, in which the suit is brought. Miller v. Pennsylvania R. Co. (C. C. 1899) 91 Fed. 298.

An averment that defendant is incorporated in a certain other state named is sufficient to show that it is not an inhabitant of Colorado. Weller v. Pennsylvania R. Co. (C. C. 1902) 113 Fed. 502.

An undenied allegation, in a bill for infringement against a nonresident corporation, that defendant "has a regular and established place of business" within the district, relates to the date of the suit, and establishes such fact for jurisdictional purposes. Streat v. American Rubber Co. (C. C. 1902) 115 Fed. 634.

Where in an action in a federal court, sitting in Pennsylvania, against a foreign corporation, the statement of claim filed when the summons was issued described the defendant as a railway corporation of the state of Virginia, and neither such statement, the summons, the præcipe therefor, nor the return, recited that the corporation was transacting business in Pennsylvania, a service made on the corporation's assistant secretary in Pennsylvania was insufficient to confer jurisdiction of the corporation. Earle v. Chesapeake & O. Ry. Co. (C. C. 1904) 127 Fed. 235.

A declaration in a local action in a federal district court, which does not lay a venue, or avers a wrong one, is bad on demurrer. U. S. v. Woolsey (D. C. 1845) Fed. Cas. No. 16,762.

Where, in order to give jurisdiction, it is necessary that defendant should be found within the district, a mere statement in the declaration that defendant "being in custody," etc., is insufficient. U. S. v. Woolsey (D. C. 1845) Fed. Cas. No. 16,762.

In an action against a foreign corporation, it is essential to support the jurisdiction of the court that it shall appear somewhere in the record, either in the application for the writ or accompanying its service or in the pleadings or findings of the court, that the corporation is engaged in business in the district. Dobson v. Farbenfabriken of Elberfeld Co. (D. C. 1913) 206 Fed. 125.

The right of plaintiff to sue is shown by the complaint alleging that plaintiff is a corporation organized under and pursuant to the laws of the state, and having its principal office and place of business in a certain county, which county is within the district of the federal court in which the action is brought. U. S. v. Stannard (D. C. 1913) 207 Fed. 198.

Venue is necessary to every traversable fact, and, where one is laid in the count, all matters following refer to it. Cocke v. Kendall (Super. Ct. Ark. 1834) Fed. Cas. No. 2,929b.

Venue in the margin of pleading is sufficient where none is laid in the body of the declaration. Cocke v. Kendall (Super. Ct. Ark. 1834) Fed. Cas. No. 2,929b.

(C) Venue dependent on nature of subject-matter

32. Accounting.—A partnership continues after dissolution for the purpose of liquidation and partition of its assets, and all the partners can be legally sued in the domicile of the firm for such

purposes. Goodrich v. Hunton (C. C. 1875) Fed. Cas. No. 5,544.

33. **Admiralty.**—See, also, ante, § 991(3), and notes thereunder.

A suit in rem for a marine tort may be prosecuted in any district where the offending thing is found. Commercial Transp. Co. v. Fitzhugh (1861) 1 Black, 574, 580, 17 L. Ed. 107.

Libels in rem may be prosecuted in any district of the United States where the property is found. The Slavers (1864) 69 U. S. (2 Wall.) 383, 17 L. Ed. 911.

Causes in admiralty are not civil actions within the purview of this statute, providing that no civil suit shall be brought in any other district than that of which the defendant is an inhabitant. Atkins v. Fiber Disintegrating Co. (1873) 18 Wall. 272, 300, 21 L. Ed. 841.

By the compact between New York and New Jersey of September 16, 1833 (ratified by Act June 28, 1834, 4 Stat. p. 708, c. 126), the boundary between two states from a point in the Hudson river in the forty-first degree of north latitude, to the sea, is declared to be the middle of the river, of the bay of New York, of the waters between Staten island and New Jersey, and of Raritan Bay. Held, that a vessel afloat on the New Jersey side of the Kill von Kull is within New Jersey, and subject to the jurisdiction of the United States district court for the district of New Jersey. In re Devoe Manuf'g Co. (1882) 108 U. S. 401, 2 Sup. Ct. 894, 27 L. Ed. 764.

This act does not apply to causes of admiralty and maritime jurisdiction; and a libel in admiralty, in personam, may be maintained against a corporation of another state in any district in which service may be had upon it. In re Louisville Underwriters (1889) 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991; In re St. Paul Fire & Marine Ins. Co. (1889) 134 U. S. 493, 10 Sup. Ct. 589, 33 L. Ed. 994. But see Wilson v. Pierce (D. C. 1852) Fed. Cas. No. 17,826.

The right of a claimant in a libel in rem to have the suit commenced in the division of the district in which he resides and in which the ship was seized (if any such right he have) is waived by appearing in the suit as claimant, and securing the release of the vessel by giving bond and stipulation, and procuring a transfer of the case to the division of his residence. The Willamette (1895) 70 Fed. 874, 18 C. C. A. 366.

In a suit in admiralty, where two or more defendants are citizens of different districts of the state of Louisiana, the suit may be brought in either district. Downs v. Wall (1910) 176 Fed. 657, 100 C. C. A. 209.

The rule which practically prohibits suits by attachment, by garnishment or otherwise, in the federal courts outside of the districts of the residence of the parties, has ordinarily no application to suits in admiralty. Robins Dry Dock & Repair Co. v. Chesbrough (C. C. A. 1914) 216 Fed. 121.

Jurisdiction in rem in admiralty is exclusive in the district courts, but the suit may be instituted in the district where the res is found, irrespective of where the injury complained of occurred. Killam v. The Eri (C. C. 871) Fed. Cas. No. 7,765.

The restrictions of Judiciary Act of 1789, § 11, do not apply in admiralty, where nonresidents may be sued by original attachment, and where they may be effectively served abroad. Romaine v. Union Ins. Co. (C. C. 1886) 28 Fed. 625, 634.

Where a libel has been filed in the Southern district of New York against a vessel for damage by collision, the owner of the vessel so libeled may sue independently for his own damage in the Eastern district of New York, and is not obliged to prosecute his claim by way of cross libel in the Southern district. Brooklyn & N. Y. Ferry Co. v. The Morrisania (C. C. 1888) 35 Fed. 558.

The locus rei sitæ gives jurisdiction in suits in rem. The Ada (D. C. 1849) Fed. Cas. No. 38.

Where a libelant procured the arrest of respondent in a suit brought in a district different from that in which they both resided, upon a stale demand, of small amount, and which was already in litigation between the parties in the courts of the state in which they dwelt, it was held, that the respondent ought to be discharged from the arrest. Martin v. Walker (D. C. 1850) Fed. Cas. No. 9,170.

The court in which the offending vessel is arrested has jurisdiction of a libel for collision occurring within the territorial limits of another district. Town v. The Western Metropolis (D. C. 1865) Fed. Cas. No. 14,114.

A vessel in the basin at Jersey City moored to piles 40 feet from the dock is within the jurisdiction of the district court for the Southern district of New York. The Argo (D. C. 1874) Fed. Cas. No. 515.

A proceeding to limit the liability of a shipowner is properly brought in the district where the stranding, out of which the liability arose, occurred, where the property which such owner seeks to abandon is within such district, and no suit has been instituted in any other district. The John Bramall (D. C. 1879) Fed. Cas. No. 7,334.

Proceedings to limit the liability of shipowners may be instituted in a district where a fund or claim equitably representing the lost vessel is in litigation, though the petitioners reside in another district. In re Leonard (D. C. 1882) 14 Fed. 53.

A vessel lying at anchor and afloat between Jersey City and Manhattan Is-

land, on the Hudson river, on the westerly side of the middle of said river, is within the territorial limits of the state of New Jersey, and hence within the admiralty jurisdiction of the United States district court for New Jersey. The Sarah E. Kennedy (D. C. 1885) 25 Fed. 569.

A libel having been filed for damages against a tug, in the district court for the Eastern district of New York, upon which an appeal was taken by the owners to the circuit and thence to the supreme court, other suits arising out of the same disaster having been brought against the owners in the state courts in the Southern district of New York, a petition to limit liability was filed by the owners in the district court for the Southern district during the pendency of the appeal in the libel suit. Held, that the petition should have been filed in the district court in which the original libel was filed. In re The Luckenback (D. C. 1886) 26 Fed. 870.

The limits of the jurisdiction of the federal Southern district of New York, and the district of New Jersey, over the waters of the Hudson river lying west of Manhattan island, are coincident with the boundaries of the jurisdiction of the states of New York and New Jersey over the same waters, as settled by the agreement between New York and New Jersey, entered into September 16, 1833, and approved by congress June 28, 1834. By an agreement New Jersey retained exclusive jurisdiction over the wharves on her shore and over all vessels fastened to such wharves. Held, therefore, that a vessel seized by the marshal while at a wharf in Jersey City was attached in the district of New Jersey, outside of the Southern district of New York, and a suit begun in the latter district by such attachment must fail for want of jurisdiction. The Norma (D. C. 1887) 32 Fed. 411.

Where a sheriff has attached a vessel, which is afterwards taken out of his custody and removed into another state, he can sue in admiralty to recover possession in the district court of the district into which the vessel has been removed. The Bonnie Doon (D. C. 1888) 36 Fed. 770.

Admiralty courts have a discretion as to entertaining suits between foreigners; and the transaction in question having taken place in Florida, where all the officers of defendant corporation resided, and libelant being an English corporation, no comity or reasons of justice or of superior convenience, so far as appeared, demand relief in the Southern district of New York, and service on a limited agent there will be set aside. Neptune Steam Nav. Co. v. Sullivan Timber Co. (D. C. 1888) 37 Fed. 159.

By the eleventh article of the compact of 1785 between Maryland and Virginia, it was provided that "process from the state of Virginia may be served on any part of the said [Potomac] river upon any person or property of any person not a citizen of Maryland, indebted to any citizen of Virginia, or charged with injury by him committed." Defendant was a citizen of Virginia, and the vessel seized was seized on that part of the Potomac river lying between the District of Columbia and that portion of Virginia contained within Alexandria county, which had been originally ceded by Virginia to the United States as part of the District of Columbia, and retroceded to Virginia by the United States in 1846. Held, that under the cession from Maryland to the United States of the District of Columbia and by implied cession from the District of Columbia, admiralty process from the Eastern district of Virginia might be validly and effectively served on the Potomac river, where the vessel was seized. Aitcheson v. The Endless Chain Dredge (D. C. 1889) 40 Fed. 253.

Where a libel in rem is brought in the wrong division, the objections thereto being purely formal, and it is probable that the case will be tried on issues of fact a motion by the respondent to transfer the cause to the right division should be granted. Nelson v. The Willamette (D. C. 1892) 53 Fed. 602.

The act of February 28, 1887, dividing the Western district of Missouri into four divisions and establishing district and circuit courts in each division, creates a distinct district, and distinct courts having all the essential features of a district and a district court as originally created; and such courts are limited in their jurisdiction over proceedings in rem in admiralty to cases in which the res is situated within their territorial limits. The L. B. X. (D. C. 1898) 88 Fed. 290.

A suit in admiralty in personam, may be maintained against a corporation of another state in any district in which service may be had upon it. Reilly v. Philadelphia & R. Ry. Co. (D. C. 1901) 109 Fed. 349.

Allegations that a Maine corporation, the owner of a vessel, had its principal place of business in Boston, and that the vessel was there enrolled, are not sufficient to show that Boston was the home port of the vessel. The New Brunswick (D. C. 1903) 125 Fed. 567, decree affirmed (1904) 129 Fed. 893, 64 C. C. A. 325.

Under R. S. §§ 4283–4285, post, §§ 8021–8023, apart from any rule on the subject any District Court having custody and control of a vessel or having it within its district so that custody can be acquired by its process, has jurisdiction of proceedings by the owner for limitation of liability. In re Louisville

& Cincinnati Packet Co. (D. C. 1915) 223 Fed. 185.

34. **Anti-Trust Act.**—A suit by resident shippers to restrain foreign interstate carriers from putting into effect a proposed advance in freight rates which is averred to be an "arbitrary and unlawful exaction," and to be the outcome of a conspiracy and combination in restraint of interstate trade, unlawful both at common law and under the federal statutes, is one in which the jurisdiction of the federal court is not invoked solely upon the ground of diversity of citizenship, and can therefore not be brought in a federal district in which none of the defendants reside. Macon Grocery Co. v. Atlantic Coast Line R. Co. (1910) 30 Sup. Ct. 184, 215 U. S. 501, 54 L. Ed. 300, affirming decree Atlantic Coast Line R. Co. v. Macon Grocery Co. (1909) 166 Fed. 206, 92 C. C. A. 114.

A bill to restrain interstate carriers, nonresidents of the district, from putting into effect an advance of rates in interstate commerce through several states, charging that they were members of an illegal combination in restraint of trade and fostering a monopoly, etc., presented for consideration the construction of the federal interstate commerce act, so that the court's jurisdiction did not rest solely on diversity of citizenship of the parties, and the federal Circuit Court in the district of complainants' residence had no jurisdiction to compel the defendants to answer over their objection. Atlantic Coast Line R. Co. v. Macon Grocery Co. (1909) 166 Fed. 206, 92 C. C. A. 114, decree affirmed Macon Grocery Co. v. Atlantic Coast Line R. Co. (1910) 30 S. Ct. 184, 215 U. S. 501, 54 L. Ed. 300, which reversed Macon Grocery Co. v. Atlantic C. L. R. Co. (C. C. 1908) 163 Fed. 738.

For the purpose of conferring jurisdiction on a Circuit Court of a suit for damages under Sherman Anti-Trust Act, post, § 8829, which authorizes a suit "in the district in which the defendant resides or is found," a foreign corporation is "found" in the state if it is doing business therein, but not otherwise. A suit for damages may be maintained in the district of plaintiff's residence, against a foreign corporation, a citizen of another state, where defendant is "found" therein. Michigan Aluminum Foundry Co. v. Aluminum Castings Co. (C. C. 1911) 190 Fed. 879. And see Southern Pac. Co. v. Arlington Heights Fruit Co. (1911) 191 Fed. 101, 111 C. C. A. 581, reversing decree Arlington Heights Fruit Co. v. Southern Pac. Co. (C. C. 1909) 175 Fed. 141.

Sherman Act July 2, 1890, § 7, post, § 8829, held not repealed by Judicial Code, § 24, par. 23, ante, § 991(23), or sections 289, 291, 297, post, §§ 1266, 1268, 1274; and hence this section, requiring certain suits to be brought in the district of defendant's residence, does not apply to suits for violations of the Sherman Act. Wogan Bros. v. American Sugar Refining Co. (D. C. 1914) 215 Fed. 273.

35. **Attachment.**—The provision that suits may be brought in the district of the residence either of plaintiff or defendant did not abrogate the settled rule that no attachment can issue out of a federal court in a case where a defendant, by reason of his nonresidence, was not and could not be personally served with process, and did not appear. Big Vein Coal Co. of West Virginia v. Read (1913) 33 Sup. Ct. 694, 229 U. S. 31, 57 L. Ed. 1053; Ex parte Des Moines & M. R. Co. (1880) 103 U. S. 794, 26 L. Ed. 461.

Under Act 1789, c. 20, § 11, incorporated into R. S. § 739, embodied herein, a foreign attachment cannot be maintained against the principal defendant unless he is an inhabitant of the district where the suit is brought, or is found within it, at the time of service of the process. Richmond v. Dreyfous (C. C. 1831) Fed. Cas. No. 11,799.

A federal court has no jurisdiction to attach property of a citizen of another state who is not found in the jurisdiction. Mauldin v. Carll (C. C. 1878) Fed. Cas. No. 9,307; Dormitzer v. Illinois & St. L. B. Co. (C. C. 1881) 6 Fed. 217.

An attachment in a United States court, in a case where no service was made on defendant, and defendant could not be found in the district, is void, under R. S. § 739, embodied herein. And a third party, claiming to own the goods attached, is entitled to set aside the attachment, the defect being jurisdictional. Noyes v. Canada (C. C. 1887) 30 Fed. 665.

Jurisdiction has been conferred as to suits against nonresidents commenced in the state courts by attachment, and removed to the federal courts. U. S. v. Ottman (C. C. 1877) Fed. Cas. No. 15,977.

Though Act March 3, 1887, authorizes an original suit brought in the circuit court, where jurisdiction is founded on the fact of diverse citizenship solely, to be brought in the district of the residence of either plaintiff or defendant, and the statutes of Connecticut permit the attachment of the property located in the state, of a nonresident defendant, without personal service on him, and, in the absence of voluntary appearance, the subjection of such property to a judgment in rem, R. S. §§ 914, 915, post, §§ 1537, 1539, authorizing the practice and modes of procedure in federal courts to be conformed to those of the respective states wherein such courts are held, and authorizing the same remedies by attachment as are provided by the laws of those states, do not give a United States circuit court sitting in Connecticut jurisdiction of proceedings in rem against the property of a nonresident defend-

ant, who has not been personally served or appeared. Harland v. United Lines Tel. Co. (C. C. 1889) 40 Fed. 308, 6 L. R. A. 252.

A nonresident defendant in an action begun by attachment and the garnishment of money due him released such garnishment by the giving of a bond as provided by statute. He died pending the action, which could not be revived against his executors because of their nonresidence. Held, that a suit in equity by plaintiff against such executors to establish his right to enforce the bond was not one to enforce a lien on property, which could be maintained in a federal court in a district of which neither plaintiff nor defendants were inhabitants, against defendants' objection. Filer & Stowell Co. v. Rainey (C. C. 1903) 120 Fed. 718.

Under this section, and post, § 1539, jurisdiction cannot be acquired by a federal court of a nonresident of the state and district by an attachment of his property within the division and district in accordance with the state law, under Gen. Code Ohio, § 11292. Smith v. Reed (D. C. 1912) 210 Fed. 968.

Whether the circuit court can obtain jurisdiction of a suit against a citizen of another state residing in a foreign country by process of foreign attachment, where defendant is not found in the district, quære. Toland v. Sprague (C. C. 1834) Fed. Cas. No. 14,076.

36. —— **Malicious suing out of attachment.**—Where jurisdiction is founded only on diverse citizenship, suit for maliciously suing out an attachment may be brought in the district in which plaintiff resides, against a corporation residing in another state. McCormick Harvesting Mach. Co. v. Walthers (1890) 10 Sup. Ct. 485, 486, 134 U. S. 41, 33 L. Ed. 833.

37. **Bankruptcy.**—Under the Act of 1867, an assignee, without regard to citizenship, could sue to recover assets in a circuit court, in any district other than that in which the decree of bankruptcy was made. Lathrop v. Drake (1875) 91 U. S. 516, 23 L. Ed. 414.

Suits may be instituted and prosecuted to a final judgment by the assignee in bankruptcy to recover the assets of the bankrupt in the circuit or district court in a district other than that in which the decree in bankruptcy was entered. Dutcher v. Wright (1876) 94 U. S. 553, 558, 24 L. Ed. 130.

R. S. § 739, embodied herein, applies to an action by an assignee in bankruptcy appointed in another district to recover assets of a bankrupt from a stranger. Shainwald v. Lewis (D. C. 1880) 5 Fed. 510, 514, order affirmed (1883) 2 Sup. Ct. 385, 108 U. S. 158, 27 L. Ed. 691.

38. **Bonds.**—A suit in the name of the United States under section 6923, post, as originally enacted, on the bond of a public contractor, for the benefit of a person furnishing materials and labor for the construction of a public work, is governed by that part of this section which provides that no civil suit shall be brought before any federal Circuit Court "against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant." Davidson Bros. Marble Co. v. U. S. ex rel. Gibson (1909) 29 Sup. Ct. 324, 326, 213 U. S. 10, 53 L. Ed. 675.

A suit on the bond of a contractor for public work, brought in the name of the United States for the use and benefit of others, as provided by Act Aug. 13, 1894, even conceding it to be a suit by the United States for the purpose of conferring jurisdiction on a federal court under section 991(1), ante, regardless of the citizenship of the parties, cannot be maintained in such court on that ground in any district other than the one of which the defendant is an inhabitant. U. S. v. O'Brien (C. C. 1903) 120 Fed. 446.

Section 3297, post, applies only to actions on obligations given under the laws of the United States upon which the act authorizes such companies to be accepted as sureties. Freeman v. American Surety Co. (C. C. 1902) 116 Fed. 548.

39. —— **Petition.**—In view of post, § 3294, a petition against a company as surety on a contractor's bond in the district where it was given, where service appears to have been made on its authorized agent, is not demurrable on the ground that it is not an inhabitant of the district. United States v. Sheridan (C. C. 1902) 119 Fed. 236.

40. **Cancellation of certificate of naturalization.**—The word "reside" in Act June 29, 1906, § 15, post, § 4374, whether requiring a domicile or mere abode, contemplates at least a choice on the part of the naturalized citizen, to wit, a voluntary sojourning on his part; and hence a federal court of a district in which a naturalized citizen was incarcerated in a federal penitentiary, other than that in which he had previously resided, has no jurisdiction to cancel his certificate of naturalization. U. S. v. Gronich (D. C. 1914) 211 Fed. 548.

41. **Carriers.**—A foreign or alien corporation operating an Atlantic steamship line could be sued for injuries to a passenger, who was a citizen of New Jersey, in a federal court sitting in New York. Jarowski v. Hamburg-American Packet Co. (1910) 182 Fed. 320, 104 C. C. A. 548, motion to vacate denied (1911) 186 Fed. 332, 108 C. C. A. 410.

The state and federal courts in Iowa have no jurisdiction of an action brought by a citizen of Iowa for damages for the wrongful delivery of goods in Colorado, shipped over a line of railroad

forming a continuous or through line, against the railroad company making such delivery, which was chartered in Kansas and operated its line of road in that state, and in Colorado and New Mexico, but not in Iowa, and that had no agent or office in the latter state. Elgin Canning Co. v. Atchison, T. & S. F. R. Co. (C. C. 1885) 24 Fed. 866.

A suit by a shipper against a carrier to require it to receive and transport property tendered for shipment involves a question of general law, and, where a diversity of citizenship exists between the parties a federal court acquires jurisdiction on that ground alone, and the suit may be brought in the district of which either complainant or defendant is an inhabitant. Danciger v. Wells Fargo & Co. (C. C. 1907) 154 Fed. 379.

A suit by resident shippers to restrain foreign interstate carriers from putting into effect a proposed advance in freight rates which is averred to be an "arbitrary and unlawful exaction," and to be the outcome of a conspiracy and combination in restraint of interstate trade, unlawful both at common law and under the federal statutes, is one in which the jurisdiction of the federal court is not invoked solely upon the ground of diversity of citizenship, and can therefore not be brought in a federal district in which none of the defendants reside. Macon Grocery Co. v. Atlantic Coast Line R. Co. (1910) 30 S. Ct. 184, 215 U. S. 501, 54 L. Ed. 300, affirming decree Atlantic Coast Line R. Co. v. Macon Grocery Co. (1909) 166 Fed. 206, 92 C. C. A. 114.

42. Claims against United States.—A federal court in a district other than that in which plaintiff resided had no jurisdiction, under Tucker Act, § 5, of a suit for a claim against the United States. Reid Wrecking Co. v. U. S. (D. C. 1913) 202 Fed. 314.

43. Conspiracy.—A claim for damages for conspiracy to injure complainant in his property rights cannot be joined in a suit in equity for an injunction and accounting for infringement of a patent for the purpose of obtaining jurisdiction over a defendant who could not be sued in the district for the infringement. Cheatham Electric Switching Device Co. v. Transit Development Co. (C. C. 1911) 191 Fed. 727.

44. Contracts.—An action upon a policy of insurance is transitory, not local, and may therefore be brought wherever the company issuing the policy can be found, without regard to where the contract of insurance was made or the subject thereof was located. Mohr & Mohr Distilling Co. v. Insurance Cos. (C. C. 1882) 12 Fed. 474.

A Pennsylvania corporation held not suable in a federal court in Maryland on a contract made in that state to be performed in Illinois, where it was not at the time doing business in Maryland. Noel Const. Co. of Baltimore City v. Geo. W. Smith & Co. (C. C. 1911) 193 Fed. 492.

45. Copyright laws.—This section is not applicable to suits within the special jurisdiction given the courts of the United States in copyright cases, and such suits may be brought in any district where the defendant can be served with process. Spears v. Flynn (C. C. 1900) 102 Fed. 6; Lederer v. Ferris (C. C. 1906) 149 Fed. 250.

R. S. § 4966, as amended by Act Jan. 6, 1897, c. 4, 29 Stat. 481, does not authorize a suit to enjoin the unauthorized performance of a copyrighted dramatic or musical composition to be brought in any district in which the defendant may be found, but merely confers the right upon the circuit court of any such district to enforce, dissolve, or modify an injunction which has been issued in the original suit, which must be in the district of his residence. Fraser v. Barrie (C. C. 1900) 105 Fed. 787.

46. Death.—In so far as diverse citizenship was concerned, an action by a citizen of Massachusetts was properly brought in the circuit court for the New Hampshire district for the death of a resident of the former state against a railroad company incorporated by the concurrent action of several states, including those named. Boston & M. R. Co. v. Hurd (1901) 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193, writ of certiorari denied Hurd v. Boston & M. R. Co. (1902) 22 Sup. Ct. 939, 184 U. S. 700, 46 L. Ed. 765.

Though a cause of action for the death of an intestate, which survives to his administrator under the New Hampshire statute (Pub. St. 1901, c. 191, §§ 8-12), is transitory, the survival is wholly where the right is, and local, and, the right to sue arising wholly in that state where the accident causing death occurred, it is not carried by the statute to a Vermont administrator of the decedent, endeavoring to sue defendant in the latter state. Lyon v. Boston & M. R. Co. (C. C. 1901) 107 Fed. 386.

An action to recover damages against a master for the death of a servant while in the course of his employment by the master's alleged negligence is a transitory action to enforce a personal liability, which may be litigated in a state other than that in which the accident occurred. Smith v. Empire State-Idaho Mining & Development Co. (C. C. 1904) 127 Fed. 462.

Where plaintiff's intestate, a citizen of Illinois, was killed, by reason of defendant's alleged negligence, in the state of Pennsylvania, an action for his death was transitory, and was therefore properly brought in Illinois. Leman v. Baltimore & O. R. Co. (C. C. 1904) 128 Fed. 191.

Where an action for wrongful death

is brought in a state other than the one where the accident or injury resulting in death occurred, based on a statute authorizing such action, it is not necessary that the action be brought in the name of the person or party specified in the statute of the state where the injury occurred and the wrong was committed, as the one to bring it and enforce the right, the statute being remedial, the action may be brought under the procedure of the state where the action was commenced, and in the name of the one there authorized to bring such action under the similar laws of that state. Dodge v. Town of North Hudson (C. C. 1910) 177 Fed. 986.

47. **Discovery.**—Suit, having failed as one to remove cloud, held not maintainable as bill for discovery and an accounting; neither party being a citizen of the district. Childs v. Missouri, K. & T. Ry. Co. (1915) 221 Fed. 219, 136 C. C. A. 629.

A bill for an examination of the vital organs of an insured man is not a suit to enforce a claim to property which, under Judicial Code, § 57, post, § 1039, may be brought in the district in which the property is, but jurisdiction thereof is governed by this section. Mutual Life Ins. Co. of New York v. Painter (D. C. 1915) 220 Fed. 998.

48. **Ejectment.**—The restriction as to venue imposed by this section is not applicable to local actions, and hence ejectment can be brought in a federal court in the district where the land lay, though both plaintiff and defendant are foreign corporations and nonresidents of the state. Elk Garden Co. v. T. W. Thayer Co. (C. C. 1910) 179 Fed. 556. Ejectment can only be brought in the district where the property affected is situated, but in such case the venue is fixed by the nature of the cause of action, and, if the parties are citizens of different states and the defendant can be served within the district, the court has jurisdiction, although neither party is a resident of the district. Kentucky Coal Lands Co. v. Mineral Development Co. (C. C. 1911) 191 Fed. 899.

49. **Employers' Liability Act.**—Where an action for injuries to a servant was brought under federal employers' liability act, Act April 22, 1908, c. 149, incorporated into section 657 et seq., federal jurisdiction did not depend solely on diverse citizenship, but was also sustainable as depending on the construction of such act, and hence the suit could not be maintained over defendant's objection in a district other than that in which defendant was an inhabitant. Smith v. Detroit & T. S. L. R. Co. (C. C. 1909) 175 Fed. 506. Where after suit brought March 5, 1910, in the federal court, sitting in Pennsylvania, by a citizen of Pennsylvania against a Maryland corporation, to recover damages for injuries resulting from defendant's negligence, in which federal jurisdiction rested exclusively on diverse citizenship, plaintiff so amended his original statement as to allege a cause of action for injuries to a servant while engaged in interstate commerce, under the federal employers' liability act, so that jurisdiction did not depend solely on diversity of citizenship, the court was thereby deprived of jurisdiction; the suit not having been brought in the district of defendant's residence. Newell v. Baltimore & O. R. Co. (C. C. 1910) 181 Fed. 698. And see, also, Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994, holding that an action under the employers' liability act between citizens of Wisconsin could only be brought originally in the federal court sitting in Wisconsin for the district in which defendant resided.

50. **Injunction.**—The circuit court for the district of Michigan has no jurisdiction of a suit by an Indiana corporation against a Michigan corporation to restrain the Michigan corporation from constructing a road in Indiana under an agreement between the Michigan corporation and another Indiana corporation. Northern Indiana R. Co. v. Michigan Cent. R. Co. (1853) 15 How. 233, 242, 14 L. Ed. 674.

A corporation of one state cannot be affected by an order or writ of injunction issued by a federal court in another state. Averill v. Southern Ry. Co. (C. C. 1896) 75 Fed. 736.

A stockholder who is a citizen and resident of Pennsylvania cannot maintain a suit in a federal court in the district of New Jersey against the corporation, which is a citizen of New Jersey, and its directors and third persons, who are citizens and residents of another state, to set aside or enjoin the enforcement of an alleged illegal contract made by the directors on behalf of the corporation with their co-defendants, where timely objection is made by the nonresident defendants, who in such case are indispensable parties. Lengel v. American Smelting & Refining Co. (C. C. 1901) 110 Fed. 19.

51. **Interstate Commerce Act.**—This section does not apply to suits of which federal courts are given exclusive jurisdiction; and a suit to enjoin railroad companies from establishing and enforcing unreasonable rates in violation of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379), is of such character and may be maintained in any district in which the defendants can be found. Northern Pac. Ry. Co. v. Pacific Coast Lumber Mfrs.' Ass'n (1908) 165 Fed. 1, 91 C. C. A. 39; Union Pac. R. Co. v. Oregon & Washington Lumber Mfrs.' Ass'n (1908) 165 Fed. 13, 91 C. C. A. 51.

A suit in a Circuit Court to enjoin the enforcement of an interstate rate made

by railroad companies alleged to be unlawful as in violation of Interstate Commerce Act Feb. 4, 1887, post, § 8563 et seq., and of Sherman Anti-Trust Act July 2, 1890, post, § 8820 et seq., pending the determination of its reasonableness by the Interstate Commerce Commission, is not one in which the jurisdiction of the court is founded only on diversity of citizenship, but involves questions arising under the laws of the United States, and, where the objection is raised, can only be maintained against a defendant in the district of which it is an inhabitant. Southern Pac. Co. v. Arlington Heights Fruit Co. (1911) 191 Fed. 101, 111 C. C. A. 581, reversing decree Arlington Heights Fruit Co. v. Southern Pac. Co. (C. C. 1909) 175 Fed. 141.

This section and post, § 1274, did not repeal by implication Act Feb. 4, 1887, § 16, as amended by Act June 8, 1910, § 13, post, § 8584, and a suit on a commission's order was properly brought in the district of the beneficiary's residence. St. Louis Southwestern R. Co. v. S. Samuels & Co. (1914) 211 Fed. 588, 128 C. C. A. 188.

Interstate Commerce Act Feb. 4, 1887, § 1, par. 3, post, § 8563, provides that all charges made for any service rendered or to be rendered in the transportation of passengers or property shall be reasonable and just, and any unreasonable charge is prohibited and declared to be unlawful. Held, that an action by certain shippers to restrain an interstate carrier from enforcing a reconsignment charge of $5 per car, as unreasonable, though maintainable at common law, was nevertheless a suit within the interstate commerce act, so that federal jurisdiction was not alone dependent on diverse citizenship, and hence could be brought only in the district of which the defendant was an inhabitant, as provided by this section. Sunderland Bros. v. Chicago, R. I. & P. Ry. Co. (C. C. 1908) 158 Fed. 877.

A suit to enforce rights given by the interstate commerce act may be brought in any federal district where the defendant can be found. Kalispell Lumber Co. v. Great Northern Ry. Co. (C. C. 1907) 157 Fed. 845.

A federal court of a district of which the complainants are inhabitants has jurisdiction of a suit to enjoin several railroad companies, who are members of an association, but not citizens of the state, from putting into effect an unlawful rate on all food commodities shipped in interstate commerce within the territory in which such district is situated, where they operate roads in the state and district, and are found and served therein. Macon Grocery Co. v. Atlantic C. L. R. Co. (C. C. 1908) 163 Fed. 736.

A suit against a railroad company based on the interstate commerce act, and within the jurisdiction of a federal court for that reason, can only be brought in the state in which the defendant is incorporated. Memphis Cotton Oil Co. v. Illinois Cent. R. Co. (C. C. 1908) 164 Fed. 290.

A suit in a federal court to enjoin a railroad company from enforcing an interstate rate, a federal question being involved, can only be brought in the state of defendant's incorporation and the district of which it is an inhabitant, unless such objection is waived. Imperial Colliery Co. v. Chesapeake & O. Ry. Co. (C. C. 1909) 171 Fed. 589.

The limitation as to the district within which suit can be brought held not to apply to suits brought to recover damages for overcharging, but such suits may be brought in any district in which the defendant can be found. Van Patten v. Chicago, M. & St. P. R. Co. (C. C. 1896) 74 Fed. 981.

52. **Judgment.**—In an action against a corporation in a court of the state of New York, in which state the defendant was incorporated, brought on a judgment recovered against it in a United States circuit court for a district in Ohio, a petition by it for removal of the cause into the United States circuit court which alleged that it was not an inhabitant of Ohio, and that process in the suit in Ohio was not personally served on defendant or any of its officers, but which did not allege that there was no service of process on its agent in the district in which the judgment was recovered, and that there was no appearance of defendant in that suit, did not raise a defense of want of jurisdiction under R. S. § 739, embodied herein. Provident Savings Life Assur. Soc. v. Ford (1885) 5 Sup. Ct. 1104, 1107, 114 U. S. 635, 29 L. Ed. 261.

The circuit court of the United States in Louisiana has jurisdiction of a suit by an attorney residing in that state against a nonresident administrator appointed by a Louisiana court, to enforce an attorney's lien on a judgment recovered by the attorney for the administrator, though the state laws give exclusive jurisdiction of such a suit to the probate court of the state. Semmes v. Whitney (C. C. 1892) 50 Fed. 666.

53. **Lien or claim on property.**—A suit to foreclose a mortgage is a local action; and the fact that the United States circuit court sitting in Missouri has entertained a bill by a railroad company owning and operating lines in that state, and in Illinois, and other states, filed by the corporation for the appointment of receivers, and has, without notice to the Illinois mortgagees, named such receivers, and, in the course of the proceedings, ordered a foreclosure of the entire line, does not oust the United States circuit court sitting in Illinois of jurisdiction of a suit by such mortgagees to remove the

receivers appointed in Missouri, so far as the lines in Illinois are concerned, and to foreclose the mortgages thereon. Atkins v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 29 Fed. 161, order affirmed Wabash, St. L. & P. Ry. Co. v. State of Illinois (1886) 7 S. Ct. 4, 118 U. S. 557, 30 L. Ed. 244.

A suit by a citizen of Ohio against citizens of Vermont, New York, and Maine, to enforce a claim to property in Vermont, is properly brought in the district of Vermont. Carpenter v. Talbot (C. C. 1888) 33 Fed. 537.

Act Aug. 13, 1888, § 1, declares that no suit shall be brought before the federal courts in any other district than that whereof defendant is an inhabitant; but section 5 provides that nothing in this act shall be construed to repeal or affect any jurisdiction or right mentioned in Act March 3, 1875, § 8. This section provides that in any suit to enforce any legal or equitable lien on, or claim to, or to remove any lien or cloud upon, property situated in the district where the suit is brought, defendants who are not inhabitants may be made parties, and brought into court by the methods there prescribed. Held, that this latter section applies to a bill brought to enforce various liens upon part of a railroad lying in the district, as against the lien of a general mortgage, which is about to be foreclosed in the same court by a suit ancillary to another suit in a different district and state; and such original bill may be maintained, although some of the defendants are nonresidents of the district. McBee v. Marietta & N. G. Ry. Co. (C. C. 1891) 48 Fed. 243, decree reversed McBee v. Central Trust Co. of N. Y. (1893) 57 Fed. 753, 6 C. C. A. 539.

This section does not affect the jurisdiction of the court in local actions to enforce a lien or claim on property within the district. Lancaster v. Asheville St. Ry. Co. (C. C. 1898) 90 Fed. 129. A federal court has jurisdiction of a suit against a nonresident defendant to foreclose a mortgage on land within the district, although neither party is a citizen of the state. Burke v. Mountain Timber Co. (D. C. 1915) 224 Fed. 591.

A complainant in a suit to enforce a claim to certain land and remove a cloud therefrom was entitled to institute such suit in the district in which the property was located and to join therein defendants who were nonresidents of the district. Miller v. Ahrens (C. C. 1907) 150 Fed. 644.

See, also, § 1039, and notes thereunder.

54. **National banks.**—Under R. S. § 629, par. 10, ante, § 991(16), providing that United States circuit courts shall have jurisdiction of all suits by or against national banks "established in the district for which the court is held," a federal court has no jurisdiction of an action brought by a national bank established in a district other than that where such court is held when the amount involved does not exceed $500. St. Louis Nat. Bank v. Brinkman (C. C. 1880) 1 Fed. 45.

A national bank as such is not authorized to sue in a federal court outside the district in which it is located; but under 13 Stat. 12, authorizing national banks to sue and be sued in any court as fully as natural persons, a bank located in one state is authorized to sue a citizen in another in a United States court held in the district where the defendant resides; since, for the purpose of determining the jurisdiction of a federal court, a national bank will be regarded as a citizen of the state where it is established or located. St. Louis Nat. Bank v. Allen (C. C. 1881) 5 Fed. 551.

Where there are two districts in a state, a national bank may bring a suit not of a local nature in the circuit court of the one in which it is located, against two or more defendants, one or more of whom reside in the district in which suit is brought. Third Nat. Bank v. Harrison (C. C. 1881) 8 Fed. 721. And see ante, § 991(16), and notes thereunder.

55. **Negotiable instruments.**—An action for the recovery of money on a note cannot be maintained in the Southern District of Ohio by a resident of that state against a resident of Texas, who had not been found and served within the district. Anderson v. Shaffer (C. C. 1881) 10 Fed. 266, 267.

56. **Nuisance.**—A bill in equity to abate a nuisance is a local suit, and can be brought only in the district where the nuisance is situated. Mississippi & M. R. Co. v. Ward (1862) 2 Black, 485, 492, 17 L. Ed. 311. And see post, § 1039, and notes thereunder.

57. **Patent laws.**—Under the provision that no civil suit shall be brought in federal courts against any person by any original process in any other district than that whereof he is an inhabitant, a corporation of one state cannot be sued in a federal court of another state for infringement of patent, though it has a place of business there. Shaw v. Quincy Min. Co. (1892) 145 U. S. 444, 12 S. Ct. 935, 36 L. Ed. 768; Halstead v. Manning, Bowman & Co. (C. C. 1888) 34 Fed. 565; Adriance, Platt & Co. v. McCormick Harvesting Mach. Co. (C. C. 1892) 55 Fed. 287; National Typewriter Co. v. Pope Mfg. Co. (C. C. 1893) 56 Fed. 849 (decree reversed Thomson Houston Electric Co. v. Capital Electric Co. [1894] 65 Fed. 341, 12 C. C. A. 643); Cramer v. Singer Mfg. Co. (C. C. 1893) 59 Fed. 74; Donnelly v. United States Cordage Co. (C. C. 1895) 66 Fed. 613; Gorham Mfg. Co. v. Watson (C. C. 1896) 74 Fed. 418 (appeal dismissed Gorham Mfg. Co. v. Watson & Newell

Co. [1896] 84 Fed. 1017, 28 C. C. A. 682). The provision does not apply to patent infringement suits. In re Hohorst (1893) 14 Sup. Ct. 221, 150 U. S. 659, 37 L. Ed. 1211; In re Keasbey & Mattison (1895) 16 Sup. Ct. 273, 160 U. S. 231, 40 L. Ed. 402; Southern Pac. Co. v. Earl (1897) 82 Fed. 690, 27 C. C. A. 185; Smith v. Sargent Mfg. Co. (C. C. 1895) 67 Fed. 801; Lederer v. Rankin (C. C. 1898) 90 Fed. 449; Spears v. Flynn (C. C. 1900) 102 Fed. 6. And it does not affect a suit under post, § 9460, to obtain the issuance of a patent, of which a Circuit Court is given exclusive jurisdiction, regardless of the citizenship of the parties or the amount in controversy, and such a suit may be brought in any district where valid service can be had on the defendant. Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co. (C. C. 1910) 181 Fed. 974. But it applies to suits to restrain infringement of patents brought against parties who are not aliens or corporations organized outside the United States. Union Switch & Signal Co. v. Hall Signal Co. (C. C. 1895) 65 Fed. 625, distinguishing In re Hohorst (1893) 14 Sup. Ct. 221, 150 U. S. 653, 37 L. Ed. 1211.

The suit may be brought in any district in which defendant is found, regardless of the place where the infringement was committed. Thompson v. Mendelsohn (C. C. 1871) Fed. Cas. No. 13,968.

The citizenship of an infringer of a patent within the district where the suit is brought gives the right to proceed in such district against him personally to prevent infringement elsewhere. Hatch v. Hall (C. C. 1884) 22 Fed. 438.

Defendant in a case arising under the patent laws must be an inhabitant of the district in which the suit is brought, or be found within it at the time of serving the original process. Allen v. Blunt (C. C. 1849) Fed. Cas. No. 215; Day v. Newark India Rubber Mfg. Co. (C. C. 1850) Fed. Cas. No. 3,685; Smith v. Sargent Mfg. Co. (C. C. 1895) 67 Fed. 801.

The court of New Jersey has no jurisdiction over the commissioner of patents, whose official residence is the District of Columbia. Illingworth v. Atha (C. C. 1890) 42 Fed. 141.

Suits for infringement of a patent may be brought wherever personal service can be had. Smith v. Sargent Manuf'g Co. (C. C. 1895) 67 Fed. 801; Earl v. Southern Pac. Co. (C. C. 1896) 75 Fed. 609; Southern Pac. Co. v. Earl (1897) 82 Fed. 690, 27 C. C. A. 185; Westinghouse Air Brake Co. v. Great Northern Ry. Co. (C. C. 1897) 84 Fed. 9.

A resident of the Eastern district of New York, who is doing business in the Southern district, and is "found" and served therein, may be sued therein for infringement of a patent by a corporation of another state. National Button Works v. Wade (C. C. 1896) 72 Fed. 298, following In re Hohorst (1893) 14 Sup. Ct. 221, 150 U. S. 659, 37 L. Ed. 1211.

A bill to restrain the infringement of a patent, filed in Missouri against a citizen of Indiana, cannot be maintained. Reinstadler v. Reeves (C. C. 1887) 33 Fed. 308.

Where a manufacturer has his factory and place of residence and business in one district, and also sells, by an agent resident in another district, manufactured articles claimed to infringe, he does not become an inhabitant of the district in which the articles are sold by the agent, and suit for infringement of letters patent cannot be brought against him in that district, by service on the agent. Anderson v. Germain (C. C. 1891) 48 Fed. 295.

A New York corporation, whose certificate provides that its principal business office is to be in the city of New York, "and such other places as the company may hereafter select," may be sued in the circuit court for the Northern district of New York, for an infringement there committed, where it has a place of business in that district. Consolidated Fastener Co. v. Columbian Fastener Co. (C. C. 1896) 73 Fed. 828.

And see Butterworth v. Hill (1885) 5 Sup. Ct. 796, 114 U. S. 128, 29 L. Ed. 119, holding that R. S. § 739, embodied herein, applied to suits under post, § 9460.

Only in the district of the residence of a party can a federal District Court, under this section, take jurisdiction of a bill in a patent infringement suit charging defendants with procuring licensees to violate their contract and in refusing to perform contract to assign plaintiffs certain other patents and asking for an injunction and specific performance; such causes of action not arising under the patent laws. Geneva Furniture Mfg. Co. v. S. Karpen & Bros. (1915) 35 S. Ct. 788, 238 U. S. 254, 59 L. Ed. 1295.

Prior to the act of March 3, 1897, defining the jurisdiction of the federal courts in patent cases, a suit for infringement could be brought in any district where valid service could be had. Westinghouse Air-Brake Co. v. Great Northern Ry. Co. (1898) 88 Fed. 258, 31 C. C. A. 525.

A person interested in a patent, though not within the particular district in which the suit is brought, may be made a party to a bill to restrain infringement in such district. Buck v. Cobb (C. C. 1847) Fed. Cas. No. 2,079.

In patent cases it is no objection to the jurisdiction that one of the defendants is a citizen of another state and district than that in which the suit is brought. Noonan v. Chester Park Athletic Club Co. (C. C. 1896) 75 Fed. 334.

A nonresident of the district may be

enjoined from committing acts of infringement within the district when he comes into it for that purpose, though he is not subject to service of process therein, or to be sued as a defendant. Kennedy v. Penn Iron & Coal Co. (C. C. 1895) 67 Fed. 339.

The provision of the judiciary act of 1789 that no civil suit in a circuit or district court shall be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, is not changed by an act giving jurisdiction to circuit courts in patent cases, without regard to citizenship. Chaffee v. Hayward (1857) 61 U. S. (20 How.) 208, 15 L. Ed. 804.

58. —— Consent to jurisdiction.—By accepting service of process the defendant, in a suit arising under the patent laws, subjects himself to the jurisdiction of a court sitting in a district of which he is not a resident. Vermont Farm-Mach. Co. v. Marble (C. C. 1884) 20 Fed. 117. But the commissioner of patents held, not to consent to be sued away from his residence at Washington. Butterworth v. Hill (1885) 5 S. Ct. 796, 114 U. S. 128, 29 L. Ed. 119.

59. —— Venue in patent cases defined by special statute.—See ante, § 1030, and notes thereunder.

60. Penalties and forfeitures.—The act of 1887 incorporated into this section did not apply to a suit to recover penalties and forfeitures under the customs laws. Lederer v. Ferris (C. C. 1906) 149 Fed. 259, citing U. S. v. Mooney (1885) 6 Sup. Ct. 304, 116 U. S. 104, 29 L. Ed. 550.

And see ante, § 1025, and notes thereunder.

61. Specific performance.—Plaintiff, who was a resident of Missouri, brought an action in the United States circuit court of New Jersey for specific performance of defendant corporation's contract to sell certain smelting ores to him, and judgment was rendered as prayed therein, and defendant was enjoined from disposing of the ores to any other persons, and from interfering in any manner with the product of the mines. Defendant disregarded the order, and its officers and directors were adjudged guilty as of a contempt. Afterwards a supplemental bill was filed, alleging that one of the directors, a resident of Pennsylvania, who was not a party to the original bill, although he was one of those adjudged in contempt, had commenced legal proceedings in a foreign state, where the mines were located, to enforce the collection of a debt due him from the corporation, and had procured the appointment of a receiver and an order of sale in satisfaction of the debt, and that such proceedings were instituted to evade the decree for specific performance of the contract previously rendered. Held that, the supplemental bill being between different parties, and introducing a new controversy, the court had no jurisdiction thereof, under this section. Mexican Ore Co. v. Mexican Guadalupe Min. Co. (C. C. 1891) 47 Fed. 351.

A suit to enforce a contract to convey land should be brought in the district where one of the parties resides, under this section because, section 1039, post, is inapplicable. Municipal Inv. Co. v. Gardiner (C. C. 1894) 62 Fed. 954.

62. Taxes.—Under this section a suit to enjoin collection of a tax, on the ground that it violates the United States constitution, must be dismissed as to such defendants as are nonresidents of the district in which it is brought. U. S. Exp. Co. v. Allen (C. C. 1889) 39 Fed. 712, decree reversed Shelton v. Platt (1890) 11 Sup. Ct. 646, 139 U. S. 591, 35 L. Ed. 273.

63. Torts.—An action for trespass committed out of the limits of the United States may be maintained in the circuit court for any district in which defendant may be found upon process against him, where the citizenship of the parties gives jurisdiction. Mitchell v. Harmony (1851) 13 How. 115, 137, 14 L. Ed. 75.

Where a complaint alleges a continuing trespass by defendant, through its agents, on plaintiff's land, and the cutting and conversion of timber growing thereon, in a single count, the entire cause of action is local, and only a federal court within the state in which the land lies has jurisdiction. Ellenwood v. Marietta Chair Co. (1895) 15 Sup. Ct. 771, 772, 158 U. S. 105, 39 L. Ed. 913.

Where the facts stated and the relief demanded show that the gravamen of the action is the conversion of lumber manufactured out of trees wrongfully cut and removed from plaintiff's land by defendant, and that the purpose of the action is to recover the value of the lumber, and not damages for any depreciation in the value of the land, the action is transitory, although the trespass to the land is stated as illustrating the character of the conversion, and as bearing upon plaintiff's right to recover the value of the manufactured lumber. Peyton v. Desmond (1904) 129 Fed. 1, 63 C. C. A. 651.

The giving of an instruction in such an action, at the request of the defendant, that the measure of damages recoverable was the value of the logs as they stood in the trees, could not change the nature of the action, whether or not it stated the correct measure of damages; nor can it be invoked by defendant to defeat the jurisdiction of the court. Id.

In Minnesota an action to recover

pecuniary damages for trespass to real estate in another state is viewed, not as relating to the real estate, but only as affording a personal remedy, and transitory. Id.

Whether an action to recover pecuniary damages for trespass to real estate is real and local, or is personal and transitory, is essentially a matter of state policy or local law, and must be determined by the view taken of the nature of the action in the state in which it is brought. Id.

In a transitory action in a federal court, as for a tort, the jurisdiction of the court is not affected by the fact that the cause of action arose in another state of which plaintiff is a citizen. Lake Shore & M. S. Ry. Co. v. Eder (1909) 174 Fed. 944, 98 C. C. A. 556.

A federal circuit court cannot take cognizance of a trespass committed on lands lying without the judicial district of the court, although the trespasser is a resident of and is found within the district, such action being local. Livingston v. Jefferson (C. C. 1811) Fed. Cas. No. 8,411.

The federal district courts have cognizance of torts committed on the high seas, when the parties or the vessel are found within their jurisdiction, without reference to the nationality of either. The Noddleburn (C. C. 1887) 30 Fed. 142.

An action for personal injuries to a servant is transitory, and may be prosecuted in any jurisdiction in which judicial process may be lawfully served on the defendant. Olson v. Buffalo Hump Min. Co. (C. C. 1904) 130 Fed. 1017.

An action against a corporation in a federal court for a common-law tort can be maintained only in the district of plaintiff's residence, or that in which defendant is incorporated, and such requirement cannot be avoided by joining in the same complaint another count stating an entirely separate cause of action of which the court has jurisdiction, nor by stating a joint cause of action against such defendant and another which is an inhabitant of the district and may be there sued; the cause of action being several as well as joint. Ware-Kramer Tobacco Co. v. American Tobacco Co. (C. C. 1910) 178 Fed. 117.

An action of trespass to recover damages for injury to land by cutting timber therefrom, and removing the same, is of a local nature, and can only be maintained in a federal court in the district in which the land is situated. Kentucky Coal Lands Co. v. Mineral Development Co. (C. C. 1911) 191 Fed. 899.

An action for the destruction of buildings in West Virginia by a fire set out by defendant railroad company was local in character, and could not be maintained in a federal court sitting in Maryland. But an action to recover for the value of personal property destroyed is transitory, and may be brought in a federal court sitting in a state other than that in which the property was situated. Id.

64. Trade-marks.—Defendant in a suit for the wrongful use of a trademark, brought in the federal court, as arising under a United States law, or as being between citizens of different states, cannot be compelled to answer in a district of which neither he nor the plaintiff is an inhabitant. In re Keasbey & Mattison Co. (1895) 16 S. Ct. 273, 160 U. S. 221, 40 L. Ed. 402.

Jurisdiction of suit against violator of rights under registered trade-marks for injunction and accounting held subject to the provision of this section, forbidding suits in district other than that of defendant's residence. Rubber & Celluloid Harness Trimming Co. v. John L. Whiting-J. J. Adams Co. (D. C. 1913) 210 Fed. 393.

III. WAIVER OF PRIVILEGE TO BE SUED IN PROPER DISTRICT AND OBJECTIONS

65. Right to waive privilege.—Exemption from suit in a district other than that of residence may be waived. Toland v. Sprague (1838) 12 Pet. 300, 330, 9 L. Ed. 1093; St. Louis & San Francisco Ry. Co. v. McBride (1891) 11 Sup. Ct. 982, 141 U. S. 127, 35 L. Ed. 659; In re Moore (1908) 28 Sup. Ct. 585, 706, 209 U. S. 490, 52 L. Ed. 904, 14 Ann. Cas. 1164; Western Loan & Savings Co. v. Butte & B. Consol. Min. Co. (1908) 28 Sup. Ct. 720, 210 U. S. 368, 52 L. Ed. 1101; Kreigh v. Westinghouse, Church, Kerr & Co. (1909) 29 Sup. Ct. 619, 620, 214 U. S. 249, 53 L. Ed. 984; Southern Exp. Co. v. Todd (1893) 56 Fed. 104, 5 C. C. A. 432; Memphis Sav. Bank v. Houchens (1902) 115 Fed. 96, 52 C. C. A. 176; Iowa Lillooet Gold Min. Co. v. Bliss (C. C. 1906) 144 Fed. 446; Mahr v. Union Pac. R. Co. (C. C.) 140 Fed. 921; Shanberg v. Fidelity & Casualty Co. of New York (1907) 158 Fed. 1, 85 C. C. A. 343, 19 L. R. A. (N. S.) 1206; McPhee & McGinnity Co. v. Union Pac. R. Co. (1907) 158 Fed. 5, 87 C. C. A. 619; Camp v. Bonsal (1913) 203 Fed. 913, 122 C. C. A. 207; Taylor v. Cook (C. C. 1841) Fed. Cas. No. 13,789; Kerp v. Michigan L. S. R. Co. (C. C. 1873) Id. 7,727; U. S. v. American Bell Tel. Co. (C. C. 1886) 29 Fed. 17; Cooley v. McArthur (C. C. 1888) 35 Fed. 372; Kansas City & T. R. Co. v. Interstate Lumber Co. (C. C. 1888) 37 Fed. 3; Norris v. Atlas Steamship Co. (C. C. 1889) 37 Fed. 279; Purcell v. British Land & Mortgage Co. (C. C. 1890) 42 Fed. 465; Betzoldt v. American Ins. Co. (C. C. 1891) 47 Fed. 705; Southern Exp. Co. v. Todd (1893) 56 Fed. 104, 5 C. C. A. 432; Smith v. Atchi-

son, T. & S. F. R. Co. (C. C. 1894) 64 Fed. 1; Marks v. Marks (C. C. 1896) 75 Fed. 321; Callahan v. Hicks (C. C. 1898) 90 Fed. 539; Cowell v. City Water Supply Co. (C. C. 1899) 96 Fed. 769; Platt v. Massachusetts Real Estate Co. (C. C. 1900) 103 Fed. 705; Fosha v. Western Union Tel. Co. (C. C. 1902) 114 Fed. 701; General Electric Co. v. Wagner Electric Mfg. Co. (C. C. 1903) 123 Fed. 101, affirmed (1904) 130 Fed. 772, 66 C. C. A. 82; Pepper v. Rogers (C. C. 1904) 128 Fed. 987; Burch v. Southern Pac. Co. (C. C. 1905) 139 Fed. 350; Iowa Lillooet Gold Min. Co. v. Bliss (C. C. 1906) 144 Fed. 446; Logan & Bryan v. Postal Telegraph & Cable Co. (C. C. 1908) 157 Fed. 570; Sagara v. Chicago, R. I. & P. Ry. Co. (C. C. 1911) 189 Fed. 220; H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C. 1911) 189 Fed. 224; Baldwin v. Pacific Power & Light Co. (D. C. 1912) 199 Fed. 291; Simpson v. Geary (D. C. 1913) 204 Fed. 507; Trinity & S. Ry. Co. v. Brown (1898) 45 S. W. 793, 91 Tex. 673; State v. Frost (1902) 89 N. W. 915, 113 Wis. 623.

Plaintiffs, who were nonresidents, commenced an action at law in the Circuit Court of the United States for the Western District of Texas against defendant, a resident of Bexar county, in such district. The petition was filed with the clerk of such court at Waco, and attachment sued out, returnable at that place, though defendant's residence was in the San Antonio, and not in the Waco, division of the district. There was but one circuit court in the district, and one clerk; nor did the statutes of the United States prescribe any particular place in the district for the location of the clerk's office, except that Act June 3, 1884, c. 64, 23 Stat. 36, provided that there should be a deputy clerk who should keep an office in El Paso, and Act June 9, 1906, c. 3063, 34 Stat. 226, required the maintenance of a clerk's office at Del Rio. Held, that the suit was properly commenced, and that, though defendant was entitled to have the process made returnable at San Antonio, under Act March 11, 1902, c. 183, § 9, 32 Stat. 67, making that place the place for return of process issued against defendants residing in Bexar county, such privilege was a personal one, which defendant could waive, and hence the filing of the petition and making the process returnable at Waco was not ground for dismissal. International Bank & Trust Co. v. Scott (1908) 159 Fed. 58, 86 C. C. A. 248. Even in a removed case. Pepper v. Rogers (C. C. 1904) 128 Fed. 987. The exemption of a defendant from suit in any district of which he is not an inhabitant or in which he is not found at the time of the service of the writ is an exemption which he may waive, but unless waived he need not answer, and will not be bound by anything which may be done against him in his absence. Butterworth v. Hill (1885) 5 Sup. Ct. 796, 114 U. S. 128, 29 L. Ed. 119. A corporation organized in one state only cannot be sued in a federal court for any other state except by a citizen of the latter state, unless it waive its privilege. Rust v. United Waterworks Co. (1895) 70 Fed. 129, 17 C. C. A. 16.

The restriction as to venue in suits where diversity of citizenship exists is a personal privilege of defendant which he may insist on or waive at his election. Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1912) 201 Fed. 932.

And see Central Trust Co. of New York v. Virginia, T. & C. Steel & Iron Co. (C. C. 1893) 55 Fed. 769, decree reversed Same v. McGeorge (1894) 14 S. Ct. 286, 151 U. S. 129, 38 L. Ed. 98, holding that the requirement that one of the parties shall be a citizen of the state in which the suit was brought cannot be waived by consent, or by appearing and pleading to the merits, although the parties are corporations organized under the laws of different states, and one of them has its principal place of business in the state and district where suit is brought. And see Smellie v. Southern Pac. Co. (D. C. 1912) 197 Fed. 641, holding that while want of jurisdiction of a federal court over a controversy cannot be waived, the right to have the action brought in a particular district may be waived by failure to object in time.

66. Manner of waiving privilege in general.—A plaintiff instituting a suit in the federal court of a district other than that of the residence of either of the parties, waives the wrong venue. H. J. Decker, Jr., & Co. v. Southern Ry. Co. (C. C. 1911) 189 Fed. 224; Turk v. Illinois Cent. R. Co. (D. C. 1912) 193 Fed. 252.

The right of a claimant in a libel in rem to have the suit commenced in the division of the district in which he resides and in which the ship was seized (if any such right he have) is waived by appearing in the suit as claimant, and securing the release of the vessel by giving bond and stipulation, and procuring a transfer of the case to the division of his residence. The Willamette (1895) 70 Fed. 874, 18 C. C. A. 366, 31 L. R. A. 715, modifying judgment (D. C. 1894) 59 Fed. 797, decree modified (1895) 72 Fed. 79, 18 C. C. A. 373.

The right of a party to be sued in the district of the residence of either plaintiff or defendant may be waived by defendant by a trial, demurrer, answer, or general appearance. McPhee & McGinnity Co. v. Union Pac. R. Co. (1907) 158 Fed. 5, 87 C. C. A. 619. And is waived by appearance and pleading to the merits. In re Moore (1908) 28 Sup. Ct. 585, 706, 209 U. S. 490, 52

L. Ed. 904, 14 Ann. Cas. 1164; Western Loan & Savings Co. v. Butte & B. Consol. Min. Co. (1908) 28 Sup. Ct. 720, 210 U. S. 368, 52 L. Ed. 1101; Detroit Trust Co. v. Pontiac Savings Bank (1912) 196 Fed. 29, 115 C. C. A. 663; Dulles v. H. D. Crippen Mfg. Co. (C. C. 1907) 156 Fed. 706; Logan & Bryan v. Postal Telegraph & Cable Co. (C. C. 1908) 157 Fed. 570; Peale v. Marian Coal Co. (C. C. 1909) 172 Fed. 639; McEldowney v. Card (C. C. 1911) 193 Fed. 475. See, also, Ex parte Wisner (1906) 27 Sup. Ct. 150, 203 U. S. 449, 51 L. Ed. 264. By general appearance and plea in bar. Norris v. Atlas Steamship Co. (C. C. 1889) 37 Fed. 279; Betzoldt v. American Ins. Co. (C. C. 1891) 47 Fed. 705. By a foreign corporation, not only by a voluntary appearance to the suit, but by doing business in a state imposing the condition of liability to suit there by service of process on its agent. U. S. v. American Bell Tel. Co. (C. C. 1886) 29 Fed. 17. But the objection is not waived by a defendant by attending at the taking of depositions by the plaintiff before the issues are made up, nor by failing to file a plea in abatement. Pacific Mut. Life Ins. Co. of California v. Tompkins (1900) 101 Fed. 539, 41 C. C. A. 488.

Where, in an action against a nonresident, begun by attachment, she appeared specially and objected to the jurisdiction, and, after summons had been served on her, and she had moved to set the same aside, she obtained leave to withdraw such motion, and was granted time to answer, she thereby waived her objection to the court's jurisdiction of her person. Lebensberger v. Scofield (1905) 139 Fed. 380, 71 C. C. A. 476.

The objection that a complaint in a federal court omits to allege the place of residence of defendants, or that they are residents of the district in which they are sued, is one that they may waive, and they are held to have waived it when they make a general appearance and in a demurrer join such objection with the objection that the complaint does not state facts sufficient to constitute a cause of action. Campbell v. Johnson (1909) 167 Fed. 102, 92 C. C. A. 554.

The objection to the jurisdiction of a particular federal Circuit Court of a suit between citizens of different states because neither of the parties is a resident of the district is waived by the defendant by appearing and filing a motion to vacate an order on grounds going to the merits of the bill as well as for want of jurisdiction. Bluefields S. S. Co. v. Steele (1911) 184 Fed. 584, 106 C. C. A. 564.

Defendant, by appearance and proceedings, held to waive the right to object to the jurisdiction of the court. Page v. Chillicothe (C. C. 1881) 6 Fed. 599.

A court of the United States is without jurisdiction of a suit as against defendants who are nonresidents of the district, where the complainant is also a nonresident, and the only ground of jurisdiction is diversity of citizenship, unless such defendants directly waive their privilege by submitting themselves to the jurisdiction of the court. Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co. (C. C. 1902) 119 Fed. 942.

A circuit court has jurisdiction of a suit where the plaintiff and defendant are citizens of different states, and the requisite amount is involved, although neither is an inhabitant of the district, when the defendant has appeared and answered to the merits without objection. Occidental Consolidated Min. Co. v. Comstock Tunnel Co. (C. C. 1903) 120 Fed. 518.

Conceding that a surety company which has furnished a bond for a contractor for government work is given the privilege of being sued thereon only in the district in which the bond was made, or in that where it has its principal office, by section 3297, post, yet a company waived such privilege where it entered appearance, pleaded to the merits, and took depositions before moving to dismiss. U. S. v. California Bridge & Construction Co. (C. C. 1907) 152 Fed. 559.

The right of a defendant to be sued in the federal district of its residence was waived by its appearance and demurring to the bill on the ground that plaintiff was not entitled to the relief asked, a decision of which would necessitate an exercise of jurisdiction over the controversy. Peale v. Marian Coal Co. (C. C. 1909) 172 Fed. 639.

A foreign corporation, by appointing a register agent on whom summons could be served in Pennsylvania, did not thereby waive its privilege to be free from suit in a federal court of Pennsylvania, except where the plaintiff was a citizen and resident of that state. Hagstoz v. Mutual Life Ins. Co. of New York (C. C. 1910) 179 Fed. 569.

The right is waived by a nonresident defendant by petitioning for removal from state court, and by a nonresident plaintiff by filing an amended complaint and by a stipulation after removal. Baldwin v. Pacific Power & Light Co. (D. C. 1912) 199 Fed. 291.

Failure of a plaintiff, in a suit against the United States under Tucker Act, § 5, to file his petition in the district of his residence, may be and was waived by the appearance of the Attorney General and his appearing at the examination of witness without objection. New York & O. S. S. Co. v. U. S. (D. C. 1912) 202 Fed. 311.

Defendants waived objections to the bringing of suit in a district in which none of the parties resided, by moving to dismiss not only on that ground, but al-

so for insufficiency of the bill. Adler Goldman Commission Co. v. Williams (D. C. 1914) 211 Fed. 530. See, also, Reinstadler v. Reeves (C. C. 1887) 33 Fed. 308; Miller-Magee Co. v. Carpenter (C. C. 1888) 34 Fed. 433.

Where an assignor begins an action in a federal court in a district in which he does not reside and defendant appears, or if he brings his action in a state court in such district and it is removed, the court of that district has jurisdiction. Cincinnati, H. & D. Ry. Co. v. Orr (D. C. 1914) 215 Fed. 261.

Where a defendant corporation, sued in a federal court in a district of which neither complainant nor any defendant is an inhabitant, waives any objection to the place of suit by appearing and joining in complainant's prayer for a receiver, such waiver is conclusive upon third persons not parties, who cannot claim that the appointment of the receiver was without jurisdiction; there being the requisite diversity of citizenship to confer constitutional jurisdiction on the court. Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626.

The filing of a general appearance in a federal court in an action commenced by service of summons alone is no waiver of defendant's right to move to dismiss for want of jurisdiction, when, on the subsequent service of the complaint, it for the first time appears that the only ground of federal jurisdiction is diverse citizenship, and that the action is brought in the wrong district. Crown Cotton Mills v. Turner (C. C. 1897) 82 Fed. 337.

Where a federal court in which suit was brought was without jurisdiction, because neither plaintiff nor defendant resided in the state or district, and such want of jurisdiction was raised by demurrer, defendant did not waive the objection either by appearing at the taking of depositions and cross-examining witness without declaring its intent to insist on its objection to the jurisdiction, or by stipulating during the taking of such depositions that copies of letters and telegrams might be used by either party in lieu of the originals. Stonega Coal & Coke Co. v. Louisville & N. R. Co. (C. C. 1905) 139 Fed. 271.

67. —— By acceptance of service.—Acceptance of service does not prevent a defendant from moving to dismiss the suit because brought in a district in which he does not reside. U. S. v. Loughrey (C. C. 1890) 43 Fed. 449.

By accepting service of process, defendant in a suit under the patent laws subjects himself to the jurisdiction of a court of a district of which he is not an inhabitant. Vermont Farm Mach. Co. v. Marble (C. C. 1884) 20 Fed. 117. And see Butterworth v. Hill (1885) 5 Sup. Ct. 796, 114 U. S. 128, 29 L. Ed. 119, holding that the commissioner of patents did not by acceptance of service consent to be sued away from Washington.

68. —— By consent.—Consent of both parties waives all objections to the jurisdiction of a court to which has been removed for diverse citizenship a suit which, by reason of the nonresidence of both parties, could not have been brought in that particular court in the first instance. In re Moore (1908) 28 Sup. Ct. 585, 706, 209 U. S. 490, 52 L. Ed. 904, 14 Ann. Cas. 1164. A foreign corporation which in pursuance of the laws of a state in which it carries on business designates a person on whom process may be served thereby consents to be sued in the district of the state. Runkle v. Lamar Ins. Co. (C. C. 1880) 2 Fed. 9; Gray v. Quicksilver Min. Co. (C. C. 1884) 21 Fed. 288; Consolidated Store Service Co. v. Lamson Consol. Store Service Co. (C. C. 1890) 41 Fed. 833; Gilbert v. New Zealand Ins. Co. (C. C. 1892) 49 Fed. 884, 15 L. R. A. 125; Clark v. Southern Pac. Co. (C. C. 1909) 175 Fed. 122. CONTRA, see Rowbotham v. George P. Steele Iron Co. (C. C. 1896) 71 Fed. 758. And see Platt v. Massachusetts Real Estate Co. (C. C. 1900) 103 Fed. 705, holding that a corporation complying with a statute of another state prescribing the conditions for foreign corporations doing business therein does not consent to be sued in a federal court by a nonresident.

In an action against a railroad company, removed from a state court to the federal circuit court of Iowa, a demurrer to a plea to the jurisdiction admitting that defendant was a foreign corporation, that it was not operating a line of railroad within Iowa, and that the cause of action did not grow out of any business transaction at any office or agency of defendant in Iowa, and not showing that defendant's agent on which service was made in Iowa might not have been a traveling agent without any office in Iowa, defendant had not consented to be found within the state of Iowa, and, therefore, being a foreign corporation, defendant was not within the jurisdiction of the courts of Iowa, either state or federal. Elgin Canning Co. v. Atchison, T. & S. F. R. Co. (C. C. 1885) 24 Fed. 866.

By consent of the parties a cause in equity may be finally heard and decided by a circuit judge of the United States within his circuit, but outside of the district in which the cause is pending; and a recital in the decree directed to be entered on such hearing, in accordance with the usual practice, that the cause was heard in open court in the district, is conclusive on all the parties who participate in the hearing. Continental Trust Co. of New York v. Toledo, St. L. & K. C. R. Co. (C. C. 1900) 99 Fed. 171.

This section does not affect the general jurisdiction of the court, where the

requisite diversity of citizenship appears, but creates a personal exemption in favor of a defendant, which he may waive by agreement or consent. Platt v. Massachusetts Real Estate Co. (C. C. 1900) 103 Fed. 705.

Where a case involves a federal question, the parties may agree to try it in a federal district other than that of which the defendant is an inhabitant, notwithstanding this section. Where there is in fact a controversy between citizens of different states, the parties can confer jurisdiction on a particular federal Circuit Court, though it is not the circuit court of the residence of either plaintiff or defendant. Hubbard v. Chicago, M. & St. P. Ry. Co. (C. C. 1910) 176 Fed. 994.

Where there is a diversity of citizenship which gives jurisdiction to a federal court, the objection that there is no jurisdiction in a particular district may be waived by appearing and pleading to the merits, but, where no federal court has jurisdiction consent of the parties cannot confer it. In re Winn (1909) 29 Sup. Ct. 515, 519, 213 U. S. 458, 53 L. Ed. 873.

69. —— **By appearance.**—A special appearance by a corporation defendant for the purpose of objecting to the jurisdiction on the ground of nonresidence in the district where the suit was brought does not waive the objection to the jurisdiction of the court on that ground. Ex parte Shaw (1892) 12 Sup. Ct. 935, 938, 145 U. S. 444, 36 L. Ed. 768.

A nonresident defendant not personally served in an attachment suit does not submit to the jurisdiction of the court by specially appearing for the purpose of objecting to the jurisdiction on the ground, among others, that the property in question was not subject to attachment or garnishment. Big Vein Coal Co. of West Virginia v. Read (1913) 33 Sup. Ct. 694, 229 U. S. 31, 57 L. Ed. 1053. The privilege is not waived where defendant makes a special appearance for the express purpose of challenging the jurisdiction over his person, though he may combine with his motion or plea to the jurisdiction matter going to the subject of the suit, as that it is not within the jurisdiction of the court as a court of equity to determine the cause as presented by the bill. Southern Pac. Co. v. Arlington Heights Fruit Co. (1911) 191 Fed. 101, 111 C. C. A. 581, reversing decree Arlington Heights Fruit Co. v. Southern Pac. Co. (C. C. 1909) 175 Fed. 141. A corporation, sued by a nonresident in the Circuit Court for the Maine District as organized in that state, though in fact a citizen of another state, with the right to object to the jurisdiction of the court in that district, waives such right by entering a general appearance; and, as it has full knowledge of the facts it cannot avail itself of the objection after plaintiff has amended his declaration to correctly allege its citizenship. Howland Pulp & Paper Co. v. Alfreds (1910) 179 Fed. 482, 103 C. C. A. 62.

The right of a defendant to be sued in the proper district is waived by general appearance. Pollard v. Dwight (1808) 4 Cranch, 421, 2 L. Ed. 666; Gracie v. Palmer (1823) 8 Wheat. 699, 700, 5 L. Ed. 719; St. Louis & S. F. Ry. Co. v. McBride (1891) 11 Sup. Ct. 982, 141 U. S. 127, 35 L. Ed. 659; Interior Const. & Imp. Co. v. Gibney (1895) 16 Sup. Ct. 272, 273, 160 U. S. 217, 40 L. Ed. 401; Southern Exp. Co. v. Todd (1893) 56 Fed. 104, 5 C. C. A. 432; Van Doren v. Pennsylvania R. Co. (1899) 93 Fed. 260, 35 C. C. A. 282; Iowa Lillooet Gold Min. Co. v. Bliss (C. C. 1906) 144 Fed. 446; Midland Contracting Co. v. Toledo Foundry & Machine Co. (1907) 154 Fed. 797, 83 C. C. A. 489; Eldorado Coal & Mining Co. v. Mariotti (C. C. A. 1914) 215 Fed. 51; U. S. v. New York & O. S. S. Co. (C. C. A. 1914) 216 Fed. 61; Lehigh Valley Coal Co. v. Yensavage (1914) 218 Fed. 547, 134 C. C. A. 275; Harrison v. Rowan (C. C. 1818) Fed. Cas. No. 6,140; McLean v. Lafayette Bank (C. C. 1846) Fed. Cas. No. 8,888; McCloskey v. Cobb (C. C. 1866) Fed. Cas. No. 8,702; Chittenden v. Darden (C. C. 1875) Fed. Cas. No. 2,688; Foote v. Massachusetts Ben. Ass'n (C. C. 1889) 39 Fed. 23. Noonan v. Delaware, L. & W. R. Co. (C. C. 1895) 68 Fed. 1; Lowry v. Tile, Mantel & Grate Ass'n of California (C. C. 1899) 98 Fed. 817; Platt v. Massachusetts Real Estate Co. (C. C. 1900) 103 Fed. 705; Von Voight v. Michigan Cent. R. Co. (C. C. 1904) 130 Fed. 398; Mahr v. Union Pac. R. Co. (C. C. 1905) 140 Fed. 921, judgment affirmed (1909) 170 Fed. 669, 96 C. C. A. 19; Irving v. Joint Dist. Council of New York and Vicinity of United Brotherhood of Carpenters, etc. (C. C. 1910) 180 Fed. 896; Gearlds v. Johnson (C. C. 1911) 183 Fed. 611; Simpson v. Geary (D. C. 1913) 204 Fed. 507; New York & O. S. S. Co. v. U. S. (D. C. 1912) 202 Fed. 311.

Where a suit is brought in a federal circuit court, on the ground of diverse citizenship, to enforce a claim to land situated in the district, defendants, who have voluntarily appeared and submitted their claims to adjudication, cannot afterwards object to the jurisdiction, on the ground that the suit is not brought in the district of the residence of either plaintiffs or defendants. Hatch v. Ferguson (C. C. 1893) 57 Fed. 966, decree affirmed (1895) 68 Fed. 43, 15 C. C. A. 201, 33 L. R. A. 759. Where a federal court has no jurisdiction under R. S. § 739, embodied herein, a subsequent appearance of defendant in an attachment case does not waive the invalidity of the proceedings. Noyes v. Canada (C. C. 1887) 30 Fed. 665. But see Rein-

stadler v. Reeves (C. C. 1887) 33 Fed. 308, holding that the formal appearance of defendants on the first rule day, followed on the second rule day by an assertion of the right to be sued in the district of their residence, is not a waiver of their right to raise the jurisdictional question. See, also, Detroit trust Co. v. Pontiac Savings Bank (1912) 196 Fed. 29, 115 C. C. A. 663.

Defendant held to have waived right to object that suit between New York and Kentucky corporations was not brought in proper district, by appearing and filing motion to dismiss on the merits. Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1915) 229 Fed. 234.

Where the assignee brings an action in a district other than that where the proceedings are pending, an appearance and answer by defendant does not preclude him from raising the question of jurisdiction. Jobbins v. Montague (D. C. 1872) Fed. Cas. No. 7,330.

The objection that a complaint in a federal court omits to allege the place of residence of defendants, or that they are residents of the district in which they are sued, is one that they may waive, and they are held to have waived it when they make a general appearance and in a demurrer join such objection with the objection that the complaint does not state facts sufficient to constitute a cause of action. Campbell v. Johnson (1909) 167 Fed. 102 92 C. C. A. 554.

70. —— By failure to plead privilege. —The exemption from suit in the federal court, in any district other than that of defendant's residence, is waived, if not pleaded. Interior Const. & Imp. Co. v. Gibney (1895) 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401; Walker v. Windsor Nat. Bank (1893) 56 Fed. 76, 5 C. C. A. 421; Von Auw v. Chicago Toy & Fancy Goods Co. (C. C. 1895) 69 Fed. 448; McBride v. Grand de Tour Plow Co. (C. C. 1889) 40 Fed. 162; Norris v. Atlas S. S. Co. (C. C. 1889) 37 Fed. 279; Hoover & Allen Co. v. Columbia Straw-Paper Co., (C. C. 1895) 68 Fed. 945; Vermont Farm Mach. Co. v. Gibson (C. C. 1892) 50 Fed. 423, decree affirmed (1893) 56 Fed. 143, 5 C. C. A. 451.

Where, in an action in a federal court by an employé against a railroad company for a personal injury, although the petition did not expressly declare upon the federal employer's liability statute, the court submitted the case to the jury upon the theory that it was based on that statute, the failure of defendant at any time to raise the objection that it was not suable under such statute in that district was a waiver of such objection. Erie R. Co. v. Kennedy (1911) 191 Fed. 332, 112 C. C. A. 76.

The objection that the cause of action arose in another district is waived when not raised in the answer. Black v. Thorne (C. C. 1872) Fed. Cas. No. 1,465.

The venue prescribed is a personal privilege granted to defendant and may be waived either expressly or by failure to take advantage of it in due time and by appropriate means. Fribourg v. Pullman Co. (C. C. 1910) 176 Fed. 981.

Where plaintiffs made no motion to remand, they could not object, for the first time on writ of error, that the removal was not to the proper district. Klink v. Chicago, R. I. & P. Ry. Co. (1915) 219 Fed. 457, 135 C. C. A. 169.

The act requires no more to constitute residence than is required in the residence element of citizenship, and that the provision of the act as to the district in which the action shall be brought does not touch the general jurisdiction of the court over the case, but affects only the mode of bringing the defendant within the jurisdiction, and is a personal privilege, which is waived unless the objection is seasonably taken. Marks v. Marks (C. C. 1896) 75 Fed. 321.

While want of jurisdiction of a federal court over a controversy cannot be waived, the right to have the action brought in a particular district may be waived by failure to object in time. Smellie v. Southern Pac. Co. (D. C. 1912) 197 Fed. 641.

71. —— By proceedings for and removal into federal court.—The inhibition against bringing of a suit in any district other than one of which either plaintiff or defendant is an inhabitant is waived by defendant's removal into a federal court of a suit brought in a court of a state of which neither of the parties is an inhabitant. Memphis Sav. Bank v. Houchens (1902) 115 Fed. 96, 52 C. C. A. 176.

The removal from state to national court, or joinder of objection to district with general demurrer waives the objection that the suit is pending in the wrong district. United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan. (1906) 145 Fed. 144, 76 C. C. A. 114.

Where, after removal of a cause, plaintiff appears and pleads and goes to trial without objection or motion to remand, the fact that neither party is a resident of the district does not deprive the court of jurisdiction. Shanberg v. Fidelity & Casualty Co. of New York (1907) 158 Fed. 1, 85 C. C. A. 343, 19 L. R. A. (N. S.) 1206, affirming judgment (C. C. 1905) 143 Fed. 651.

Where defendant is sued in a court of a state in which neither he nor plaintiff resides, and removes the cause to the federal court in such district, plaintiff, having elected to institute the suit in such state court, cannot object to such removal on the ground that defendant is not a citizen or resident of the district, and that therefore the

court would not have had original jurisdiction of the suit. Cowell v. City Water-Supply Co. (C. C. 1899) 96 Fed. 769.

A defendant by appearing in the courts of a state in which neither plaintiff nor defendant resided, and filing a bond and petition to remove the case to the federal court, thereby waived his right to be sued in the district of his residence, and thereby submitted himself to the jurisdiction of the state court; and hence plaintiff, after removal, is not entitled to have the case remanded on the ground that the federal circuit court had no jurisdiction, in that neither plaintiff nor defendant was a resident of the state in which the suit was brought. Whitworth v. Illinois Cent. R. Co. (C. C. 1901) 107 Fed. 557.

The right is waived by a nonresident defendant petitioning for removal from state court. Baldwin v. Pacific Power & Light Co. (D. C. 1912) 199 Fed. 291.

72. —— **By pleading to the merits.**—The right to be sued in the proper district is waived by pleading to the merits. St. Louis & S. F. Ry. Co. v. McBride (1891) 11 Sup. Ct. 982, 141 U. S. 127, 35 L. Ed. 659; Ingersoll v. Coram (1908) 29 Sup. Ct. 92, 95, 211 U. S. 335, 53 L. Ed. 208; Southern Exp. Co. v. Todd (1893) 56 Fed. 104, 5 C. C. A. 432; Shanberg v. Fidelity & Casualty Co. of New York (1907) 158 Fed. 1, 85 C. C. A. 343, 19 L. R. A. (N. S.) 1206; Atchison, T. & S. F. Ry. Co. v. Gilliland (1912) 193 Fed. 608, 113 C. C. A. 476; Detroit Trust Co. v. Pontiac Savings Bank (1912) 196 Fed. 29, 115 C. C. A. 663; Lehigh Valley Coal Co. v. Yensavage (1914) 218 Fed. 547, 134 C. C. A. 275; Occidental Consolidated Min. Co. v. Comstock Tunnel Co. (C. C. 1903) 120 Fed. 518; Logan & Bryan v. Postal Telegraph & Cable Co. (C. C. 1908) 157 Fed. 570; Ware-Kramer Tobacco Co. v. American Tobacco Co. (C. C. 1910) 178 Fed. 117. By defendant uniting a plea to the merits with a plea claiming his privilege to be sued in another district. Baltimore & O. R. Co. v. Doty (1904) 133 Fed. 866, 67 C. C. A. 38. By answering without objection to the jurisdiction on that ground waives such objection. Blackburn v. Selma, M. & M. R. Co. (C. C. 1879) Fed. Cas. No. 1,467; Atchison, T. & S. F. Ry. Co. v. Gilliland (1912) 193 Fed. 608, 113 C. C. A. 476; Northwestern Lumber Co. v. Cizen (1912) 196 Fed. 454, 116 C. C. A. 228.

A foreign corporation sued in a federal court entered a general appearance and demurred to the complaint for want of jurisdiction; the complaint alleging no jurisdictional facts. An amended complaint was filed, alleging diversity of citizenship and that plaintiff was a resident of the district. Defendant answered, denying such allegation of residence, joining issue on the merits, and also pleading a counterclaim. Held, that it did not waive its objection to being sued in that district, and that, when on the hearing it appeared that plaintiff was not a resident of the district, it was entitled to a dismissal of the action. Leonard v. Merchants' Coal Co. (1908) 162 Fed. 885, 89 C. C. A. 575.

The objection to the jurisdiction of a particular federal Court of a suit between citizens of different states because neither of the parties is a resident of the district is waived by the defendant by appearing and filing a motion to vacate an order on grounds going to the merits of the bill as well as for want of jurisdiction. Bluefields S. S. Co. v. Steele (1911) 184 Fed. 584, 106 C. C. A. 564.

Where an action by a subcontractor on the bond of the contractor for public improvement was brought in the wrong district, but the surety filed an affidavit of defense containing defenses to the merits, the objection was waived. U. S. v. Schofield Co. (C. C. 1910) 182 Fed. 240, judgment affirmed Title Guaranty & Surety Co. v. U. S. (1911) 187 Fed. 98, 109 C. C. A. 106, writ of certiorari denied (1911) 32 Sup. Ct. 523, 223 U. S. 720, 56 L. Ed. 629, motion to vacate supersedeas granted (1912) 32 Sup. Ct. 168, 222 U. S. 401, 56 L. Ed. 248.

73. —— **By demurrer.**—Objection to jurisdiction held waived by demurring on grounds reaching to merits of cause of action. Western Loan & Savings Co. v. Butte & B. Consol. Min. Co. (1908) 28 Sup. Ct. 720, 210 U. S. 368, 52 L. Ed. 1101; Texas Co. v. Central Fuel Oil Co. (1912) 194 Fed. 1, 114 C. C. A. 21; Scott v. Hoover (C. C. 1900) 99 Fed. 247.

Where circuit courts have jurisdiction of a controversy by reason of the amount involved, and the diverse citizenship of the parties, defendant by demurring on its first appearance, not only on the ground that the court had no jurisdiction, but also on the ground that the complaint did not state facts sufficient to constitute a cause of action, waives the provision that no civil suit shall be brought by original process in any other district than that whereof he is an inhabitant. St. Louis & S. F. Ry. Co. v. McBride (1891) 11 Sup. Ct. 982, 141 U. S. 127, 35 L. Ed. 659. Error in bringing the suit in the wrong district was waived by a demurrer, not only objecting to the venue, but asserting that plaintiff had no cause of action on the merits. Marian Coal Co. v. Peale (1913) 204 Fed. 161, 122 C. C. A. 397, modifying decree Peale v. Marian Coal Co. (C. C. 1911) 190 Fed. 376. And is waived by general demurrer. Grove v. Grove (C. C. 1899) 93 Fed. 865; Ware-Kramer Tobacco Co. v. American Tobacco Co. (C. C. 1910)

178 Fed. 117. But see Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co. (C. C. 1902) 119 Fed. 942, holding that the filing of a demurrer to the bill, though on other grounds, is not a waiver.

74. —— By motion to dismiss.—In a suit between citizens of different states to set aside alleged fraudulent conveyances, objection to bringing of suit in district in which none of the parties resided held waived by moving to dismiss, not only on that ground, but for insufficiency of the bill. Adler Goldman Commission Co. v. Williams (D. C. 1914) 211 Fed. 530.

75. Manner of raising question of venue.—Diversity of citizenship will not give authority to federal courts to render a judgment in personam where neither plaintiffs nor defendants are inhabitants of the district in which suit is brought and where defendant appears specially and objects to jurisdiction being exercised over it. Ladew v. Tennessee Copper Co. (1910) 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069.

The question whether a suit in a federal court is maintainable in the district where brought, under the statute, may be raised either by motion to set aside the service of process or by special demurrer, where a special appearance is made for that purpose only, and before pleading to the merits. Southern Pac. Co. v. Denton (1892) 13 Sup. Ct. 44, 146 U. S. 206, 36 L. Ed. 942; Mexican Cent. Ry. Co. v. Pinkney (1893) 13 Sup. Ct. 859, 149 U. S. 194, 37 L. Ed. 699; Ware-Kramer Tobacco Co. v. American Tobacco Co. (C. C. 1910) 178 Fed. 117. The objection of a defendant to the maintenance of an action against him in a federal court on the ground that neither he nor plaintiff is a resident of the district may be taken by demurrer under the Kentucky practice where the facts appear on the face of the petition. Tice v. Hurley (C. C. 1906) 145 Fed. 391. Where a bill shows on its face that defendant is not an inhabitant of the district wherein the suit is brought, defendant may assert his objection to being served out of the district of his residence by demurrer as well as by motion to dismiss. Reinstadler v. Reeves (C. C. 1887) 33 Fed. 368; Miller-Magee Co. v. Carpenter (C. C. 1888) 34 Fed. 433. The objection is waived by general appearance, and is not raised by a demurrer after such appearance. Noonan v. Delaware, L. & W. R. Co. (C. C. 1895) 68 Fed. 1. The objection that the suit was not brought in the district of defendant's residence, or where he was found at the time of service, will be considered waived, unless taken by plea in abatement. De Wolf v. Rabaud (1828) 26 U. S. (1 Pet.) 476, 7 L. Ed. 227.

76. Time to raise objection to avoid waiver.—The objection that the suit is brought in the wrong district cannot be raised by the defendant after he has pleaded in bar. Texas & P. R. Co. v. Saunders (1894) 14 Sup. Ct. 257, 259, 151 U. S. 105, 38 L. Ed. 90. An objection to the jurisdiction made for the first time by motion in arrest of judgment is too late. Southern Exp. Co. v. Todd (1893) 56 Fed. 104, 5 C. C. A. 432. Objection cannot be raised for the first time on appeal. Carter-Crume Co. v. Peurrung (1898) 86 Fed. 439, 30 C. C. A. 174, judgment affirmed (1900) 99 Fed. 888, 40 C. C. A. 150. The privilege is waived unless the objection is seasonably taken. Marks v. Marks (C. C. 1896) 75 Fed. 321.

The Circuit Courts of the United States having full jurisdiction of patent cases, the limitation in respect to the district of residence of a defendant or of place of business and acts of infringement may be waived, and the objection cannot be made after the case has proceeded beyond the pleadings, and into the taking of testimony. General Electric Co. v. Wagner Electric Mfg. Co. (C. C. 1903) 123 Fed. 101, affirmed (1904) 130 Fed. 772, 66 C. C. A. 82.

77. Persons who may raise objection to avoid waiver.—One defendant cannot object as to jurisdiction over another defendant, who admits that his citizenship is rightfully described to give jurisdiction. Harrison v. Urann (C. C. 1840) Fed. Cas. No. 6,146.

Where suit is brought by a citizen of Massachusetts against a Vermont corporation and a New York corporation in the circuit court of Vermont, it will not be dismissed on motion of the Vermont corporation for want of jurisdiction of the parties, in the absence of objection by the New York company, especially if the suit is a proceeding to enforce an equitable claim to property in the district, within R. S. § 738, post, § 1039. Jewett v. Bradford Sav. Bank & Trust Co. (C. C. 1891) 45 Fed. 801.

Nonresidents, only, can object to the jurisdiction of the court when residents and nonresidets of the district are joined in one suit. Smith v. Atchison, T. & S. F. R. Co. (C. C. 1894) 64 Fed. 1.

The provision exempting a defendant from being sued in any district other than that of his domicile is for his benefit, and may be waived by him; and, if he makes no objection to the jurisdiction of the court on that ground, the plaintiff cannot, nor is the court ousted of jurisdiction. Callahan v. Hicks (C. C. 1898) 90 Fed. 539.

Where the requisite diversity of citizenship exists between the parties to give a federal court jurisdiction, the objection that the suit is brought in a district where neither resides is one which may be waived, and, when it has been waived by a defendant corporation by appearing and voluntarily submitting itself to the jurisdiction of the court, it cannot be raised by a stockholder of such corporation who is subsequently permitted to intervene. Citizens' Bank

& Trust Co. v. Union Mining & Gold Co. (C. C. 1900) 106 Fed. 97.

Where a defendant corporation, sued in a federal court in a district of which neither complainant nor any defendant is an inhabitant, waives any objection to the place of suit by appearing and joining in complainant's prayer for a receiver, such waiver is conclusive upon third persons not parties, who cannot claim that the appointment of the receiver was without jurisdiction; there being the requisite diversity of citizenship to confer constitutional jurisdiction on the court. Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626.

78. Determination of objections.—Plaintiff, who had previously been a citizen and resident of West Virginia, removed with his family into Virginia, where he bought a house, in which he resided with his family, paid taxes, and voted for some three or four years, after which he determined to return to West Virginia, and rented a house there, but before his actual removal he commenced an action in the circuit court of the United States in West Virginia against a corporation of California. Held, on a plea by defendant to the jurisdiction, that, even conceding that plaintiff had not lost his domicile in West Virginia by his removal, he had lost his residence, which was only regained by his actual return to the state to reside, and that at the time of the commencement of the action he was not a resident of the state, so as to give the court jurisdiction under the judiciary act of 1888. Pacific Mut. Life Ins. Co. of California v. Tompkins (1900) 101 Fed. 539, 41 C. C. A. 488.

A motion to set aside the service in a federal court, on the ground that defendant is not an inhabitant of the district where the question of intention appears to be involved, will not be determined alone on the ex parte affidavit of defendant, nor will it be passed for determination of the question on plea or answer where defendant is under arrest; but the issue will be referred to a master, to take such testimony thereon as may be offered by either party, subject to the right of cross-examination. Canadian Pac. Ry. Co. v. Wenham (C. C. 1906) 146 Fed. 206.

IV. PROCESS

79. District to which process may issue.—Under section 6923, post, requiring suits on federal contractors' bonds to be brought in the district where the contract was to be performed, a federal court in such district had jurisdiction to order the service of process on a defendant residing in another district. Baker Contract Co. v. U. S. (1913) 204 Fed. 390, 122 C. C. A. 560.

The issuance of a subpœna to be served outside the territorial jurisdiction of a federal court, and the service thereof, is a mere nullity, and not a commencement of the suit, which will stop the running of limitation. U. S. v. American Lumber Co. (1898) 85 Fed. 827, 29 C. C. A. 431, affirming decree (C. C. 1897) 80 Fed. 309.

The circuit and district courts of the United States cannot send their process into another district, except where specially authorized by law. Ex parte Graham (C. C. 1818) Fed. Cas. No. 5,657.

A citizen of Ohio brought a suit to recover money in the circuit court for the Eastern district of Arkansas, against defendants, who resided in the Western district, and sued out a writ of attachment directed to the Western district. Held, that a motion to discharge the attachment must be sustained, as there was no authority to send the writ into the Western district. Seidenbach v. Hollowell (C. C. 1879) Fed. Cas. No. 12,635.

The process of federal courts will not run throughout the United States, except in the particular cases and to the extent provided by R. S. § 738, incorporated into post, § 1039. Bourke v. Amison (C. C. 1887) 32 Fed. 710.

80. Service of process.—No judgment can be rendered by a Circuit Court against any defendant who has not been personally served with process unless he waived service and appeared. Levy v. Fitzpatrick (1841) 15 Pet. 167, 171, 10 L. Ed. 699. Personal service of notice within the jurisdiction of the court, or a voluntary appearance, or consent to substituted service, is indispensable to jurisdiction to adjudicate a personal claim, or which charges property of the defendant beyond the territorial jurisdiction of the court. Michigan Trust Co. v. Ferry (1910) 175 Fed. 667, 99 C. C. A. 221; Id. (1910) 175 Fed. 681, 99 C. C. A. 235, judgments reversed (1913) 33 Sup. Ct. 550, 228 U. S. 346, 57 L. Ed. 867. In the absence of express statutory authority, there is no power in a court to order personal service of process upon a defendant beyond its territoral jurisdiction. Jennings v. Johnson (1906) 148 Fed. 337, 78 C. C. A. 329.

The process of a circuit court cannot be served without the district in which it is established, without the special authority of law therefor. Toland v. Sprague (1838) 12 Pet. 300, 328, 9 L. Ed. 1093.

Service of summons on a director of a foreign corporation who is casually within the state for a few days confers no jurisdiction on a federal court, where the corporation is doing no business and has no property in the state. Remington v. Central Pac. R. Co. (1905) 25 Sup. Ct. 577, 579, 198 U. S. 95, 49 L. Ed. 959.

A federal court in one state does not acquire jurisdiction over a defendant which is a corporation of another state, and which does not carry on business in the state of the suit, nor have any au-

thorized representative therein, by the service of process on one who is merely shown to have been a director of such corporation two years previously. Eldred v. American Palace-Car Co. of New Jersey (1900) 105 Fed. 455, 45 C. C. A. 1.

Jurisdiction is not acquired by a federal court over a corporation defendant shown by the bill to have been organized under the laws of another state, and to have its place of business in such state, by service of process in a third state upon an officer of the corporation there found. Ellsworth Trust Co. v. Parramore (1901) 108 Fed. 906, 48 C. C. A. 132.

Under this section, service of process cannot be made on persons without the circuit wherein the action is pending. A suit to set aside a decree of foreclosure and sale thereunder is not so far a mere continuation of the original foreclosure suit as to authorize the service of subpœnas upon persons without the territorial jurisdiction of the court. Pacific R. R. v. Missouri Pac. Ry. Co. (C. C. 1880) 3 Fed. 772, decree reversed (1884) 4 Sup. Ct. 583, 111 U. S. 505, 28 L. Ed. 498.

Where a defendant, residing in another district, is enticed and induced to come into the district where the plaintiff resides by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon him, and the same is served through such improper means, such service is illegal, and ought to be set aside, and the process dismissed. Steiger v. Bonn (C. C. 1880) 4 Fed. 17.

A federal circuit court has no jurisdiction over a defendant served with process while temporarily in a district in which he does not reside. Smith v. Tuttle (C. C. 1870) Fed. Cas. No. 13,-120.

Defendant corporations, organized under the laws of Maine, but having their principal place of business in Massachusetts, where a majority of their officers and directors resided, were sued in the circuit court for the district of Massachusetts; the writs being served by attachment of corporate property within the latter state, and by service on the corporate officers. Held, that the court had no jurisdiction. Boston Electric Co. v. Electric Gas-Lighting Co. (C. C. 1885) 23 Fed. 838.

If a corporation organized under the laws of the state of Colorado have an office in the city of New York, and nowhere else, and all the persons competent to represent it be there, service may be made upon its agents in that city. Hunter v. International Ry. Imp. Co. (C. C. 1886) 26 Fed. 299.

Service of a subpœna outside the judicial district is ineffective as compulsory process. Romaine v. Union Ins. Co. (C. C. 1886) 28 Fed. 625.

The federal courts of Illinois cannot obtain jurisdiction of an Iowa corporation by service process. Jessup v. Illinois Cent. R. Co. (C. C. 1888) 36 Fed. 735.

In a suit by nonresident complainants, jurisdiction of a defendant corporation not resident in the district where suit was brought was not acquired by service on its resident director, it not being alleged that the property in controversy was within the district. Eldred v. American Palace Car Co. (C. C. 1900) 103 Fed. 209.

Except in suits of a local nature to enforce a lien or claim against property within the district, and upon a proper order, or in suits for infringement of a patent, there is no authority of law for the service of process issued by a circuit court of the United States outside of the district. Cely v. Griffin (C. C. 1902) 113 Fed. 981.

Where a minority stockholders' bill sought the appointment of a receiver for the corporation, with authority to appear in an action in a state court, and there obtain relief against a judgment rendered against the corporation with an injunction against further interference with the corporation's property, and an accounting as to certain stock alleged to have been pledged for the indemnity of the corporation, the suit was not local in character, warranting service on defendants, not citizens of the state, by publication. Schultz v. Highland Gold Mines Co. (C. C. 1907) 158 Fed. 337.

Service on a defendant does not give a court jurisdiction founded only on diversity of citizenship and neither party is a resident of the state, if seasonable objection is made. Slater Trust Co. v. Randolph-Macon Coal Co. (C. C. 1907) 166 Fed. 170.

A suit against a corporation of another state cannot be maintained in a federal court in the district of the plaintiff's residence, where jurisdiction depends on diversity of citizenship alone, where service was not made within the district of suit and defendant has no place of business therein, although it may have such place of business and be served in another district in the same state; and where such a suit has been properly removed into a federal court the service will be quashed. Wange v. Public Service Ry. Co. (C. C. 1908) 159 Fed. 189.

And see Alaska Commercial Co. v. Debney (1906) 144 Fed. 1, 75 C. C. A. 131.

A federal court does not acquire jurisdiction over a corporation of another state, domiciled therein, which maintains no regular or established place of business or agent within the district where the suit is brought, by service of process on a person not in fact its agent within the district. Westinghouse Mach. Co. v. Press Pub. Co. (C. C. 1901) 110 Fed. 254.

Jurisdiction cannot be obtained of a

foreign corporation by attaching goods in a store conducted by its agents within the district, and service of summons on its president within the district. Day v. Newark India-Rubber Mfg. Co. (C. C. 1850) Fed. Cas. No. 3,685.

Where a foreign mining corporation carries on a general business and has property in one district of the federal court, it can be reached by process served upon the managing officers or agents within such district, as the court, in considering the question of citizenship of such corporation, will look beyond the charter issued by a state not within the district. Thornburgh v. Savage Min. Co. (C. C. 1867) Fed. Cas. No. 13,986.

Jurisdiction over a Connecticut corporation cannot be acquired by the circuit court of the United States for the Southern district of New York, by service of process on one of its officers in the district. Decker v. New York Belting & Packing Co. (C. C. 1873) Fed. Cas. No. 3,727.

The federal circuit court cannot acquire jurisdiction of the person of a defendant corporation of another state, by resort to a state statute licensing the corporation on condition of its submission to be sued in such state. Southern & A. Tel. Co. v. New Orleans, M. & T. R. Co. (C. C. 1874) Fed. Cas. No. 13,185.

A federal court cannot obtain jurisdiction of a foreign insurance company by the service of process on a general agent within the state, under a state statute providing that foreign insurance companies doing business within the state shall file a written instrument with the superintendent of insurance, authorizing any agent of such company in the state to acknowledge service of process for such company, and consenting that such service of process shall be as valid as if made upon the company itself. Leonard v. Lycoming Fire Ins. Co. (C. C. 1877) Fed. Cas. No. 8,258.

In an action against a railroad company, removed from a state court to the federal circuit court of Iowa, a demurrer to a plea to the jurisdiction admitted that defendant was a foreign corporation, that it was not operating a line of railroad within the state of Iowa and that the cause of action did not grow out of any business transaction at any office or agency of defendant in Iowa. For aught that appeared defendant's agent on which service was made in Iowa might have been a traveling agent without any office in Iowa. Held that, as to such cause of action, defendant had not consented to be found within the state of Iowa, and, therefore, being a foreign corporation, defendant was not within the jurisdiction of the courts of Iowa, either state or federal. Elgin Canning Co. v. Atchison, T. & S. F. R. Co. (C. C. 1885) 24 Fed. 866.

81. —— **Law governing service.**—A federal court cannot acquire jurisdiction over a corporation of another state, and which is a citizen thereof, where it is not carrying on business in the state where the court sits, by any officer or agent representing the corporation, on whom service can be made, and there is no state law under which it is subject to suit therein, merely by service on an officer of the corporation temporarily in the state. Mecke v. Valleytown Mineral Co. (1899) 93 Fed. 697, 35 C. C. A. 151.

See notes under § 1537, post.

82. —— **Service procured by fraud or force.**—Defendant, by his own testimony, while residing in Yukon Territory, Canada, conveyed an interest in a mining claim to an agent of plaintiffs as security for an indebtedness to plaintiff, and, at the time he left that territory for Alaska, had not obtained a reconveyance of the property, which he had sold to his brother. Before leaving he gave to his brother a written power of attorney to transact any and all business relating to his interests in Yukon Territory, which letter of attorney was never revoked, and was used by his brother in making a settlement of defendant's indebtedness and obtaining a conveyance of the property. Held that, although defendant before leaving had sold all of his property in the territory, the power of attorney constituted his brother his agent and legal representative within the territory on whom legal service of process against him might be made under section 14 of Consolidated Ordinances of the Northwest Territories of Canada 1898, p. 198, which provides that, "in case any defendant is out of the territories but has an agent, managing clerk or other representative resident and carrying on his business within the same," service of the writ of summons may be made on such agent or representative, and that a judgment there obtained against defendant on a service so made was valid, and, no fraud being alleged, conclusive on the merits when sued on in a court of the United States, under the rule of comity which is recognized between the courts of the two countries. Alaska Commercial Co. v. Debney (1906) 144 Fed. 1, 75 C. C. A. 131.

Where a defendant residing in another district is enticed and induced to come into the district where the plaintiff resides by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon him, and the same is served through such improper means, such service is illegal, and ought to be set aside, and the process dismissed. Steiger v. Bonn (C. C. 1880) 4 Fed. 17.

Where a person has been brought from another state by force, or has been induced to come into a state by the fraud and deceit of another for the purpose of procuring the service of a summons in a civil action, and personal service has been made under such circumstances, the service of process and return of the officer will be quashed on proper plea, where the facts are undisputed. Blair v. Turtle (C. C. 1881) 5 Fed. 394.

Plaintiff, a resident of Wisconsin, who was a policy holder in a Pennsylvania insurance company, desiring to obtain service on the company in Wisconsin in an action not connected with his policy, requested the company to send a receipt for a renewal premium to the cashier of a local bank, so that he might obtain it at the time of making payment; and it was so sent, with instructions to the cashier to collect the premium and deliver the receipt. Plaintiff paid the premium, and on the same day caused a summons in an action against the company to be served on the cashier, as agent; relying on a state statute which makes any person "who collects any premium for insurance" an agent of the company. Held, that plaintiff having induced the company to send the collection to the cashier for the sole purpose of bringing it within the state jurisdiction, the service so obtained by a fraud or trick was invalid. Frawley, Bundy & Wilcox v. Pennsylvania Casualty Co. (C. C. 1903) 124 Fed. 259.

Where plaintiff's agent induced the secretary of defendant corporation, which was a resident of New York, to come into New Jersey for an interview with reference to certain machinery purchased from defendant, and at the close of the interview, as such secretary was leaving the place where it was held, he was served with process, which was dated the day that he had notified plaintiff's agent that he would be at the place of the interview, such facts, unexplained, warranted a finding that the service was obtained by fraud. Cavanagh v. Manhattan Transit Co. (C. C. 1905) 183 Fed. 818.

A defendant, who, knowing that a possible cause of action exists against him in a certain jurisdiction, voluntarily goes into such jurisdiction on business with third parties, takes the risk of being there discovered and served with process; and such service is not invalidated because the plaintiff had knowledge that defendant would come within the jurisdiction and arranged to be notified when he did come, where no trick or device was resorted to for the purpose of inducing his coming. Case v. Smith Lineaweaver & Co. (C. C. 1907) 152 Fed. 730.

83. —— **Question for court.**—Under R. S. § 739, embodied herein, providing that no civil suit shall be brought against a citizen of the United States in any other district than that of which he is an inhabitant, "or in which he is found at the time of serving the writ," it is always for the federal court to determine whether a nonresident corporation sued therein has transacted business to such an extent within the district, and has such a representative or agent therein, that jurisdiction to render a personal judgment against the corporation may be acquired by service on that agent. St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co. (C. C. 1887) 32 Fed. 802.

Jurisdiction of the person of the defendant rests on the actual facts, and not on the accuracy of the decision of the marshal of the question whether defendant corporation, at the date of the service, was doing business within the state and district, and, if so, whether the person on whom the writ was served was the defendant's representative in doing such business. Peper Automobile Co. v. American Motor Car Sales Co. (C. C. 1910) 180 Fed. 245.

84. —— **Return of service.**—The marshal's return should show affirmatively that the subpœna was served on defendant within the district in which the suit was brought in order to confer jurisdiction, where the bill alleged that defendant was a resident of another state. Thayer v. Wales (C. C. 1872) Fed. Cas. No. 13,872.

85. **Privileges and exemptions.**—Where, in a suit begun by attachment and removed to the federal court, one of the defendants (a nonresident) came into the state pending a motion to dissolve the attachment, the court had jurisdiction to authorize the issuance and service of an alias summons upon her. Lebensberger v. Scofield (1905) 139 Fed. 380, 71 C. C. A. 476.

A party going into another state as a witness, or as a party under process of a court, to attend upon the trial of a cause, is exempt from process in such state while he is necessarily attending there in respect to such trial. Brooks v. Farwell (C. C. 1880) 4 Fed. 166.

A party to a suit brought in a circuit court of the United States is protected from the service of process and papers in another suit between the same parties for the same cause of action, which has been commenced in a circuit court in another state, while attending there a regular examination of witnesses in the former suit. Plimpton v. Winslow (C. C. 1881) 9 Fed. 365.

Where a nonresident of the state is in attendance on a trial in the circuit court as a witness in a case therein pending, he is privileged from service of summons in a civil action issued from a state court in such state, and the privilege extends to a reasonable time after the disposition of the cause to enable him to return to his own state;

and if, in such case, he is served with summons from the state court, the fact that he files in that court a petition and bond for removal, under the act of congress, does not prevent him from objecting to the service when the case is removed to the circuit court. Atchison v. Morris (C. C. 1882) 11 Fed. 582.

Where parties or witnesses, while in attendance upon the trial of a cause, including going to and returning from the place of trial, do no wrong or injury to third parties, they may claim exemption from service of civil process; but where they lay aside the character of parties or witnesses, and, for their own behalf and benefit, give cause for the institution of actions against them by third parties, they cannot invoke this privilege, but must be deemed to have waived the exemption. The trial upon which the party or witness is in attendance must not, however, be interfered with by such service. Nichols v. Horton (C. C. 1882) 14 Fed. 327.

Defendant, while in attendance as a party and witness upon the trial of a case in Howard county, Iowa, by telegram directed and instructed the sheriff of Mower county, Minn., to seize by writ of attachment the goods of plaintiff, whereupon plaintiff immediately brought suit for the wrongful taking thereof, and served defendant with notice of the commencement of such suit. Held, that defendant could not protect himself from responding to the action brought against him by the alleged owner of the property, under the privilege usually accorded to witnesses and parties in attendance upon a trial of a cause in court. Nichols v. Horton (C. C. 1882) 14 Fed. 327.

A nonresident defendant, in attendance upon the trial of his case, at which trial his presence is necessary both as a witness and for the purpose of instructing his counsel, is protected while in such attendance from service by summons of a new writ or complaint against him. Wilson Sewing-Mach. Co. v. Wilson (C. C. 1885) 22 Fed. 803.

The exemption of a witness or party to a suit from service of process does not extend to service of a subpœna to testify in the same cause on which he is giving attendance. Norris v. Hassler (C. C. 1885) 23 Fed. 581.

Where a nonresident who has come into the district to attend the trial of a case in which he is plaintiff is detained within the jurisdiction of the court as a witness in another suit, he is not subject to civil service for the institution of suits against him while so detained. Small v. Montgomery (C. C. 1885) 23 Fed. 707.

Petitioner, while in attendance upon the federal court as a witness, was served with a writ of garnishment from a state court. Held, that the plaintiff in such writ could not be restrained from proceeding in the state court, nor be punished as for a contempt of the federal court. Ex parte Schulenburg (C. C. 1885) 25 Fed. 211.

One temporarily in another state, in attendance on court as a witness, is exempt from service of civil process. Kauffman v. Kennedy (C. C. 1885) 25 Fed. 785.

The policy of the law exempting from service of process parties and witnesses going to and from court extends only to the jurisdiction in which attendance at court is required, and does not render invalid a service of process from a Massachusetts court upon a citizen of Vermont while traveling through Massachusetts to attend court in Connecticut as a witness. Holyoke & South Hadley Falls Ice Co. v. Ambden (C. C. 1893) 55 Fed. 593, 21 L. R. A. 319.

A suitor who came into a foreign jurisdiction on request of his counsel to confer with counsel during the argument of a demurrer is privileged from service of process during the argument of the demurrer and pending a temporary adjournment thereof for convenience of the court. Kinne v. Lant (C. C. 1895) 68 Fed. 436.

Service of subpœna to attend hearings as a witness, upon an attorney who has come from another state to attend to business of his clients pending in the court, before he has had reasonable time to take his departure, will be set aside, on his motion, as a violation of the protection which the law extends to all necessarily attending upon a court, especially when the business of his clients requires his immediate presence in other states. Central Trust Co. v. Milwaukee St. Ry. Co. (C. C. 1896) 74 Fed. 442.

A defendant cannot claim exemption from the service of process on the ground that he was within the jurisdiction as a witness in a suit in a state court in which he was a plaintiff where such suit was in furtherance of the alleged actionable wrong for which the plaintiff sues. Iron Dyke Copper Min. Co. v. Iron Dyke R. Co. (C. C. 1904) 132 Fed. 208.

A person going into another state as a witness or as a party defendant in a suit therein, either nominally or as a defendant in interest, is exempt from process in such state while he is necessarily attending there in respect to such trial, at least in the absence of a state statute unequivocally abrogating such exemption. Skinner & Mounce Co. v. Waite (C. C. 1907) 155 Fed. 828.

A receiver while in attendance on a court in another jurisdiction as plaintiff in an action therein, and also in obedience to a subpœna served on him by the defendant, and while going to and returning from such court, is privileged from the service of civil process on him in a suit against him in such jurisdiction. Peet v. Fowler (C. C. 1909) 170 Fed. 618.

Under the rule of a majority of the

federal courts, a nonresident, who comes into a state for the sole purpose of appearing before a court in which he is charged with a crime, in obedience to a recognizance previously given by him, is exempt from service of summons in a civil action while in such attendance, or before he has secured further bail required by the court. Kaufman v. Garner (C. C. 1909) 173 Fed. 550.

Hearings before a referee in bankruptcy are within the rule that a party may attend a judicial hearing away from the place of his residence without being subjected to the service of process. Morrow v. U. H. Dudley & Co. (D. C. 1906) 144 Fed. 441.

Defendant, a nonresident of New York, held to have been under subpœna to testify before a federal grand jury at the time he was served with process in a civil action in the state court, and that such service was therefore void. Dwelle v. Allen (D. C. 1912) 193 Fed. 546.

The privileges of suitors and witnesses from service of process extends to those attending before commissioners to take deposition, though taken by agreement. The privilege of a suitor from service of process extends to his attendance before a notary public for the taking of his deposition pursuant to agreement of the parties, when, under Comp. St. Neb. 1911, c. 61, § 7, and R. S. § 863, post, § 1472, a witness may be compelled by process to appear before a notary and answer questions put to him. Roschynialski v. Hale (D. C. 1913) 201 Fed. 1017.

A nonresident plaintiff, in an action in the United States court, held privileged from being sued in such court while attending the trial of such action. Read v. Neff (D. C. 1913) 207 Fed. 890.

CITED WITHOUT DEFINITE APPLICATION

U. S. v. Union Pac. R. Co. (1878) 98 U. S. 569, 604, 25 L. Ed. 143; Ex parte Des Moines & M. R. Co. (1880) 103 U. S. 794, 796, 26 L. Ed. 461; Ex parte Shaw (1892) 12 Sup. Ct. 935, 936, 937, 145 U. S. 444, 36 L. Ed. 768; Petri v. F. E. Creelman Lumber Co. (1905) 26 Sup. Ct. 133, 137, 199 U. S. 487, 50 L. Ed. 261; Jones v. Gould (1906) 149 Fed. 153, 159, 80 C. C. A. 1; Cucciarre v. New York Cent. & H. R. R. Co. (1908) 163 Fed. 38, 90 C. C. A. 220; O'Neil v. Wolcott Mining Co. (1909) 174 Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200; Liggett & M. L. Co. v. Miller (C. C. 1880) 1 Fed. 203, 204; The Cortes Co. v. Thannhauser (C. C. 1881) 9 Fed. 226, 228; Sleppy v. Bank of Commerce (C. C. 1883) 17 Fed. 712; Vermont Farm Mach. Co. v. Marble (C. C. 1884) 20 Fed. 117, 118; Erstein v. Rothschild (C. C. 1884) 22 Fed. 61, 65; Treadwell v. Seymour (C. C. 1890) 41 Fed. 579, 581; Single v. Scott Paper Mfg. Co. (C. C. 1893) 55 Fed. 553, 555; Cely v. Griffin (C. C. 1902) 113 Fed. 981; United States Consolidated Seeded Raisin Co. v. Phœnix Raisin Seeding & Packing Co. (C. C. 1903) 124 Fed. 234; Rome Petroleum & Iron Co. v. Hughes Specialty Well Drilling Co. (C. C. 1904) 130 Fed. 585; United Shoe Machinery Co. v. Duplessis Independent Shoe Machinery Co. (C. C. 1904) 133 Fed. 930; Ladd Metals Co. v. American Mining Co. (C. C. 1907) 152 Fed. 1008; Shawnee Nat. Bank v. Missouri, K. & T. Ry. Co. (C. C. 1909) 175 Fed. 458; Ladew v. Tennessee Copper Co. (C. C. 1910) 179 Fed. 245 (affirmed [1910] 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069, and [1910] 31 Sup. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073); Doscher v. U. S. Pipe Line Co. (C. C. 1911) 185 Fed. 959; Michigan Aluminum F. Co. v. Aluminum Castings Co. (C. C. 1911) 190 Fed. 879; Lung Chung v. Northern Pac. R. Co. (D. C. 1884) 19 Fed. 254, 257; U. S. v. Standard Oil Co. (D. C. 1907) 154 Fed. 728; Puget Sound Sheet Metal Works v. Great Northern Ry. Co. (D. C. 1912) 195 Fed. 350; Thoma v. Perri (D. C. 1913) 205 Fed. 632.

§ 1034. (Jud. Code, § 52.) Suits in States containing more than one district.

When a State contains more than one district, every suit not of a local nature, in the district court thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein,

execution may be issued, directed to the marshal of any district in the same State.

R. S. § 740. Act March 3, 1881, c. 144, § 2, 21 Stat. 507. Act March 3, 1911, c. 231, § 52, 36 Stat. 1101.

Notes of Decisions

In general.—Where there are several defendants residing in different districts of same state the court acquires jurisdiction where each is served in his own district. Act May 4, 1858. Babbitt v. Burgess (C. C. 1873) Fed. Cas. No. 693.

Proceedings to limit the liability of shipowners may be instituted in a district where a fund or claim equitably representing the lost vessel is in litigation, though the petitioners reside in another district. In re Leonard (D. C. 1882) 14 Fed. 53.

"Inhabitant," "resident," and "citizen" defined.—The words "inhabitant," "resident," and "citizen" in this section contemplate the same condition and all include the same idea. U. S. v. Gronich (D. C. 1914) 211 Fed. 548. And see, also, Shaw v. Quincy Ming. Co. (1892) 12 Sup. Ct. 935, 145 U. S. 444, 36 L. Ed. 768; In re Hohorst (1893) 14 Sup. Ct. 221, 150 U. S. 653, 37 L. Ed. 1211; Galveston, H. & S. A. Ry. Co. v. Gonzales (1894) 14 Sup. Ct. 401, 151 U. S. 496, 38 L. Ed. 248. And see notes under, ante, § 1033.

Suit of a "local nature" defined.—A suit by creditors for the appointment of a receiver for a railroad is a suit of a "local nature." East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (1892) 49 Fed. 609, 15 L. R. A. 109. And see post, §§ 1035–1037, and notes thereunder.

"Suit" defined.—The L. B. X. (D. C. 1898) 88 Fed. 290.

Repeal of statute.—R. S. § 740, embodied herein was not repealed by the jurisdictional acts of 1875, 1887, or 1888. East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 608, 15 L. R. A. 109; Goddard v. Mailler (C. C. 1897) 80 Fed. 422; New Jersey Steel & Iron Co. v. Chormann (C. C. 1900) 105 Fed. 532; John D. Park & Sons Co. v. Bruen (C. C. 1904) 133 Fed. 806; Doscher v. United States Pipe Line Co. (C. C. 1911) 185 Fed. 959.

Applicability of statute.—The provision that a suit not of a local nature, brought in a district in a state, containing more than one district, against a single defendant, shall be brought in the district in which defendant resides, does not apply to a case where a single defendant is a corporation created by such state. Locomotive Engine Safety Truck Co. v. Erie Ry. Co. (C. C. 1872) Fed. Cas. No. 8,452.

Under Bankruptcy Act July 1, 1898, § 2, post, § 9586, giving courts of bankruptcy jurisdiction to adjudge persons bankrupt who have had their principal place of business or residence or domicile, for the greater part of six months preceding the filing of the petition, within the territorial jurisdiction of the court, and section 18, providing that personal service shall be made as process is served in suits in equity, and, where personal service cannot be made, notice must be given by publication as provided by law for notice by publication, and R. S. § 629, subd. 8, ante, § 991(10), authorizing service by publication, a trustee of a person who is beyond the territorial limits of a bankruptcy court at the time of the filing of the petition, but who has for more than a year prior to a few days before the filing of the petition resided within the district, may go outside of the district and avoid, as authorized by sections 60b, 67e, post, §§ 9644, 9651, preferential transfers, notwithstanding R. S. § 740 embodied herein. Hills v. F. D. McKinniss Co. (D. C. 1910) 188 Fed. 1012.

There is no provision of law by which a resident of the Eastern district of Tennessee can be summoned to appear and defend against transitory legal causes of action, even if properly joined with causes of an equitable nature, brought within the Middle district. Bucyrus Co. v. McArthur (D. C. 1914) 219 Fed. 266.

District in which suit may or must be brought.—A defendant, to give jurisdiction on the ground of residence in a certain district, must be a real, and not merely a nominal, party. Sackett's Harbor Bank v. Barry (C. C. 1857) Fed. Cas. No. 12,204. Where a state contains more than one district, and the suit is not of a local nature, the suit must be brought in the district in which one or more of the defendants resides. Seidenbach v. Hollowell (C. C. 1879) Fed. Cas. No. 12,635. A statute dividing the Southern district of Ohio into two divisions, and providing that all suits, not of a local nature, in circuit and district courts, must be brought in the division of the district, where the defendant resides, does not deprive the court of that division where defendant does not reside of jurisdiction over a case, but is simply a rule of convenience. Page v. City of Chillicothe (C. C. 1881) 6 Fed. 599. A suit by Italian aliens for death of their son against a corporation of Pennsylvania and Ohio must be brought in the federal district where the corporation is a legal resident. Colosino v. Pittsburgh & L. E. R. Co. (D. C. 1914) 210 Fed. 550. And see McMicken v. Webb (1837) 11 Pet. 25, 38, 9 L. Ed. 618,

holding that the residence of a party in another district of a state than that in which the suit is brought in a federal court does not exempt him from its jurisdiction. The division of a state into two or more districts cannot affect the jurisdiction on account of citizenship. If the party is found in the district in which he is sued, the case is out of the prohibition that "no civil suit shall be brought in the courts of the United States against a defendant by any original process in any other district whereof he is an inhabitant, or in which he shall be found at the time of serving the writ," contained in R. S. § 739, embodied herein. And see Third Nat. Bank v. Harrison (C. C. 1881) 8 Fed. 721, holding that where there are two districts in a state, a national bank may bring a suit not of a local nature in the circuit court of the one in which it is located, against two or more defendants, one or more of whom reside in the district in which suit is brought.

In a suit brought in the federal court within the Southern district of Ohio, the declaration averred defendant to be a citizen of Ohio, and the plaintiffs citizens of Iowa. Held, that it was not necessary, to give jurisdiction to the court, that the declaration should allege the defendant to be a resident of the Southern district of Ohio. A court of the United States has jurisdiction where the parties are citizens of different states, and defendant is served within the district, without reference to the division of a state into districts. Vore v. Fowler (C. C. 1869) Fed. Cas. No. 17,003.

When the citizenship is diverse, and plaintiff is a resident of the district, it is not necessary that he shall reside in the particular division of the district where the suit is brought. Merchants' Nat. Bank v. Chattanooga Const. Co. (C. C. 1892) 53 Fed. 314.

A suit by creditors for the appointment of a receiver for a railroad is a suit of a local nature within this section. East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 608, 15 L. R. A. 109.

Where a state contains more than one federal judicial district, a corporation of the state, for the purpose of bringing suit or being sued in a federal court, is at least prima facie, a resident and inhabitant of the district in which it has its principal office, as designated in its certificate or articles of incorporation in accordance with the requirement of the state law. Firestone Tire & Rubber Co. v. Vehicle Equipment Co. (C. C. 1907) 155 Fed. 676.

—— Waiver of privilege to be sued in proper district.—A statute dividing the Southern district of Ohio into two divisions, and providing that all suits not of a local nature in circuit and district courts must be brought in the division of the district where the defendant resides, simply confers a personal privilege on the defendant which he may waive. Page v. City of Chillicothe (C. C. 1881) 6 Fed. 599.

And see notes under ante, § 1033.

Writs directed to marshals of other districts.—The court for the Eastern district of New York has power to issue an attachment and direct the same to the marshal for any other district within the state of New York. Treadwell v. Seymour (C. C. 1890) 41 Fed. 579.

And see post, § 1539, and notes thereunder.

Cited without definite application, Ex parte Shaw (1892) 12 Sup. Ct. 935, 937, 145 U. S. 444, 36 L. Ed. 768; Greeley v. Lowe (1894) 15 Sup. Ct. 24, 26, 155 U. S. 58, 39 L. Ed. 69; Petri v. F. E. Creelman Lumber Co. (1905) 26 Sup. Ct. 133, 137, 199 U. S. 487, 50 L. Ed. 281; St. Louis Southwestern R. Co. v. S. Samuels & Co. (1914) 211 Fed. 588, 590, 128 C. C. A. 188; Erstein v. Rothschild (C. C. 1884) 22 Fed. 61, 65; U. S. v. Gronich, 211 Fed. 548.

§ 1035. (Jud. Code, § 53.) Districts containing more than one division; where suit to be brought; transfer of criminal cases.

When a district contains more than one division, every suit not of a local nature against a single defendant must be brought in the division where he resides; but if there are two or more defendants residing in different divisions of the district it may be brought in either division. All mesne and final process subject to the provisions of this section may be served and executed in any or all of the divisions of the district, or if the State contains more than one district, then in any of such districts, as provided in the preceding section. All prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court, or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district. When a transfer is ordered by the court or judge, all the papers in the case, or certified copies thereof, shall be transmitted by the clerk, under the seal of the court, to the division

to which the cause is so ordered transferred; and thereupon the cause shall be proceeded with in said division in the same manner as if the offense had been committed therein. In all cases of the removal of suits from the courts of a State to the district court of the United States such removal shall be to the United States district court in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of United States courts, shall be deemed to refer to the terms of the United States district court in such division.

Act June 2, 1906, c. 2569, § 2, 34 Stat. 207. Act March 5, 1910, c. 82, 36 Stat. 233. Act March 3, 1911, c. 231, § 53, 36 Stat. 1101.

Notes of Decisions

Construction of statute in general.—A provision that all suits not of a local nature must be brought in the division of the district where the defendant resides, simply confers a personal privilege on the defendant which he may waive. It does not deprive the court of division where defendant does not reside of jurisdiction over a case, but is simply a rule of convenience. Page v. City of Chillicothe (C. C. 1881) 6 Fed. 599. When federal jurisdiction depended on diverse citizenship alone, plaintiff could sue in the district of his residence, but was not required under this section to sue in the division of the district in which he resided. Reich v. Tennessee Copper Co. (D. C. 1913) 209 Fed. 880.

See, also, International Bank & Trust Co. v. Scott (1908) 159 Fed. 58, 86 C. C. A. 248, holding that a privilege was a personal one which defendant could waive.

A district court within whose jurisdiction a corporation has in fact had its principal place of business for the preceding six months has jurisdiction to adjudge such corporation a bankrupt, although its articles of incorporation fix its principal place of business in another jurisdiction. In re Wenatchee-Stratford Orchard Co. (D. C. 1913) 205 Fed. 964.

Suit not of a local nature.—A libel in rem is an action of a local character, within a provision that actions not of a local nature shall be brought in the division where defendant resides; and it must be brought in the division where the res happens to be situated when the suit is begun. Nelson v. The Willamette (D. C. 1892) 53 Fed. 602.

Divison of district in which suit may be brought.—When the citizenship is diverse, and plaintiff is a resident of the district, it is not necessary that he shall reside in the particular division of the district where the suit is brought. Merchants' Nat. Bank v. Chattanooga Construction Co. (C. C. 1892) 53 Fed. 314. It is not necessary that action against such defendant be brought in the division of the district wherein plaintiff resides. Dinzy v. Illinois Cent. R. Co. (C. C. 1894) 61 Fed. 49.

Privilege to be sued in proper district.—See ante, § 1030, and notes thereunder.

Place of filing of petition.—In an action brought in the Western division of the Northern district of Ohio, the petition should be filed in the clerk's office at Toledo before process can issue. A filing in Cleveland, whereupon the deputy clerk issues summons and forwards the petition to the clerk's office at Toledo, is not sufficient to base a valid service in the Western division. U. S. v. Eddy (C. C. 1885) 28 Fed. 226.

Transfer.—A defendant, procuring the removal of a cause from a state court and filing the transcript in a division of the court, held precluded from asserting that the cause was pending in the wrong division, so as to give it the right to demand a removal to another division. Facts held not sufficient to impel to action the discretion of the court to grant a transfer. O'Donnell v. Atchison, T. & S. F. R. Co. (C. C. 1892) 49 Fed. 689.

Under the act dividing the district of Georgia into two divisions and providing that suits shall be brought against the parties who live in the counties embraced in the Northwestern division in that division, where bankruptcy proceedings were instituted against a bankrupt living in the Northwestern division, but the petition was filed and process made returnable at Atlanta, instead of at Rome, the case would be transferred to the Northwestern division, and new process directed to be served on the bankrupt in that division returnable at Rome. In re Hamrick (D. C. 1909) 175 Fed. 279.

Prosecutions for crimes.—The district court sitting in one division has jurisdiction to hear and determine a motion for new trial in a criminal case tried in another division of the district. Dwyer v. U. S. (1909) 170 Fed. 160, 163, 95 C. C. A. 416.

That the grand jury is sworn to inquire into offenses committed within a division only in which the court is sitting held not to avoid an indictment for an offense committed within that division. U. S. v. Wan Lee (D. C. 1890) 44 Fed. 707. See, also, Barrett v. U.

S. (1898) 18 Sup. Ct. 327, 169 U. S. 218, 42 L. Ed. 723.

The provision of this section that in districts having more than one division criminal cases shall be tried in the division where the offense was committed, unless transferred to another division on motion of defendant, applies only to districts having statutory divisions. U. S. v. Sutherland (D. C. 1914) 214 Fed. 320.

Cited without definite application, St. Louis Southwestern R. Co. v. S. Samuels & Co. (1914) 211 Fed. 588, 590, 128 C. C. A. 188.

§ 1036. (Jud. Code, § 54.) Suits of a local nature, where to be brought.

In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides.

R. S. § 741. Act March 3, 1911, c. 231, § 54, 36 Stat. 1102.

Notes of Decisions

Statute repealed or superseded.—This section, and ante, § 1034, and post, § 1037, were not repealed by the jurisdictional acts of 1875, 1887, or 1888. East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 609, 15 L. R. A. 109. But, in a suit of a local nature in a federal court to enforce a lien on property, a nonresident defendant cannot be brought in by service of original process upon him in the district of his residence, as provided in R. S. § 741, which has been superseded by Act March 3, 1875, § 8, incorporated into section 1039, post; but he must be brought in by an order made in accordance with the provisions of the latter section. Seybert v. Shamokin & Mt. C. Electric Ry. Co. (C. C. 1901) 110 Fed. 810.

Jurisdiction and venue in local actions or suits.—An action by an assignee to recover a sum of money due the bankrupt, under a written contract, is not local. Babbitt v. Burgess (C. C. 1873) Fed. Cas. No. 693.

Section 1026, ante, extended the provisions of that portion of Act May 4, 1858, which is embodied in this section to the case of a defendant residing out of the state, but interested in property of a local nature within the jurisdiction, which plaintiff was seeking to subject to a lien, but did not otherwise enlarge or affect the general jurisdiction of the court in a suit of local nature. East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 608, 613, 15 L. R. A. 109.

The restriction as to venue imposed by Act March 3, 1887, incorporated into section 1033, ante, is not applicable to local actions. Elk Garden Co. v. T. W. Thayer Co. (C. C. 1910) 179 Fed. 556.

—— **Cancellation of contract for sale of land.**—A suit for the cancellation of a contract for the sale of land is one in personam, and may be brought in a district other than that in which the land is situated. Jones v. Byrne (C. C. 1906) 149 Fed. 457, decree reversed Byrne v. Jones (1908) 159 Fed. 321, 90 C. C. A. 101.

—— **Creditors' suit for appointment of receiver.**—A suit by creditors for appointment of a receiver for a railroad is of a local nature. East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 609, 15 L. R. A. 109.

—— **Ejectment.**—The restriction as to venue imposed by Act March 3, 1887, incorporated into section 1033, ante, is not applicable to local actions, and ejectment is a local action such as can be maintained only in the district where the land lies. Elk Garden Co. v. T. W. Thayer Co. (C. C. 1910) 179 Fed. 556.

—— **Libel in rem.**—In a suit in a federal court to foreclose a mortgage on property situated within the district, the jurisdiction of the court is not defeated by the fact that one of the defendants is not a resident of the district. Seybert v. Shamokin & Mt. C. Electric Ry. Co. (C. C. 1901) 110 Fed. 810.

A libel in rem is an action of a local nature and must be brought in the division where the res happens to be. Nelson v. The Willamette (D. C. 1892) 53 Fed. 602.

—— **Nuisance.**—A bill in equity to abate a nuisance is a local suit and can be brought only in the district where the nuisance is situated. Mississippi & M. R. Co. v. Ward (1862) 2 Black, 485, 492, 17 L. Ed. 311.

—— **Trespass for injury to land.**—A federal circuit court cannot take cognizance of a trespass committed on lands lying without the judicial district of the court, although the trespasser is a resident of and is found within the district, such action being local. Livingston v. Jefferson (C. C. 1811) Fed. Cas. No. 8,411.

An action of trespass to recover damages for injury to land by cutting timber therefrom, and removing the same, is of a local nature, and can only be maintained in a federal court in the dis-

trict in which the land is situated. Kentucky Coal Lands Co. v. Mineral Development Co. (C. C. 1911) 191 Fed. 899.

Cited without definite application, Greeley v. Lowe (1894) 15 Sup. Ct. 24, 26, 155 U. S. 58, 39 L. Ed. 69; St. Louis Southwestern R. Co. v. S. Samuels & Co. (1914) 211 Fed. 588, 590, 128 C. C. A. 188; Erstein v. Rothschild (C. C. 1884) 22 Fed. 61, 65; Goddard v. Mailler (C. C. 1897) 80 Fed. 422; Ladew v. Tennessee Copper Co. (C. C. 1910) 179 Fed. 245, affirmed (1910) 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069 (affirmed [1910] 31 Sup. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073).

§ 1037. (Jud. Code, § 55.) When property lies in different districts in same State.

Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted.

R. S. § 742. Act March 3, 1911, c. 231, § 55, 36 Stat. 1102.

Notes of Decisions

Repeal of statute.—This section held not repealed by the jurisdictional acts of 1875, 1887, 1888. East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 608, 15 L. R. A. 109.

Suit of local nature.—A suit by creditors for the appointment of a receiver for a railroad is a suit of a local nature. East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co. (C. C. 1892) 49 Fed. 608, 15 L. R. A. 109.

District in which suit may be brought.—A suit by a creditor of a railroad company to have its property, situated in different federal districts of the same state, administered for the benefit of all creditors, is one of a local nature which, under this section, may be brought in either of such districts, and the appointment of a receiver therein is an equitable attachment of all property of the defendant within the state. Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626.

Cited without definite application, Greeley v. Lowe (1894) 15 Sup. Ct. 24, 27, 155 U. S. 58, 39 L. Ed. 69; Memphis Sav. Bank v. Houchens (1902) 115 Fed. 96, 52 C. C. A. 176; St. Louis Southwestern R. Co. v. S. Samuels & Co. (1914) 211 Fed. 588, 590, 128 C. C. A. 188; Erstein v. Rothschild (C. C. 1884) 22 Fed. 61, 65; Goddard v. Mailler (C. C. 1897) 80 Fed. 422; Ladew v. Tennessee Copper Co. (C. C. 1910) 179 Fed. 245 (affirmed [1910] 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069, and [1910] 31 Sup. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073); Kentucky Coal Lands Co. v. Mineral Development Co. (C. C. 1911) 191 Fed. 899.

§ 1038. (Jud. Code, § 56.) When property lies in different States in same circuit; jurisdiction of receiver.

Where in any suit in which a receiver shall be appointed the land or other property of a fixed character, the subject of the suit, lies within different States in the same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all the property, the subject of the suit, lying or being within such circuit; subject, however, to the disapproval of such order, within thirty days thereafter, by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within ten days thereafter, of a duly certified copy of the bill and of the order of appointment. The disapproval of such appointment within such thirty days, or the failure to file such certified copy of the bill and order of appointment within ten days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the

State in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be.

Act March 3, 1911, c. 231, § 56, 36 Stat. 1102.

Notes of Decisions

Surrender of possession to state receiver.—A federal court, which in a foreclosure suit had taken possession by its receivers of all of the property of a corporation, situated in three states, under this section, held to have power, with the consent of defendant and its lienholders, to turn over possession and the control and management of such property to receivers appointed by a state court, which had the better right to possession of that situated within its own state. Kansas City Pipe Line Co. v. Fidelity Title & Trust Co. (1914) 217 Fed. 187, 133 C. C. A. 181.

Conformity to procedure in other state.—See Manship v. New South Building & Loan Ass'n (C. C. 1901) 110 Fed. 845.

Decisions prior to statute.—See notes under § 1047, post.

Cited without definite application, St. Louis Southwestern R. Co. v. S. Samuels & Co. (1914) 211 Fed. 588, 590, 128 C. C. A. 188.

§ 1039. (Jud. Code, § 57.) Absent defendants in suits to enforce liens, remove clouds on titles, etc.

When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: Provided, however, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court

shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

R. S. §§ 738, 742. Act March 3, 1875, c. 137, § 8, 18 Stat. 472. Act March 3, 1911, c. 231, § 57, 36 Stat. 1102.

Notes of Decisions

1. Validity and repeal.
2. Construction of statute in general.
3. Application and operation of statute in general.
4. "Suit" within statute.
5. "Property within the district" within the statute.
6. "Lien on or claim to property" within the statute.
7. "Found within district" within the statute.
8. "Absent defendant" within the statute.
9. Suit to enforce lien on or claim to property within the statute in general.
10. —— Attachment and garnishment.
11. —— Creditors' suit.
12. —— Establishment of judgment as a lien.
13. —— Eminent domain.
14. —— Foreclosure of liens.
15. —— Foreclosure of mortgages.
16. —— Injunction.
17. —— Partition.
18. —— Quieting title.
19. —— Specific performance.
20. Suit to remove incumbrance, lien or cloud on title.
21. —— Cancellation of conveyances or instruments.
22. —— Cloud on title by tax sale.
23. —— Ejectment.
24. —— Fraudulent conveyances and transfers.
25. —— Injunction.
26. —— Judgments.
27. —— Nuisance.
28. —— Quieting title.
29. Time of commencement of action.
30. Waiver of right to be sued in district of inhabitancy.
31. Appearance by nonresident defendant.
32. Pleading and proof of jurisdictional facts.
33. Jurisdiction over nonresident defendants.
34. Process, form of.
35. Privileges and exemptions from service of process.
36. Service of process on nonresident defendant.
37. Service on person in possession.
38. Person on whom substituted service may be made.
39. Service by publication, when authorized.
40. Compliance with statute authorizing substituted service.
41. Condition precedent to order for substituted service.
42. Affidavit for order of publication.
43. Citation directing publication.
44. Publication sufficiency of.
45. Order for substituted service good as against collateral attack.
46. Vacation of order for substituted service.
47. Decree, issues determined.
48. Opening decree.
49. Vacating sales under judgments.

1. Validity and repeal.—See Mellen v. Moline Malleable Iron Works (1889) 9 Sup. Ct. 781, 131 U. S. 352, 33 L. Ed. 178; Arndt v. Griggs (1890) 10 Sup. Ct. 557, 134 U. S. 316, 33 L. Ed. 918.

The repealing clause of the Judiciary Act of 1887, 1888, did not reach this section, which is still in force. Citizens' Savings & Trust Co. v. Illinois Cent. R. Co. (1907) 27 Sup. Ct. 425, 427, 205 U. S. 46, 51 L. Ed. 703.

Statutes like this which undertake to give to courts jurisdiction over nonresidents who do not come within the district for purposes either of residence or business should not be enlarged by too liberal construction. Nonmagnetic Watch Co. v. Association Horlogere Suisse (C. C. 1890) 44 Fed. 6, 7.

2. Construction of statute in general.—See Mellen v. Moline Malleable Iron Works (1889) 9 Sup. Ct. 781, 131 U. S. 352, 33 L. Ed. 178. And see, also, Arndt v. Griggs (1890) 10 Sup. Ct. 557, 134 U. S. 316, 33 L. Ed. 918.

3. Application and operation of statute in general.—This section has no application to the question of parties to a litigation begun several years before its passage. Robertson v. Carson (1873) 19 Wall. 94, 106, 22 L. Ed. 178. But it was applied to parties brought into a pending case after its passage. McBurney v. Carson (1878) 99 U. S. 567, 25 L. Ed. 378. It relates to legal and equitable liens or claims on real or personal property within the district where the suit was brought. Citizens' Savings & Trust Co. v. Illinois Cent. R. Co. (1907) 27 Sup. Ct. 425, 427, 205 U. S. 46, 51 L. Ed. 703. And does not extend to all suits of a local nature nor to all local actions in rem but is limited to suits brought to enforce the rights specified, and cannot be extended beyond them by construction. Ladew v. Tennessee Copper Co. (C. C. 1910) 179 Fed. 245, decree affirmed (1910) 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069, and Wetmore v. Tennessee Copper Co. (1910) 31 Sup. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073. And does not refer to a suit in which plaintiff seeks, through a receiver, to apply the general property of defendant to the payment of his debts, but to suits in equity to enforce some preexisting lien or claim on a specific piece of property. Shainwald v. Lewis (D. C. 1880) 5 Fed. 510, order affirmed (1883) 2 Sup. Ct. 385, 108 U. S. 158, 27 L. Ed. 691. It recognizes the principle of local jurisdiction in questions touching title to real estate and the right of service by publication. Morris v. Graham (C. C. 1892) 51 Fed. 53, 56. It has nothing to do with the right to bring suits, but only with making it so that suits to enforce certain kinds of causes of action rightfully brought may be prosecuted to a hearing and determination. Kentucky Coal Lands Co.

v. Mineral Development Co. (C. C. 1911) 191 Fed. 899.

A contention that as the words "one or more" in section 1032, ante, contemplated a controversy in which two or more defendants would be involved, therefore such words "one or more" mean the same in the Act of 1875, giving the right to bring such action where one or more may so reside, is fallacious. Dick v. Foraker (1894) 15 Sup. Ct. 124, 127, 155 U. S. 404, 39 L. Ed. 201.

When the requisite diversity of citizenship between the parties exists to give a federal court jurisdiction, a suit to establish a lien or claim on property within this section may be maintained in the district where the property is situated, though neither the plaintiff nor defendant is a resident thereof. Kentucky Coal Lands Co. v. Mineral Development Co. (1914) 219 Fed. 45, 133 C. C. A. 151, reversing (C. C. 1911) 191 Fed. 899. Though there is but one defendant. Wheelwright v. St. Louis, N. O. & O. Canal & Transp. Co. (C. C. 1892) 50 Fed. 709; Single v. Scott Paper Mfg. Co. (C. C. 1893) 55 Fed. 553; Ladew v. Tennessee Copper Co. (C. C. 1910) 179 Fed. 245, decree affirmed (1910) 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069, and Wetmore v. Tennessee Copper Co. (1910) 31 Sup. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073. Or though plaintiff and some of the defendants are residents of other districts. Greeley v. Lowe (1894) 15 Sup. Ct. 24, 26, 155 U. S. 58, 39 L. Ed. 69. For personal service is not essential to give the court jurisdiction. Single v. Scott Paper Mfg. Co. (C. C. 1893) 55 Fed. 553. And he may be served personally out of the state or may be brought in by publication under this section. Black v. Scott (C. C. 1881) 9 Fed. 186, 189.

This section must be so construed as not to include a person resident in a territory. Goldsmith v. Gilliland (C. C. 1885) 24 Fed. 154, 156.

A proceeding in equity to enforce a lien on a fund which is within reach of the court, where the trustees and complainant have the requisite citizenship, is a proceeding within the jurisdiction of the court under this section, and the court has jurisdiction to adjudicate on the rights of the persons claiming the fund, if they be notified of the pendency of the suit by service or publication. Goodman v. Niblack (1880) 102 U. S. 556, 563, 26 L. Ed. 229.

Under this section and ante, § 1033, a complainant in a suit to enforce a claim to certain land and remove a cloud therefrom was entitled to institute such suit in the district in which the property was located and to join therein defendants who were nonresidents of the district. Miller v. Ahrens (C. C. 1907) 150 Fed. 644.

This section, as originally enacted and amended by Act March 3, 1887, and Act Aug. 13, 1888, conferred jurisdiction on a federal court of a suit to remove a cloud from the title to land lying within the district where suit was brought, and the court might take jurisdiction where neither of the parties were residents of the state. Gillespie v. Pocahontas Coal & Coke Co. (C. C. 1907) 162 Fed. 742, decree reversed (1908) 163 Fed. 992, 91 C. C. A. 494, certiorari denied Pocahontas Coal & Coke Co. v. Gillespie (1909) 29 Sup. Ct. 700, 214 U. S. 519, 53 L. Ed. 1065.

The provision of ante, § 1033, does not affect the jurisdiction of the court in local actions to enforce a lien or claim upon real estate or personal property within the district. Lancaster v. Asheville St. Ry. Co. (C. C. 1898) 90 Fed. 129.

But, where an action was brought in a state court between nonresidents, and an attachment was levied on property of the defendant within the state solely to obtain jurisdiction, the action was not brought to enforce a legal or equitable lien on the property within such act, and was therefore not removable to the federal court. George v. Tennessee Coal, Iron & R. Co. (C. C. 1911) 184 Fed. 951.

The provision for service of nonresidents of the district with duplicate writs, which is made by the act dividing Texas into four judicial districts, is not limited to local actions of the class described by this section. In re Dunn (1909) 29 Sup. Ct. 299, 303, 212 U. S. 374, 53 L. Ed. 558.

4. **"Suit" within statute.**—The word "suit" includes an action at law and a proceeding in equity. Elk Garden Co. v. T. W. Thayer Co. (C. C. 1910) 179 Fed. 556.

5. **"Property within the district" within the statute.**—Shares of stock in a Michigan corporation by the laws of that state deemed personal property must be so considered within the meaning of this section. Jellenik v. Huron Copper Min. Co. (1900) 20 Sup. Ct. 559, 562, 177 U. S. 1, 44 L. Ed. 647.

Though certificates of corporate stock are technically only written evidences of interests in the corporate property, they are so far in the nature of chattels that, when certificates of stock in a corporation of one state are held in pledge or as collateral in another state, the courts of the latter may establish a lien thereon in a suit commenced by substituted service, under a statute authorizing such service in suits to establish liens on personal property within the state. Merritt v. American Steel-Barge Co. (1897) 79 Fed. 228, 24 C. C. A. 530.

The stock of a corporation organized under the laws of a state has its situs in such state, and is property within a federal judicial district in the state. Jones v. Gould (C. C. 1905) 141 Fed. 698, order affirmed (1906) 149 Fed.

153, 80 C. C. A. 1. But see Kilgour v. New Orleans Gas Light Co. (C. C. 1875) Fed. Cas. No. 7,764, holding that shares of corporate stock held by a nonresident of the district, within which the corporation is domiciled, are not "personal property within the district."

Certificates of corporate stock, indorsed and delivered as security to a trustee, with power of sale in case of default on the trust agreement, held "property," within this section. Blake v. Foreman Bros. Banking Co. (D. C. 1914) 218 Fed. 264.

A so-called "news franchise" of a newspaper, arising out of a contract with the Associated Press for furnishing its dispatches, although such contract provides that the privilege thereby granted may be transferred with the newspaper on condition that the purchaser will enter into a new and similar contract, implies that the assent of the Associated Press must be obtained to the new contract, and is merely a contract, which cannot, by any action of the newspaper, become property or the subject of a suit in rem, so as to support the jurisdiction of a federal court, under R. S. § 738, incorporated into this section. Lawrence v. Times Printing Co. (C. C. 1898) 90 Fed. 24.

The jurisdiction of the court of a suit, when the citizenship is diverse, is not affected by the fact that the property on which the lien existed is within the custody of the sheriff, under writs of attachment issuing from a state court, though it might affect the power of the court to take possession of the property. Wheelwright v. St. Louis, N. O. & O. Canal & Transp. Co. (C. C. 1892) 50 Fed. 709.

A patent right cannot have a situs in a particular district, within this section, so that a court may acquire jurisdiction of a nonresident defendant by publication in a suit to establish title thereto. Standard Gas Power Co. of Georgia v. Standard Gas Power Co. of Delaware (D. C. 1915) 224 Fed. 990.

A federal court in New York cannot take jurisdiction of a suit against nonresident aliens to establish title to bonds held by them as executors on the theory that they were within the district within this section, because that state, by virtue of probate of testator's will and appointment of defendants as executors, may treat both them and the estate as constructively present and subject to jurisdiction. Chase v. Wetzlar (1912) 32 Sup. Ct. 659, 663, 225 U S. 79, 56 L. Ed. 990.

Where a nonresident, who was a necessary party to a suit with reference to certain insurance, had a claim which was transitory, the claim had no such situs within the district as to justify the court in taking jurisdiction. Stockbridge v. Phœnix Mut. Life Ins. Co. (D. C. 1912) 193 Fed. 558.

The fact that a suit relates to land lying within the district does not give jurisdiction thereof to the circuit court of the United States, when it would not otherwise exist. Pooley v. Luco (C. C. 1896) 72 Fed. 561.

6. "Lien on or claim to property" within the statute.—The words "claim to * * * property" as used in this section, relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest or other direct right or claim to the property itself, and do not include a suit which merely seeks to enforce a restriction which the law imposes upon the owner of the property in reference to its proper use to avoid injury to other property, as one to abate or enjoin a nuisance. Ladew v. Tennessee Copper Co. (C. C. 1910) 179 Fed. 245, decree affirmed (1910) 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069, and Wetmore v. Tennessee Copper Co. (1910) 31 Sup. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073.

A suit must be one which concerns the title to some specific property within the district to come within the intent and meaning of this section, and a suit by a member of a syndicate, which was in effect a partnership, to wind up its affairs and for the appointment of a receiver on the ground of mismanagement by the managers, is not such a suit, especially where the only allegation in the bill with respect to property within the district is that the syndicate is the owner of stock in certain railroads therein. A subscriber to a syndicate fund, which was placed absolutely in the hands of managers to be invested in certain coal lands and railroad property and in constructing connecting lines, the property to be then sold and the proceeds divided or capitalized, and the stock distributed among the subscribers, has no lien upon or claim to the specific property so purchased by the managers which will give a court jurisdiction of a suit in rem against it, under this section, where neither complainant nor defendants are residents of the district. Jones v. Gould (C. C. 1905) 141 Fed. 698, order affirmed (1906) 149 Fed. 153, 80 C. C. A. 1.

Where a nonresident, who was a necessary party to a suit with reference to certain insurance, had a claim which was transitory, the claim had no such situs within the district as to justify the court in taking jurisdiction, under this section. Stockbridge v. Phœnix Mut. Life Ins. Co. (D. C. 1912) 193 Fed. 558.

7. "Found within district" within the statute.—A Maryland corporation operating mines in Pennsylvania and authorized to do business in New York is "found," and therefore may be sued in Maryland, Pennsylvania, or New York. Teti v. Consolidated Coal Co. of Maryland (D. C. 1914) 217 Fed. 443.

A corporation chartered by another state, but having, in the district where

suit is brought, a place of business, in charge of an agent designated to receive service, as required by the state statute, is "found" within the district, within this section, and there is no occasion for service by publication. Spencer v. Kansas City Stockyards Co. (C. C. 1893) 56 Fed. 741. And see notes under ante, § 1033.

8. "Absent defendant" within the statute.—Where service on defendant, a national bank, located and doing business in another state, was made under an order of court pursuant to this section, in a suit to relieve the bankrupts' real estate, situated in this district, from the lien of certain judgments, and to remove a cloud upon the title, the bank is an "absent defendant," within the section, and jurisdiction attaches. Duff v. First Nat. Bank (C. C. 1882) 13 Fed. 65.

9. Suit to enforce lien on or claim to property within the statute in general.—A suit brought by an assignee of a specified certificate of stock, which is physically within the district, seeking to establish his ownership thereof, and alleging that its custodian had wrongfully refused to deliver it to him, but fraudulently surrendered it for cancellation, and procured a new certificate in his own name, and which prays for the delivery to complainant of the original, and a cancellation of the spurious reissue, states an equitable cause of action, and falls within this section. Ryan v. Seaboard & R. R. Co. (C. C. 1897) 83 Fed. 889. A suit by a citizen of Ohio against citizens of Vermont, New York, and Maine, to enforce a claim to property in Vermont, is properly brought in the district of Vermont. Carpenter v. Talbot (C. C. 1888) 33 Fed. 537. But a suit in a federal court in New Jersey by stockholders of a Maine corporation against such corporation and others to set aside a transfer of patents and property by the corporation to a codefendant, and to compel a restoration of such property, where the property is not within the district of New Jersey, and the relief sought is general, and not in rem, is not one to enforce a claim to or lien on property in the district. Eldred v. American Palace Car Co. of New Jersey (1900) 105 Fed. 455, 45 C. C. A. 1. Nor is a suit for an account of lumber, etc., taken from demised premises, for damages for defendant's breaches of covenant, for the appointment of a receiver of demised premises, lumber, etc., within this section. Ellis v. Reynolds (C. C. 1888) 35 Fed. 394.

A suit by heirs against trustees under a will to recover a residue in the hands of defendants is not one to enforce a lien or claim on property, within this section. Fayerweather v. Ritch (C. C. 1898) 89 Fed. 385.

A suit by a stockholder against the corporation and others to restrain the enforcement of a contract by which the corporation sold stock to its codefendants is not one to "enforce any legal or equitable lien or claim" against the stock, within the meaning of R. S. § 738, embodied herein, authorizing the bringing in of nonresident defendants in such suits. Lengel v. American Smelting & Refining Co. (C. C. 1901) 110 Fed. 19.

A nonresident defendant in an action begun by attachment and the garnishment of money due him released such garnishment by the giving of a bond as provided by statute. He died pending the action, which could not be revived against his executors because of their nonresidence. Held, that a suit in equity by plaintiff against such executors to establish his right to enforce the bond was not one to enforce a lien on property, which could be maintained in a federal court in a district of which neither plaintiff nor defendants were inhabitants, against defendants' objection. Filer & Stowell Co. v. Rainey (C. C. 1903) 120 Fed. 718.

A suit in equity to recover shares of stock in a corporation of another state, which are not alleged to be held by any defendant who resides within the state in which the suit is brought, is not one to establish a claim to "personal property within the district," nor does the fact that the principal defendant, although a nonresident, enters a general appearance, authorize the court to bring in other nonresident defendants by constructive service. McKane v. Burke (C. C. 1904) 132 Fed. 688.

A suit in equity by a lessee against a nonresident lessor to enforce alleged rights under the terms of the lease by requiring the defendant to elect either to sell the land to, or to buy the building thereon from, complainant at an appraised value, or to have the court make such election and carry the same into effect through a master or trustee appointed for the purpose, is not within the jurisdiction of the Circuit Court of the United States for the district in which the property is situated. York County Sav. Bank v. Abbot (C. C. 1905) 139 Fed. 988.

Where an action was brought in a state court between nonresidents, and an attachment was levied on property of the defendant within the state solely to obtain jurisdiction, the action was not brought to enforce a legal or equitable lien on the property, and was therefore not removable to the federal court. George v. Tennessee Coal, Iron & R. Co. (C. C. 1911) 184 Fed. 951.

A suit held not one to establish a claim to real property in the district, or to enforce a lien or remove a cloud on the title to real or personal property, and therefore could not be maintained in such district against the protest of the nonresident defendants, un-

der this section. Revett v. Clise (D. C. 1913) 207 Fed. 673.

A bill for an examination of the vital organs of an insured man is not a suit to enforce a claim to property which, under this section, may be brought in the district in which the property is, but jurisdiction thereof is governed by Judicial Code, § 51, ante, § 1033. Mutual Life Ins. Co. of New York v. Painter (D. C. 1915) 220 Fed. 998.

A cause against a mining company involving the invalidity of directors controlling the company's property held removable as a local action to enforce a claim of its property situated within the district. Consolidated Interstate Callahan Mining Co. v. Callahan Mining Co. (D. C. 1915) 228 Fed. 528.

10. —— Attachment and garnishment.—In an action against a nonresident, commenced by attachment and garnishment, and supplemented by publication of service, the sheriff's return showed that neither defendant nor any of his property had been found in the county. The garnishees denied having any property or credits belonging to defendant, and these answers were not controverted by plaintiff, as allowed by the state law. Held that, there being no personal service and no res to support the publication, defendant was entitled to a dismissal of the cause, unless plaintiff should impeach the truth of the garnishees' answers within a certain time given. McGillin v. Claflin (C. C. 1892) 52 Fed. 657. And see Hauf v. Wilson (C. C. 1887) 31 Fed. 384.

See Ex parte Des Moines & M. R. Co. (1880) 103 U. S. 794, 26 L. Ed. 461, holding that an attachment cannot be sued out against the property of defendant when the court has not acquired jurisdiction of the person. And see, also, Big Vein Coal Co. v. Read (1913) 33 Sup. Ct. 694, 229 U. S. 31, 57 L. Ed. 1053.

11. —— Creditors' suit.—This section does not enlarge the right of an individual to sue, and confers no right upon a simple contract creditor to maintain a creditors' suit in a federal court to set aside an alleged fraudulent conveyance of property by the debtor, nor does the fact that complainant has an alleged mechanic's lien upon the property afford basis for such a general creditors' suit, since such lien, if valid, may be enforced in rem against the property, regardless of conveyances, whether prior or subsequent. Canton Roll & Machine Co. v. Rolling Mill Co. of America (C. C. 1907) 155 Fed. 321, decree modified (1909) 168 Fed. 465, 93 C. C. A. 621, writ of certiorari denied Logan v. Farmers' Deposit Nat. Bank of Pittsburgh, Pa. (1909) 29 S. Ct. 694, 214 U. S. 513, 53 L. Ed. 1062, and appeal dismissed (1909) 29 S. Ct. 698, 214 U. S. 500, 53 L. Ed. 1060.

A creditors' suit in a federal court to subject property within the district standing in the name of others to the payment of complainant's judgment is a local suit, of which, under this section, the court has jurisdiction, notwithstanding the fact that neither complainant nor the judgment defendant is a citizen or resident of the district. Hultberg v. Anderson (C. C. 1909) 170 Fed. 657.

12. —— Establishment of judgment as a lien.—A suit by an alien judgment creditor to establish the judgment as a lien against property of the judgment debtor may be brought in the district in which the property is situated, regardless of the fact that defendants are inhabitants of another district. De Hierapolis v. Lawrence (C. C. 1899) 99 Fed. 321.

13. —— Eminent domain.—A proceeding to condemn right of way under eminent domain statutes is not a suit to enforce a "legal or equitable claim to property" within this section, of which the federal court has jurisdiction, regardless of citizenship of parties. Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1912) 201 Fed. 932.

14. —— Foreclosure of liens.—A suit on a contract giving a lien for its performance on oil leases and wells held maintainable in a federal court in the district where the property was situated under this section, regardless of residence save as to diversity of citizenship. Texas Co. v. Central Fuel Oil Co. (1912) 194 Fed. 1, 114 C. C. A. 21.

Proceedings to foreclose a lien are proceedings in rem, and personal service on absent parties is not essential to give the court jurisdiction. Oswald v. Kampmann (C. C. 1886) 28 Fed. 36.

Act Aug. 13, 1888, § 1, declares that no suit shall be brought before the federal courts in any other district than that whereof defendant is an inhabitant; but section 5 provides that nothing in this act shall be construed to repeal or affect any jurisdiction or right mentioned in Act March 3, 1875, § 8. This section provides that in any suit to enforce any legal or equitable lien on, or claim to, or to remove any lien or cloud upon, property situated in the district where the suit is brought, defendants who are not inhabitants may be made parties, and brought into court by the methods there prescribed. Held, that this latter section applies to a bill brought to enforce various liens upon part of a railroad lying in the district, as against the lien of a general mortgage, which is about to be foreclosed in the same court by a suit ancillary to another suit in a different district and state. McBee v. Marietta & N. G. Ry. Co. (C. C. 1891) 48 Fed. 243, decree reversed Same v. Central Trust Co. (1893) 57 Fed. 753, 6 C. C. A. 539.

A suit by an alien judgment creditor to establish the judgment as a lien against property of the judgment debtor

may be brought in the district in which the property is situated, regardless of the fact that defendants are inhabitants of another district. De Hierapolis v. Lawrence (C. C. 1899) 99 Fed. 321.

15. —— **Foreclosure of mortgages.**—Under this section a suit to foreclose a mortgage may be maintained in the circuit court of the United States in the district where the property is situated, where the requisite amount is involved, and the parties are citizens of different states, though neither is a resident of the district. Grove v. Grove (C. C. 1899) 93 Fed. 865. A suit to foreclose a mortgage is a local action; and the fact that the United States court sitting in Missouri has entertained a bill by a railroad company owning and operating lines in that state, and in Illinois, and other states, filed by the corporation, for the appointment of receivers, and has, without notice to the Illinois mortgagees, named such receivers, and, in the course of the proceedings, ordered a foreclosure of the entire line, does not operate to oust the United States circuit court sitting in Illinois of jurisdiction of a suit by such mortgagees to remove the receivers appointed in Missouri, so far as the lines in Illinois are concerned, and to foreclose the mortgages thereon. Atkins v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 29 Fed. 161. The court has jurisdiction of a suit by a resident of another district to foreclose a mortgage on land situated within the district, though some of the defendants are, and others are not, residents of the district in which the suit is brought. Ames v. Holderbaum (C. C. 1890) 42 Fed. 341. Though defendant is not an inhabitant of the district, nor found therein, where personal service is made on him in another district. Merrihew v. Fort (C. C. 1899) 98 Fed. 899.

This section, though construed in connection with ante, § 1033, applies to a bill brought to enforce various liens on part of a railroad lying in the district, as against the lien of a general mortgage, which is about to be foreclosed in the same court by a suit ancillary to another suit in a different district and state; and such original bill may be maintained, although some of the defendants are nonresidents of the district. McBee v. Marietta & N. G. Ry. Co. (C. C. 1891) 48 Fed. 243, decree reversed McBee v. Central Trust Co. of N. Y. (1893) 57 Fed. 753, 6 C. C. A. 539.

See, also, Seybert v. Shamokin & Mt. C. Electric R. Co. (C. C. 1901) 110 Fed. 810.

16. —— **Injunction.**—A suit to enjoin further prosecution of an action at law on a note by a citizen and resident of the state in which the suit is brought, and to have the note canceled, on the ground that it was obtained by fraud, is one to enforce an equitable claim to property within the district, within the meaning of this section, and the court is authorized by an order made thereunder to bring in the nonresident payee of the note, who is alleged in the bill to have or claim some interest therein. Manning v. Berdan (C. C. 1904) 132 Fed. 382.

An action by an alien bondholder of a railroad company to restrain the trustee in a mortgage securing the bonds from paying over to the company, in fraud of plaintiff's rights, the proceeds of the sale of land which by the mortgage was set apart to create a sinking fund for the redemption of the bonds, was maintainable, and when commenced within the district of which the trustee was an inhabitant, and in which it had the fund, and an order might issue to the company, a nonresident corporation, to appear and plead, etc. Pollitz v. Farmers' Loan & Trust Co. (C. C. 1889) 39 Fed. 707.

17. —— **Partition.**—A suit for partition is within the class of cases specified in this section. Greeley v. Lowe (1894) 15 Sup. Ct. 2428, 155 U. S. 58, 39 L. Ed. 69.

A suit for partition is a local action within this section and one in which any question between any of the parties, plaintiffs or defendants, affecting their rights or interests in the land may be put in issue and determined; and a federal court is not without jurisdiction because questions may arise between plaintiffs, who are citizens of the same state, nor will it make a realignment of parties to defeat its jurisdiction because such questions may arise, where the bill, although properly setting out the interest of each party in the premises, does not disclose any controversy which renders it necessary. German Savings & Loan Soc. v. Tull (1905) 136 Fed. 1, 69 C. C. A. 1, writ of certiorari denied (1906) 26 S. Ct. 757, 200 U. S. 621, 50 L. Ed. 624.

18. —— **Quieting title.**—See U. S. v. Southern Pac. R. Co. (C. C. 1894) 63 Fed. 481.

19. —— **Specific performance.**—In determining whether a suit to enforce specific performance of a contract to convey lands is a suit to enforce an "equitable claim" to real estate, within this section, the court may consider the relief prescribed by the state statutes in favor of parties having the right to enforce such contracts; and in Ohio, where the statutes provide for constructive service on nonresidents, and also declare that if a judgment ordering a conveyance is not complied with the judgment itself shall operate as a conveyance, such a suit is an "equitable claim." Single v. Scott Paper Manuf'g Co. (C. C. 1893) 55 Fed. 553. But a suit to enforce a contract to convey land should be brought in the district where one of the parties resides, un-

der ante, § 1033, because this section is not applicable, to specific performance. Municipal Inv. Co. v. Gardiner (C. C. 1894) 62 Fed. 954. And a suit by a lessee against a nonresident lessor to enforce alleged rights under the lease by requiring defendant to elect either to sell the land to, or to buy the building thereon from, complainant at an appraised value, or to have the court make such election and carry the same into effect through a master or trustee appointed for the purpose, is not within the jurisdiction of the court for the district in which the property is situated, by virtue of this section, where defendant has not appeared. York County Sav. Bank v. Abbot (C. C. 1905) 139 Fed. 988. But may be one to enforce a lien or claim to the property, which, when in good faith, is on the face of the bill within the jurisdiction of the court for the district in which the property is situated. York County Sav. Bank v. Abbot (C. C. 1904) 131 Fed. 980. And see Texas Co. v. Central Fuel Co. (1912) 194 Fed. 1, 114 C. C. A. 21, holding that the section applies if any lien or charge on the land was reserved as part of the contract.

A suit in equity in which complainant alleges that he entered into a contract to sell certain land to defendants, receiving a part of the purchase price, that defendants are in default as to a second payment, and prays for a specific enforcement of the contract, that complainant be given a judgment for the amount due on the contract and defendants' interest in the land be sold to pay the same is not one "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real * * * property." Nelson v. Husted (C. C. 1910) 182 Fed. 921.

20. Suit to remove incumbrance, lien, or cloud on title.—Under this section a United States court has jurisdiction of a suit to remove a cloud from a title to land situated in the district where the suit is brought, though defendant is a citizen of another state. Dick v. Foraker (1894) 15 Sup. Ct. 124, 127, 155 U. S. 404, 39 L. Ed. 201; Childs v. Missouri, K. & T. Ry. Co. (1915) 221 Fed. 219, 136 C. C. A. 629; Johnson v. North Star Lumber Co. (1913) 206 Fed. 624, 125 C. C. A. 118, affirming decree North Star Lumber Co. v. Johnson (D. C. 1912) 196 Fed. 56.

A suit to cancel and annul certain deeds and leases of the property of a railway company lying wholly within the Eastern district of Illinois may be brought and maintained in the federal court for that district against defendants who are inhabitants of the Northern district of Illinois, as being a suit to remove an "incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought." Citizens' Savings & Trust Co. v. Illinois Cent. R. Co. (1907) 27 Sup. Ct. 425, 427, 205 U. S. 46, 51 L. Ed. 703.

A suit by a receiver to adjust equities existing between himself as such receiver and nonresident defendants in whose behalf in part another defendant has obtained a judgment in his own name which he is seeking to enforce against a fund in the receiver's hands is one to remove an "incumbrance or lien or cloud upon the title to * * * property within the district" within this section, and in which substituted service may be made on the nonresident defendants, as therein provided. Brown v. Pegram (C. C. 1906) 143 Fed. 701.

Suits to remove clouds on title, resting on state statutes, established usages and practices in equity, are embraced within this section. Louisville & N. R. Co. v. Western Union Tel. Co. (1914) 34 S. Ct. 810, 234 U. S. 369, 58 L. Ed. 1356.

When a complainant alleges in her bill that she was fraudulently induced to execute an agreement to receive less than her lawful share of her husband's estate, and that the estate is being divided according to such fraudulent agreement, instead of being distributed in accordance with the law of the state where it is being administered, the suit must be considered as instituted "to remove a cloud upon title to personal property," within this section, and as calling for equitable relief within the jurisdiction of the United States circuit court. Castello v. Castello (C. C. 1882) 14 Fed. 207.

A suit in equity in which complainant alleges that he entered into a contract to sell certain land to defendants, receiving a part of the purchase price, that defendants are in default as to a second payment, and prays for a specific enforcement of the contract, that complainant be given a judgment for the amount due on the contract and defendants' interest in the land be sold to pay the same is not one "to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real * * * property." Nelson v. Husted (C. C. 1910) 182 Fed. 921.

An action by a creditor of a corporation to set aside as fraudulent a trust deed of the property of the corporation, given to secure certain of its guarantors, and to subject the trust fund to the payment of the debts of the corporation, is an action to remove an incumbrance or lien or cloud upon title, within the meaning of the act. Mellen v. Moline Malleable Iron Works (1889) 9 S. Ct. 781, 131 U. S. 352, 33 L. Ed. 178.

Where complainant was fraudulently induced by defendant B. to purchase certain timber land on the latter's agreement to take a one-twentieth in-

terest, and later to increase it to one-eighth, complainant's suit to rescind the contract, divest himself of the title, and recover the purchase money was not for the removal of a cloud on title within this section, and hence could not be maintained against B. in a federal court in a district in which he did not reside. Camp v. Bonsal (1913) 203 Fed. 913, 122 C. C. A. 207.

But see Remer v. McKay (C. C. 1892) 54 Fed. 432, holding that a suit to remove cloud from title to land may be brought in another state, since the decree compelling defendant to release the cloud operates only in personam.

A decree in a suit to quiet title against a defendant, who is a citizen of another state, rendered on service by publication, pursuant to this act, will not bar a subsequent action of ejectment by defendant to recover the land involved. Clark v. Hammett (C. C. 1886) 27 Fed. 339.

A District Court had jurisdiction of action to remove cloud on title to machinery and patents by defendant's claims thereto under contract to invent and manufacture. Burpee v. Guggenheim (D. C. 1915) 226 Fed. 214.

District Court held to have jurisdiction of a bill by the holder of bonds of an irrigation district to remove cloud upon his title thereto. Thompson v. Emmett Irr. Dist. (C. C. A. 1915) 227 Fed. 560.

21. —— **Cancellation of conveyances or instruments.**—An action by a creditor of a corporation to set aside as fraudulent a trust deed of its property given to secure certain of its guarantors, and to subject the trust fund to the payment of its debts, is an action to remove an encumbrance or lien or cloud on title within the meaning of this section. Mellen v. Moline Malleable Iron Works (1889) 9 Sup. Ct. 781, 785, 131 U. S. 352, 33 L. Ed. 178.

A suit by a purchaser of real estate at execution sale, to cancel and set aside a prior conveyance made by the judgment debtor as a cloud on his title, is a suit in rem, and within this section. Morrison v. Marker (C. C. 1899) 93 Fed. 692.

A suit to cancel a mortgage on real estate is of a local nature, and may be maintained in a federal court of the district where the property is situated, where there is the requisite diversity of citizenship and amount involved to give it jurisdiction, without regard to the residence of the parties. Cowell v. City Water Supply Co. (C. C. 1899) 96 Fed. 769.

See, also, New York Ins. Co. v. Bangs (1880) 103 U. S. 435, 437, 26 L. Ed. 580.

And see, also, Citizens' Savings & Trust Co. v. Illinois Cent. R. Co. (1907) 27 Sup. Ct. 425, 205 U. S. 46, 51 L. Ed. 703.

In a suit to cancel a land patent, where the bill shows that the defendants are absent or nonresidents of the district, the appropriate process is a special order of service. U. S. v. American Lumber Co. (C. C. 1897) 80 Fed. 309, decree affirmed (1898) 85 Fed. 827, 29 C. C. A. 431.

22. —— **Cloud on title by tax sale.**—A suit to remove a cloud on a title by a tax sale is within this section. Dick v. Foraker (1894) 15 Sup. Ct. 124, 155 U. S. 404, 39 L. Ed. 201.

23. —— **Ejectment.**—Under this section ejectment may be maintained in a federal court, in the district where the land is situated, the citizenship of the parties being diverse, even though it is not the district of the residence of either plaintiff or defendant. Spencer v. Kansas City Stock-Yards Co. (C. C. 1893) 56 Fed. 741.

24. —— **Fraudulent conveyances and transfers.**—Service may be had on an absent defendant under this section when suit is brought to cancel for fraud a deed of lands situated within the district. Evans v. Charles Scribner's Sons (C. C. 1893) 58 Fed. 303, 304.

But such service cannot be had when the suit is for the purpose of setting aside alleged fraudulent transfers of life insurance policies issued by a foreign company, and which are not within the district, although such company, in compliance with a state statute, has deposited bonds with the comptroller general of the state, especially when the company acknowledges its liability on the policies and offers to pay the amount thereof into court. Id.

Where the cancellation of the deed and of the transfers of the policies is sought in the same suit, service as to the former cause of action will not draw to it jurisdiction as to the latter, as there is no connection between the two. Evans v. Charles Scribner's Sons (C. C. 1893) 58 Fed. 303, 305.

This section does not enlarge the right of an individual to sue, and confers no right on a simple contract creditor to maintain a creditors' suit in a federal court to set aside an alleged fraudulent conveyance of property by the debtor, nor does the fact that complainant has an alleged mechanic's lien upon the property afford basis for such a general creditors' suit, since such lien, if valid, may be enforced in rem against the property, regardless of conveyances, whether prior or subsequent. Canton Roll & Machine Co. v. Rolling Mill Co. of America (C. C. 1907) 155 Fed. 321, decree modified (1909) 168 Fed. 465, 93 C. C. A. 621, writ of certiorari denied Logan v. Farmers' Deposit Nat. Bank of Pittsburgh, Pa. (1909) 29 S. Ct. 694, 214 U. S. 513, 53 L. Ed. 1062, and appeal dismissed (1909) 29 S. Ct. 698, 214 U. S. 500, 53 L. Ed. 1060. And see Mellen v. Moline Malleable Iron Works (1889) 9

Sup. Ct. 781, 131 U. S. 352, 33 L. Ed. 178.

Under Bankruptcy Act July 1, 1898, § 2, post, § 9586, giving courts of bankruptcy jurisdiction to adjudge persons bankrupt who have had their principal place of business or residence or domicile, for the greater part of six months preceding the filing of the petition, within the territorial jurisdiction of the court, and section 18, post, § 9602, providing that personal service shall be made as process is served in suits in equity, and, where personal service cannot be made, notice must be given by publication as provided by law for notice by publication, and this section as formerly enacted, authorizing service by publication, a trustee of a person who is beyond the territorial limits of a bankruptcy court at the time of the filing of the petition, but who has for more than a year prior to a few days before the filing of the petition resided within the district, may go outside of the district and avoid, as authorized by sections 60b, 67e, post, §§ 9644, 9651, preferential transfers, notwithstanding R. S. § 740, ante, § 1034, providing that suits not of a local nature against a single defendant must be brought in the district in which he resides. Hills v. F. D. McKinniss Co. (D. C. 1910) 188 Fed. 1012.

25. —— **Injunction.**—A court held not to have had jurisdiction of a suit in equity against a nonresident infant, not concerning property, but to cancel a contract and for an injunction. New York L. Ins. Co. v. Bangs (1880) 103 U. S. 435, 437, 26 L. Ed. 580.

Under this section suit by New York telegraph corporation to enjoin Kentucky railroad corporation from interfering with telegraph lines in the Northern district of Georgia held maintainable in that district. Western Union Telegraph Co. v. Louisville & N. R. Co. (D. C. 1915) 229 Fed. 234.

26. —— **Judgments.**—A federal court has jurisdiction of a suit in equity brought by citizens of the state in which it sits, against citizens of other states, to set aside, as fraudulently obtained, judgments of a probate court against an intestate's estate, which are a lien on his real property situated within the district and inherited by complainants. McDaniel v. Traylor (1905) 25 Sup. Ct. 369, 370, 196 U. S. 415, 49 L. Ed. 533, decree reversed (C. C. 1903) 123 Fed. 338.

A suit by a Kentucky railway company to annul judgments of special courts of eminent domain, condemning portions of its right of way in Mississippi for a New York telegraph company, on the ground that they are invalid under the local law, and becloud the railway company's title, is a suit to remove a cloud upon title within this section, and is therefore justiciable in the federal District Court wherein the property is located, though the judgments are void on their face, where under the local law, the owner may maintain such a suit, and the judgments in eminent domain may be attacked because not for a public use. Louisville & N. R. Co. v. Western Union Tel. Co. (1914) 34 S. Ct. 810, 234 U. S. 369, 58 L. Ed. 1356.

27. —— **Nuisance.**—The asserted right of citizens of New York and West Virginia, as owners of timber lands in Georgia, near the Tennessee boundary line, to protection against the destruction of their forests by the discharge of deleterious fumes and gases from the works of a New Jersey corporation situated within the territorial jurisdiction of the federal circuit for the Eastern District of Tennessee, held not a claim to real property within the district, within this section. Ladew v. Tennessee Copper Co. (1910) 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069, affirming decree (C. C. 1910) 179 Fed. 245, which is affirmed Wetmore v. Same (1910) 31 Sup. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073.

A suit by a nonresident owner of lands within the territorial jurisdiction of the federal Circuit Court for the Eastern District of Tennessee for protection against injury from a discharge of deleterious fumes and gases from the works of a New Jersey corporation situated within the district does not present a claim to real property within the district, within this section. Wetmore v. Tennessee Copper Co. (1910) 31 Sup. Ct. 84, 218 U. S. 369, 54 L. Ed. 1073, affirming decree Ladew v. Same (C. C. 1910) 179 Fed. 245, which is affirmed (1910) 31 Sup. Ct. 81, 218 U. S. 357, 54 L. Ed. 1069.

28. —— **Quieting title.**—A suit by the United States to quiet title is within the jurisdiction of the circuit court where the land lies, though defendants are inhabitants of other districts. U. S. v. Southern Pac. R. Co. (C. C. 1894) 63 Fed. 481.

29. **Time of commencement of action.**—The provision of this section that defendants not found in the district may be, by the court, ordered to plead within a certain time, does not fix the time when suit is commenced against nonresident defendants, so as to stop the running of the statute. Bisbee v. Evans (C. C. 1883) 17 Fed. 474.

30. **Waiver of right to be sued in district of inhabitancy.**—The exemption from suit out of the district of inhabitancy, secured by ante, § 1033, is personal to a defendant, and may be waived; and where suit is brought by a citizen of Massachusetts against a Vermont corporation and a New York corporation in the circuit court of Vermont, it will not be dismissed on motion of the Vermont corporation for want of jurisdiction of the parties, in

the absence of objection by the New York company, especially if the suit is a proceeding to enforce an equitable claim to property in the district, within R. S. § 738, incorporated into this section. Jewett v. Bradford Sav. Bank & Trust Co. (C. C. 1891) 45 Fed. 801. And see, also, notes under ante, § 1033.

31. Appearance by nonresident defendant.—The filing in a federal court by the defendant who was a citizen and resident of another state and was there served, of a motion to quash the service on the ground that "it appears from the face of the bill of complaint that the relief sought is of such nature that he cannot lawfully be called upon to defend against the same in this district" did not invoke the exercise of the jurisdiction of the court on the merits, so as to constitute a general appearance; the question raised being whether the case made by the bill was one of a local nature so as to authorize the court to obtain jurisdiction of defendant by publication or by service of process without the district, which necessarily required the court to look into the bill. Jones v. Gould (1906) 149 Fed. 153, 80 C. C. A. 1, affirming decree (C. C. 1905) 141 Fed. 698.

Where, in a suit in a federal court against a nonresident defendant, in which jurisdiction is sought to be maintained under this section, no service is obtained on the defendant within the jurisdiction, it is settled that the entry of an appearance by such defendant "specially and solely for the purpose of objecting to the jurisdiction of the court," and the filing of a motion to dismiss, and, on its being overruled, of a demurrer, do not amount to a general appearance to give the court jurisdiction over the person of the defendant. York County Sav. Bank v. Abbot (C. C. 1905) 139 Fed. 988.

32. Pleading and proof of jurisdictional facts.—Dismissal of a bill filed against nonresident aliens in a federal court because complaint did not establish the fact that the property to be affected was within the district, as contemplated by this act, involves a question as to the power of the federal court, reviewable by direct appeal to the Supreme Court. Chase v. Wetzlar (1912) 32 Sup. Ct. 659, 661, 225 U. S. 79, 56 L. Ed. 990.

Complainant invoking jurisdiction of federal court of a suit against nonresident aliens under this section, has the burden of proving the jurisdictional fact that the property to be affected is within the jurisdiction, where averments in this respect are traversed. Chase v. Wetzlar (1912) 32 Sup. Ct. 659, 662, 225 U. S. 79, 56 L. Ed. 990.

Where it is necessary to show that defendants have property in the state, the allegation should be direct, and specify the property. McDonald v. Cooper (C. C. 1887) 32 Fed. 745.

In a suit by nonresident complainants, that jurisdiction of a defendant corporation not resident in the district where suit was brought was not acquired by service on its resident director, it not being alleged that the property in controversy was within the district. Eldred v. American Palace Car Co. (C. C. 1900) 103 Fed. 209.

Where a stockholder's bill to set aside an issue and transfer of the corporation's common stock was filed by complainant, a citizen of Indiana, in the Circuit Court for the Northern District of West Virginia, and all the necessary parties defendant were alleged to be citizens of West Virginia and of such district, except the defendant C. Company, which was alleged to be a citizen of New Jersey, but as to which jurisdiction was alleged to attach by reason of the fact that the property involved was situated in the Northern District of West Virginia, and that a cloud on the title thereof was sought to be removed as authorized by this section, the bill was not demurrable for failure to show sufficient jurisdictional facts. Howard v. National Telephone Co. (C. C. 1910) 182 Fed. 215.

33. Jurisdiction over nonresident defendants.—Where there is property within the jurisdiction of the court on which a lien is claimed, nonresidents may be summoned under this section. Mercantile Trust Co. v. Portland & O. R. Co. (C. C. 1882) 10 Fed. 604. This section authorizes the bringing in of parties to a suit who are nonresidents of the district where the suit is brought, by service of an order of the court, as therein provided. Castello v. Castello (C. C. 1882) 14 Fed. 207. But a court in a suit to enforce a lien, can acquire jurisdiction over a defendant, not found in the district, only by following this section. Mere service of a subpœna, though by order of court, on the president of a corporation defendant in another state, is ineffective to give jurisdiction, and a decree entered on such service is void. Kent v. Honsinger (C. C. 1909) 167 Fed. 619.

The successor in a deed of trust may be brought in, if a resident of another district, where the suit is one to adjudge a lien created by the deed a subsisting lien. Massachusetts Mut. Life Ins. Co. v. Chicago & A. R. Co. (C. C. 1882) 13 Fed. 857, decree affirmed Chicago & A. R. Co. v. Union Rolling Mill Co. (1883) 3 Sup. Ct. 594, 109 U. S. 702, 27 L. Ed. 1081.

On a bill in the nature of a general creditors bill, brought against a railroad company lying wholly within the Eastern district of Virginia, held, that the court could obtain jurisdiction of the District of Columbia, as a codefendant claiming a lien. Hay v. Alexandria & W. R. Co. (C. C. 1882) Fed. Cas. No. 6,254a.

Service may be made on a national

bank, located and doing business in another state, under an order of court pursuant to this section, in a suit to relieve a bankrupt's real estate, situated in the district, from the lien of certain judgments, and to remove a cloud on the title. Duff v. First Nat. Bank (C. C. 1882) 13 Fed. 65.

Where an action by an alien bondholder of a railroad company to restrain the trustee in a mortgage securing the bonds from paying over to the company, in fraud of plaintiff's rights, the proceeds of the sale of land which by the mortgage was set apart to create a sinking fund for the redemption of the bonds, was commenced within the district of which the trustee was an inhabitant, and in which it had the fund, an order might issue to the company, a nonresident corporation, to appear and plead, etc. Pollitz v. Farmers' Loan & Trust Co. (C. C. 1889) 39 Fed. 707.

In a suit to determine the title to a patent right, a nonresident defendant cannot be served by publication, under this section. Nonmagnetic Watch Co. v. Association Horlogere Suisse (C. C. 1890) 44 Fed. 6.

Where the cancellation of a deed and of the transfers of life insurance policies is sought in the same suit, substituted service on an absent defendant as to the former cause of action, authorized by this section, will not draw to it jurisdiction as to the latter, as there is no connection between the two. Evans v. Charles Scribner's Sons (C. C. 1893) 58 Fed. 303.

Under this section a federal court is given jurisdiction of a suit to foreclosure a mortgage on real estate within the district, though the defendant is not an inhabitant of the district, nor found therein, where personal service is made upon him in another district. Merrihew v. Fort (C. C. 1899) 98 Fed. 899.

Under this section and ante, § 1033, in a suit by nonresident complainants, jurisdiction of a defendant corporation not resident in the district where suit was brought was not acquired by service on its resident director, it not being alleged that the property in controversy was within the district. Eldred v. American Palace Car Co. (C. C. 1900) 103 Fed. 209.

In a suit against several defendants in personam, not affecting property within the district, jurisdiction could not be obtained over such of the defendants as were nonresidents of the district, over their objection, by substituted service. Jackson v. Hooper (C. C. 1909) 171 Fed. 597.

Where a bill filed in the federal court to wind up the affairs of a corporation and distribute its assets also seeks the removal of an acting trustee under a deed of trust to secure bonds, and, in the event of the corporation's insolvency, the appointment of a receiver, and the cancellation of alleged fraudulent bonds held by nonresidents of the district, such nonresidents may be brought in by constructive service as provided by this section. State Nat. Bank of Denison v. Syndicate Co. of Eureka Springs, Ark. (C. C. 1910) 178 Fed. 359.

A bankruptcy court held authorized to adjudge one a bankrupt on personal service and publication without the district. Hills v. F. D. McKinniss Co. (D. C. 1910) 188 Fed. 1012.

The court is not authorized to direct service by publication, unless it is shown that personal service is not practicable. Hicks v. Crawford Coal & Iron Co. (C. C. 1911) 190 Fed. 334.

Where the venue is fixed by the nature of the case, and the parties are citizens of different states, and the defendant can be served within the district, the court has jurisdiction, though neither party is a resident of the district. Kentucky Coal Lands Co. v. Mineral Development Co. (C. C. 1911) 191 Fed. 899.

Service of notice of involuntary bankruptcy proceedings on the bankrupt by publication having been made, personal service was not required by this section to be made on a state court receiver in possession of a portion of the bankrupt's property. Sidney L. Bauman Diamond Co. v. Hart (1911) 192 Fed. 498, 113 C. C. A. 104.

The order directing an absent defendant to appear, plead, etc., must be made by the court in term. Bronson v. Keokuk (C. C. 1873) Fed. Cas. No. 1,928.

34. Process, form of.—See Cortes Co. v. Thannhauser (C. C. 1881) 9 Fed. 226, holding that subpœna or notice is not an original process. And see, also, notes under ante, § 1033.

Under ante, § 1033, the process of federal courts will not run throughout the United States, except in the particular cases and to the extent provided by R. S. § 738, incorporated into this section. Bourke v. Amison (C. C. 1887) 32 Fed. 710.

35. Privileges and exemptions from service of process.—See notes under ante, § 1033.

36. Service of process on nonresident defendant.—Service on a nonresident defendant outside of the district of suit is only authorized in a federal court in cases within this section, and in no other case can the court acquire jurisdiction of a defendant by such service. Cely v. Griffin (C. C. 1902) 113 Fed. 981; Winter v. Koon, Schwarz & Co. (C. C. 1904) 132 Fed. 273. Service may be had on an absent defendant, when the suit is brought to cancel for fraud a deed of lands situated within the district. Evans v. Charles Scribner's Sons (C. C. 1893) 58 Fed. 303. See, also, Parsons v. Howard (C. C. 1873) Fed. Cas. No. 10,777.

A subpœna or notice, issued on the filing of a bill in equity to enjoin an action at law, is not regarded as an original process or proceeding, within the meaning of Act March 3, 1875, § 1, providing that no civil suit shall be brought before a circuit court or a district court, "against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding," except as provided in section 8 of the same act, which provides for bringing in absent defendants in suits to enforce or remove liens of property within the district; nor within the terms of rule 13 in equity, providing that the service of all subpœnas shall be by a delivery of a copy thereof, by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling house or usual place of abode of each defendant, with some adult person who is a member or resident in the family. Cortes Co. v. Thannhauser (C. C. 1881) 9 Fed. 226.

The successor in a deed of trust may be brought in, if a resident of another district, where the suit is one to adjudge a lien created by such deed a subsisting lien. Massachusetts Mut. Life Ins. Co. v. Chicago & A. R. Co. (C. C. 1882) 13 Fed. 857.

37. Service on person in possession.—The provision of this section for the service in local actions to enforce a lien of an order on the person in possession of the property does not require service where such person is within the jurisdiction and is served with a subpœna as a defendant. Blake v. Foreman Bros. Banking Co. (D. C. 1914) 218 Fed. 264.

38. Person on whom substituted service may be made.—A suit to set aside a decree of foreclosure and sale thereunder is not so far a mere continuation of the original foreclosure suit as to authorize the service of subpœnas upon persons without the territorial jurisdiction of the court. Pacific R. R. v. Missouri Pac. Ry. Co. (C. C. 1880) 3 Fed. 772, decree reversed (1884) 4 Sup. Ct. 583, 111 U. S. 505, 28 L. Ed. 498.

Where a suit by a receiver, appointed in a suit to wind up a partnership, to set aside mortgages on the partnership property as fraudulent, included new parties, not connected in any way with plaintiff in the original suit, they could not be brought into court by order for substituted service on attorney in fact, and the order for substituted service must be vacated. Bowen v. Christian (C. C. 1883) 16 Fed. 729.

When a suit is instituted by a state, and a cross-bill is filed against it, it is proper to serve the state by making substituted service upon the attorney general, by whom the bill was filed. Port Royal & A. Ry. Co. v. State (C. C. 1894) 60 Fed. 552.

39. Service by publication, when authorized.—The constructive service by notice and publication as provided for by these sections applies only to such defendants as are citizens of different states. Horsford v. Gudger (C. C. 1888) 35 Fed. 388, 392, reversed (1890) 10 Sup. Ct. 1069, 136 U. S. 639, 34 L. Ed. 556.

The mode for giving the federal courts jurisdiction over an absent defendant by publication is exclusive, and, where such requirements are not complied with, the court acquires no jurisdiction though publication was made in the mode provided by the statutes of the state in which such court sits. Bracken v. Union Pac. Ry. Co. (1893) 56 Fed. 447, 5 C. C. A. 548, judgment affirmed (1896) 75 Fed. 347, 21 C. C. A. 387.

A suit for foreclosure of a mortgage, not seeking a personal judgment, is essentially a proceeding in rem; and service by publication, in a case allowed by the statute, is sufficient to give jurisdiction. Martin v. Pond (C. C. 1887) 30 Fed. 15, appeal dismissed (1890) 11 S. Ct. 1024, 140 U. S. 688, 35 L. Ed. 604.

The right to have service by publication on a nonresident defendant is not defeated by the fact that such defendant is in the habit of coming into the state as often as once in two weeks. Palmer v. McCormick (C. C. 1887) 30 Fed. 82. See, also, American F. L. M. Co. v. Benson (C. C. 1887) 33 Fed. 456.

40. Compliance with statute authorizing substituted service.—Service by publication is resorted to only when personal service is not practicable within a reasonable time, and by the exercise of reasonable diligence. Bronson v. Keokuk (C. C. 1873) Fed. Cas. No. 1,928. When constructive or substituted service by publication is authorized by statute, the statute must be strictly pursued. Halsey v. Hurd (C. C. 1853) Fed. Cas. No. 5,966; Galpin v. Page (C. C. 1874) Fed. Cas. No. 5,206. Every fact necessary to the exercise of jurisdiction must affirmatively appear. Cissell v. Pulaski County (C. C. 1881) 10 Fed. 891.

Statutes authorizing extraterritorial service of process ought to be strictly construed, and under this section, an application for an order of publication, which alleges that the number of defendants is large, that the exact residence of many of them is unknown, and cannot with reasonable diligence be learned, and the great cost of obtaining personal service upon those whose residences are known, but which fails to show that such service is impracticable, or to distinctly state the known places of residence, or show the diligence used to ascertain the places of residence

when unknown, must be denied. Batt v. Proctor (C. C. 1891) 45 Fed. 515.

This section is not met by an order merely directing the service of process on a defendant by the marshal of another district, and such service of a subpœna in the usual form does not confer jurisdiction. Jennings v. Johnson (1906) 148 Fed. 337, 78 C. C. A. 329.

41. Condition precedent to order for substituted service.—To procure order of service, on absent or nonresident defendants in the class of suits mentioned in this section, it is not necessary in all cases to lay a foundation therefor by first issuing subpœnas, or by making an order requiring defendants to appear before a certain date. If the bill itself shows that they are absent or nonresident, and cannot be served within the district, such subpœna or order is useless and nugatory, and the "warning order" may be procured at once and as the first process. U. S. v. American Lumber Co. (C. C. 1897) 80 Fed. 309, decree affirmed (1898) 85 Fed. 827, 29 C. C. A. 431.

A marshal's return of "not found" in the district where the suit is brought is not a condition precedent to the making of the order for substituted service contemplated by this section, and the order may be made on a proper showing by affidavit alone. Forsyth v. Pierson (C. C. 1882) 9 Fed. 801.

The trust deed was given to secure W., C., and H., who was the nonresident defendant. C. and H. were directors of the corporation. The bill was filed August 1, 1883, making the corporation, the trustee, and the cestuis que trustent parties. After the defendants served had answered, upon the application of complainant, a receiver was appointed to take charge of the property. November 28, 1883, W. filed a cross-bill, alleging that his debt and that of C. were valid, and that the trust deed had been executed without C.'s co-operation, but that H. had used his position as director to secure his debt, and asked that the deed be held invalid as to H., but valid as to the others. He also alleged that the property was depreciating in value, and ought to be sold. An order was entered requiring the defendants to appear and plead, which directed that if H. was served with a copy of the order by a certain time, and failed to appear, the cross-bill would be taken as confessed. The order was served on H. in time, but he failed to appear. On December 22d, on the application of the receiver, the property was ordered sold, and sale was made to W., and in time confirmed. On March 3, 1884, H. was ordered to appear and plead to the original bill, or judgment would be taken for confessed. The order was duly served, and, upon his failure to appear, judgment was taken for confessed, and, on final hearing, it was decreed that H. was not entitled to any lien by reason of said trust deed. Held, that the act was complied with. Mellen v. Moline Malleable Iron Works (1889) 131 U. S. 352, 9 S. Ct. 781, 33 L. Ed. 178.

42. Affidavit for order of publication.—An affidavit for order for service by publication must contain some evidence that defendant cannot be found in the state after due diligence,—more than the mere assertion of the fact. But a statement of facts as to residence and actual abode of defendant, which clearly shows that any search for him within the state would be unavailing, is sufficient. McDonald v. Cooper (C. C. 1887) 32 Fed. 745.

In an action to enforce a tax bill for a street assessment, where service was made on defendant by publication, the fact that the affidavit for publication was made by a third person, without disclosing whether he was agent or attorney for plaintiff, does not invalidate a judgment in plaintiff's favor, nor affect the title of the purchaser at the sale. Bird v. McClelland Stumpf & Pelzer Brick Mfg. Co. (C. C. 1891) 45 Fed. 458.

An affidavit for publication containing the title of the cause, showing the parties, alleging the filing of the petition, and stating the object and prayer thereof to be to declare satisfied a designated trust deed between specified parties on described premises, to secure the payment of a described indebtedness, and to quiet the plaintiff's title, held to sufficiently show the nature of the action and the relief sought. Ormsby v. Ottman (1898) 85 Fed. 492, 29 C. C. A. 295.

A warning order against a defendant on the ground that he is a nonresident of Kentucky, and believed to be absent therefrom, cannot be made on an affidavit of such facts filed by plaintiff four months previously. Spreen v. Delsignore (C. C. 1899) 94 Fed. 71.

43. Citation directing publication.—The citation commanding publication of a notice should state that the paper in which the publication is to be made is a newspaper; but the omission so to do is a mere irregularity, and does not vitiate a judgment. Oswald v. Kampmann (C. C. 1886) 28 Fed. 36.

44. Publication, sufficiency of.—A summons published six times in a weekly newspaper is thereby served on the defendant after 42 days from the date of the first publication. McDonald v. Cooper (C. C. 1887) 32 Fed. 745.

Under the Minnesota statute requiring that the summons in attachment shall be published "once in each week for six consecutive weeks," it is insufficient to prove merely that publication was made "for the period of seven successive weeks." Bigelow v. Chatterton (1892) 51 Fed. 614, 2 C.

C. A. 402, following Godfrey v. Valentine (1888) 40 N. W. 163, 39 Minn. 337.

45. Order for substituted service good as against collateral attack.—This section does not prescribe the evidence on which the court shall find the nonresidence; and an order for special service which contains a finding that none of the defendants were inhabitants of or could be found within the district will be presumed to have been based on sufficient and competent evidence, when collaterally attacked. Woods v. Woodson (1900) 100 Fed. 515, 40 C. C. A. 525. A recital in a decree that the order of publication awarded against absent defendants had been duly posted and published must, on a collateral attack, be received as evidence that the statutory requirements had been observed; the original process, order of publication, and other papers having been lost from the files. Beattie v. Wilkinson (C. C. 1888) 36 Fed. 646.

46. Vacation of order for substituted service.—On motion to vacate order for substituted service made in a suit purporting to have been brought under this section, the court must examine the bill, and the order should be set aside unless the bill affirmatively shows sufficient grounds for relief under the statute and complainants' right to maintain the suit. Gage v. Riverside Trust Co. (C. C. 1906) 156 Fed. 1002.

Affidavits on a motion to set aside service and dismiss the bill and statements by counsel in argument cannot supply an allegation that the suit affects property in the district. Jackson v. Hooper (C. C. 1909) 171 Fed. 597.

47. Decree, issues determined.—In a suit in a federal court, brought under section 738, R. S., embodied herein, to establish a lien on the interest of defendants in property in the hands of an ancillary administrator in the state in which the suit is brought, the decree is necessarily confined to the property localized within the jurisdiction, though personal judgments may be entered against the defendants to which the liens are incidental. Ingersoll v. Coram (C. C. 1905) 136 Fed. 689, decree reversed Coram v. Ingersoll (1906) 148 Fed. 169, 78 C. C. A. 303, which is reversed Ingersoll v. Coram (1908) 29 S. Ct. 92, 211 U. S. 335, 53 L. Ed. 208.

48. Opening decree.—Under this section an absolute right to appear in and defend within a year after final judgment a suit to enforce a lien or to remove a cloud on title to property within the district was given to absent defendants whenever the jurisdiction of the federal Circuit Court over them rested upon publication, though they may in fact have had knowledge of the suit. But no other terms than the payment of costs can be imposed by the court in opening a decree to permit absent defendants served only by publication to appear in and defend a suit. Perez y Fernandez v. Fernandez y Perez (1911) 31 Sup. Ct. 412, 414, 220 U. S. 224, 55 L. Ed. 443; Blanco y Blanco v. Hubbard (1911) 31 Sup. Ct. 415, 220 U. S. 233, 55 L. Ed. 447.

Evidence held not to show that substituted service was sufficient to justify decree pro confesso and nonresident defendants were entitled, under this section, to come in and defend under the final decree. American Freehold Land Mortgage Co. of London v. Thomas (1896) 71 Fed. 782, 18 C. C. A. 327.

49. Vacating sales under judgments.—A resident of a county that became a part of West Virginia left his home to enter the Confederate army. Suit was commenced against him, in Ohio, by creditors, attachment levied on his lands there situated, and constructive service made upon him, and such lands sold under the judgment therein. Upon bill to set aside such sales on the ground that the proceedings were void, held that, having voluntarily left his country for the purpose of engaging in hostilities against it, his heirs cannot complain of legal proceedings regularly prosecuted against him as an absentee, on the ground of his inability to return or to hold communication with the place where such proceedings were conducted. Jenkins v. Hannan (C. C. 1884) 26 Fed. 657.

Cited without definite application, Butterworth v. Hill (1885) 5 Sup. Ct. 796, 798, 114 U. S. 128, 29 L. Ed. 119; Roller v. Holly (1900) 20 Sup. Ct. 410, 414, 176 U. S. 398, 44 L. Ed. 52; Ingersoll v. Coram (1908) 29 Sup. Ct. 92, 95, 211 U. S. 335, 53 L. Ed. 208; United States Fidelity & Guaranty Co. v. Bray (1912) 32 Sup. Ct. 620, 621, 225 U. S. 205, 56 L. Ed. 1055; Hobbs Mfg. Co. v. Gooding (1910) 176 Fed. 259, 100 C. C. A. 83; Erstein v. Rothschild (C. C. 1884) 22 Fed. 61, 65; Bostwick v. Covell (C. C. 1885) 24 Fed. 402; Pitkin County Min. Co. v. Markell (C. C. 1887) 33 Fed. 386, 390; Central Trust Co. v. Ohio Cent. R. Co. (C. C. 1898) 85 Fed. 342, 344; Mason v. New York Steam Power Co. (C. C. 1898) 87 Fed. 241; Deck v. Whitman (C. C. 1899) 96 Fed. 873, 889; Jenkins v. York Cliffs Imp. Co. (C. C. 1901) 110 Fed. 807; Ingersoll v. Coram (C. C. 1903) 127 Fed. 418; Miller & Lux v. Rickey (C. C. 1904) 127 Fed. 575; Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626; Acord v. Western Pocahontas Corp. (C. C. 1907) 156 Fed. 989, 998, affirmed (1909) 174 Fed. 1019, 98 C. C. A. 625 (certiorari denied [1910] 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346); Parker v. Kelley (C. C. 1908) 166 Fed. 968; In re Burka (D. C. 1901) 107 Fed. 674, 675; In re Risteen (D. C. 1903) 122 Fed. 732; U. S. v. Standard Oil Co. (D. C. 1907) 154 Fed. 728; Pensacola State Bank v. Melton (D. C. 1913) 210 Fed. 57.

§ 1040. (Jud. Code, § 58.) Civil causes may be transferred to another division of district by agreement.

Any civil cause, at law or in equity, may, on written stipulation of the parties or of their attorneys of record signed and filed with the papers in the case, in vacation or in term, and on the written order of the judge signed and filed in the case in vacation or on the order of the court duly entered of record in term, be transferred to the court of any other division of the same district, without regard to the residence of the defendants, for trial. When a cause shall be ordered to be transferred to a court in any other division, it shall be the duty of the clerk of the court from which the transfer is made to carefully transmit to the clerk of the court to which the transfer is made the entire file of papers in the cause and all documents and deposits in his court pertaining thereto, together with a certified transcript of the records of all orders, interlocutory decrees, or other entries in the cause; and he shall certify, under the seal of the court, that the papers sent are all which are on file in said court belonging to the cause; for the performance of which duties said clerk so transmitting and certifying shall receive the same fees as are now allowed by law for similar services, to be taxed in the bill of costs, and regularly collected with the other costs in the cause; and such transcript, when so certified and received, shall henceforth constitute a part of the record of the cause in the court to which the transfer shall be made. The clerk receiving such transcript and original papers shall file the same and the case shall then proceed to final disposition as other cases of a like nature.

Act Feb. 28, 1887, c. 271, § 4, 24 Stat. 425. Act June 2, 1906, c. 2569, § 1, 34 Stat. 206. Act March 3, 1911, c. 231, § 58, 36 Stat. 1103.

§ 1041. (Jud. Code, § 59.) Upon creation of new district or division, where prosecution to be instituted or action brought.

Whenever any new district or division has been or shall be established, or any county or territory has been or shall be transferred from one district or division to another district or division, prosecutions for crimes and offenses committed within such district, division, county, or territory prior to such transfer, shall be commenced and proceeded with the same as if such new district or division had not been created, or such county or territory had not been transferred, unless the court, upon the application of the defendant, shall order the cause to be removed to the new district or division for trial. Civil actions pending at the time of the creation of any such district or division, or the transfer of any such county or territory, and arising within the district or division so created or the county or territory so transferred, shall be tried in the district or division as it existed at the time of the institution of the action, or in the district or division so created, or to which the county or territory is or shall be so transferred, as may be agreed upon by the parties, or as the court shall direct. The transfer of such prosecutions and actions shall be made in the manner provided in the section last preceding.

Act March 3, 1911, c. 231, § 59, 36 Stat. 1103.

Act Aug. 5, 1886, c. 928, § 7, 24 Stat. 309. Act March 2, 1901, c. 801, § 7, 31 Stat. 881. Act March 3, 1911, c. 231, § 60, 36 Stat. 1103.

Notes of Decisions

Transfer of causes to newly created district or division.—Baldwin v. Rice (1904) 89 N. Y. S. 738, 44 Misc. Rep. 64, modified (1905) 91 N. Y. S. 1086, 100 App. Div. 241, and (1905) 75 N. E 1096, 183 N. Y. 55, which were modified (1906) 76 N. E. 1088, 184 N. Y. 523.

Revival of action in new district or division.—Baldwin v. Rice (1904) 89 N. Y. S. 738, 44 Misc. Rep. 64, modified (1905) 91 N. Y. S. 1086, 100 App. Div. 241, and (1905) 75 N. E. 1096, 183 N. Y. 55, which were modified (1906) 76 N. E. 1088, 184 N. Y. 523.

Trial of offenses committed prior to division of district.—The separation of an existing judicial district of the United States into parts does not take away the right to try offenses previously committed in either sudivision of the district. (1853) 6 Op. Atty. Gen. 103.

§ 1042. (Jud. Code, § 60.) Creation of new district, or transfer of territory not to divest lien; how lien to be enforced.

The creation of a new district or division, or the transfer of any county or territory from one district or division to another district or division, shall not affect or divest any lien theretofore acquired in the circuit or district court by virtue of a decree, judgment, execution, attachment, seizure, or otherwise, upon property situated or being within the district or division so created, or the county or territory so transferred. To enforce any such lien, the clerk of the court in which the same is acquired, upon the request and at the cost of the party desiring the same, shall make a true and certified copy of the record thereof, which, when so made and certified, and filed in the proper court of the district or division in which such property is situated or shall be, after such transfer, shall constitute the record of such lien in such court, and shall be evidence in all courts and places equally with the original thereof; and thereafter like proceedings shall be had thereon, and with the same effect, as though the cause or proceeding had been originally instituted in such court. The provisions of this section shall apply not only in all cases where a district or division is created, or a county or any territory is transferred by this or any future Act, but also in all cases where a district or division has been created, or a county or any territory has been transferred by any law heretofore enacted.

Act March 3, 1911, c. 231, § 60, 36 Stat. 1103.

§ 1043. (Jud. Code, § 61.) Commissioners to administer oaths to appraisers.

Any district judge may appoint commissioners, before whom appraisers of vessels or goods and merchandise seized for breaches of any law of the United States, may be sworn; and such oaths, so taken, shall be as effectual as if taken before the judge in open court.

R. S. § 570. Act March 3, 1911, c. 231, § 61, 36 Stat. 1104.

§ 1044. (Jud. Code, § 62.) Transfer of records to district court when a Territory becomes a State.

When any Territory is admitted as a State, and a district court is established therein, all the records of the proceedings in the several cases pending in the highest court of said Territory at the time of such admission, and all records of the proceedings in the several cases in which judgments or decrees had been rendered in said territorial court before that time, and from which writs of error could have been sued out or appeals could have been taken, or from which writs of error had been sued out or appeals had been taken and prosecuted to the Supreme Court or to the circuit court of appeals, shall be transferred to and deposited in the district court for the said State.

R. S. § 567. Act March 3, 1911, c. 231, § 62, 36 Stat. 1104.

Notes of Decisions

Power of Congress.—Territorial courts are courts of the United States, and it rests with Congress to declare to what tribunal their records and proceedings shall be transferred on the admission of the territory as a state. Hunt v. Palao (1846) 4 How. 589, 11 L. Ed. 1115. The exercise by Congress of the power to authorize the transfer of records in pending cases to the district court is a rightful exercise of power of claiming and exercising ownership over such records. Incrarity v. Curtis (1851) 4 Fla. 175, citing Benner v. Porter (1850) 9 How. 235, 13 L. Ed. 119. And see Stewart v. Preston (1846) 1 Fla. 1; Beatty v. Ross (1847) 1 Fla. 198. And records of territorial courts did not pass to any court or courts until the government, whose

records they were, provided, either expressly or by implication, for their transfer; and the judicial action of some other tribunals, therefore, that the courts of the state became possessed of such records, did not warrant jurisdiction. Upon the admission of a state into the Union, the concurrence of both the federal and state governments is requisite to transfer the records, in cases of appropriate state jurisdiction. Inerarity v. Curtis (1851) 4 Fla. 175.

Construction of statute.—The act of 1848 incorporated into R. S. § 569, post, § 1046, must be construed so as to transfer cases into the district courts if on admission the state did not form part of a judicial circuit, but if attached to a circuit then into the Circuit Court. A cause held transferrable to the Circuit Court. U. S. Express Co. v. Kountze Bros. (1869) 8 Wall. 342, 350, 19 L. Ed. 457. But, so far as congress did not claim the records of territorial courts, it left them under the control of the state. Inerarity v. Curtis (1851) 4 Fla. 175. And see Benner v. Porter (1850) 9 How. 235, 245, 13 L. Ed. 119, holding that the act of 1847 provided for transfers of cases to the federal courts. And see, also, Cotton v. U. S. (1850) 9 How. 579, 13 L. Ed. 265. And see, also, Forsyth v. U. S. (1850) 9 How. 571, 13 L. Ed. 262.

The statute itself makes the transfer, and there is no provision for any request to transfer a cause of a federal character to the district court. Dunton v. Muth (C. C. 1891) 45 Fed. 390, 393. But see Hunt v. Palao (1846) 4 How. 589, 590, 11 L. Ed. 1115, holding that a writ of error could not be issued to bring a record of a former territorial court of appeals deposited as directed by state law for safe keeping with the clerk of the supreme court of the state.

Cases pending.—See Washington & I. R. Co. v. Cœur D'Alene Ry. & Nav. Co. (1894) 60 Fed. 981, 9 C. C. A. 303, decree affirmed (1895) 16 Sup. Ct. 231, 160 U. S. 77, 40 L. Ed. 346.

Filing of depositions.—Depositions, the taking of which was begun before and completed after admission of state, held properly filed with the clerk of the district court to which the action was transferred. Scott v. Vulcan Iron Works Co. (1912) 122 P. 186, 31 Okl. 334.

Jurisdiction of federal Supreme Court.—The acts of 1847, 1848, incorporated into R. S. §§ 567–569 (this compilation, §§ 1044–1046), provide for the transfer of causes from territorial courts to the district court, and for a review of judgments and final decrees on writs of error or appeal. Benner v. Porter (1850) 9 How. 235, 245, 13 L. Ed. 119.

The supreme court can revise a judgment of the superior court of the district of west Florida in a criminal case which originated in October, 1845, and was transferred to the district court of the United States for the northern district of Florida. Forsyth v. U. S. (1850) 9 How. 571, 572, 13 L. Ed. 262.

The supreme court has jurisdiction to review certain classes of cases brought up from the territorial courts of Florida. Cotton v. U. S. (1850) 9 How. 579, 13 L. Ed. 265.

Decisions under enabling acts.—Koenigsberger v. Richmond Silver Min. Co. (1895) 158 U. S. 41, 15 S. Ct. 751, 39 L. Ed. 889; Pickett v. U. S. (1910) 30 Sup. Ct. 265, 216 U. S. 456, 54 L. Ed. 566; Arizona & N. M. R. Co. v. Clark (1915) 35 Sup. Ct. 210, 235 U. S. 669, 59 L. Ed. 415, affirming judgment (1913) 207 Fed. 817, 125 C. C. A. 305; Blackburn v. Wooding (1893) 56 Fed. 545, 6 C. C. A. 6; Washington & I. R. Co. v. Cœur D'Alene Ry. & Nav. Co. (1894) 60 Fed. 981, 9 C. C. A. 303 (decree affirmed [1895] 16 Sup. Ct. 231, 160 U. S. 77, 40 L. Ed. 346); Phillips v. U. S. (1912) 201 Fed. 259, 120 C. C. A. 149; United States v. Alamogordo Lumber Co. (1912) 202 Fed. 700, 121 C. C. A. 162; Herman v. McKinney (C. C. 1890) 43 Fed. 689; Dorne v. Richmond Silver Min. Co. (C. C. 1890) 43 Fed. 690; U. S. v. Taylor (C. C. 1890) 44 Fed. 2; Strasburger v. Beecher (C. C. 1890) 44 Fed. 209; U. S. v. Lynde (C. C. 1890) 44 Fed. 215; Carr v. Fife (C. C. 1891) 44 Fed. 713; Bluebird Min. Co. v. Murray (C. C. 1891) 45 Fed. 388; Dunton v. Muth (C. C. 1891) 45 Fed. 390; Nickerson v. Crook (C. C. 1891) 45 Fed. 658; Carson v. Donaldson (C. C. 1891) 45 Fed. 821; Kenyon v. Knipe (C. C. 1891) 46 Fed. 309; Burke v. Bunker Hill & S. Mining & Concentrating Co. (C. C. 1891) 46 Fed. 644; Back v. Sierra Nevada Consol. Min. Co. (C. C. 1891) 46 Fed. 673; Sargent v. Kindred (C. C. 1892) 49 Fed. 485; United States v. Baum (C. C. 1896) 74 Fed. 43; Fraser v. Trent (C. C. 1896) 74 Fed. 423, following Crown Point Min. Co. v. Ontario Silver Min. Co. (C. C. 1896) 74 Fed. 419; Hecht v. Metzler (C. C. 1897) 82 Fed. 340; Young v. U. S. (C. C. 1910) 176 Fed. 612; Hamilton v. The Walla Walla (D. C. 1890) 44 Fed. 4; La Porte v. State (Ariz. 1913) 132 P. 563; Carter v. Bennett (1852) 4 Fla. 283; Trench v. Strong (1868) 4 Nev. 87; Miller v. Sunde (1890) 1 N. D. 1, 44 N. W. 301; Braithwaite v. Power (1891) 1 N. D. 455, 48 N. W. 354; Sargent v. Kindred (1895) 5 N. D. 8, 63 N. W. 151; Higgins v. Brown (Okl. 1908) 94 P. 703; Choctaw, O. & G. R. Co. v. Sittel (Okl. 1908) 97 P. 362; Reeves v. Territory (Okl. Cr. App. 1909) 101 P. 1039; Humphreys v. Davidson (Okl. 1909) 102 P. 91; Moberly v. Roth (Okl. 1909) 102 P. 182; Friend v. Same, Id. 185, 186; Eaves v. Mullen (Okl. 1910) 107 P. 433; Burdett v. Burdett (Okl.

1910) 109 P. 922; Southern Surety Co. v. State (Okl. 1912) 127 P. 409; Strong v. Barnhart (1875) 5 Or. 496; Dorne v. Richmond Silver Min. Co. (1890) 1 S. D. 20, 44 N. W. 1021; Wing v. Chicago & N. W. Ry. Co. (1891) 1 S. D. 455, 47 N. W. 530; Thompson v. Schaetzel (1891) 2 S. D. 395, 50 N. W. 631, following Wing v. Chicago & N. W. Ry. Co. (1891) 1 S. D. 455, 47 N. W. 530.

Cited without definite application, Sheppard v. Wilson (1848) 6 How. 260, 273, 12 L. Ed. 430.

§ 1045. (Jud. Code, § 63.) District judge shall demand and compel delivery of records of territorial court.

It shall be the duty of the district judge, in the case provided in the preceding section, to demand of the clerk, or other person having possession or custody of the records therein mentioned, the delivery thereof, to be deposited in said district court; and in case of the refusal of such clerk or person to comply with such demand, the said district judge shall compel the delivery of such records by attachment or otherwise, according to law.

R. S. § 568. Act March 3, 1911, c. 231, § 63, 36 Stat. 1104.

Notes of Decisions

Authority of federal courts to compel delivery of records.—National courts cannot compel state courts to transmit original papers, but, when a state court refuses so to do, may proceed upon certified transcripts. Burke v. Bunker Hill & S. Mining & Concentrating Co. (C. C. 1891) 46 Fed. 644; Back v. Sierra Nevada Consol. Min. Co. (C. C. 1891) 46 Fed. 673; Murray v. Bluebird Min. Co. (C. C. 1891) 45 Fed. 387.

Cited without definite application, Sheppard v. Wilson (1848) 6 How. 260, 273, 12 L. Ed. 430; The City of Panama v. Phelps (1879) 101 U. S. 453, 456, 25 L. Ed. 1061.

§ 1046. (Jud. Code, § 64.) Jurisdiction of district courts in cases transferred from territorial courts.

When any Territory is admitted as a State, and a district court is established therein, the said district court shall take cognizance of all cases which were pending and undetermined in the trial courts of such Territory, from the judgments or decrees to be rendered in which writs of error could have been sued out or appeals taken to the Supreme Court or to the circuit court of appeals, and shall proceed to hear and determine the same.

R. S. § 569. Act March 3, 1911, c. 231, § 64, 36 Stat. 1104.

Notes of Decisions

Jurisdiction of federal Supreme Court.—See notes under ante, § 1044.

Jurisdiction of state and federal courts in general.—Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co. (1895) 16 Sup. Ct. 231, 160 U. S. 77, 40 L. Ed. 346; St. Louis & S. F. R. Co. v. Cundieff (1909) 171 Fed. 319, 96 C. C. A. 211; Ames v. Colorado Cent. R. Co. (C. C. 1876) Fed. Cas. No. 324; Bates v. Payson (C. C. 1877) Fed. Cas. No. 1,103; Dorne v. Richmond Silver Min. Co. (C. C. 1890) 43 Fed. 690 (judgment affirmed Koenigsberger v. Richmond Silver Min. Co. [1895] 15 S. Ct. 751, 158 U. S. 41, 39 L. Ed. 889); Strasburger v. Beecher (C. C. 1890) 44 Fed. 209; U. S. v. Lynde (C. C. 1890) 44 Fed. 215; Johnson v. Bunker Hill & S. M. & C. Co. (C. C. 1891) 46 Fed. 417; Young v. U. S. (C. C. 1910) 176 Fed. 612; Hamilton v. The Walla Walla (D. C. 1890) 44 Fed. 4; Wilson v. People (1877) 3 Colo. 325; Scott v. Detroit Young Men's Society's Lessee (Mich. 1843) 1 Doug. 119; Irvine v. Marshall (1859) 3 Minn. 72 (Gil. 33); In re Dewar's Estate (1891) 10 Mont. 426, 25 Pac. 1026; Hamilton v. Kneeland (1865) 1 Nev. 40; Hastings v. Johnson (1866) 2 Nev. 190; Sparrow v. Strong, Id. 362; Braithwaite v. Jordan (1895) 5 N. D. 196, 65 N. W. 701; Campbell v. Coulston (N. D. 1910) 124 N. W. 689; Talliaferro v. Porter (Ohio 1834) Wright, 610; Ex parte Bailey (Okl. 1908) 94 P. 553; Ex parte Brown (Okl. 1908) 94 P. 556; Ex parte Ellis (Okl. 1908) 94 P. 556; Frick Co. v. Oats (Okl. 1908) 94 P. 682; Higgins v. Brown (Okl. 1908) 94 P. 703; Ex parte Buchanen (Okl. 1908) 94 P. 943; Ex parte Curlee (Okl. 1908) 95 P. 414; State v. Chaney (Okl. 1909) 102 P. 133; Crump v. Pitchford (Okl. 1909) 104 P. 911; Kelley v. U. S. (Okl. Cr. App. 1909) 104 P. 922; Ex parte Howland (Okl. Cr. App. 1909) 104 P. 927; Swift v. Coulter (Okl. 1911) 115 P. 871, 28 Okl. 768; Scott v. McGirth (Okl. 1914) 139 P. 519; Smith v. Tosini (1891) 1 S. D. 632, 48 N. W. 299;

Western Union Telegraph Co. v. Parsley (Tex. Civ. App. 1909) 121 S. W. 226.

Cited without definite application, Sheppard v. Wilson (1848) 6 How. 260, 273, 12 L. Ed. 430.

§ 1047. (Jud. Code, § 65.) Receivers to manage property according to State laws.

Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall willfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both.

Act March 3, 1887, c. 373, § 2, 24 Stat. 554. Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436. Act March 3, 1911, c. 231, § 65, 36 Stat. 1104.

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3. Nature and purpose of remedy.
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8. Persons entitled to appointment.
9. Persons against whom receiver may be appointed.

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12. Preservation and protection of property in general.
13. Preservation of property pending litigation in general.
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15. Security for payment of demand.
16. Performance or enforcement of judgment or decree.
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21. Appointment on consent of parties.
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28. Scope of inquiry and questions considered on application.
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34. Selection of receiver.
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37. Operation and effect of order in general.
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39. Person who may question validity of appointment.
40. Estoppel and waiver.
41. Revocation or modification of appointment.
42. Collateral attack on appointment.
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51. Nature and right of possession of receiver.
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53. Protection of possession of receiver in general.
54. Interference with possession of receiver and possession thereof.
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57. Liens on and adverse claims to property.
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59. Remedies of general creditors as against property.
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61. Representation by receiver of court and parties.
62. Authority of receiver in general.
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65. Determination of controversies.
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69. Continuance and conduct of business.
70. Completion and extension of works.
71. Contracts of receiver in general.
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73. Loans and advances to receiver and securities therefor.
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75. Expenditures in general.
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79. Individual interest in transactions.
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85. Instructions or authority to receiver to act.
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91. Action in which certificates may issue.
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105. Authority and duty of receiver to sell in general.
106. Necessity and grounds for sale.
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108. Notice of sale.
109. Time, manner, and terms of sale.
110. Bids and payment of or failure to comply with bid.
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112. Opening or vacating sale.
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167. —— Account.
168, 169. Allowance and payment or recovery of compensation and expenses.
170. Liabilities of parties, property or funds for compensation and expenses.
171. Forms and requisites of account.
172. Objections to account and proceedings thereon.
173. Settlement of account.
174. Discharge of receiver.

IX. Foreign and ancillary receiverships

175. Foreign appointment.
176. Ancillary appointment.
177. Title to and possession of property.
178. Management and disposition of property.
179. Rights and remedies of creditors.
180. Actions by and against foreign receivers.
181. Accounting.

X. Liabilities on bonds or undertakings
182. Nature and extent.
183. Breach or fulfillment of condition.
184. Remedies in receivership proceedings.
185. Actions.

I. CONSTRUCTION AND OPERATION OF STATUTE

1. In general.—The federal court has jurisdiction to determine any proceedings to punish for contempt one who had seized property which was in the hands of a receiver appointed by that court, whether the goods were seized and retained in violation of the laws of the state and whether the receiver in conducting the business of the railroad was proceeding according to the valid laws of the state as required by this section. In re Swan (1894) 14 Sup. Ct. 225, 229, 150 U. S. 637, 37 L. Ed. 1207. This section does not restrict the power of the court to preserve property in the custody of the law from external attack. Ex parte Tyler (1893) 13 Sup. Ct. 785, 149 U. S. 164, 37 L. Ed. 689; Id., 13 Sup. Ct. 793, 149 U. S. 191, 37 L. Ed. 698 (affirming order In re Friedrich [C. C. 1892] 51 Fed. 747); Fidelity Title & Trust Co. v. Kansas Natural Gas Co. (D. C. 1913) 219 Fed. 614. It was not designed to interfere with the constitutional jurisdiction of the courts of the United States in matters of equitable cognizance, and does not require them to administer property in their hands in accordance with state laws. First Nat. Bank of Houston v. Ewing (1900) 103 Fed. 168, 43 C. C. A. 150, writ of certiorari denied (1900) 21 S. Ct. 919, 179 U. S. 686, 45 L. Ed. 386. But a receiver appointed by a federal court to take charge of a railroad must operate the road according to the laws of the state in which it is situated. Erb v. Morasch (1900) 20 Sup. Ct. 819, 820, 177 U. S. 584, 44 L. Ed. 897. And federal court's appointment of a receiver for a railroad held no obstacle to mandamus from a state court, requiring the railroad to construct a line through a county seat according to state Constitution and statutes. Kansas City, M. & O. Ry. Co. of Texas v. State (Tex. 1914) 163 S. W. 582, modifying judgment (Tex. Civ. App. 1913) 155 S. W. 561. Where receivers of a railroad running through Arkansas, who were appointed in that state, had removed into another state, the court would authorize them to be sued in the state courts of Arkansas by service on their station agents or clerks therein. Central Trust Co. v. St. Louis, A. & T. Ry. Co. (C. C. 1889) 40 Fed. 426.

In proceedings in a state court to wind up a corporation, such court has no power to restrain proceedings in a federal court on libels to enforce maritime liens against vessels of the corporation, where the receiver of the corporation never took possession of such vessels, and they were seized by the marshal under the libels before the receiver qualified, though he was appointed before the libels were filed, for the doctrine of relation has no application in such a case. Moran. v. Sturges (1894) 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981.

Where property of a tenant corporation was in the hands of receivers appointed by the federal court, such court had jurisdiction to hear and determine a question as to the landlord's right of entry for alleged breach of a condition in the lease. Odell v. H. Batterman Co. (D. C. 1914) 217 Fed. 305, order reversed (C. C. A. 1915) 223 Fed. 292.

Receivers for a railroad company appointed by a federal court held entitled to sue in a state court to recover real property rented by the railroad company from the tenant holding over after the expiration of the lease. Delano v. Malcomson-Houghten Co. (Mich. 1914) 148 N. W. 749.

2. Applicability of state statutes in general.—A receiver appointed by a federal court to take charge of a railroad must operate the road according to the laws of the state in which it is situated. Erb v. Morasch (1900) 20 Sup. Ct. 819, 177 U. S. 584, 44 L. Ed. 897, affirming judgment (1899) 56 P. 133, 60 Kan. 251. The classification and right to priority of payment of claims of employés in the immediate service of railroad receivers appointed by a court of the United States are matters for the determination of that court in accordance with the general principles of equity, unaffected by state laws regulating claims of employés and the distribution of funds in the hands of receivers of a state court. First Nat. Bank of Houston v. Ewing (1900) 103 Fed. 168, 43 C. C. A. 150, writ of certiorari denied (1900) 21 Sup. Ct. 919, 179 U. S. 686, 45 L. Ed. 386.

And see Hassall v. Wilcox (1889) 9 Sup. Ct. 590, 130 U. S. 493, 32 L. Ed. 1001; Allen v. Dillingham (1894) 60 Fed. 176, 8 C. C. A. 544; Burke v. Same (1894) 60 Fed. 729, 9 C. C. A. 255; Foreman v. Central Trust Co. (1896) 71 Fed. 776, 18 C. C. A. 321; American Nat. Bank v. Northwestern Mut. Life Ins. Co. (1898) 89 Fed. 610, 32 C. C. A. 275; Guaranty Trust Co. of New York v. Galveston City R. Co. (1901) 107 Fed. 311, 46 C. C. A. 305, writ of certiorari denied Paul Shean Sanitary Plumbing & Manufacturing Co. v. Guaranty Trust Co. of New York (1901) 21 S. Ct. 925, 181 U. S. 622, 45 L. Ed. 1032; Hampton v. Norfolk & W. Ry. Co. (1904) 127 Fed. 662, 62 C. C. A. 388 (affirming judgment Fidelity Insurance Trust & Safe Deposit Co. v. Norfolk & W. R. Co. [C. C. 1902] 114 Fed. 389); Willcox v. Jones (1910) 177 Fed. 870, 101 C. C. A. 84 (affirming decree Meyer Rubber Co. v. Georgetown & W. R. Co. [C. C. 1909] 174 Fed. 731); Central Trust Co. v. Central Iowa Ry. Co. (C. C.

1889) 38 Fed. 889; Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C. 1897) 82 Fed. 360; Grand Trunk Ry. Co. v. Central Vt. R. Co. (C. C. 1898) 91 Fed. 696; Central Trust Co. of New York v. Worcester Cycle Mfg. Co. (C. C. 1902) 114 Fed. 659; Hamilton v. David C. Beggs Co. (C. C. 1909) 171 Fed. 157; Pusey & Jones v. Pennsylvania Paper Mills (C. C. 1909) 173 Fed. 634 (decree affirmed George M. Newhall Engineering Co. v. Egolf [1911] 185 Fed. 481, 107 C. C. A. 581); Wabash R. Co. v. West Side Belt R. Co. (D. C. 1912) 197 Fed. 442; Commonwealth v. Felton (1899) 53 S. W. 1046, 21 Ky. Law Rep. 1039, 107 Ky. 330; Smith v. Fidelity Bldg., Loan & Investment Ass'n (Com. Pl. 1895) 4 Pa. Dist. R. 317; Kirby Lumber Co. v. Cunningham (Tex. Civ. App. 1913) 154 S. W. 288.

II. NATURE AND GROUNDS OF RECEIVERSHIP

(A) Nature and subjects of remedy

3. Nature and purpose of remedy.—Pennsylvania Steel Co. v. New York City Ry. Co. (1912) 198 Fed. 721, 117 C. C. A. 503 (modifying decrees [C. C. 1911] 189 Fed. 661, 190 Fed. 609, and [D. C. 1912] 194 Fed. 543, and reversing decrees In re New York City R. Co. [C. C. 1911] 188 Fed. 339, and Pennsylvania Steel Co. v. New York City R. Co. [C. C. 1911] 188 Fed. 343, and order affirmed [C. C. A. 1913] 204 Fed. 513); Morrison v. Buckner (C. C. 1843) Fed. Cas. No. 9,844; Overton v. Memphis & L. R. Co. (C. C. 1882) 10 Fed. 866 (appeal dismissed Memphis & L. R. Co. v. Overton [1889] 9 Sup. Ct. 800, 131 U. S. 441, 33 L. Ed. 218); Mercantile Trust Co. v. Baltimore & O. R. Co. (1898) 89 Fed. 606.

4. Remedy provisional or incidental to other relief.—Brassey v. New York & N. E. R. Co. (C. C. 1884) 19 Fed. 663; Wabash, St. L. & P. R. Co. v. Central Trust Co. (C. C. 1885) 23 Fed. 513; Atkins v. Wabash, St. L. & P. R. (C. C. 1886) 29 Fed. 161; Clarke v. Central R. & Banking Co. of Georgia (C. C. 1893) 54 Fed. 556; Zuber v. Micmac Gold Mining Co. (C. C. 1910) 180 Fed. 625.

5. Pendency and condition of cause.—Universal Savings & Trust Co. v. Stoneburner (1902) 113 Fed. 251, 51 C. C. A. 208; Union Mut. Life Ins. Co. v. Union Mills Plaster Co. (C. C. 1889) 37 Fed. 286, 3 L. R. A. 90; Harrington v. Union Oil Co. (C. C. 1906) 144 Fed. 235; Gallagher v. Asphalt Co. of America (1904) 58 A. 403, 67 N. J. Eq. 441.

6. Existence of or resort to other remedy.—Street Grading Dist. No. 60 of Little Rock, Ark., v. Hagadorn (1911) 186 Fed. 451, 108 C. C. A. 429 (writ of certiorari denied Hagadorn v. Street Grading Dist. No. 60 of Little Rock, Ark. [1911] 32 Sup. Ct. 524, 223 U. S. 721, 56 L. Ed. 630); Connor v. Kimball (1911) 186 Fed. 458, 108 C. C. A. 436; Morrison v. Buckner (C. C. 1843) Fed. Cas. No. 9,844; Jones v. Smith (C. C. 1889) 40 Fed. 314; U. S. v. Masich (C. C. 1890) 44 Fed. 10; Phinizy v. Augusta & K. R. Co. (C. C. 1893) 56 Fed. 273.

7. Discretion of court.—Milwaukee & M. R. Co. v. Soutter (1864) 14 Sup. Ct. 1158, 154 U. S. 540, 17 L. Ed. 604; Morrison v. Buckner (C. C. 1843) Fed. Cas. No. 9,844; Williamson v. New Albany, etc., R. Co. (C. C. 1857) Fed. Cas. No. 17,753; Crane v. McCoy (C. C. 1860) Fed. Cas. No. 3,354; Beecher v. Bininger (C. C. 1870) Fed. Cas. No. 1,222; Moore v. Bank of British Columbia (C. C. 1901) 106 Fed. 574 (judgment modified [1903] 125 Fed. 849, 60 C. C. A. 431, writ of certiorari denied Bank of British Columbia v. Moore [1904] 24 Sup. Ct. 851, 192 U. S. 606, 48 L. Ed. 585); Rowland v. Auto Car Co. (C. C. 1905) 133 Fed. 835; Clark v. Walter T. Bradley Coal, Lime & Cement Co. (D. C. 1895) 6 App. D. C. 437; Wood v. Grayson (D. C. 1900) 16 App. D. C. 174; Lenox v. Notrebe (Super. Ct. Ark. 1833) Fed. Cas. No. 8,246b.

8. Persons entitled to appointment.—Quincy, M. & P. R. Co. v. Humphreys (1892) 12 Sup. Ct. 787, 145 U. S. 82, 36 L. Ed. 632, affirming Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1888) 34 Fed. 259; Maxwell v. McDaniels (1910) 184 Fed. 311, 106 C. C. A. 453; Hugh v. McRae (C. C. 1869) Fed. Cas. No. 6,840; Ryder v. Bateman (C. C. 1898) 93 Fed. 16; Dodds v. Palmer Mountain Tunnel Co. (C. C. 1911) 188 Fed. 447.

9. Persons against whom receiver may be appointed.—U. S. v. Masich (C. C. 1890) 44 Fed. 10; Illinois Cent. R. Co. v. Mississippi Cent. R. Co. (D. C. 1876) Fed. Cas. No. 7,008.

(B) Grounds of appointment of receiver

10. Right or interest in property requiring protection.—Hook v. Bosworth (1894) 64 Fed. 443, 12 C. C. A. 208; Maxwell v. McDaniels (1910) 184 Fed. 311, 106 C. C. A. 453; Overton v. Memphis & L. R. R. Co. (C. C. 1882) 10 Fed. 866; Fechheimer v. Baum (C. C. 1889) 37 Fed. 167; Kelley v. Boettcher (C. C. 1898) 89 Fed. 125; Lancaster v. Asheville St. Ry. Co. (C. C. 1898) 90 Fed. 129; Moore v. Bank of British Columbia (C. C. 1901) 106 Fed. 574, judgment modified (1903) 125 Fed. 849, 60 C. C. A. 431 (writ of certiorari denied Bank of British Columbia v. Moore [1904] 24 Sup. Ct. 851, 192 U. S. 606, 48 L. Ed. 585); American Can Co. v. Erie Preserving Co. (C.

C. 1909) 171 Fed. 540, order affirmed (1910) 183 Fed. 96, 105 C. C. A. 388.

11. Fraud in obtaining possession.—Pacific R. R. of Missouri v. Ketchum (1877) 95 U. S. 1, 24 L. Ed. 347.

12. Preservation and protection of property in general. — International Trust Co. v. Decker Bros. (1907) 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152; Crane v. McCoy (C. C. 1860) Fed. Cas. No. 3,354; Kennedy v. St. Paul & P. R. Co. (C. C. 1873) Fed. Cas. No. 7,706; Union Trust Co. v. St. Louis, I. M. & S. R. Co. (C. C. 1877) Fed. Cas. No. 14,402; Allen v. Dallas & W. R. Co. (C. C. 1878) Fed. Cas. No. 221; Union Mut. Life Ins. Co. v. Kellogg (C. C. 1878) Fed. Cas. No. 14,373; Hazzard v. Credit Mobilier (C. C. 1879) Fed. Cas. No. 6,289; Taylor v. Philadelphia & R. R. Co. (C. C. 1881) 7 Fed. 381; Blair v. St. Louis, H. & K. R. Co. (C. C. 1884) 20 Fed. 348; McHenry v. New York, P. & O. R. Co. (C. C. 1885) 25 Fed. 114; Union Mut. Life Ins. Co. v. Union Mills Plaster Co. (C. C. 1889) 37 Fed. 286, 3 L. R. A. 90; Buckeye Engine Co. v. Donau Brewing Co. (C. C. 1891) 47 Fed. 6; Farmers' Loan & Trust Co. v. Winona & S. W. Ry. Co. (C. C. 1893) 59 Fed. 957; Putnam v. Jacksonville, L. & St. L. Ry. Co. (C. C. 1893) 61 Fed. 440; Underground Electric Rys. Co. of London, Limited, v. Owsley (C. C. 1909) 169 Fed. 671, order affirmed (1909) 176 Fed. 26, 99 C. C. A. 500.

13. Preservation of property pending litigation in general.—Union Trust Co. v. Illinois Midland R. Co. (1886) 6 Sup. Ct. 809, 117 U. S. 434, 29 L. Ed. 963; Sage v. Memphis & L. R. Co. (1888) 8 S. Ct. 887, 125 U. S. 361, 31 L. Ed. 694 (reversing decree [C. C. 1883] 18 Fed. 571); Central Trust Co. of New York v. Chattanooga, R. & C. R. Co. (1899) 94 Fed. 275, 36 C. C. A. 241; Higgins Oil & Fuel Co. v. Snow (1902) 113 Fed. 433, 51 C. C. A. 267; Heinze v. Butte & B. Consol. Min. Co. (1903) 126 Fed. 1, 61 C. C. A. 63 (writ of certiorari denied [1904] 25 S. Ct. 788, 195 U. S. 631, 49 L. Ed. 353); Allen v. Dallas & W. R. Co. (C. C. 1878) Fed. Cas. No. 221; Benedict v. St. Joseph & W. R. Co. (C. C. 1883) 19 Fed. 173; St. Louis, K. C. & C. R. Co. v. Dewees (C. C. 1885) 23 Fed. 519; American Loan & Trust Co. v. Toledo, C. & S. Ry. Co. (C. C. 1886) 29 Fed. 416; Mercantile Trust Co. v. Missouri, K. & T. Ry. Co. (C. C. 1888) 36 Fed. 221, 1 L. R. A. 397; Wanneker v. Hitchcock (C. C. 1889) 38 Fed. 383; Jones v. Smith (C. C. 1889) 40 Fed. 314; Robinson v. Taylor (C. C. 1890) 42 Fed. 803; Devereux v. Fleming (C. C. 1891) 47 Fed. 177; Northern Pac. R. Co. v. St. Paul, M. & M. Ry. Co. (C. C. 1891) 47 Fed. 536; Ulman v. Clark (C. C. 1896) 75 Fed. 868; Watson v. Bettman (C. C. 1898) 88 Fed. 825; Kelley v. Boettcher (C. C. 1898) 89 Fed. 125; Einstein v. Schnebly (C. C. 1898) 89 Fed. 540; State Trust Co. v. Kansas City, P. & G R. Co. (C. C. 1903) 120 Fed. 398; Gutterson & Gould v. Lebanon Iron & Steel Co. (C. C. 1907) 151 Fed. 72; Lenox v. Notrebe (Super. Ct. Ark. 1833) Fed. Cas. No. 8,246b; Parkhurst v. Kinsman (C. C. 1848) Fed. Cas. No. 10,760; Union Mut. Life Ins. Co. v. Kellogg (C. C. 1878) Fed. Cas. No. 14.373.

14. —— Insolvency or misconduct of party in possession as against claimant.—American Nat. Bank v. Northwestern Mut. Life Ins. Co. (1898) 89 Fed. 610, 32 C. C. A. 275; Strain v. Palmer (1908) 159 Fed. 628, 86 C. C. A. 618; Williamson v. New Albany, etc., R. Co. (C. C. 1857) Fed. Cas. No. 17,753; Ruggles v. Southern Minnesota R. Co. (C. C. 1872) Fed. Cas. No. 12,121; Kerp v. Michigan L. S. R. Co. (C. C. 1873) Fed. Cas. No. 7,727; Wilmer v. Atlanta & R. Air Line Ry. Co. (C. C. 1874, 1875) Fed. Cas. No. 17,775; Union Trust Co. v. St. Louis, I. M. & S. R. Co. (C. C. 1877) Fed. Cas. No. 14,402; Tysen v. Wabash Ry. Co. (C. C. 1878) Fed. Cas. No. 14,315; Western Division of Western N. C. R. Co. v. Drew (C. C. 1879) Fed. Cas. No. 17,434; Brassey v. New York & N. E. R. Co. (C. C. 1884) 19 Fed. 663; Dow v. Memphis & L. R. R. Co. (C. C. 1884) 20 Fed. 260 (decree modified Memphis & L. R. R. Co. v. Dow [1887] 7 Sup. Ct. 482, 120 U. S. 287, 30 L. Ed. 595); Hervey v. Illinois Midland Ry. Co. (C. C. 1884) 28 Fed. 169; Mercantile Trust Co. v. Missouri, K. & T. Ry. Co. (C. C. 1888) 36 Fed. 221, 1 L. R. A. 397; Farmers' Loan & Trust Co. v. Meridian Waterworks Co. (C. C. 1905) 139 Fed. 661; Illinois Cent. R. Co. v. Mississippi Cent. R. Co. (D. C. 1876) Fed. Cas. No. 7,008.

15. Security for payment of demand.—Grant v. Phœnix Mut. Life Ins. Co. (1887) 7 S. Ct. 841, 121 U. S. 105, 30 L. Ed. 905; Joseph Dry Goods Co. v. Hecht (1903) 120 Fed. 760, 57 C. C. A. 64; Nowell v. International Trust Co. (1909) 169 Fed. 497, 94 C. C. A. 589 (writ of certiorari denied [1910] 30 S. Ct. 694, 217 U. S. 603, 54 L. Ed. 899); Western Division of Western N. C. R. Co. v. Drew (C. C. 1879) Fed. Cas. No. 17,434; Cone v. Combs (C. C. 1883) 18 Fed. 576; Wabash, St. L. & P. Ry. Co. v. Central Trust Co. (C. C. 1885) 23 Fed. 513; Lawrence Iron Works Co. v. Rockbridge Co. (C. C. 1891) 47 Fed. 755.

16. Performance or enforcement of judgment or decree.—Naumburg v. Hyatt (C. C. 1885) 24 Fed. 898; Union Mut. Life Ins. Co. v. Union Mills Plaster Co. (C. C. 1889) 37 Fed. 286, 3 L. R. A. 90.

17. Defenses and grounds of opposition.—Sloo v. Law (C. C. 1849) Fed.

Cas. No. 12,956; Ewing v. Blight (C. C. 1855) Fed. Cas. No. 4,590; Wilkinson v. Dobbie (C. C. 1874) Fed. Cas. No. 17,670; Ames Iron Works v. West (C. C. 1885) 24 Fed. 313; Naumburg v. Hyatt (C. C. 1885) 24 Fed. 898; Hood v. First Nat. Bank (C. C. 1886) 29 Fed. 55; American Loan & Trust Co. v. Toledo, C. & S. R. Co. (C. C. 1886) 29 Fed. 416.

18. —— Title or possession of defendant or third person.—Underground Electric Rys. Co. of London, Limited, v. Owsley (1909) 176 Fed. 26, 99 C. C. A. 500 (affirming order [C. C. 1909] 169 Fed. 671); Vose v. Reed (C. C. 1871) Fed. Cas. No. 17,011; Kerp v. Michigan L. S. R. Co. (C. C. 1873) Fed. Cas. No. 7,727; Searles v. Jacksonville, P. & M. R. Co. (C. C. 1873) Fed. Cas. No. 12,586; McGeorge v. Big Stone Gap Imp. Co. (C. C. 1893) 57 Fed. 262; Ryder v. Bateman (C. C. 1898) 93 Fed. 16; Lenox v. Notrebe (Super. Ct. Ark. 1833) Fed. Cas. No. 8,246b.

III. APPOINTMENT AND QUALIFICATION

19. Jurisdiction and authority of court or judge.—Pennsylvania Co. for Insurance on Lives and for Granting Annuities v. Jacksonville, T. & K. W. Ry. Co. (1893) 55 Fed. 131, 5 C. C. A. 53 (motion denied Jacksonville, T. & K. W. Ry. Co. v. American Const. Co. [1893] 57 Fed. 66, 6 C. C. A. 249); City of Shelbyville, Ky., v. Glover (1910) 184 Fed. 234, 106 C. C. A. 376; Maxwell v. McDaniels (1910) 184 Fed. 311, 106 C. C. A. 453; Bluefields S. S. Co. v. Steele (1911) 184 Fed. 584, 106 C. C. A. 564; Wilmer v. Atlanta & R. Air Line Ry. Co. (C. C. 1874, 1875) Fed. Cas. No. 17,775; Overton v. Memphis & L. R. R. Co. (C. C. 1882) 10 Fed. 866, appeal dismissed Memphis & L. R. R. Co. v. Overton (1889) 9 Sup. Ct. 800, 131 U. S. 441, 33 L. Ed. 218; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1885) 23 Fed. 863; Evans v. Union Pac. Ry. Co. (C. C. 1893) 58 Fed. 497; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. 1896) 72 Fed. 26 (overruling [C. C. 1895] 69 Fed. 871); In re Brant (C. C. 1899) 96 Fed. 257; Hutchinson v. American Palace Car Co. (C. C. 1900) 104 Fed. 182; H. B. Claflin Co. v. Furtick (C. C. 1902) 119 Fed. 429; Cole v. Philadelphia & E. Ry. Co. (C. C. 1905) 140 Fed. 944 (decree reversed Kreider v. Cole [1907] 149 Fed. 647, 79 C. C. A. 339); Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626; American Can Co. v. Erie Preserving Co. (C. C. 1909) 171 Fed. 540 (order affirmed [1910] 183 Fed. 96, 105 C. C. A. 388); Patterson v. Patterson (C. C. 1910) 182 Fed. 952; People v. New York City Ry. Co. (1907) 107 N. Y. S. 247, 57 Misc. Rep. 114; Texas & P. Ry. Co. v. Gay (1894) 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; Shields v. Coleman (1895) 15 Sup. Ct. 570, 574, 157 U. S. 168, 39 L. Ed. 660.

20. Appointment on court's own motion.—Elk Fork Oil & Gas Co. v. Foster (1900) 99 Fed. 495, 39 C. C. A. 615.

21. Appointment on consent of parties.—Whelpley v. Erie Ry. Co. (C. C. 1868) Fed. Cas. No. 17,504.

22. Form and requisites of application for appointment in general.—Sage v. Memphis & L. R. Co. (1888) 8 Sup. Ct. 887, 125 U. S. 361, 31 L. Ed. 694; Quincy, M. & P. R. Co. v. Humphreys (1892) 12 Sup. Ct. 787, 145 U. S. 82, 36 L. Ed. 632 (affirming Central Trust Co. v. Wabash, St. L. & P. Ry. Co. [C. C. 1888] 34 Fed. 259); Clark v. Brown (1902) 119 Fed. 130, 57 C. C. A. 76; Bluefields S. S. Co. v. Steele (1911) 192 Fed. 23, 112 C. C. A. 411; American Can Co. v. Erie Preserving Co. (C. C. 1909) 171 Fed. 540, order affirmed (1910) 183 Fed. 96, 105 C. C. A. 388.

23. Time for application.—Cone v. Combs (C. C. 1883) 18 Fed. 576.

24. Parties on application.—Skiddy v. Atlantic, M. & O. R. Co. (C. C. 1879) Fed. Cas. No. 12,922; Mercantile Trust Co. v. Portland & O. R. Co. (C. C. 1882) 10 Fed. 604.

25. Notice of application.—North American Land & Timber Co. v. Watkins (1901) 109 Fed. 101, 48 C. C. A. 254; Cabaniss v. Reco Min. Co. (1902) 116 Fed. 318, 54 C. C. A. 190; Joseph Dry Goods Co. v. Hecht (1903) 120 Fed. 760, 57 C. C. A. 64; Huff v. Bidwell (1907) 151 Fed. 563, 81 C. C. A. 43; Mann v. Gaddie (1907) 158 Fed. 42, 88 C. C. A. 1 (reversing decree Gaddie v. Mann [C. C. 1906] 147 Fed. 960); Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509; McLean v. Lafayette Bank (C. C. 1844) Fed. Cas. No. 8,887; Allen v. Dallas & W. R. Co. (C. C. 1878) Fed. Cas. No. 221; Olmstead v. Distilling & Cattle Feeding Co. (C. C. 1895) 67 Fed. 24.

26. Use and effect of pleadings on application.—Clark v. Brown (1902) 119 Fed. 130, 57 C. C. A. 76; Ryder v. Bateman (C. C. 1898) 93 Fed. 16; Ford v. Taylor (C. C. 1905) 137 Fed. 149.

27. Affidavits and other evidence on application.—Commercial & Savings Bank v. Corbett (C. C. 1878) Fed. Cas. No. 3,057; Lloyd v. Chesapeake, O. & S. W. R. Co. (C. C. 1895) 65 Fed. 351; Romare v. Broken Arrow Coal & Mining Co. (C. C. 1902) 114 Fed. 194.

28. Scope of inquiry and questions considered on application.—Kerp v. Michigan L. S. R. Co. (C. C. 1873) Fed. Cas. No. 7,727; Taylor v. Philadelphia & R. R. Co. (C. C. 1881) 7

Fed. 381; Kelley v. Boettcher (C. C. 1898) 89 Fed. 125.

29. Hearing and determination of application.—Pacific R. Co. of Missouri v. Ketchum (1877) 95 U. S. 1, 24 L. Ed. 347.

30. Conditions on granting application.—Union Trust Co. of New York v. Souther (1883) 2 S. Ct. 295, 107 U. S. 591, 27 L. Ed. 488; Same v. Fitzgerald (1883) 2 S. Ct. 298, 107 U. S. 595, 27 L. Ed. 490; Kneeland v. American Loan & Trust Co. (1890) 10 S. Ct. 950, 136 U. S. 89, 34 L. Ed. 379; Central Trust Co. of New York v. Marietta & N. G. Ry. Co. (1891) 48 Fed. 875, 1 C. C. A. 140; Dow v. Memphis & L. R. R. Co. (C. C. 1884) 20 Fed. 260; Central Trust Co. v. St. Louis, A. & T. Ry. Co. (C. C. 1890) 41 Fed. 551; Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co. (C. C. 1892) 53 Fed. 182; Burroughs v. Toxaway Co. (C. C. 1910) 182 Fed. 129, decree reversed (1911) 185 Fed. 435, 107 C. C. A. 505; State ex rel. Basket v. Woodson (1901) 64 S. W. 774, 164 Mo. 440.

31. Conditions on refusing application.—Williamson v. New Albany, etc., R. Co. (C. C. 1857) Fed. Cas. No. 17,753; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1885) 25 Fed. 693.

32. Order an application.—Clark v. Brown (1902) 119 Fed. 130, 57 C. C. A. 76; Breed v. Glasgow Inv. Co. (C. C. 1899) 92 Fed. 760; Ford v. Taylor (C. C. 1905) 137 Fed. 149; Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626.

33. Eligibility for appointment.—Stanton v. Alabama & C. R. Co. (C. C. 1875) Fed. Cas. No. 13,296; Meier v. Kansas Pac. Ry. Co. (C. C. 1878) Fed. Cas. No. 9,395; Buck v. Piedmont & A. Life Ins. Co. (C. C. 1880) 4 Fed. 849; Atkins v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 29 Fed. 161; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (C. C. 1891) 45 Fed. 436; Wood v. Oregon Development Co. (C. C. 1893) 55 Fed. 901; State Trust Co. of New York v. National Land Imp. & Mfg. Co. (C. C. 1893) 72 Fed. 575; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. 1894) 61 Fed. 546; Farmers' Loan & Trust Co. v. Cape Fear & Y. Val. R. Co. (C. C. 1894) 62 Fed. 675; Ralston v. Washington & C. R. R. Co. (C. C. 1895) 65 Fed. 557; Olmstead v. Distilling & Cattle Feeding Co. (C. C. 1895) 67 Fed. 24; Bowling Green Trust Co. v. Virginia Passenger & Power Co. (C. C. 1904) 133 Fed. 186.

34. Selection of receiver.—Richards v. Chesapeake & O. R. Co. (C. C. 1876) Fed. Cas. No. 11,771; Fowler v. Jarvis-Conklin Mortgage Trust Co. (C. C. 1894) 66 Fed. 14; Dillon v. Oregon S. L. & U. N. Ry. Co. (C. C. 1895) 66 Fed. 622.

35. Bond.—Taylor v. Life Ass'n of America (C. C. 1880) 3 Fed. 465; Phillips v. Smoot (D. C. 1882) 1 Mackey, 478.

36. Extension of receivership and subsequent appointments in other actions and proceedings.—Wabash, St. L. & P. Ry. Co. v. Central Trust Co. (C. C. 1884) 22 Fed. 272; Mercantile Trust Co. v. Missouri, K. & T. Ry. Co. (C. C. 1889) 41 Fed. 8; New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. (C. C. 1893) 58 Fed. 268; Lloyd v. Chesapeake, O. & S. W. R. Co. (C. C. 1895) 65 Fed. 351; Illinois Cent. R. Co. v. Mississippi Cent. R. Co. (D. C. 1876) Fed. Cas. No. 7,008.

37. Operation and effect of order in general.—Illinois Steel Co. v. Putnam (1895) 68 Fed. 515, 15 C. C. A. 556; Holland Trust Co. v. International Bridge & Tramway Co. (1898) 85 Fed. 865, 29 C. C. A. 460 (affirming decree International Bridge & Tramway Co. v. Holland Trust Co. [1897] 81 Fed. 422, 26 C. C. A. 469); Atchison, T. & S. F. Ry. Co. v. Osborn (1906) 148 Fed. 606, 78 C. C. A. 378 (writ of certiorari denied Osborn v. Atchison, T. & S. F. R. Co. [1907] 28 S. Ct. 255, 207 U. S. 589, 52 L. Ed. 353); Mercantile Trust Co. v. Pittsburg & W. R. Co. (C. C. 1887) 29 Fed. 732; American Surety Co. of New York v. Worcester Cycle Mfg. Co. (C. C. 1898) 90 Fed. 773; Grove v. Grove (C. C. 1899) 93 Fed. 865; Manhattan Trust Co. v. Chicago Electric Traction Co. (C. C. 1910) 188 Fed. 1006; Spencer v. Welch (1899) 25 So. 405, 51 La. Ann. 753.

38. Effect of irregular or invalid appointment.—Gila Bend Reservoir & Irrigation Co. v. Gila Water Co. (1906) 26 S. Ct. 615, 202 U. S. 270, 50 L. Ed. 1023 (rehearing denied [1907] 27 S. Ct. 495, 205 U. S. 279, 51 L. Ed. 801, affirming decree [1904] 76 Pac. 990, 9 Ariz. 57); Couper v. Shirley (1896) 75 Fed. 168, 21 C. C. A. 288; Clark v. Brown (1902) 119 Fed. 130, 57 C. C. A. 76; McIntosh v. Ward (1907) 159 Fed. 66, 86 C. C. A. 256; Harrington v. Union Oil Co. (C. C. 1906) 144 Fed. 235.

39. Person who may question validity of appointment.—Cincinnati Equipment Co. v. Degnan (1910) 184 Fed. 834, 107 C. C. A. 158 (writ of certiorari denied [1911] 31 S. Ct. 724, 220 U S. 623, 55 L. Ed. 614); Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C. 1898) 85 Fed. 87.

40. Estoppel and waiver.—Brown v. Lake Superior Iron Co. (1890) 10 Sup. Ct. 604, 134 U. S. 530, 33 L. Ed. 1021.

41. Revocation or modification of appointment.—Universal Savings & Trust Co. v. Stoneburner (1902) 113 Fed. 251, 51 C. C. A. 208; Allen v. Dallas & W. R. Co. (C. C. 1878) Fed. Cas.

No. 221; Sage v. Memphis & L. R. R. Co. (C. C. 1883) 18 Fed. 571; Walters v. Anglo-American Mortgage & Trust Co. (C. C. 1892) 50 Fed. 316; Enos v. New York & O. R. Co. (C. C. 1900) 103 Fed. 47; Patterson v. Patterson (C. C. 1910) 184 Fed. 547; Illinois Cent. R. Co. v. Mississippi Cent. R. Co. (D. C. 1876) Fed. Cas. No. 7,008; Shields v. Coleman (1895) 15 Sup. Ct. 570, 575, 157 U. S. 168, 39 L. Ed. 660.

42. Collateral attack on appointment.—Shields v. Coleman (1895) 15 S. Ct. 570, 157 U. S. 168, 39 L. Ed. 660; Gunby v. Armstrong (1904) 133 Fed. 417, 66 C. C. A. 627; Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509; Olmstead v. Distilling & Cattle Feeding Co. (C. C. 1895) 73 Fed. 44 (following Brown v. Lake Superior Iron Co. [1890] 10 Sup. Ct. 604, 134 U. S. 530, 33 L. Ed. 1021); Shinney v. North American Savings, Loan & Building Co. (C. C. 1899) 97 Fed. 9.

43. Duration and termination of receivership in general.—Milwaukee & M. R. R. Co. v. Soutter (1864) 69 U. S. (2 Wall.) 510, 17 L. Ed. 900; Shields v. Coleman (1895) 15 S. Ct. 570, 157 U. S. 168, 39 L. Ed. 660; Twin City Power Co. v. Barrett (1903) 126 Fed. 302, 61 C. C. A. 288 (affirming decree Barrett v. Twin City Power Co. [C. C. 1902] 118 Fed. 861); Southern Ry. Co. v. Townsend (1908) 161 Fed. 310, 88 C. C. A. 390; Bray v. Staples (1910) 180 Fed. 321, 103 C. C. A. 451; Howard v. La Crosse & M. R. Co. (C. C. 1864) Fed. Cas. No. 6,760; Andrews v. Smith (C. C. 1881) 5 Fed. 833; Taylor v. Philadelphia & R. R. Co. (C. C. 1881) 9 Fed. 1; Davis v. Duncan (C. C. 1884) 19 Fed. 477; Brassey v. New York & N. E. R. Co. (C. C. 1884) 19 Fed. 663; Jones v. Smith (C. C. 1889) 40 Fed. 314; Marshall v. Otto (C. C. 1893) 59 Fed. 249; Platt v. Philadelphia & R. R. Co. (C. C. 1894) 65 Fed. 872; De La Vergne Refrigerating Mach. Co. v. Palmetto Brewing Co. (C. C. 1896) 72 Fed. 579; Hanlon v. Smith (C. C. 1909) 175 Fed. 192.

44. Removal.—Meier v. Kansas Pac. Ry. Co. (C. C. 1878) Fed. Cas. No. 9,395; Atkins v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 29 Fed. 161; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 29 Fed. 618; Handy v. Cleveland & M. R. Co. (C. C. 1887) 31 Fed. 689; Wood v. Oregon Development Co. (C. C. 1893) 55 Fed. 901; Street v. Maryland Cent. Ry. Co. (C. C. 1893) 58 Fed. 47; Clarke v. Central Railroad & Banking Co. of Georgia (C. C. 1893) 66 Fed. 16; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. 1894) 61 Fed. 546; Farmers' Loan & Trust Co. v. Cape Fear & Y. Val. R. Co. (C. C. 1894) 62 Fed. 675; Fowler v. Jarvis-Conklin Mortg. Co. (C. C. 1894) 63 Fed. 888; Fowler v. Jarvis-Conklin Mortg. Trust Co. (C. C. 1894) 66 Fed. 14; Bayne v. Brewer Pottery Co. (C. C. 1897) 82 Fed. 391; Land Title & Trust Co. v. Asphalt Co. of America (C. C. 1902) 120 Fed. 996; Shainwald v. Lewis (D. C. 1881) 8 Fed. 878.

45. Appointment of successor.—Taylor v. Easton (1910) 180 Fed. 363, 103 C. C. A. 509; Phinizy v. Augusta & K. R. Co. (C. C. 1893) 56 Fed. 273.

IV. TITLE TO AND POSSESSION OF PROPERTY

46. Effect of appointment and qualification of receiver.—In re Reisenberg (1908) 28 Sup. Ct. 219, 208 U. S. 90, 52 L. Ed. 403 (dismissing petitions Pennsylvania Steel Co. v. New York City R. Co. [C. C. 1907] 157 Fed. 440); Commonwealth Roofing Co. v. North American Trust Co. (1905) 135 Fed. 984, 68 C. C. A. 418; Pennsylvania Steel Co. v. New York City Ry. Co. (1912) 198 Fed. 721, 117 C. C. A. 503 (modifying decrees [C. C. 1911] 189 Fed. 661, 190 Fed. 609, and [D. C. 1912] 194 Fed. 543, reversing decrees In re New York City R. Co. [C. C. 1911] 188 Fed. 339, and Pennsylvania Steel Co. v. New York City R. Co. [C. C. 1911] 188 Fed. 343, and order affirmed [C. C. A. 1913] 204 Fed. 513); Taylor v. Philadelphia & R. R. Co. (C. C. 1881) 9 Fed. 1; Central Trust Co. of New York v. Worcester Cycle Mfg. Co. (C. C. 1898) 90 Fed. 584.

47. Property vesting in receiver in general.—U. S. v. Borcherling (1902) 22 Sup. Ct. 607, 185 U. S. 223, 46 L. Ed. 884; Hook v. Bosworth (1894) 64 Fed. 443, 12 C. C. A. 208; Winchester v. Davis Pyrites Co. (1895) 67 Fed. 45, 14 C. C. A. 300; Coler v. Grainger County (1896) 74 Fed. 16, 20 C. C. A. 267; Taylor v. Life Ass'n of America (C. C. 1882) 13 Fed. 493; Movius v. Lee (C. C. 1887) 30 Fed. 298; United States Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1890) 42 Fed. 343; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co. (C. C. 1892) 52 Fed. 937; Kittel v. Augusta, T. & G. R. Co. (C. C. 1897) 78 Fed. 855; Cronenwett v. Boston & A. Transp. Co. (C. C. 1899) 95 Fed. 52; Tilford v. Atlantic Match Co. (C. C. 1905) 134 Fed. 924; Bowker v. Haight & Freese Co. (C. C. 1906) 146 Fed. 257 (writ of error dismissed Bien v. Robinson [1908] 28 Sup. Ct. 379, 208 U. S. 423, 52 L. Ed. 556); Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626; Ball v. Coker (C. C. 1909) 168 Fed. 304.

48. Property fraudulently conveyed.—Werner v. Murphy (C. C. 1894) 60 Fed. 769.

49. Title or right acquired by receiver in general.—Very v. Watkins (1859) 64 U. S. (23 How.) 469, 16 L. Ed. 522; Quincy, M. & P. R. Co. v. Humphreys (1892) 12 Sup. Ct. 787, 145 U. S. 82, 36 L. Ed. 632; Appleton Waterworks Co. v. Central Trust Co. of New York

(1899) 93 Fed. 286, 35 C. C. A. 302; Dayton Hydraulic Co. v. Felsenthall (1902) 116 Fed. 961, 54 C. C. A. 537; Hart v. Barney & Smith Mfg. Co. (C. C. 1881) 7 Fed. 543; Dow v. Memphis & L. R. R. Co. (C. C. 1884) 20 Fed. 768 (decree reversed [1888] 8 Sup. Ct. 673, 124 U. S. 652, 31 L. Ed. 565); Cole v. Oil Well Supply Co. (C. C. 1893) 57 Fed. 534; Ames v. Union Pac. Ry. Co. (C. C. 1896) 74 Fed. 335.

50. Time of vesting of title or right.—Illinois Steel Co. v. Putnam (1895) 68 Fed. 515, 15 C. C. A. 556, 30 U. S. App. 358; Farmers' Loan & Trust Co. v. Detroit, B. C. & A. R. Co. (C. C. 1895) 71 Fed. 29; Connecticut River Banking Co. v. Rockbridge Co. (C. C. 1895) 73 Fed. 709 (decree affirmed Temple v. Glasgow [1897] 80 Fed. 441, 25 C. C. A. 540); Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626.

51. Nature and right of possession of receiver.—Shields v. Coleman (1895) 15 Sup. Ct. 570, 157 U. S. 168, 39 L. Ed. 660; Bibber-White Co. v. White River Valley Electric R. Co. (C. C. 1901) 107 Fed. 176; Morrill v. American Reserve Bond Co. of Kentucky (C. C. 1907) 151 Fed. 305; In re John L. Nelson & Bro. Co. (D. C. 1907) 149 Fed. 590.

52. Remedies and proceedings of receiver to obtain possession.—Shields v. Coleman (1895) 15 S. Ct. 570, 157 U. S. 168, 39 L. Ed. 660; Tinsley v. Anderson (1898) 18 S. Ct. 805, 171 U. S. 101, 43 L. Ed. 91; Winchester v. Davis Pyrites Co. (1895) 67 Fed. 45, 14 C. C. A. 300 (affirming Wheeler v. Walton & Whann Co. [C. C. 1894] 64 Fed. 664); Sullivan v. Colby (1896) 71 Fed. 460, 18 C. C. A. 193; Miles v. New South Building & Loan Ass'n (C. C. 1899) 95 Fed. 919; Horn v. Pere Marquette R. Co. (C. C. 1907) 151 Fed. 626.

53. Protection of possession of receiver in general.—Ex parte Tyler (1893) 13 Sup. Ct. 785, 149 U. S. 164, 37 L. Ed. 689; Id., 13 Sup. Ct. 793, 149 U. S. 791, 37 L. Ed. 698; Schindelholz v. Cullum (1893) 55 Fed. 885, 5 C. C. A. 293, 12 U. S. App. 242; Paxson v. Cunningham (1894) 63 Fed. 132, 11 C. C. A. 111; Lake Shore & M. S. Ry. Co. v. Felton (1900) 103 Fed. 227, 43 C. C. A. 189; City of Shelbyville, Ky., v. Glover (1910) 184 Fed. 234, 106 C. C. A. 376; Erie Ry. Co. v. Heath (C. C. 1871) Fed. Cas. No. 4,514; Young v. Montgomery & E. R. Co. (C. C. 1875) Fed. Cas. No. 18,166; In re Higgins (C. C. 1886) 27 Fed. 443; Beers v. Wabash, St. L. & P. Ry. Co. (C. C. 1888) 34 Fed. 244; Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co. (C. C. 1892) 53 Fed. 687; Ex parte Chamberlain (C. C. 1893) 55 Fed. 704; Ledoux v. La Bee (C. C. 1897) 83 Fed. 761; Metropolitan Trust Co. v. Columbus, S. & H. Ry. Co. (C. C. 1899) 95 Fed. 18; Bibber-White Co. v. White River Valley Electric R. Co. (C. C. 1901) 107 Fed. 176; Brady v. South Shore Traction Co. (D. C. 1901) 197 Fed. 669.

54. Interference with possession of receiver and possession thereof.—Wiswall v. Sampson (1852) 55 U. S. (14 How.) 52, 14 L. Ed. 322; Davis v. Gray (1872) 83 U. S. (16 Wall.) 203, 21 L. Ed. 447; Ex parte Tyler (1893) 13 Sup. Ct. 785, 149 U. S. 164, 37 L. Ed. 689; Wilmer v. Atlanta & R. Air Line Ry. Co. (C. C. 1874, 1875) Fed. Cas. No. 17,775; Secor v. Toledo, P. & W. R. Co. (C. C. 1877) Fed. Cas. No. 12,605; In re Doolittle (C. C. 1885) 23 Fed. 544; U. S. v. Kane (C. C. 1885) 23 Fed. 748; In re Wabash R. Co. (C. C. 1885) 24 Fed. 217; In re Higgins (C. C. 1886) 27 Fed. 443; The Holladay Case (C. C. 1886) 27 Fed. 830; U. S. v. Murphy (C. C. 1890) 44 Fed. 39; American Const. Co. v. Jacksonville, T. & K. W. Ry. Co. (C. C. 1892) 52 Fed. 937; Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1894) 62 Fed. 803; U. S. v. Jose (C. C. 1894) 63 Fed. 951; Sands v. E. S. Greeley & Co. (C. C. 1897) 80 Fed. 195; Royal Trust Co. v. Washburn, B. & I. R. Ry. Co. (C. C. 1902) 113 Fed. 531, judgment affirmed (1905) 139 Fed. 865, 71 C. C. A. 579; In re Young (D. C. 1881) 7 Fed. 855; Ohio & M. R. Co. v. Fitch (1863) 20 Ind. 498; State v. Miller (1894) 54 Kan. 244, 38 Pac. 269; City Water Co. v. State (1895) 88 Tex. 600, 32 S. W. 1033; Wood v. New York & N. E. R. Co. (C. C. 1894) 61 Fed. 236, 237.

55. Set-offs and counterclaims against receiver.—Grant v. Buckner (1898) 19 S. Ct. 163, 172 U. S. 232, 43 L. Ed. 430.

56. Equities of third persons in general.—Felton v. Ackerman (1894) 61 Fed. 225, 9 C. C. A. 457; Standard Oil Co. of Ky. v. Hawkins (1896) 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739; American Can Co. v. Williams (1910) 178 Fed. 420, 101 C. C. A. 634 (affirming judgment [C. C. 1908] 176 Fed. 816); Gage Lumber Co. v. McEldowney (1913) 207 Fed. 255, 124 C. C. A. 641 (reversing decree In re Clairfield Lumber Co. [D. C. 1911] 194 Fed. 181); In re Hall & Stillson Co. (C. C. 1895) 69 Fed. 425; In re Hall & Stilson Co. (C. C. 1896) 73 Fed. 527; Auten v. City Electric St. Ry. Co. (C. C. 1900) 104 Fed. 395.

57. Liens on and adverse claims to property.—United States Trust Co. v. Wabash W. Ry. Co. (1893) 14 S. Ct. 86, 150 U. S. 287, 37 L. Ed. 1085; Seney v. Wabash W. Ry. Co. (1893) 14 S. Ct. 94, 150 U. S. 310, 37 L. Ed. 1092 (affirming decree Central Trust Co. v. Wabash, St. L. & P. Ry. Co. [C.

C. 1889] 38 Fed. 63); Comer v. Felton (1894) 61 Fed. 731, 10 C. C. A. 28; Scott v. Farmers' Loan & Trust Co. (1895) 69 Fed. 17, 16 C. C. A. 358, 32 U. S. App. 468; Denison & N. Ry. Co. v. Ranney-Alton Mercantile Co. (1900) 104 Fed. 595, 44 C. C. A. 65; Howard v. Delgado & Co. (1903) 121 Fed. 26, 57 C. C. A. 270; Commonwealth Roofing Co. v. North American Trust Co. (1905) 135 Fed. 984, 68 C. C. A. 418; Kirkpatrick v. Eastern Milling & Export Co. (1905) 137 Fed. 387, 69 C. C. A. 579 (modifying decree [C. C. 1904] 135 Fed. 146); American Can Co. v. Erie Preserving Co. (1910) 183 Fed. 96, 105 C. C. A. 388 (affirming orders [C. C. 1909] 171 Fed. 540, 548); Cowden v. Wild Goose Mining & Trading Co. (1912) 199 Fed. 561, 118 C. C. A. 85; Risk v. Kansas Trust & Banking Co. (C. C. 1893) 58 Fed. 45; Fidelity Insurance, Trust & Safe Deposit Co. v. Roanoke Iron Co. (C. C. 1896) 81 Fed. 439; McRae v. Bowers Dredging Co. (C. C. 1898) 86 Fed. 344; Central Trust Co. of New York v. Worcester Cycle Mfg. Co. (C. C. 1902) 114 Fed. 659; In re Olzendam Co. (C. C. 1902) 117 Fed. 179; The Roslyn (D. C. 1877) Fed. Cas. No. 12,068.

58. Remedies to establish or enforce liens or claims.—Wiswall v. Sampson (1852) 55 U. S. (14 How.) 52, 14 L. Ed. 322; Schindelholz v. Cullum (1893) 55 Fed. 885, 5 C. C. A. 293; Clark v. McGhee (1898) 87 Fed. 789, 31 C. C. A. 321; Minot v. Mastin (1899) 95 Fed. 734, 37 C. C. A. 234; Strain v. Palmer (1908) 159 Fed. 628, 86 C. C. A. 618; De Visser v. Blackstone (C. C. 1868) Fed. Cas. No. 3,840; Kennedy v. Indianapolis, C. & L. R. Co. (C. C. 1880) 3 Fed. 97; The Holladay Case (C. C. 1886) 29 Fed. 226; Pine Lake Iron Co. v. La Fayette Car Works (C. C. 1893) 53 Fed. 853; Clyde v. Richmond & D. R. Co. (C. C. 1893) 56 Fed. 539; Wheeler v. Watton & Whann Co. (C. C. 1895) 65 Fed. 720; Burleigh v. Chehalis Co. (C. C. 1896) 75 Fed. 873; Moore v. Southern States Land & Timber Co. (C. C. 1896) 83 Fed. 399; Sands v. E. S. Greeley & Co. (C. C. 1897) 80 Fed. 195; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C. 1897) 82 Fed. 642; American Loan & Trust Co. v. Central Vermont R. Co. (C. C. 1898) 86 Fed. 390; Virginia, T. & C. Steel & Iron Co. v. Bristol Land Co. (C. C. 1898) 88 Fed. 134; Black v. Black (C. C. 1899) 93 Fed. 346; Cohen v. Gold Creek, Nev., Min. Co. (C. C. 1899) 95 Fed. 580; Kirkpatrick v. Eastern Milling & Export Co. (C. C. 1904) 135 Fed. 144; Kirkpatrick v. Eastern Milling & Export Co. (C. C. 1904) 135 Fed. 146, decree modified (1905) 137 Fed. 387, 69 C. C. A. 579; Kirkpatrick v. Eastern Milling & Export Co. (C. C. 1905) 135 Fed. 151; The Jonas H. French (D. C. 1902) 119 Fed. 462.

59. Remedies of general creditors as against property.—Central Trust Co. of New York v. Chattanooga, R. & C. R. Co. (C. C. 1895) 68 Fed. 685; Moore v. Southern States Land & Timber Co. (C. C. 1896) 83 Fed. 399; Mercantile Trust Co. v. Baltimore & A. R. Co. (C. C. 1897) 79 Fed. 389; Vanderveer v. Asbury Park & B. St. Ry. Co. (C. C. 1897) 82 Fed. 355; Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C. 1898) 88 Fed. 622; Grosscup v. German Savings & Loan Soc. (C. C. 1908) 162 Fed. 947.

60. Effect of appointment and rights of receiver as to pending actions.—Missouri, K. & T. Trust Co. v. German Nat. Bank (1896) 77 Fed. 117, 23 C. C. A. 65; Wilder v. City of New Orleans (1898) 87 Fed. 843, 31 C. C. A. 249; Denton v. Baker (1899) 93 Fed. 46, 35 C. C. A. 187; Toledo, St. L. & K. C. R. Co. v. Continental Trust Co. (1899) 95 Fed. 497, 36 C. C. A. 155 (modifying decree Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. [C. C. 1898] 86 Fed. 929); National Electric Signaling Co. v. Telefunken Wireless Telegraph Co. of United States (1913) 208 Fed. 679, 125 C. C. A. 647; Owens v. Ohio Cent. R. Co. (C. C. 1884) 20 Fed. 10; Atkins v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 29 Fed. 161 (order affirmed Wabash, St. L. & P. Ry. Co. v. State of Illinois [1886] 7 Sup. Ct. 4, 118 U. S. 557, 30 L. Ed. 244); Mercantile Trust Co. v. Pittsburg & W. R. Co. (C. C. 1887) 29 Fed. 732; Pine Lake Iron Co. v. La Fayette Car Works (C. C. 1893) 53 Fed. 853; Perry v. Godbe (C. C. 1897) 82 Fed. 141; Speckart v. German Nat. Bank (C. C. 1898) 85 Fed. 12; Youtsey v. Hoffman (C. C. 1901) 108 Fed. 693.

V. MANAGEMENT AND DISPOSITION OF PROPERTY

(A) Administration in general

61. Representation by receiver of court and parties.—Turner v. Indianapolis, B. & W. Ry. Co. (C. C. 1879) Fed. Cas. No. 14,260; Hamor v. Taylor-Rice Engineering Co. (C. C. 1897) 84 Fed. 392; Metropolitan Trust Co. of City of New York v. North Carolina Lumber Co. (C. C. 1908) 162 Fed. 170.

62. Authority of receiver in general.—Northern Pac. Ry. Co. v. American Trading Co. (1904) 25 Sup. Ct. 84, 195 U. S. 439, 49 L. Ed. 269 (affirming decree Farmers' Loan & Trust Co. v. Northern Pac. R. Co. [1903] 120 Fed. 873, 57 C. C. A. 533); Braman v. Farmers' Loan & Trust Co. (1902) 114 Fed. 18, 51 C. C. A. 644; King v. Pomeroy (1903) 121 Fed. 287, 58 C. C. A. 209; Cowdrey v. Railroad Co. (C. C. 1870) Fed. Cas. No. 3,293; Clarke v.

Central Railroad & Banking Co. of Georgia (C. C. 1893) 66 Fed. 16; Johnson v. Lehigh Valley Traction Co. (C. C. 1904) 130 Fed. 933; Robinson v. Mutual Reserve Life Ins. Co. (C. C. 1910) 182 Fed. 850, decree affirmed (1911) 189 Fed. 347, 111 C. C. A. 79.

63. Discretion of receivers.—Continental Trust Co. of New York v. Toledo, St. L. & K. C. R. Co. (C. C. 1894) 59 Fed. 514; State of South Carolina v. Port Royal & A. Ry. Co. (C. C. 1898) 89 Fed. 565; Coy v. Title Guarantee & Trust Co. (D. C. 1912) 198 Fed. 275; Hitner v. Diamond State Steel Co. (D. C. 1913) 207 Fed. 616.

64. Custody, use, and care of property.—Washington Market Co. v. Warthen Bros. (D. C. 1893) 2 Mackey, 432.

65. Determination of controversies.—Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1910) 180 Fed. 514.

66. Incumbrances and charges on property.—Jennings v. Philadelphia & R. R. Co. (C. C. 1884) 23 Fed. 569; Clyde v. Richmond & D. R. Co. (C. C. 1894) 63 Fed. 21.

67. Assumption and performance of obligations.—Sunflower Oil Co. v. Wilson (1892) 12 S. Ct. 235, 142 U. S. 313, 35 L. Ed. 1025; Quincy, M. & P. R. Co. v. Humphreys (1892) 12 S. Ct. 787, 145 U. S. 82, 36 L. Ed. 632 (affirming Central Trust Co. v. Wabash, St. L. & P. Ry. Co. [C. C. 1888] 34 Fed. 259); General Electric Co. v. Whitney (1896) 74 Fed. 664, 20 C. C. A. 674, 41 U. S. App. 165; Platt v. Philadelphia & R. R. Co. (1898) 84 Fed. 535, 28 C. C. A. 488; Sloss Iron & Steel Co. v. South Carolina & G. R. Co. (1898) 85 Fed. 133, 29 C. C. A. 50; Keeler v. Atchison, T. & S. F. Ry. Co. (1899) 92 Fed. 545, 34 C. C. A. 523; South Carolina & G. R. Co. v. Carolina, C. G. & C. Ry. Co. (1899) 93 Fed. 543, 35 C. C. A. 423; Kirker v. Owings (1899) 98 Fed. 499, 39 C. C. A. 132; Rosenthal v. McGraw (1905) 138 Fed. 721, 71 C. C. A. 277; Wa ash, St. L. & P. Ry. Co. v. Central Trust Co. (C. C. 1884) 22 Fed. 269; Central Trust Co. v. Ohio Cent. R. Co. (C. C. 1885) 23 Fed. 306; Thomas v. Peoria & R. I. Ry. Co. (C. C. 1888) 36 Fed. 808 (decree modified and reversed Thomas v. Western Car Co. [1893] 13 S. Ct. 824, 149 U. S. 95, 37 L. Ed. 663); Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co. (C. C. 1889) 42 Fed. 6; Central Trust Co. of New York v. Marietta & N. G. Ry. Co. (C. C. 1892) 51 Fed. 15; Ames v. Union Pac. Ry. Co. (C. C. 1894) 60 Fed. 966; In re Seattle, L. S. & E. Ry. Co. (C. C. 1894) 61 Fed. 541; United Electric Securities Co. v. Louisiana Electric Light Co. (C. C. 1896) 71 Fed. 615; Central Trust Co. v. East Tennessee Land Co. (C. C. 1897) 79 Fed. 19; Manhattan Trust Co. v. Sioux City & N. R. Co. (C. C. 1897) 81 Fed. 50; Grand Trunk Ry. v. Central Vermont R. R. (C. C. 1897) 81 Fed. 541; Breed v. Glasgow Inv. Co. (C. C. 1899) 92 Fed. 760; Whightsel v. Felton (C. C. 1899) 95 Fed. 923; Moore v. New Orleans Waterworks Co. (C. C. 1902) 114 Fed. 380; American Can Co. v. Erie Preserving Co. (C. C. 1909) 171 Fed. 540 (order affirmed [1910] 183 Fed. 96, 105 C. C. A. 388); Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1910) 180 Fed. 514; Ely v. Van Kannel Revolving Door Co. (C. C. 1911) 184 Fed. 459; Coy v. Title Guarantee & Trust Co. (D. C. 1912) 198 Fed. 275; Butterworth v. Degnon Construction Co. (D. C. 1913) 208 Fed. 381.

68. Acceptance of lease.—Kneeland v. American Loan & Trust Co. (1890) 10 Sup. Ct. 950, 136 U. S. 89, 34 L. Ed. 379; Quincy, M. & P. R. Co. v. Humphreys (1892) 12 Sup. Ct. 787, 145 U. S. 82, 36 L. Ed. 632 (affirming [C. C. 1888] 34 Fed. 259); St. Joseph & St. L. R. Co. v. Humphreys (1892) 12 S. Ct. 795, 145 U. S. 105, 36 L. Ed. 690; U. S. Trust Co. v. Wabash W. Ry. Co. (1893) 14 S. Ct. 86, 150 U. S. 287, 37 L. Ed. 1085; Seney v. Wabash W. Ry. Co. (1893) 14 S. Ct. 94, 150 U. S. 310, 37 L. Ed. 1092 (affirming decree Central Trust Co. v. Wabash, St. L. & P. Ry. Co. [C. C. 1889] 38 Fed. 63, affirming Central Trust Co. v. Wabash, St. L. & P. Ry. Co. [C. C. 1888] 34 Fed. 259); Carswell v. Farmers' Loan & Trust Co. (1896) 74 Fed. 88, 20 C. C. A. 282; Empire Distilling Co. v. McNulta (1897) 77 Fed. 700, 23 C. C. A. 415 (decree affirmed Dennehy v. McNulta [1898] 86 Fed. 825, 30 C. C. A. 422, 41 L. R. A. 609); Mercantile Trust Co. v. Farmers' Loan & Trust Co. (1897) 81 Fed. 254, 26 C. C. A. 383 (affirming decree Same v. St. Louis & S. F. Ry. Co. [C. C. 1896] 71 Fed. 601; certiorari denied [1897] 18 S. Ct. 944, 168 U. S. 710, 42 L. Ed. 1213); Central Trust Co. v. Continental Trust Co. of City of New York (1898) 86 Fed. 517, 30 C. C. A. 235 (certiorari denied [1898] 18 S. Ct. 940, 168 U. S. 711); United States Trust Co. v. Mercantile Trust Co. (1898) 88 Fed. 140, 31 C. C. A. 42 (affirming decree Mercantile Trust Co. v. Atlantic & P. R. Co. [C. C. 1897] 80 Fed. 18); Dayton Hydraulic Co. v. Felsenthall (1902) 116 Fed. 961, 54 C. C. A. 537; Fidelity Safe Deposit & Trust Co. v. Armstrong (C. C. 1888) 35 Fed. 567; Easton v. Houston & T. C. Ry. Co. (C. C. 1889) 38 Fed. 784; Park v. New York, L. E. & W. R. Co. (C. C. 1893) 57 Fed. 799; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. 1893) 58 Fed. 257; New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. (C. C. 1893) 58 Fed. 268; Ames v. Union Pac. Ry. Co. (C. C. 1894) 60 Fed. 966; Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1896) 77 Fed. 667; Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C.

1899) 94 Fed. 722; Johnson v. Lehigh Valley Traction Co. (C. C. 1904) 130 Fed. 932; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1911) 188 Fed. 680; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1911) 190 Fed. 609 (decree modified [1912] 198 Fed. 721, 117 C. C. A. 503).

69. Continuance and conduct of business.—Pennsylvania R. Co. v. Jones (1894) 15 S. Ct. 136, 155 U. S. 333, 39 L. Ed. 176; Cake v. Mohun (1896) 17 S. Ct. 100, 164 U. S. 311, 41 L. Ed. 447; Memphis & C. R. Co. v. Hoechner (1895) 67 Fed. 456, 14 C. C. A. 469; Central Trust Co. v. Continental Trust Co. of City of New York (1898) 86 Fed. 517, 30 C. C. A. 235 (certiorari denied [1898] 18 S. Ct. 940, 168 U. S. 711); South Carolina & G. R. Co. v. Carolina, C. G. & C. Ry. Co. (1899) 93 Fed. 543, 35 C. C. A. 423; Central Trust Co. of New York v. Denver & R. G. R. Co. (1899) 97 Fed. 239, 38 C. C. A. 143; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (1903) 120 Fed. 873, 57 C. C. A. 533 (decree affirmed Northern Pac. R. Co. v. American Trading Co. [1904] 25 S. Ct. 84, 195 U. S. 439, 49 L. Ed. 269, reversing decree [C. C. 1902] 112 Fed. 829); Cox v. Terre Haute & I. R. Co. (1904) 133 Fed. 371, 66 C. C. A. 433; Cowdrey v. Railroad Co. (C. C. 1870) Fed. Cas. No. 3,293; Taylor v. Philadelphia & R. R. Co. (C. C. 1881) 9 Fed. 1; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1885) 23 Fed. 863; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1885) 26 Fed. 3; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1887) 30 Fed. 332; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1889) 38 Fed. 63 (decree affirmed United States Trust Co. of New York v. Same [1893] 14 S. Ct. 86, 150 U. S. 287, 37 L. Ed. 1085, and Seney v. Same [1893] 14 S. Ct. 94, 150 U. S. 310, 37 L. Ed. 1092); Clarke v. Central Railroad & Banking Co. of Georgia (C. C. 1893) 66 Fed. 16; Central Railroad & Banking Co. of Georgia v. Farmers' Loan & Trust Co. (C. C. 1897) 79 Fed. 158; Central Trust Co. of New York v. Colorado Midland Ry. Co. (C. C. 1898) 89 Fed. 560; Gutterson & Gould v. Lebanon Iron & Steel Co. (C. C. 1907) 151 Fed. 72; Pusey & Jones v. Pennsylvania Paper Mills (C. C. 1909) 173 Fed. 629.

70. Completion and extension of works.—Girard Life Insurance, Annuity & Trust Co. v. Cooper (1892) 51 Fed. 332, 2 C. C. A. 245 (decree affirmed [1896] 16 S. Ct. 879, 162 U. S. 529, 40 L. Ed. 1062); Bibber-White Co. v. White River Val. Electric R. Co. (1902) 115 Fed. 786, 53 C. C. A. 282; Stanton v. Alabama & C. R. Co. (C. C. 1875) Fed. Cas. No. 13,296; Kennedy v. St. Paul & P. R. Co. (C. C. 1878) Fed. Cas. No. 7,707; Central Trust Co. of New York v. Marietta & N. G. Ry. Co. (C. C. 1891) 48 Fed. 32 (decree reversed [1891] 48 Fed. 850, 1 C. C. A. 116).

71. Contracts of receiver in general.—Chicago Deposit Vault Co. v. McNulta (1894) 14 S. Ct. 915, 153 U. S. 554, 38 L. Ed. 819; Girard Life Insurance, Annuity & Trust Co. v. Cooper (1896) 16 S. Ct. 879, 162 U. S. 529, 40 L. Ed. 1062 (affirming [1892] 51 Fed. 332, 2 C. C. A. 245); Girard Life Insurance, Annuity & Trust Co. v. Cooper (1892) 51 Fed. 332, 2 C. C. A. 245 (decree affirmed [1896] 16 S. Ct. 879, 162 U. S. 529, 40 L. Ed. 1062); Monsarrat v. Mercantile Trust Co. (1901) 109 Fed. 230, 48 C. C. A. 328; Western Union Tel. Co. v. Boston Safe Deposit & Trust Co. (1901) 112 Fed. 37, 50 C. C. A. 106; American Bonding & Trust Co. v. Baltimore & O. S. W. R. Co. (1903) 124 Fed. 866, 60 C. C. A. 52 (writ of certiorari denied [1903] 24 S. Ct. 846, 191 U. S. 575, 48 L. Ed. 308); Wolf v. Lovering (1908) 159 Fed. 91, 86 C. C. A. 281; In re Kalb & Berger Mfg. Co. (1908) 165 Fed. 895, 91 C. C. A. 573; In re Roberts (1909) 169 Fed. 1022, 94 C. C. A. 668; Benedict v. Maynard (C. C. 1851) Fed. Cas. No. 1,295; Turner v. Indianapolis, B. & W. Ry. Co. (C. C. 1879) Fed. Cas. No. 14,260; McCoy v. Marietta & C. R. Co. (C. C. 1882) Fed. Cas. No. 8,730b; Wabash, St. L. & P. R. Co. v. Central Trust Co. (C. C. 1884) 22 Fed. 269; Farmers' Loan & Trust Co. v. Burlington & S. W. Ry. Co. (C. C. 1887) 32 Fed. 805; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1888) 34 Fed. 259 (decree affirmed United States Trust Co. of New York v. Wabash W. Ry. Co. [1893] 14 S. Ct. 86, 150 U. S. 287, 37 L. Ed. 1085); Investment Co. of Philadelphia v. Ohio & N. W. Ry. Co. (C. C. 1889) 41 Fed. 378; Clarke v. Central Railroad & Banking Co. of Georgia (C. C. 1893) 66 Fed. 16; The Clara A. McIntyre (D. C. 1899) 94 Fed. 552.

72. Employés of receiver.—Bernard v. Union Trust Co. (1908) 159 Fed. 620, 86 C. C. A. 610, 16 L. R. A. (N. S.) 1118; Cowden v. Wild Goose Mining & Trading Co. (1912) 199 Fed. 561, 118 C. C. A. 35; Boyce v. Southern Nat. Bank of Wilmington, N. C. (1913) 203 Fed. 698, 122 C. C. A. 82; Blair v. St. Louis, H. & K. R. Co. (C. C. 1884) 20 Fed. 348; Frank v. Denver & R. G. Ry. Co. (C. C. 1885) 23 Fed. 757; Missouri Pac. Ry. Co. v. Texas & P. Ry. Co. (C. C. 1888) 33 Fed. 701; Beers v. Wabash, St. L. & P. Ry. Co. (C. C. 1888) 34 Fed. 244; Missouri Pac. Ry. Co. v. Texas & P. Ry. Co. (C. C. 1890) 41 Fed. 319; Waterhouse v. Comer (C. C. 1893) 55 Fed. 149, 19 L. R. A. 403; Continental Trust Co. of New York v. Toledo, St. L. & K. C. R. Co. (C. C. 1894) 59 Fed. 514; Thomas v. East Tennessee, V. & G. Ry. Co. (C. C. 1894) 60

Fed. 7 (limiting Missouri Pac. Ry. Co. v. Texas & P. Ry. Co. [1888] 33 Fed. 701; Id. [1890] 41 Fed. 319); Ames v. Union Pac. Ry. Co. (C. C. 1894) 60 Fed. 674; Ames v. Union Pac. Ry. Co. (C. C. 1894) 62 Fed. 7; Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1894) 62 Fed. 17; Booth v. Brown (C. C. 1894) 62 Fed. 794; United States Trust Co. v. Omaha & St. L. Ry. Co. (C. C. 1894) 63 Fed. 737; Platt v. Philadelphia & R. R. Co. (C. C. 1894) 65 Fed. 660; Farmers' Loan & Trust Co. v. Central R. & Banking Co. of Georgia (C. C. 1895) 166 Fed. 333; Dexter v. Union Pac. Ry. Co. (C. C. 1896) 75 Fed. 947; Doe v. Northwestern Coal & Transportation Co. (C. C. 1896) 78 Fed. 62; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1908) 165 Fed. 455; Bibber-White Co. v. White River Valley Electric R. Co. (C. C. 1909) 175 Fed. 470; Shainwald v. Lewis (D. C. 1881) 8 Fed. 878; In re Herman (D. C. 1892) 50 Fed. 517; In re J. B. & J. M. Cornell Co. (D. C. 1912) 201 Fed. 381.

73. Loans and advances to receiver and securities therefor.—Elk Fork Oil & Gas Co. v. Foster (1900) 99 Fed. 495, 39 C. C. A. 615; People's Sav. Bank & Trust Co. v. Rogers (1910) 177 Fed. 386, 100 C. C. A. 618; Clarke v. Central Railroad & Banking Co. of Georgia (C. C. 1893) 54 Fed. 556 (denying motion for order authorizing the payment of certain expenses [C. C. 1892] 50 Fed. 338, 15 L. R. A. 683); Elk Fork Oil & Gas Co. v. Jennings (C. C. 1898) 90 Fed. 767; In re Erie Lumber Co. (D. C. 1906) 150 Fed. 817.

74. Disposition of property, funds and income in general.—Farmers' Loan & Trust Co. v. Eaton (1902) 114 Fed. 14, 51 C. C. A. 640.

75. Expenditures in general.—Cowdrcy v. Galveston, H. & H. R. R. Co. (1876) 93 U. S. 352, 23 L. Ed. 950; Northern Alabama Ry. Co. v. Hopkins (1898) 87 Fed. 505, 31 C. C. A. 94; Wilkinson v. Washington Trust Co. of City of New York (1900) 102 Fed. 28, 42 C. C. A. 140; Braman v. Farmers' Loan & Trust Co. (1902) 114 Fed. 18, 51 C. C. A. 644; Burroughs v. Toxaway Co. (1911) 185 Fed. 435, 107 C. C. A. 505 (reversing decree [C. C. 1910] 182 Fed. 129); Skiddy v. Atlantic, M. & O. R. Co. (C. C. 1879) Fed. Cas. No. 12,922; Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co. (C. C. 1892) 52 Fed. 908; Park v. New York, L. E. & W. R. Co. (C. C. 1894) 64 Fed. 190; Cleveland C. & S. R. Co. v. Knickerbocker Trust Co. (C. C. 1894) 64 Fed. 623; Lloyd v. Chesapeake, O. & S. W. R. Co. (C. C. 1895) 65 Fed. 351; Tinsley v. Etowah Power Co. (D. C. 1912) 197 Fed. 602; In re Tisch (D. C. 1912) 202 Fed. 1018; Hitner v. Diamond State Steel Co. (D. C. 1913) 207 Fed. 616.

76. —— Counsel fees.—Cake v. Mohun (1896) 17 S. Ct. 100, 164 U. S. 311, 41 L. Ed. 447; Boston Safe Deposit & Trust Co. v. Chamberlain (1895) 66 Fed. 847, 14 C. C. A. 363; Merchants' Bank v. Crysler (1895) 67 Fed. 388, 14 C. C. A. 444, 32 U. S. App. 187; Weed v. Central of Georgia Ry. Co. (C. C. A. 1900) 100 Fed. 162; Wilkinson v. Washington Trust Co. of City of New York (1900) 102 Fed. 28, 42 C. C. A. 140; Drey v. Watson (1905) 138 Fed. 792, 71 C. C. A. 158; Cowdrey v. Railroad Co. (C. C. 1870) Fed. Cas. No. 3,293; Blair v. St. Louis, H. & K. R. Co. (C. C. 1884) 20 Fed. 351; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1885) 23 Fed. 675; Sowles v. National Union Bank (C. C. 1897) 82 Fed. 139.

77. —— Taxes.—Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1887) 30 Fed. 332; Mercantile Trust Co. v. Atlantic & P. R. Co. (C. C. 1897) 80 Fed. 18 (decree affirmed United States Trust Co. v. Mercantile Trust Co. [1898] 88 Fed. 140, 31 C. C. A. 427).

78. Interest on funds.—Hinckley v. Gilman, C. & S. R. R. Co. (1879) 100 U. S. 153, 25 L. Ed. 591; Wilkinson v. Washington Trust Co. of City of New York (1900) 102 Fed. 28, 42 C. C. A. 140; Clark v. Brown (1902) 119 Fed. 130, 57 C. C. A. 76; Malcomson v. Wappoo Mills (C. C. 1900) 99 Fed. 633; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1908) 158 Fed. 460.

79. Individual interest in transactions.—Strang v. Edson (1912) 198 Fed. 813, 117 C. C. A. 455.

80. Fraud or other misconduct of receiver.—Gunn v. Ewan (1899) 93 Fed. 80, 35 C. C. A. 213; Kirker v. Owings (1899) 98 Fed. 499, 39 C. C. A. 132; Missouri & K. Interurban Ry. Co. v. Edson (1912) 198 Fed. 819, 117 C. C. A. 461; Stanton v. Alabama & C. R. Co. (C. C. 1875) Fed. Cas. No. 13,296; Davis v. Duncan (C. C. 1884) 19 Fed. 477; In re Higgins (C. C. 1886) 27 Fed. 443; Gutterson & Gould v. Lebanon Iron & Steel Co. (C. C. 1907) 151 Fed. 72.

81. Loss of property.—Huxley v. Hayes (1913) 201 Fed. 899, 120 C. C. A. 413, affirming judgment (C. C. 1911) 191 Fed. 943.

82. Reimbursement and indemnity to receiver.—Union Trust Co. v. Illinois Midland Ry. Co. (1886) 6 Sup. Ct. 809, 117 U. S. 434, 29 L. Ed. 963.

83. Successive receivers.—Central R. & Banking Co. of Georgia v. Farmers' Loan & Trust Co. of New York (1903) 125 Fed. 1001, 60 C. C. A. 400 (affirming decree [C. C. 1902] 113 Fed. 405); State v. Port Royal & A. Ry. Co. (C. C. 1898) 84 Fed. 67; Pennsyl-

vania Steel Co. v. New York City Ry. Co. (C. C. 1909) 170 Fed. 335.

(B) Supervision and instructions of court

84. Jurisdiction to instruct and control receiver.—Mercantile Trust Co. v. Farmers' Loan & Trust Co. (1897) 81 Fed. 254, 26 C. C. A. 383, affirming decree Same v. St. Louis & S. F. Ry. Co. (C. C. 1896) 71 Fed. 601 (certiorari denied [1897] 18 S. Ct. 944, 168 U. S. 710, 42 L. Ed. 1213); Guaranty Trust Co. of New York v. North Chicago St. R. Co. (1904) 130 Fed. 801, 65 C. C. A. 65 (writ of certiorari denied Fetzer v. Kohn [1904] 24 S. Ct. 860, 194 U. S. 638, 48 L. Ed. 1161); Holmes v. Dowie (1910) 177 Fed. 182, 100 C. C. A. 390; Central Trust Co. of N. Y. v. Texas & St. L. Ry. (C. C. 1884) 22 Fed. 135; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 29 Fed. 618; Missouri Pac. Ry. Co. v. Texas & P. Ry. Co. (C. C. 1887) 31 Fed. 862; Farmers' Loan & Trust Co. v. Central R. & Banking Co. of Georgia (C. C. 1895) 166 Fed. 333; New York Security & Trust Co. v. Equitable Mortgage Co. (C. C. 1896) 71 Fed. 556; Metropolitan Trust Co. of City of New York v. North Carolina Lumber Co. (C. C. 1908) 162 Fed. 170; Gay v. Hudson River Electric Power Co. (C. C. 1909) 173 Fed. 1003, order affirmed (1910) 177 Fed. 1003, 100 C. C. A. 665; Ex parte Tyler (1893) 13 Sup. Ct. 785, 792, 149 U. S. 164, 37 L. Ed. 689.

85. Instructions or authority to receiver to act.—In re McElrath (C. C. 1873) Fed. Cas. No. 8,780; In re Philadelphia & R. R. Co. (C. C. 1881) Fed. Cas. No. 11,085a.

86. —— Subject-matter.—New England R. Co. v. Carnegie Steel Co. (1896) 75 Fed. 54, 21 C. C. A. 219; Taylor v. Philadelphia & R. R. Co. (C. C. 1881) 7 Fed. 381; Mercantile Trust Co. v. Missouri, K. & T. Ry. Co. (C. C. 1889) 41 Fed. 8; Lloyd v. Chesapeake, O. & S. W. R. Co. (C. C. 1895) 65 Fed. 351; Ledoux v. La Bee (C. C. 1897) 83 Fed. 761; Pakradooni v. Storey Cotton Co. (C. C. 1907) 151 Fed. 607; Pfahler v. McCrum-Howell Co. (D. C. 1912) 197 Fed. 684.

87. —— Proceedings to obtain instructions.—U. S. Trust Co. v. Omaha & St. L. Ry. Co. (C. C. 1894) 63 Fed. 737.

88. —— Operation and effect.—Hunt v. Illinois Cent. R. Co. (1899) 96 Fed. 644, 37 C. C. A. 548; Missouri & K. Interurban Ry. Co. v. Edson (1912) 198 Fed. 819, 117 C. C. A. 461; Missouri Pac. R. Co. v. Texas & P. Ry. Co. (C. C. 1887) 31 Fed. 862; Gutterson & Gould v. Lebanon Iron & Steel Co. (C. C. 1907) 151 Fed. 72.

89. Annulment or modification of acts or contracts of receiver.—Farmers' Loan & Trust Co. v. Central R. & Banking Co. of Georgia (C. C. 1895) 166 Fed. 333; Felton v. Ackerman (1894) 61 Fed. 225, 227, 9 C. C. A. 457.

(C) Receivers' certificates

90. Power to authorize issue.—Wallace v. Loomis (1877) 97 U. S. 146, 24 L. Ed. 895; International Trust Co. v. Decker Bros. (1907) 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152; Illinois Steel Co. v. Ramsey (1910) 176 Fed. 853, 100 C. C. A. 323; American Brake Shoe & Foundry Co. v. Pere Marquette R. Co. (1913) 205 Fed. 14, 123 C. C. A. 322; Credit Co. v. Arkansas Cent. R. Co. (C. C. 1882) 15 Fed. 46; Farmers' Loan & Trust Co. v. Grape Creek Coal Co. (C. C. 1892) 50 Fed. 481, 16 L. R. A. 603; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1908) 161 Fed. 787; Farmers' Loan & Trust Co. v. Burbank Power & Water Co. (D. C. 1912) 196 Fed. 539.

91. Action in which certificates may issue.—Union Trust Co. v. Illinois Midland Ry. Co. (1886) 6 Sup. Ct. 809, 117 U. S. 434, 29 L. Ed. 963.

92. Purpose of issue.—Union Trust Co. v. Southern Sawmills & Lumber Co. (1908) 166 Fed. 193, 92 C. C. A. 101 (writ of certiorari denied American Woodworking Machinery Co. v. Union Trust Co. [1909] 30 S. Ct. 398, 215 U. S. 596, 54 L. Ed. 342); American Brake Shoe & Foundry Co. v. Pere Marquette R. Co. (1913) 205 Fed. 14, 123 C. C. A. 322; Stanton v. Alabama & C. R. Co. (C. C. 1875) Fed. Cas. No. 13,296; Taylor v. Philadelphia & N. R. Co. (C. C. 1880) 7 Fed. 377; Credit Co. v. Arkansas Cent. R. Co. (C. C. 1882) 15 Fed. 46; Street v. Maryland Cent. Ry. Co. (C. C. 1893) 59 Fed. 25; Newton v. Eagle & Phœnix Mfg. Co. (C. C. 1896) 76 Fed. 418; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1908) 165 Fed. 477.

93. Necessity and grounds for issue.—Shaw v. Little Rock & Ft. S. R. Co. (1879) 100 U. S. 605, 25 L. Ed. 757; First Nat. Bank of Houston v. Ewing (1900) 103 Fed. 168, 43 C. C. A. 150 (writ of certiorari denied [1900] 21 S. Ct. 919, 179 U. S. 686, 45 L. Ed. 386); Illinois Steel Co. v. Ramsey (1910) 176 Fed. 853, 100 C. C. A. 323; Street v. Maryland Cent. Ry. Co. (C. C. 1893) 59 Fed. 25; Gay v. Hudson River Electric Power Co. (C. C. 1909) 166 Fed. 771.

94. Consent of parties interested.—Farmers' Loan & Trust Co. v. Centralia & C. R. Co. (1899) 96 Fed. 636, 37 C. C. A. 528; Illinois Steel Co. v. Ramsey (1910) 176 Fed. 853, 100 C. C. A. 323; Street v. Maryland Cent. R. Co. (C. C. 1893) 59 Fed. 25; Fidelity Ins., Trust & Safe Deposit Co. v. Roanoke Iron Co. (C. C. 1895) 68 Fed.

623; B. Borchardt Co. v. Yaryan Naval Stores Co. (D. C. 1913) 206 Fed. 366.

95. Proceedings preliminary to issue.—Bibber-White Co. v. White River Val. Electric R. Co. (1902) 115 Fed. 786, 53 C. C. A. 282; Bernard v. Union Trust Co. (1908) 159 Fed. 620, 86 C. C. A. 610, 16 L. R. A. (N. S.) 1118; American Brake Shoe & Foundry Co. v. Pere Marquette R. Co. (1913) 205 Fed. 14, 123 C. C. A. 322.

96. Sale or other disposition.—Bibber-White Co. v. White River Val. Electric R. Co. (1902) 115 Fed. 786, 53 C. C. A. 282.

97. Validity in general.—Alabama Iron & Ry. Co. v. Anniston Loan & Trust Co. (1893) 57 Fed. 25, 6 C. C. A. 242; Farmers' Loan & Trust Co. v. Centralia & C. R. Co. (1899) 96 Fed. 636, 37 C. C. A. 528; Stanton v. Alabama & C. R. Co. (C. C. 1875) Fed. Cas. No. 13,296; Stanton v. Alabama & C. R. Co. (C. C. 1887) 31 Fed. 585; Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co. (C. C. 1889) 42 Fed. 372; Fidelity Ins. & Safe-Deposit Co. v. Shenandoah Iron Co. (C. C. 1890) 42 Fed. 372; Central Trust Co. v. Sheffield & B. Coal, Iron & Ry. Co. (C. C. 1890) 44 Fed. 526; Bibber-White Co. v. White River Valley Electric R. Co. (C. C. 1909) 175 Fed. 470.

98. —— Estoppel.—Central Trust Co. v. Seasongood (1889) 9 S. Ct. 575, 130 U. S. 482, 32 L. Ed. 985; Alabama Iron & Ry. Co. v. Anniston Loan & Trust Co. (1893) 57 Fed. 25, 6 C. C. A. 242; Stanton v. Alabama & C. R. Co. (C. C. 1887) 31 Fed. 585; Central Trust Co. v. Sheffield & B. Coal, Iron & Railway Co. (C. C. 1890) 44 Fed. 526.

99. Negotiability and transfer.—Bernard v. Union Trust Co. (1908) 159 Fed. 620, 86 C. C. A. 610, 16 L. R. A. (N. S.) 1118; Stanton v. Alabama & C. R. Co. (C. C. 1875) Fed. Cas. No. 13,-296; Union Trust Co. of New York v. Chicago & L. H. R. Co. (C. C. 1881) 7 Fed. 513; Central Nat. Bank of Boston v. Hazard (C. C. 1887) 30 Fed. 484; Stanton v. Alabama & C. R. Co. (C. C. 1887) 31 Fed. 585.

100. Rights and obligations of holders in general.—Union Trust Co. v. Illinois Midland Ry. Co. (1886) 6 S. Ct. 809, 117 U. S. 434, 29 L. Ed. 963; Mercantile Trust Co. v. Kanawha & O. Ry. Co. (1893) 58 Fed. 6, 7 C. C. A. 3 (distinguishing Vilas v. Page [1887] 13 N. E. 743, 106 N. Y. 439); Gordon v. Newman (1894) 62 Fed. 686, 10 C. C. A. 587, 23 U. S. App. 660; Stanton v. Alabama & C. R. Co. (C. C. 1875) Fed. Cas. No. 13,296; Bank of Montreal v. Thayer (C. C. 1881) 7 Fed. 622; Central Nat. Bank of Boston v. Hazard (C. C. 1887) 30 Fed. 484; Mercantile Trust Co. v. Kanawha & O. Ry. Co. (C. C. 1892) 50 Fed. 874; Electrical Supply Co. v. Put-in-Bay Waterworks, Light & Railway Co. (C. C. 1898) 84 Fed. 740; In re J. B. & J. M. Cornell Co. (D. C. 1912) 201 Fed. 381; Passage v. Dansville & Mt. M. R. Co. (1899) 58 N. Y. S. 770, 41 App. Div. 182.

101. Lien and priorities.—Miltenberger v. Logansport, C. & S. W. R. Co. (1882) 1 S. Ct. 140, 106 U. S. 286, 27 L. Ed. 117; Union Trust Co. v. Illinois Midland Ry. Co. (1886) 6 S. Ct. 809, 117 U. S. 434, 29 L. Ed. 963; Kneeland v. Luce (1891) 12 S. Ct. 32, 141 U. S. 491, 35 L. Ed. 830; Mercantile Trust Co. v. Kanawha & O. Ry. Co. (1893) 58 Fed. 6, 7 C. C. A. 3; Hanna v. State Trust Co. (1895) 70 Fed. 2, 16 C. C. A. 586, 30 L. R. A. 201; Central Trust Co. v. Marietta & N. G. R. Co. (1896) 75 Fed. 193, 21 C. C. A. 291; Central Trust Co. v. Marietta & N. G. R. Co. (1896) 75 Fed. 209, 21 C. C. A. 307; Third Street & Suburban Ry. Co. v. Lewis (1897) 79 Fed. 196, 24 C. C. A. 482 (appeal dismissed [1899] 19 S. Ct. 451, 173 U. S. 457, 43 L. Ed. 766); Anderson v. Condict (1899) 93 Fed. 349, 35 C. C. A. 335; Farmers' Loan & Trust Co. v. Centralia & C. R. Co. (1899) 96 Fed. 636, 37 C. C. A. 528; First Nat. Bank of Houston v. Ewing (1900) 103 Fed. 168, 43 C. C. A. 150 (writ of certiorari denied [1900] 21 S. Ct. 919, 179 U. S. 686, 45 L. Ed. 386); Appeal of Columbus, S. & H. R. Co. (1901) 109 Fed. 177, 48 C. C. A. 275; Bank of Commerce v. Central Coal & Coke Co. (1902) 115 Fed. 878, 53 C. C. A. 334; Royal Trust Co. v. Washburn, B. & I. R. Ry. Co. (1902) 120 Fed. 11, 57 C. C. A. 31; Bernard v. Union Trust Co. (1908) 159 Fed. 620, 86 C. C. A. 610, 16 L. R. A. (N. S.) 1118; Pennsylvania Steel Co. v. New York City Ry. Co. (1908) 163 Fed. 242, 90 C. C. A. 188; Nowell v. International Trust Co. (1909) 169 Fed. 497, 94 C. C. A. 589 (writ of certiorari denied [1910] 30 Sup. Ct. 694, 217 U. S. 603, 54 L. Ed. 899); American Trust Co. v. Metropolitan S. S. Co. (1911) 190 Fed. 113, 111 C. C. A. 376 (affirming order Berwind-White Coal Mining Co. v. Same [C. C. 1910] 183 Fed. 250, writ of certiorari denied American Trust Co. v. Metropolitan S. S. Co. [1911] 32 S. Ct. 526, 223 U. S. 727, 56 L. Ed. 632); Cowden v. Wild Goose Mining & Trading Co. (1912) 199 Fed. 561, 118 C. C. A. 35; Hervey v. Illinois Midland Ry. Co. (C. C. 1884) 28 Fed. 169; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1885) 23 Fed. 863; Farmers' Loan & Trust Co. v. Grape Creek Coal Co. (C. C. 1892) 50 Fed. 481, 16 L. R. A. 603; Mercantile Trust Co. v. Kanawha & O. Ry. Co. (C. C. 1892) 50 Fed. 874; Laughlin v. United States Rolling-Stock Co. (C. C. 1894) 64 Fed. 25; Doe v. Northwestern Coal & Transportation Co. (C. C. 1896) 78 Fed. 62; Metropolitan Trust Co. v. Lake Cities

Electric Ry. Co. (C. C. 1900) 100 Fed. 897; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1908) 165 Fed. 455; Pusey & Jones v. Pennsylvania Paper Mills (C. C. 1909) 173 Fed. 634 (decree affirmed George M. Newhall Engineering Co. v. Egolf [1911] 185 Fed. 481, 107 C. C. A. 581); Bibber-White Co. v. White River Valley Electric Co. (C. C. 1909) 175 Fed. 470.

102. Payment.—Union Trust Co. v. Illinois Midland Ry. Co. (1886) 6 Sup. Ct. 809, 117 U. S. 434, 29 L. Ed. 963; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1885) 23 Fed. 863; Mercantile Trust Co. v. Kanawha & O. Ry. Co. (C. C. 1892) 50 Fed. 874; Doe v. Northwestern Coal & Transportation Co. (C. C. 1896) 78 Fed. 62; Electrical Supply Co. v. Put-in-Bay Waterworks, Light & Railway Co. (C. C. 1898) 84 Fed. 740; In re C. M. Burkhalter & Co. (D. C. 1910) 179 Fed. 403.

(D) Sale and conveyance or redelivery of property

103. Power to authorize sale by receiver.—Wheeling Bridge & Terminal Ry. Co. v. Reymann Brewing Co. (1898) 90 Fed. 189, 32 C. C. A. 571; In re Third Nat. Bank (D. C. 1880) 4 Fed. 775.

104. Necessity and grounds for sale.—Pennsylvania R. Co. v. Allegheny Val. R. Co. (C. C. 1890) 42 Fed. 82; Fidelity Insurance Trust & Safe Deposit Co. v. Roanoke Iron Co. (C. C. 1897) 84 Fed. 752; Bibber-White Co. v. White River Val. Electric R. Co. (C. C. 1901) 110 Fed. 473; Wabash R. Co. v. West Side Belt R. Co. (D. C. 1912) 197 Fed. 442.

105. Authority and duty of receiver to sell in general.—Hitz v. Jenks (1902) 22 Sup. Ct. 598, 185 U. S. 155, 46 L. Ed. 851.

106. Necessity and grounds for sale.—Hitz v. Jenks (1902) 22 Sup. Ct. 598, 185 U. S. 155, 46 L. Ed. 851, reversing decree (1900) 16 App. D. C. 530; Bibber-White Co. v. White River Val. Electric R. Co. (C. C. 1901) 110 Fed. 473.

107. Proceedings to procure and order for sale.—International Trust Co. v. Decker Bros. (1907) 152 Fed. 78, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152.

108. Notice of sale.—City of New Orleans v. Peake (1892) 52 Fed. 74, 2 C. C. A. 626.

109. Time, manner, and terms of sale.—Bound v. South Carolina Ry. Co. (1893) 58 Fed. 473, 7 C. C. A. 322; Lake Superior Iron Co. v. Brown, Bonnell & Co. (C. C. 1890) 44 Fed. 539, decree affirmed Leadville Coal Co. v. McCreery (1891) 12 Sup. Ct. 28, 141 U. S. 475, 38 L. Ed. 824.

110. Bids and payment of or failure to comply with bid.—Fidelity Insurance Trust & Safe Deposit Co. v. Roanoke Iron Co. (C. C. 1897) 84 Fed. 752.

111. Report and confirmation of sale.—Fidelity Insurance, Trust & Safe Deposit Co. v. Roanoke Iron Co. (C. C. 1897) 84 Fed. 752; In re Third Nat. Bank (D. C. 1880) 4 Fed. 775.

112. Opening or vacating sale.—Files v. Brown (1903) 124 Fed. 133, 59 C. C. A. 403; Farmers' Loan & Trust Co. v. Burlington & S. W. Ry. Co. (C. C. 1887) 32 Fed. 805; Lake Superior Iron Co. v. Brown, Bonnell & Co. (C. C. 1890) 44 Fed. 539 (decree affirmed Leadville Coal Co. v. McCreery [1891] 12 Sup. Ct. 28, 141 U. S. 475, 38 L. Ed. 824; Fisher v. Lefferts (C. C. 1901) 105 Fed. 711; Buchler v. Black (D. C. 1913) 205 Fed. 1000.

113. Collateral attack on sale.—Gila Bend Reservoir & Irrigation Co. v. Gila Water Co. (1906) 26 Sup. Ct. 615, 202 U. S. 270, 50 L. Ed. 1023 (affirming [1904] 76 Pac. 990, 9 Ariz. 57); McEwen v. Harriman Land Co. (1905) 138 Fed. 797, 71 C. C. A. 163; Bradly v. Marine & River Phosphate Min. & Mfg. Co. of South Carolina (C. C. 1879) Fed. Cas. No. 1,789, affirmed Marine & River Phosphate Min. & Mfg. Co. v. Bradley (1881) 105 U. S. 175, 26 L. Ed. 1034.

114. Operation and effect of sale in general.—Richards v. Haliday (C. C. 1899) 92 Fed. 798.

115. Title and rights of purchaser.—City of New Orleans v. Peake (1892) 52 Fed. 74, 2 C. C. A. 626; Downs v. Farmers' Loan & Trust Co. (1897) 79 Fed. 215, 24 C. C. A. 500; Richards v. Halliday (1901) 112 Fed. 86, 50 C. C. A. 133; Horner v. Continental & Commercial Trust & Savings Bank (1912) 198 Fed. 832, 117 C. C. A. 474; Drake v. Goodridge (C. C. 1869) Fed. Cas. No. 4,063; In re Third Nat. Bank (D. C. 1880) 4 Fed. 775; First Trust & Savings Bank v. Southern Indiana Ry. Co. (D. C. 1912) 195 Fed. 330.

116. Liabilities of purchaser.—Cake v. Mohun (1896) 17 S. Ct. 100, 164 U. S. 311, 41 L. Ed. 447; Chicago & O. R. R. Co. v. McCammon (1894) 61 Fed. 772, 10 C. C. A. 50; State of Tennessee v. Quintard (1897) 80 Fed. 829, 26 C. C. A. 165; Thompson v. Northern Pac. Ry. Co. (1899) 93 Fed. 384, 35 C. C. A. 357; St. Louis S. W. Ry. Co. v. Jackson (1899) 95 Fed. 560, 37 C. C. A. 165; Terre Haute & L. Ry. Co. v. Harrison (1899) 96 Fed. 907, 37 C. C. A. 615; Ohio Coal Co. v. Whitcomb (1903) 123 Fed. 359, 59 C. C. A. 487 (writ of certiorari denied Whitcomb v. Ohio Coal Co. [1903] 24 S. Ct. 841, 191 U. S. 567, 48 L. Ed. 305; Gray v. Grand Trunk Western Ry. Co. (1907) 156 Fed. 736, 84 C. C. A. 392 (writ of certiorari denied Grand Trunk Western R. Co. v. Gray [1907] 28 S. Ct. 260, 207 U. S. 594,

52 L. Ed. 356); Farmers' Loan & Trust Co. v. Central R. R. of Iowa (C. C. 1880) 7 Fed. 537; Hale v. Burlington, C. R. & N. Ry. Co. (C. C. 1881) 13 Fed. 203; Farmers' Loan & Trust Co. v. Central R. Co. of Iowa (C. C. 1883) 17 Fed. 758; Blair v. Walker (C. C. 1886) 26 Fed. 73 (appeal dismissed [1889] 10 S. Ct. 1065, 136 U. S. 631, 34 L. Ed. 550); Stanton v. Alabama & C. R. Co. (C. C. 1887) 31 Fed. 585; Jesup v. Wabash, St. L. & P. Ry. Co. (C. C. 1890) 44 Fed. 663; Central Trust Co. of New York v. Cincinnati, J. & M. Ry. Co. (C. C. 1892) 58 Fed. 500; Central Railroad & Banking Co. of Georgia v. Farmers' Loan & Trust Co. (C. C. 1897) 79 Fed. 158; Fidelity Insurance, Trust & Safe Deposit Co. v. Norfolk & W. R. Co. (C. C. 1898) 88 Fed. 815; Mercantile Trust Co. v. St. Louis & S. F. Ry. Co. (C. C. 1900) 99 Fed. 485; First Trust & Savings Bank v. Southern Indiana Ry. Co. (D. C. 1912) 195 Fed. 330.

117. Proceeds of sale.—Farmers' Loan & Trust Co. v. Newman (1895) 8 S. Ct. 1364, 127 U. S. 649, 32 L. Ed. 303.

118. Reconveyance and redelivery of property on termination of receivership.—Farmers' Loan & Trust Co. v. Central R. Co. (C. C. 1883) 17 Fed. 758; Pioneer Gold Mining Co. v. Baker (C. C. 1884) 20 Fed. 4.

VI. ALLOWANCE AND PAYMENT OF CLAIMS

119. Liabilities of property or funds in hands of receiver.—Shepherd v. Pepper (1890) 10 S. Ct. 438, 133 U. S. 626, 33 L. Ed. 706; Gay Mfg. Co. v. Gittings (1892) 53 Fed. 45, 3 C. C. A. 422, 8 U. S. App. 275; Jones v. Central Trust Co. (1896) 73 Fed. 568, 19 C. C. A. 569; Standard Oil Co. of Kentucky v. Hawkins (1896) 74 Fed. 395, 20 C. C. A. 468, 33 L. R. A. 739, 46 U. S. App. 115; Denison & N. Ry. Co. v. Ranney-Alton Mercantile Co. (1900) 104 Fed. 595, 44 C. C. A. 65; Cox v. Terre Haute & I. R. Co. (1904) 133 Fed. 371, 66 C. C. A. 433 (affirming decree [C. C. 1903] 123 Fed. 439); Davis v. Duncan (C. C. 1884) 19 Fed. 477; Central Trust Co. of New York v. Cincinnati, J. & M. R. Co. (C. C. 1892) 58 Fed. 500; Pine Lake Iron Co. v. La Fayette Car Works (C. C. 1893) 53 Fed. 853; New York Security & Trust Co. v. Lombard Inv. Co. of Kansas (C. C. 1896) 73 Fed. 537; Stewart v. Wisconsin Cent. R. Co. (C. C. 1899) 95 Fed. 577; Pennsylvania Steel Co. v. New York City Ry. Co. (D. C. 1913) 202 Fed. 607, order affirmed (1913) 206 Fed. 663, 124 C. C. A. 463.

120. Secured claims.—De Visser v. Blackstone (C. C. 1868) Fed. Cas. No. 3,840; New York Security & Trust Co. v. Lombard Inv. Co. of Kansas (C. C. 1896) 73 Fed. 537; Doe v. Northwestern Coal & Transportation Co. (C. C. 1896) 78 Fed. 62; London & S. F. Bank v. Willamette Steam Mill, Lumbering & Manufacturing Co. (C. C. 1897) 80 Fed. 226; Lockport Felt Co. v. United Box Board & Paper Co. (C. C. 1911) 189 Fed. 767.

121. Presentation and filing of claims.—Texas & P. Ry. Co. v. Manton (1897) 17 S. Ct. 216, 164 U. S. 636, 41 L. Ed. 580 (affirming Texas & P. R. Co. v. Bloom [1894] 9 C. C. A. 300, 60 Fed. 979); U. S. Trust Co. v. Territory of New Mexico (1902) 22 Sup. Ct. 172, 183 U. S. 535, 46 L. Ed. 315 (affirming decree [1900] 62 P. 987, 10 N. M. 416); New England R. Co. v. Carnegie Steel Co. (1896) 75 Fed. 54, 21 C. C. A. 219; Southern Ry. Co. v. Carnegie Steel Co. (1896) 76 Fed. 492, 22 C. C. A. 289 (decree affirmed [1900] 20 S. Ct. 347, 176 U. S. 257, 44 L. Ed. 458); Southern Ry. Co. v. Adams (1896) 76 Fed. 504, 22 C. C. A. 300; Empire Distilling Co. v. McNulta (1897) 77 Fed. 700, 23 C. C. A. 415 (decree affirmed Dennehy v. McNulta [1898] 86 Fed. 825, 30 C. C. A. 422); Central Trust Co. of New York v. Denver & R. G. R. Co. (1899) 97 Fed. 239, 38 C. C. A. 143; Zacher v. Fidelity Trust & Safety Vault Co. (1901) 106 Fed. 593, 45 C. C. A. 480 (writ of certiorari denied [1901] 21 S. Ct. 924, 181 U. S. 621, 45 L. Ed. 1032); Western New York & P. R. Co. v. Penn Refining Co., Limited, of Oil City, Pa. (1905) 137 Fed. 343, 70 C. C. A. 23 (judgment affirmed Penn Refining Co. v. Western New York & P. R. Co. [1908] 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456); Chicago Great Western R. Co. v. Hulbert (1913) 205 Fed. 248, 125 C. C. A. 98; Thompson v. Scott (C. C. 1876) Fed. Cas. No. 13,975; Blair v. St. Louis, H. & K. R. Co. (C. C. 1884) 19 Fed. 861; Thomas v. Peoria & R. I. Ry. Co. (C. C. 1888) 36 Fed. 808 (decree modified and reversed Same v. Western Car Co. [1893] 13 S. Ct. 824, 149 U. S. 95, 37 L. Ed. 663); London & S. F. Bank v. Willamette Steam Mill, Lumbering & Manufacturing Co. (C. C. 1897) 80 Fed. 226; Park v. New York, L. E. & W. R. R. (C. C. 1905) 140 Fed. 799; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1908) 165 Fed. 458; In re Seaboard Air Line Ry. (C. C. 1909) 166 Fed. 376; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1910) 176 Fed. 469; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1911) 187 Fed. 287; Ely v. Van Kannel Revolving Door Co. (C. C. 1911) 184 Fed. 459; Smith v. Jones Lumber & Mercantile Co. (D. C. 1912) 200 Fed. 647.

122. Objections to claims and proceedings thereon.—Blair v. St. Louis, H. & K. R. Co. (C. C. 1884) 22 Fed. 471; Stanton v. Alabama & C. R. Co. (C. C. 1887) 31 Fed. 585; Central Trust Co. of New York v. Wabash, St.

L. & P. Ry. Co. (C. C. 1891) 46 Fed. 156; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1908) 161 Fed. 784; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1910) 180 Fed. 790; Manhattan Trust Co. v. Chicago Electric Traction Co. (C. C. 1910) 188 Fed. 1006; Investment Registry v. Chicago & M. Electric Ry. Co. (D. C. 1913) 204 Fed. 500.

123. Allowance or disallowance.—First Nat. Bank of Bethel v. National Pahquioque Bank (1871) 81 U. S. (14 Wall.) 383, 20 L. Ed. 840; Comer v. Felton (1894) 61 Fed. 731, 10 C. C. A. 28, 22 U. S. App. 313; Bosworth v. Terminal R. Ass'n of St. Louis (1899) 19 S. Ct. 625, 174 U. S. 182, 43 L. Ed. 941 (modifying judgment [1897] 80 Fed. 969, 26 C. C. A. 279); Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co. (1899) 19 S. Ct. 827, 174 U. S. 674, 43 L. Ed. 1130 (reversing decree [1898] 84 Fed. 539, 28 C. C. A. 202); Southern Ry. Co. v. Adams (1896) 76 Fed. 504, 22 C. C. A. 300; Morgan's L. & T. R. & S. S. Co. v. Moran (1898) 91 Fed. 22, 33 C. C. A. 313; Central Trust Co. of New York v. Denver & R. G. R. Co. (1899) 97 Fed. 239, 38 C. C. A. 143; Gibson v. Standard Automatic Gas Engine Co. (1905) 134 Fed. 799, 67 C. C. A. 445; Thomas v. Peoria & R. I. Ry. Co. (C. C. 1888) 36 Fed. 808; New York Security & Trust Co. v. Lombard Inv. Co. (C. C. 1896) 75 Fed. 172; Black v. Black (C. C. 1899) 93 Fed. 346; Stewart v. Wisconsin Cent. R. Co. (C. C. 1899) 95 Fed. 577; Bibber-White Co. v. White River Valley Electric R. Co. (C. C. 1909) 175 Fed. 470.

124. Priorities in general.—Woodworth v. Blair (1884) 5 S. Ct. 6. 112 U. S. 8, 28 L. Ed. 615; Union Trust Co. v. Illinois Midland Ry. Co. (1886) 6 S. Ct. 809, 117 U. S. 434, 29 L. Ed. 963; St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co. (1888) 8 S. Ct. 1011, 125 U. S. 658, 31 L. Ed. 832; Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co. (1890) 11 S. Ct. 61, 137 U. S. 171, 34 L. Ed. 625; Quincy, M. & P. R. Co. v. Humphreys (1892) 12 S. Ct. 787, 145 U. S. 82, 36 L. Ed. 632 (affirming Central Trust Co. v. Wabash, St. L. & P. Ry. Co. [C. C. 1888] 34 Fed. 259); United States Trust Co. v. Wabash W. Ry. Co. (1893) 14 S. Ct. 86, 150 U. S. 287, 37 L. Ed. 1085 (affirming Central Trust Co. v. Wabash, St. L. & P. Ry. Co. [C. C. 1889] 38 Fed. 63); Seney v. Wabash W. Ry. Co. (1893) 14 S. Ct. 94, 150 U. S. 310, 37 L. Ed. 1092; Southern Ry. Co. v. Carnegie Steel Co. (1900) 20 S. Ct. 347, 44 L. Ed. 458 (affirming decree [1896] 76 Fed. 492, 22 C. C. A. 289); Tod v. Kentucky Union Ry. Co. (1892) 52 Fed. 241, 3 C. C. A. 60, 18 L. R. A. 305; Petersburg Sav. & Ins. Co. v. Dellatorre (1895) 70 Fed. 643, 17 C. C. A. 310; Foreman v. Central Trust Co. of New York (1896) 71 Fed. 776, 18 C. C. A. 321; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (1897) 79 Fed. 227, 24 C. C. A. 511; Veatch v. American Loan & Trust Co. (1897) 79 Fed. 471, 25 C. C. A. 39 (motion for rehearing allowed [1897] 84 Fed. 274, 28 C. C. A. 384); Continental Trust Co. v. American Surety Co. (1897) 80 Fed. 180, 25 C. C. A. 364 (certiorari denied [1897] 18 S. Ct. 941, 168 U. S. 708, 42 L. Ed. 1211); Central Trust Co. of New York v. Chattanooga, R. & C. R. Co. (1899) 94 Fed. 275, 36 C. C. A. 241; Terre Haute & I. R. Co. v. Cox (1900) 102 Fed. 825, 42 C. C. A. 654 (writ of certiorari denied [1901] 21 S. Ct. 923, 181 U. S. 618, 45 L. Ed. 1030); Illinois Trust & Savings Bank v. Doud (1900) 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481 (affirming decree Illinois Trust & Savings Bank v. Ottumwa Electric Ry. [C. C. 1898] 89 Fed. 235); Gregg v. Mercantile Trust Co. (1901) 109 Fed. 220, 48 C. C. A. 318; Niles Tool Works Co. v. Louisville, N. A. & C. Ry. Co. (1902) 112 Fed. 561, 50 C. C. A. 390; Southern Building & Loan Ass'n v. Carey (1902) 114 Fed. 288, 52 C. C. A. 174; Bloomfield v. Roy (1903) 120 Fed. 502, 56 C. C. A. 652; Boyce v. Continental Wire Co. (1903) 125 Fed. 740, 60 C. C. A. 508; Michigan S. S. Co. v. Thornton (1905) 136 Fed. 134, 69 C. C. A. 132; Atchison, T. & S. F. Ry. Co. v. Osborn (1906) 148 Fed. 606, 78 C. C. A. 378 (writ of certiorari denied Osborn v. Atchison, T. & S. F. R. Co. [1907] 28 S. Ct. 255, 207 U. S. 589, 52 L. Ed. 353); Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co. (1907) 154 Fed. 629, 83 C. C. A. 403; Merchants' Loan & Trust Co. v. Chicago Rys. Co. (1907) 158 Fed. 923, 86 C. C. A. 87 (reversing order Guaranty Trust Co. of New York v. Chicago Union Traction Co. [C. C. 1907] 158 Fed. 913); Strain v. Palmer (1908) 159 Fed. 628, 86 C. C. A. 618; Elmira Mechanics' Soc. of New York v. Stanchfield (1908) 160 Fed. 811, 87 C. C. A. 585; Empire State Surety Co. v. Carroll County (1912) 194 Fed. 593, 114 C. C. A. 435; Cornell v. Nichols & Langworthy Mach. Co. (1912) 201 Fed. 320, 119 C. C. A. 558; Carbon Fuel Co. v. Chicago, C. & L. R. Co. (1912) 202 Fed. 172, 120 C. C. A. 460; Jessup v. Atlantic & G. R. Co. (C. C. 1879) Fed. Cas. No. 7,299; In re Dexterville Mfg. & Boom Co. v. Case (C. C. 1880) 4 Fed. 873; Calhoun v. St. Louis & S. E. Ry. Co. (C. C. 1880) 14 Fed. 9; Dow v. Memphis & L. R. Co. (C. C. 1884) 20 Fed. 260 (decree modified Memphis & L. R. Co. v. Dow [1887] 7 S. Ct. 482, 120 U. S. 287, 30 L. Ed. 595); Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1885) 23 Fed. 863; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1887) 30 Fed. 332; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1887) 32 Fed. 566; Easton v. Houston & T. C. Ry.

Co. (C. C. 1889) 38 Fed. 12; Farmers' Loan & Trust Co. v. Green Bay, W. & St. P. Ry. Co. (C. C. 1891) 45 Fed. 664; Union Loan & Trust Co. v. Southern California Motor Road Co. (C. C. 1892) 51 Fed. 106; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (C. C. 1892) 52 Fed. 678; Phinizy v. Augusta & K. R. Co. (C. C. 1894) 62 Fed. 771; Newgass v. Atlantic & D. Ry. Co. (C. C. 1894) 72 Fed. 712; Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co. (C. C. 1895) 69 Fed. 658; Farmers' Loan & Trust Co. v. Detroit, B. C. & A. R. Co. (C. C. 1895) 71 Fed. 29; Fidelity Insurance, Trust & Safe Deposit Co. v. Norfolk & W. R. Co. (C. C. 1896) 72 Fed. 704; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. 1896) 74 Fed. 431; Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C. 1897) 81 Fed. 60; Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C. 1897) 82 Fed. 360; Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1898) 91 Fed. 195, 202; American Surety Co. v. Worcester Cycle Mfg. Co. (C. C. 1902) 114 Fed. 658; State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. 1903) 120 Fed. 398; Central Trust Co. v. East Tennessee, V. & G. Ry. Co. (D. C. 1895) 70 Fed. 764; Isaac McLean Sons Co. v. William S. Butler & Co. (D. C. 1913) 208 Fed. 730.

125. Taxes.—City of Boston v. Beal (1893) 55 Fed. 26, 5 C. C. A. 26, 5 U. S. App. 253 (affirming [C. C. 1892] 51 Fed. 306); Comer v. Polk Co. (1897) 81 Fed. 921, 27 C. C. A. 1; U. S. Trust Co. v. Mercantile Trust Co. (1898) 88 Fed. 140, 31 C. C. A. 427 (affirming decree Mercantile Trust Co. v. Atlantic & P. R. Co. [C. C. 1897] 80 Fed. 18); First Nat. Bank of Houston v. Ewing (1900) 103 Fed. 168, 43 C. C. A. 150 (writ of certiorari denied [1900] 21 S. Ct. 919, 179 U. S. 686, 45 L. Ed. 386); Ex parte Chamberlain (C. C. 1893) 55 Fed. 704; Wheeler v. Walton & Whann Co. (C. C. 1895) 65 Fed. 720; Ledoux v. La Bee (C. C. 1897) 83 Fed. 761; Fidelity Insurance, Trust & Safe Deposit Co. v. Roanoke Iron Co. (C. C. 1898) 84 Fed. 744.

126. Expenses of receivership.—Louisville, E. & St. L. R. Co. v. Wilson (1891) 11 S. Ct. 405, 138 U. S. 501, 34 L. Ed. 1023; Palmer v. State of Texas (1909) 29 S. Ct. 230, 212 U. S. 118, 53 L. Ed. 435 (modifying judgment State of Texas v. Palmer [1907] 158 Fed. 705, 85 C. C. A. 603, 22 L. R. A. [N. S.] 316); Petersburg Sav. & Ins. Co. v. Dellatorre (1895) 70 Fed. 643, 17 C. C. A. 310; Mercantile Trust Co. v. Farmers' Loan & Trust Co. (1897) 81 Fed. 254, 26 C. C. A. 383 (affirming decree Same v. St. Louis & S. F. Ry. Co. [C. C. 1896] 71 Fed. 601; certiorari denied [1897] 18 S. Ct. 944, 168 U. S. 710, 42 L. Ed. 1213); Pennsylvania Co. for Insurance on Lives and for Granting Annuities v. Jacksonville, T. & K. W. Ry. Co. (1899) 93 Fed. 60, 35 C. C. A. 202; Elk Fork Oil & Gas Co. v. Foster (1900) 99 Fed. 495, 39 C. C. A. 615; Weed v. Central of Georgia Ry. Co. (C. C. A. 1900) 100 Fed. 162; Dickinson v. Saunders (1904) 129 Fed. 16, 63 C. C. A. 666; Guaranty Trust Co. of New York v. Chicago Rys. Co. (1911) 185 Fed. 411, 109 C. C. A. 18 (writ of certiorari denied [1911] 31 S. Ct. 720, 220 U. S. 616, 55 L. Ed. 611); Ætna Life Ins. Co. v. Leonard (1911) 186 Fed. 148, 108 C. C. A. 260; Linen Thread Co. v. A. Booth & Co. (1911) 192 Fed. 515, 113 C. C. A. 71; Bayliss v. Lafayette, M. & B. Ry. Co. (C. C. 1879) Fed. Cas. No. 1,141; Hiles v. Case (C. C. 1880) 14 Fed. 141; American Loan & Trust Co. v. South Atlantic & O. R. Co. (C. C. 1896) 81 Fed. 62; Sowles v. National Union Bank (C. C. 1897) 82 Fed. 139; Elk Fork Oil & Gas Co. v. Jennings (C. C. 1898) 90 Fed. 767; Fidelity Insurance, Trust & Safe Deposit Co. v. Norfolk & W. R. Co. (C. C. 1902) 114 Fed. 389 (judgment affirmed Hampton v. Same [1904] 127 Fed. 662, 62 C. C. A. 388); Bowker v. Haight & Freese Co. (C. C. 1908) 161 Fed. 655 (order modified [1909] 170 Fed. 67, 95 C. C. A. 343); Bibber-White Co. v. White River Valley Electric R. Co. (C. C. 1909) 175 Fed. 470; Barker v. Southern Building & Loan Ass'n (C. C. 1910) 181 Fed. 636; Burroughs v. Toxaway Co. (C. C. 1910) 182 Fed. 129 (decree reversed [1911] 185 Fed. 435, 107 C. C. A. 505); Ely v. Van Kannel Revolving Door Co. (C. C. 1911) 184 Fed. 459; Cornell v. Nichols & Langworthy Mach. Co. (C. C. 1911) 189 Fed. 556.

127. Expenses of continuing business by receiver.—Meyer v. Western Car Co. (1880) 102 U. S. 1, 26 L. Ed. 59; Miltenberger v. Logansport, C. & S. W. R. Co. (1882) 1 Sup. Ct. 140, 106 U. S. 286, 27 L. Ed. 117; Burnham v. Bowen (1884) 4 Sup. Ct. 675, 111 U. S. 776, 28 L. Ed. 596; Union Trust Co. v. Illinois Midland Ry. Co. (1886) 6 Sup. Ct. 809, 117 U. S. 434, 29 L. Ed. 963; Union Trust Co. v. Morrison (1888) 8 Sup. Ct. 1004, 125 U. S. 591, 31 L. Ed. 825; Kneeland v. American Loan & Trust Co. (1890) 10 Sup. Ct. 950, 136 U. S. 89, 34 L. Ed. 379; Quincy, M. & P. R. Co. v. Humphreys (1892) 12 Sup. Ct. 787, 145 U. S. 82, 36 L. Ed. 632 (affirmed Central Trust Co. v. Wabash, St. L. & P. Ry. Co. [C. C. 1888] 34 Fed. 259); Thomas v. Western Car Co. (1893) 13 Sup. Ct. 824, 149 U. S. 95, 37 L. Ed. 663 (affirming Thomas v. Peoria & R. I. Ry. Co. [C. C. 1888] 36 Fed. 808); Virginia & A. Coal Co. v. Central Railroad & Banking Co. of Georgia (1898) 18 Sup. Ct. 657, 170 U. S. 355, 42 L. Ed. 1068 (affirming decree Clark v. Central Railroad & Banking Co. of Georgia

[1895] 66 Fed. 803, 14 C. C. A. 112); St. Louis S. W. Ry. Co. v. Holbrook (1896) 73 Fed. 112, 19 C. C. A. 385; Jones v. Central Trust Co. (1896) 73 Fed. 568, 19 C. C. A. 569, 43 U. S. App. 224; Savannah, F. & W. Ry. Co. v. Jacksonville, T. & K. W. Ry. Co. (1897) 79 Fed. 35, 24 C. C. A. 437; Central Trust Co. v. East Tennessee, V. & G. R. Co. (1897) 80 Fed. 624, 26 C. C. A. 30; Mercantile Trust Co. v. Farmers' Loan & Trust Co. (1897) 81 Fed. 254, 26 C. C. A. 383 (affirming decree Same v. St. Louis & S. F. Ry. Co. [C. C. 1896] 71 Fed. 601, certiorari denied [1897] 18 Sup. Ct. 944, 168 U. S. 710, 42 L. Ed. 1213); Cross v. Evans (1898) 86 Fed. 1, 29 C. C. A. 523; Pennsylvania Co. for Insurance on Lives and for Granting Annuities v. Jacksonville, T. & K. W. Ry. Co. (1899) 93 Fed. 60, 35 C. C. A. 202; Reinhart v. Augusta Min. & Inv. Co. (1899) 94 Fed. 901, 36 C. C. A. 541; International Trust Co. v. T. B. Townsend Brick & Contracting Co. (1899) 95 Fed. 850, 37 C. C. A. 396; First Nat. Bank of Houston v. Ewing (1900) 103 Fed. 168, 43 C. C. A. 150 (writ of certiorari denied [1900] 21 Sup. Ct. 919, 179 U. S. 686, 45 L. Ed. 386); Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co. (1907) 154 Fed. 629, 83 C. C. A. 403; People's Sav. Bank & Trust Co. v. Rogers (1910) 177 Fed. 386, 100 C. C. A. 618; Missouri, K. & T. Ry. Co. v. City Trust Co. (1913) 209 Fed. 45, 126 C. C. A. 187; Davenport v. Alabama & C. R. Co. (C. C. 1875) Fed. Cas. No. 3,588; Western Division of Western N. C. R. Co. v. Drew (C. C. 1879) Fed. Cas. No. 17,434; Dow v. Memphis & L. R. Co. (C. C. 1884) 20 Fed. 260; Blair v. St. Louis, H. & K. R. Co. (C. C. 1885) 23 Fed. 523; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1885) 25 Fed. 69; Blair v. St. Louis, H. & K. R. Co. (C. C. 1885) 25 Fed. 232; U. S. Trust Co. v. New York, W. S. & B. R. Co. (C. C. 1885) 25 Fed. 800; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1887) 30 Fed. 332; Farmers' Loan & Trust Co. v. Vicksburg & M. R. Co. (C. C. 1888) 33 Fed. 778; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1888) 34 Fed. 259; Brown v. Toledo, P. & W. R. Co. (C. C. 1888) 35 Fed. 444; Thomas v. Peoria & R. I. R. Co. (C. C. 1888) 36 Fed. 808; Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co. (C. C. 1889) 42 Fed. 6; Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co. (C. C. 1891) 46 Fed. 26; Phinizy v. Augusta & K. R. Co. (C. C. 1894) 62 Fed. 771; Bound v. South Carolina Ry. Co. (C. C. 1894) 174 Fed. 729; Central Trust Co. of New York v. Charlotte, C. & A. R. Co. (C. C. 1895) 65 Fed. 264; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. 1895) 68 Fed. 36; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. 1895) 71 Fed. 245; New York Security & Trust Co. v. Louisville, E. & St. L. C. R. Co. (C. C. 1897) 79 Fed. 386; Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C. 1897) 82 Fed. 360; Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C. 1898) 88 Fed. 636; Fordyce v. Omaha, Kansas City & E. R. R. (C. C. 1906) 145 Fed. 544; Meyer Rubber Co. v. Georgetown & W. R. Co. (C. C. 1909) 174 Fed. 731 (decree affirmed Willcox v. Jones [1910] 177 Fed. 870, 101 C. C. A. 84); Finance Co. of Pennsylvania v. Trenton & N. B. Ry. Co. (C. C. 1909) 189 Fed. 282; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1911) 190 Fed. 609 (decree modified [1912] 198 Fed. 721. 117 C. C. A. 503); In re J. B. & J. M. Cornell Co. (D. C. 1912) 201 Fed. 381.

128. Priority of unsecured debts incurred before receivership to pre-existing liens, in general.—Union Trust Co. v. Morrison (1888) 8 Sup. Ct. 1004, 125 U. S. 591, 31 L. Ed. 825; Kneeland v. American Loan & Trust Co. (1890) 10 Sup. Ct. 950, 136 U. S. 89, 34 L. Ed. 379; Kneeland v. Bass Foundry & Machine Works (1891) 11 Sup. Ct. 857, 140 U. S. 592, 35 L. Ed. 543; Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co. (1899) 19 Sup. Ct. 827, 174 U. S. 674, 43 L. Ed. 1130 (reversing decree [1898] 84 Fed. 539, 28 C. C. A. 202); Southern Ry. Co. v. Carnegie Steel Co. (1900) 20 Sup. Ct. 347, 176 U. S. 257, 44 L. Ed. 458 (decree affirmed [1896] 76 Fed. 492, 22 C. C. A. 289); Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (1894) 62 Fed. 205, 10 C. C. A. 323; Farmers' Loan & Trust Co. v. Longworth (1897) 83 Fed. 336, 27 C. C. A. 541; Farmers' Loan & Trust Co. v. Nestelle (1897) 79 Fed. 748, 25 C. C. A. 194; Central Trust Co. of New York v. Hennen (1898) 90 Fed. 593, 33 C. C. A. 189; Atchison, T. & S. F. R. Co. v. Osborn (1906) 148 Fed. 606, 78 C. C. A. 378 (writ of certiorari denied Osborn v. Atchison, T. & S. F. R. Co. [1907] 28 Sup. Ct. 255, 207 U. S. 589, 52 L. Ed. 353); Denniston v. Chicago, A. & St. L. R. Co. (C. C. 1864) Fed. Cas. No. 3,800; King v. Ohio & M. Ry. Co. (C. C. 1878) Fed. Cas. No. 7,801; Skiddy v. Atlantic, M. & O. R. Co. (C. C. 1879) Fed. Cas. No. 12,922; Hiles v. Case (C. C. 1880) 14 Fed. 141; Farmers' Loan & Trust Co. v. Missouri, I. & N. Ry. Co. (C. C. 1884) 21 Fed. 264; Blair v. St. Louis, H. & K. R. Co. (C. C. 1885) 23 Fed. 521; Mercantile Trust Co. v. Pittsburgh & W. R. Co. (C. C. 1887) 29 Fed. 732; Bound v. South Carolina Ry. Co. (C. C. 1891) 47 Fed. 30; Williams v. Groat (C. C. 1896) 73 Fed. 59; Ames v. Union Pac. Ry. Co. (C. C. 1896) 74 Fed. 335; Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C. 1897) 79 Fed. 389; Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C. 1898)

88 Fed. 620; Lee v. Pennsylvania Traction Co. (C. C. 1900) 105 Fed. 405; Lockport Felt Co. v. United Box Board & Paper Co. (C. C. 1910) 182 Fed. 328.

129. Purpose for which debt was contracted.—Northern Pac. R. Co. v. Lamont (1895) 69 Fed. 23, 16 C. C. A. 364; Scott v. Farmers' Loan & Trust Co. (1895) 69 Fed. 17, 16 C. C. A. 358; Veatch v. American Loan & Trust Co. (1897) 79 Fed. 471, 25 C. C. A. 39 (motion for rehearing allowed [1897] 84 Fed. 274, 28 C. C. A. 384); Rhode Island Locomotive Works v. Continental Trust Co. (1900) 108 Fed. 5, 47 C. C. A. 147 (writ of certiorari denied [1903] 23 S. Ct. 847, 187 U. S. 649, 47 L. Ed. 348); Atchison, T. & S. F. R. Co. v. Osborn (1906) 148 Fed. 606, 78 C. C. A. 378 (writ of certiorari denied Osborn v. Atchison, T. & S. F. R. Co. [1907] 28 S. Ct. 255, 207 U. S. 589, 52 L. Ed. 353); Investment Co. v. Ohio & N. W. R. Co. (C. C. 1888) 36 Fed. 48; Bound v. South Carolina Ry. Co. (C. C. 1892) 51 Fed. 58; Farmers' Loan & Trust Co. v. American Waterworks Co. (C. C. 1895) 107 Fed. 23; Ames v. Union Pac. Ry. Co. (C. C. 1896) 74 Fed. 335; Front Street Cable Ry. Co. v. Drake (C. C. 1897) 84 Fed. 257; Fordyce v. Omaha, Kansas City & E. R. R. (C. C. 1906) 145 Fed. 544; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1908) 165 Fed. 457; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1909) 165 Fed. 485; Guaranty Trust Co. of New York v. Metropolitan St. Ry. Co. (C. C. 1910) 180 Fed. 637.

130. —— Salary of officers and counsel fees.—Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (C. C. 1892) 52 Fed. 526; National Bank of Augusta v. Carolina, K. & W. R. Co. (C. C. 1894) 63 Fed. 25; Seaboard Air Line Ry. v. Continental Trust Co. (C. C. 1908) 166 Fed. 597.

131. —— Labor, supplies, and materials furnished.—Louisville, E. & St. L. R. Co. v. Wilson (1891) 11 S. Ct. 405, 138 U. S. 501, 34 L. Ed. 1023; Kneeland v. Bass Foundry & Machine Works (1891) 11 S. Ct. 857, 140 U. S. 592, 35 L. Ed. 543; Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co. (1900) 20 S. Ct. 363, 176 U. S. 298, 44 L. Ed. 475 (affirming decree [1897] 79 Fed. 202, 24 C. C. A. 487); Southern Ry. Co. v. Carnegie Steel Co. (1896) 76 Fed. 492, 22 C. C. A. 289 (decree affirmed [1900] 20 S. Ct. 347, 176 U. S. 257, 44 L. Ed. 458); Same v. American Brake Co. (1896) 76 Fed. 502, 22 C. C. A. 298; Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co. (1897) 79 Fed. 202, 24 C. C. A. 487 (decree affirmed [1900] 20 S. Ct. 363, 176 U. S. 298, 44 L. Ed. 475); Southern Development Co. v. Farmers' Loan & Trust Co. (1897) 79 Fed. 212, 24 C. C. A. 497; Central of Georgia Ry. Co. v. Hitchcock (1899) 91 Fed. 209, 33 C. C. A. 453; Felton v. City of Cincinnati (1899) 95 Fed. 336, 37 C. C. A. 88; Appeals of Columbus, S. & H. R. Co. (1901) 109 Fed. 177, 48 C. C. A. 275; Dickinson v. Saunders (1904) 129 Fed. 16, 63 C. C. A. 666; Turner v. Indianapolis, B. & W. Ry. Co. (C. C. 1878) Fed. Cas. No. 14,258; Taylor v. Philadelphia & R. R. Co. (C. C. 1880) 7 Fed. 377; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (C. C. 1892) 49 Fed. 693; Kansas Loan & Trust Co. v. Electric Ry., Light & Power Co. of Sedalia, Mo. (C. C. 1901) 108 Fed. 702; City Trust Co. v. Sedalia Light & Traction Co. (D. C. 1912) 195 Fed. 845; Pennsylvania Steel Co. v. New York City Ry. Co. (D. C. 1913) 208 Fed. 168.

132. —— Nature and purpose of labor, supplies, and materials.—Southern Ry. Co. v. Carnegie Steel Co. (1900) 20 S. Ct. 347, 176 U. S. 257, 44 L. Ed. 458 (affirming decree [1896] 76 Fed. 492, 22 C. C. A. 289); Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co. (1900) 20 S. Ct. 363, 176 U. S. 298, 44 L. Ed. 475 (affirming decree [1897] 79 Fed. 202, 24 C. C. A. 487); First Nat. Bank of Houston v. Ewing (1900) 103 Fed. 168, 43 C. C. A. 150 (writ of certiorari denied [1900] 21 S. Ct. 919, 179 U. S. 686, 45 L. Ed. 386; Rhode Island Locomotive Works v. Continental Trust Co. (1900) 108 Fed. 5, 47 C. C. A. 147 (writ of certiorari denied [1903] 23 S. Ct. 847, 187 U. S. 649, 47 L. Ed. 348); Guaranty Trust Co. of New York v. Galveston City R. Co. (1901) 107 Fed. 311, 46 C. C. A. 305 (writ of certiorari denied Paul Shean Sanitary Plumbing & Manufacturing Co. v. Guaranty Trust Co. of New York [1901] 21 S. Ct. 925, 181 U. S. 622, 45 L. Ed. 1032); Southern Ry. Co. v. Chapman Jack Co. (1902) 117 Fed. 424, 54 C. C. A. 598; Southern Ry. Co. v. Ensign Mfg. Co. (1902) 117 Fed. 417, 54 C. C. A. 591; Cleveland, C. & S. Ry. Co. v. Knickerbocker Trust Co. (C. C. 1898) 86 Fed. 73; Stewart v. Wisconsin Cent. R. Co. (C. C. 1899) 95 Fed. 577.

133. —— Rentals and traffic and mileage balances.—Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (1894) 62 Fed. 205, 10 C. C. A. 323; Mather Humane Stock Transp. Co. v. Anderson (1896) 76 Fed. 164, 22 C. C. A. 109; Pullman's Palace Car Co. v. American Loan & Trust Co. (1897) 84 Fed. 18, 28 C. C. A. 263 (applying Thomas v. Western Car Co. [1893] 13 Sup. Ct. 824, 149 U. S. 95, 37 L. Ed. 663); Platt v. Philadelphia & R. R. Co. (1898) 84 Fed. 535, 28 C. C. A. 488; Louisville & N. R. Co. v. Central Trust Co. (1898) 87 Fed. 500, 31 C. C. A. 89; Gregg v. Mercantile Trust Co. (1901) 109 Fed. 220, 48 C. C. A. 318; Monsarrat v. Mercantile Trust Co. (1901) 109 Fed. 230, 48 C. C. A. 328; St. Louis Merchants' Bridge

Terminal Ry. Co. v. Continental Trust Co. (1901) 111 Fed. 669, 49 C. C. A. 529; Thomas v. Peoria & R. I. Ry. Co. (C. C. 1888) 36 Fed. 808 (decree modified and reversed Thomas v. Western Car Co. [1893] 13 S. Ct. 824, 149 U. S. 95, 37 L. Ed. 663); Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co. (C. C. 1891) 46 Fed. 26; New York, P. & O. R. Co. v. New York, L. E. & W. R. Co. (C. C. 1893) 58 Fed. 268; Western Union Tel. Co. v. Boston Safe-Deposit & Trust Co. (C. C. 1898) 87 Fed. 788; Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C. 1898) 90 Fed. 163; Manhattan Trust Co. v. Sioux City & N. R. Co. (C. C. 1900) 102 Fed. 710, decree reversed Same v. Trust Co. of North America (1901) 107 Fed. 328, 46 C. C. A. 322, writ of certiorari denied Trust Co. of North America v. Manhattan Trust Co. (1901) 21 S. Ct. 925, 181 U. S. 622, 45 L. Ed. 1032.

134. Diversion of income.—Union Trust Co. of New York v. Souther (1883) 2 S. Ct. 295, 107 U. S. 591, 27 L. Ed. 488; Same v. Fitzgerald (1882) 2 S. Ct. 298, 107 U. S. 595, 27 L. Ed. 490; Burnham v. Bowen (1884) 4 S. Ct. 675, 111 U. S. 776, 28 L. Ed. 596; Union Trust Co. v. Illinois Midland Ry. Co. (1886) 6 S. Ct. 809, 117 U. S. 434, 29 L. Ed. 963; St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co. (1888) 8 S. Ct. 1011, 125 U. S. 658, 31 L. Ed. 832; Texas & P. Ry. Co. v. Manton (1897) 17 S. Ct. 216, 164 U. S. 636, 41 L. Ed. 580; Same v. Bloom (1894) 60 Fed. 979, 9 C. C. A. 300 (following Railway Co. v. Johnson [1890] 13 S. W. 463, 76 Tex. 421, 18 Am. St. Rep. 60); Southern Ry. Co. v. Carnegie Steel Co. (1900) 20 S. Ct. 347, 176 U. S. 257, 44 L. Ed. 458 (affirming decree [1896] 76 Fed. 492, 22 C. C. A. 289); Clark v. Central Railroad & Banking Co. of Georgia (1895) 66 Fed. 803, 14 C. C. A. 112 (decree affirmed Virginia & A. Coal Co. v. Central R. & Banking Co. of Georgia [1898] 18 S. Ct. 657, 170 U. S. 355, 42 L. Ed. 1068); Southern Ry. Co. v. Carnegie Steel Co. (1896) 76 Fed. 492, 22 C. C. A. 289 (decree affirmed [1900] 20 S. Ct. 347, 176 U. S. 257, 44 L. Ed. 458); Southern Ry. Co. v. American Brake Co. (1896) 76 Fed. 502, 22 C. C. A. 298; Veatch v. American Loan & Trust Co. (1897) 79 Fed. 471, 25 C. C. A. 39 (motion for rehearing allowed [1897] 84 Fed. 274, 28 C. C. A. 384); Central Trust Co. v. East Tennessee, V. & G. R. Co. (1897) 80 Fed. 624, 26 C. C. A. 30; Ruhlender v. Chesapeake, O. & S. W. R. Co. (1898) 91 Fed. 5, 33 C. C. A. 299; Illinois Trust & Savings Bank v. Doud (1900) 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481 (affirming decree Illinois Trust & Savings Bank v. Ottumwa Electric Ry. [C. C. 1898] 89 Fed. 235); Gregg v. Mercantile Trust Co. (1901) 109 Fed. 220, 48 C. C. A. 318; Gregg v. Metropolitan Trust Co. (1903) 124 Fed. 721, 59 C. C. A. 637 (decree affirmed [1905] 25 S. Ct. 415, 197 U. S. 183, 49 L. Ed. 717); Williamson v. New Albany, etc., R. Co. (C. C. 1857) Fed. Cas. No. 17,753; Lafayette Co. v. Neely (C. C. 1884) 21 Fed. 738; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (C. C. 1891) 48 Fed. 188; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (C. C. 1892) 49 Fed. 693 (following [C. C. 1891] 48 Fed. 188); Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (C. C. 1892) 52 Fed. 526 (distinguishing Fosdick v. Schall [1878] 99 U. S. 235, 25 L. Ed. 339); Street v. Maryland Cent. Ry. Co. (C. C. 1893) 59 Fed. 25; Central Trust Co. of New York v. Chattanooga S. R. Co. (C. C. 1895) 69 Fed. 295; Fordyce v. Omaha, Kansas City & E. R. R. (C. C. 1906) 145 Fed. 544; Fordyce v. Kansas City & N. Connecting R. Co. (C. C. 1906) 145 Fed. 566.

135. Time of incurring debt.—Miltenberger v. Logansport, C. & S. W. R. Co. (1882) 1 S. Ct. 140, 106 U. S. 286, 27 L. Ed. 117; Southern Ry. Co. v. Carnegie Steel Co. (1900) 20 S. Ct. 347, 176 U. S. 257, 44 L. Ed. 458 (affirming decree [1896] 76 Fed. 492, 22 C. C. A. 289); Gregg v. Metropolitan Trust Co. (1905) 25 S. Ct. 415, 197 U. S. 183, 49 L. Ed. 717 (affirming decree [1903] 124 Fed. 721, 59 C. C. A. 637); Bound v. South Carolina Ry. Co. (1893) 58 Fed. 473, 7 C. C. A. 322; Cutting v. Tavares, O. & A. R. Co. (1894) 61 Fed. 150, 9 C. C. A. 401 (decree affirmed Florida Cent. & P. R. Co. v. Cutting [1895] 68 Fed. 586, 15 C. C. A. 597); Scott v. Farmers' Loan & Trust Co. (1895) 69 Fed. 17, 16 C. C. A. 358 (appeal dismissed Farmers' Loan & Trust Co. v. Scott [1896] 16 S. Ct. 1201, 163 U. S. 686, 41 L. Ed. 318); Northern Pac. R. Co. v. Lamont (1895) 69 Fed. 23, 16 C. C. A. 364; Scott v. Farmers' Loan & Trust Co. (1895) 69 Fed. 17, 16 C. C. A. 358; Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co. (1892) 53 Fed. 182; New England R. Co. v. Carnegie Steel Co. (1896) 75 Fed. 54, 21 C. C. A. 219; Southern Ry. Co. v. Tillett (1896) 76 Fed. 507, 22 C. C. A. 303; Morgan's Louisiana & T. R. & S. S. Co. v. Farmers' Loan & Trust Co. (1897) 79 Fed. 210, 24 C. C. A. 495; Central Trust Co. v. East Tennessee, V. & G. R. Co. (1897) 80 Fed. 624, 26 C. C. A. 30; Louisville & N. R. Co. v. Central Trust Co. (1898) 87 Fed. 500, 31 C. C. A. 89; Guaranty Trust Co. of New York v. Galveston City R. Co. (1901) 107 Fed. 311, 46 C. C. A. 305 (writ of certiorari denied Paul Shean Sanitary Plumbing & Manufacturing Co. v. Guaranty Trust Co. of New York [1901] 21 S. Ct. 925, 181 U. S. 622, 45 L. Ed. 1032); Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co. (1905) 137 Fed. 26,

71 C. C. A. 1 (reversing decrees State Trust Co. v. Kansas City, P. & G. R. Co. [C. C. 1904] 128 Fed. 129, and [C. C. 1904] 129 Fed. 455); Skiddy v. Atlantic, M. & O. R. Co. (C. C. 1879) Fed. Cas. No. 12,922; In re Kelly (C. C. 1881) 5 Fed. 846; Olyphant v. St. Louis Ore & Steel Co. (C. C. 1884) 22 Fed. 179; Blair v. St. Louis, H. & K. R. Co. (C. C. 1884) 22 Fed. 471; Blair v. St. Louis, H. & K. R. Co. (C. C. 1885) 23 Fed. 521; Blair v. St. Louis, H. & K. R. Co. (C. C. 1885) 23 Fed. 523; Blair v. St. Louis, H. & K. Ry. Co. (C. C. 1885) 23 Fed. 704; United States Trust Co. v. New York, W. S. & B. R. Co. (C. C. 1885) 25 Fed. 797; Olyphant v. St. Louis Ore & Steel Co. (C. C. 1886) 28 Fed. 729; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 28 Fed. 871; Central Trust Co. v. East Tennessee, V. & G. R. Co. (C. C. 1886) 30 Fed. 895; Farmers' Loan & Trust Co. v. Vicksburg & M. R. Co. (C. C. 1888) 33 Fed. 778; Thomas v. Peoria & R. I. Ry. Co. (C. C. 1888) 36 Fed. 808 (decree modified and reversed Same v. Western Car Co. [1893] 13 S. Ct. 824, 149 U. S. 95, 37 L. Ed. 663); American Loan & Trust Co. v. East & West R. Co. (C. C. 1891) 46 Fed. 101; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (C. C. 1892) 52 Fed. 678; Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co. (C. C. 1892) 53 Fed. 182; Wood v. New York & N. E. R. Co. (C. C. 1895) 70 Fed. 741; State v. Port Royal & A. Ry. Co. (C. C. 1898) 84 Fed. 67; Thomas v. Cincinnati, N. O. & T. P. Ry. Co. (C. C. 1898) 91 Fed. 195; State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. 1904) 129 Fed. 455, decree reversed Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co. (1905) 137 Fed. 26, 71 C. C. A. 1.

136. Charge against income or corpus.—Atkins v. Petersburg R. Co. (C. C. 1879) Fed. Cas. No. 604; Farmers' Loan & Trust Co. v. Cape Fear & Y. V. R. Co. (C. C. 1896) 73 Fed. 712; Ames v. Union Pac. Ry. Co. (C. C. 1896) 75 Fed. 49; Finance Co. of Pennsylvania v. Trenton & N. B. Ry. Co. (C. C. 1911) 189 Fed. 282.

137. Priorities of liens and incumbrances.—Sage v. Memphis & L. R. Co. (1888) 8 S. Ct. 887, 125 U. S. 361, 31 L. Ed. 694 (reversing decree [C. C. 1883] 18 Fed. 571); Jones v. Central Trust Co. (1896) 73 Fed. 568, 19 C. C. A. 569; Veatch v. American Loan & Trust Co. (1897) 84 Fed. 274, 28 C. C. A. 384 (allowing a motion for a rehearing [1897] 79 Fed. 471, 25 C. C. A. 39); Hampton v. Norfolk & W. Ry. Co. (1904) 127 Fed. 662, 62 C. C. A. 388 (affirming judgment Fidelity Insurance Trust & Safe Deposit Co. v. Norfolk & W. R. Co. [C. C. 1902] 114 Fed. 389); Jessup v. Atlantic & G. R. Co. (C. C. 1879) Fed. Cas. No. 7,299; Central Trust Co. v. Texas & St. L. Ry. Co. (C. C. 1885) 23 Fed. 673; Blair v. St. Louis, H. & K. R. Co. (C. C. 1885) 25 Fed. 2; Central Trust Co. v. Texas & St. L. Ry. Co. (C. C. 1886) 27 Fed. 178; Central Trust Co. v. East Tennessee, V. & G. R. Co. (C. C. 1886) 30 Fed. 895; Park v. New York, L. E. & W. R. Co. (C. C. 1894) 64 Fed. 190; Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. 1895) 68 Fed. 36; Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co. (C. C. 1895) 69 Fed. 658; Dillon v. Oregon S. L. & U. N. Ry. Co. (C. C. 1896) 75 Fed. 949; Ledoux v. La Bee (C. C. 1897) 83 Fed. 761; Central Trust Co. v. Chattanooga, R. & C. R. R. (C. C. 1898) 89 Fed. 388 (decree affirmed [1899] 94 Fed. 275, 36 C. C. A. 241; New York Security & Trust Co. v. Louisville, E. & St. L. Consol. R. Co. (C. C. 1900) 102 Fed. 382.

138. Payment.—U. S. Trust Co. v. Wabash W. Ry. Co. (1893) 14 S. Ct. 86, 150 U. S. 287, 37 L. Ed. 1085 (affirming decree Central Trust Co. v. Wabash, St. L. & P. Ry. Co. [C. C. 1889] 38 Fed. 63); Seney v. Wabash W. Ry. Co. (1893) 14 Sup. Ct. 94, 150 U. S. 310, 37 L. Ed. 1092; Illinois Steel Co. v. Putnam (1895) 68 Fed. 515, 15 C. C. A. 556; New England R. Co. v. Carnegie Steel Co. (1896) 75 Fed. 54, 21 C. C. A. 219; People's Sav. Bank & Trust Co. v. Rogers (1910) 177 Fed. 386, 100 C. C. A. 618; Tredegar Co. v. Seaboard Air Line Ry. (1910) 183 Fed. 289, 105 C. C. A. 501; Taylor v. Philadelphia & R. R. Co. (C. C. 1880) 7 Fed. 377; Jennings v. Philadelphia & R. R. Co. (C. C. 1884) 23 Fed. 569; Eells v. Johann (C. C. 1886) 27 Fed. 327; Clarke v. Central Railroad & Banking Co. of Georgia (C. C. 1893) 54 Fed. 556; Clyde v. Richmond & D. R. Co. (C. C. 1894) 63 Fed. 21; Cleveland, C. & S. R. Co. v. Knickerbocker Trust Co. (C. C. 1894) 64 Fed. 623; Farmers' Loan & Trust Co. v. Detroit, B. C. & A. R. Co. (C. C. 1895) 71 Fed. 29; Grand Trunk Ry. v. Central Vermont R. Co. (C. C. 1897) 78 Fed. 690; Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C. 1897) 79 Fed. 389; Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C. 1898) 88 Fed. 620; Grand Trunk Ry. o. v. Central Vermont R. Co. (C. C. 1899) 91 Fed. 561; Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C. 1899) 91 Fed. 569; Gutterson & Gould v. Lebanon Iron & Steel Co. (C. C. 1907) 151 Fed. 72; Whelan v. Enterprise Transp. Co. (C. C. 1908) 166 Fed. 138; Edwards v. Bay State Gas Co. of Delaware (C. C. 1909) 172 Fed. 971; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1910) 182 Fed. 155.

VII. ACTIONS

139. Capacity to sue and to be sued.—Great Western Min. & Mfg. Co. v.

Harris (1905) 25 S. Ct. 770, 198 U. S. 561, 49 L. Ed. 1163 (affirming decree [1903] 128 Fed. 321, 63 C. C. A. 51, and reversing judgment Great Western Min. & Mfg. Co. v. Harris' Estate [C. C. 1901] 111 Fed. 38); Fowler v. Osgood (1905) 141 Fed. 20, 72 C. C. A. 276, 4 L. R. A. (N. S.) 824; In re Seaboard Air Line Ry. Co. (C. C. 1909) 166 Fed. 376.

140. Right to sue receiver.—See, post, § 1048, and notes thereunder.

141. Remedies of receiver in receivership proceedings.—Central Railroad & Banking Co. v. Farmers' Loan & Trust Co. (C. C. 1893) 56 Fed. 357; Wood v. New York & N. E. R. Co. (C. C. 1894) 61 Fed. 236; Virginia, T. & C. Steel & Iron Co. v. Bristol Land Co. (C. C. 1898) 88 Fed. 134; Whelan v. Enterprise Transp. Co. (C. C. 1908) 164 Fed. 95.

142. Remedies against receiver in receivership proceedings. — Mercantile Trust Co. v. Pittsburgh & W. Ry. Co. (1902) 115 Fed. 475, 53 C. C. A. 207; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1885) 23 Fed. 863; Central Trust Co. v. Texas & St. L. Ry. Co. (C. C. 1885) 24 Fed. 151; New York Security & Trust Co. v. Lincoln St. Ry. Co. (C. C. 1896) 77 Fed. 525; Steele v. Walker (1897) 21 So. 942, 115 Ala. 485, 67 Am. St. Rep. 62; State v. New Orleans Water Supply Co. (1904) 36 So. 117, 111 La. 1049.

143. Rights of action by receiver.—Hale v. Allinson (1903) 23 Sup. Ct. 244, 248, 188 U. S. 56, 47 L. Ed. 380; Blair v. City of Chicago (1906) 26 S. Ct. 427, 201 U. S. 400, 50 L. Ed. 801 (reversing decree Govin v. City of Chicago [C. C. 1904] 132 Fed. 848); Phenix Ins. Co. v. Schultz (1897) 80 Fed. 337, 25 C. C. A. 453 (affirming Schultz v. Phenix Ins. Co. of Brooklyn [C. C. 1896] 77 Fed. 375); Oliver v. Clarke (1901) 106 Fed. 402, 45 C. C. A. 360; Lewis v. Clark (1904) 129 Fed. 570, 64 C. C. A. 138; Hubert v. City of New Orleans (1904) 130 Fed. 21, 64 C. C. A. 389; Fairview Fluor Spar & Lead Co. v. Ulrich (1911) 192 Fed. 894, 113 C. C. A. 372; Brigham v. Luddington (C. C. 1874) Fed. Cas. No. 1,874; Cuykendall v. Miles (C. C. 1882) 10 Fed. 342, 343; Hazard v. Durant (C. C. 1884) 19 Fed. 471; Dick v. Struthers (C. C. 1885) 25 Fed. 103; Dick v. Oil Well Supply Co., Id. 105; Wilkinson v. Culver (C. C. 1885) 25 Fed. 639; Harland v. Bankers' & Merchants' Tel. Co. (C. C. 1887) 32 Fed. 305; Harland v. Bankers' and Merchants' Tel. Co. (C. C. 1887) 33 Fed. 199; Lee v. Terbell (C. C. 1889) 40 Fed. 44; Chambers v. McDougal (C. C. 1890) 42 Fed. 694; Rogers v. Riley (C. C. 1896) 80 Fed. 759; Brown v. French (C. C. 1897) 80 Fed. 166; Wigton v. Bosler (C. C. 1900) 102 Fed. 70; Hale v. Tyler (C. C. 1900) 104 Fed. 757; Lewis v. American Naval Stores Co. (C. C. 1902) 119 Fed. 391; Edwards v. National Window Glass Jobbers' Ass'n (C. C. 1905) 139 Fed. 795; Covell v. Fowler (C. C. 1906) 144 Fed. 535; Irvine v. Putnam (C. C. 1911) 190 Fed. 321; Strout v. United Shoe Machinery Co. (D. C. 1912) 195 Fed. 313; Jones v. Moore (D. C. 1912) 198 Fed. 301.

144. Rights of action against receivers.—Jordan v. Wells (C. C. 1878) Fed. Cas. No. 7,525; Curran v. Craig (C. C. 1884) 22 Fed. 101; Mercantile Trust Co. v. Atlantic & P. R. Co. (C. C. 1895) 70 Fed. 518; Peoria, D. & E. Ry. Co. v. Central Trust Co. (C. C. 1897) 83 Fed. 910; Wyatt v. Ohio & M. R. Co. (1881) 10 Ill. App. (10 Bradw.) 289; Ohio & M. R. Co. v. Russell (1885) 115 Ill. 52, 3 N. E. 561; Ft. Wayne, M. & C. R. Co. v. Mellett (1883) 92 Ind. 535.

See post, § 1048, and notes thereunder.

145. Defenses against receivers.—Thompson v. Phenix Ins. Co. (1890) 10 Sup. Ct. 1019, 136 U. S. 287, 34 L. Ed. 408.

146. Defenses by receivers.—Davis v. Duncan (C. C. 1884) 19 Fed. 477; Hamor v. Taylor-Rice Engineering Co. (C. C. 1897) 84 Fed. 392; Bell v. New York Safety Steam Power Co. (C. C. 1910) 183 Fed. 274.

147. Set-off and counterclaim.—Grant v. Buckner (1898) 19 Sup. Ct. 163, 172 U. S. 232, 43 L. Ed. 430; Barber Asphalt Co. v. Forty-Second St., M. & St. N. Ave. Ry. Co. (C. C. 1909) 175 Fed. 154 (decree reversed Barber Asphalt Pav. Co. v. Forty-Second St., M. & St. N. Ave. R. Co. [1910] 180 Fed. 648, 103 C. C. A. 614); Butterworth v. Degnon Construction Co. (D. C. 1913) 208 Fed. 381.

148. Leave of court to sue receiver, necessity.—Hale v. Duncan (C. C. 1877) Fed. Cas. No. 5,914; Kennedy v. Indianapolis, C. & L. R. Co. (C. C. 1880) 3 Fed. 97, 98; Naumburg v. Hyatt (C. C. 1885) 24 Fed. 898; Carter v. Rodewald (1884) 108 Ill. 351; Ft. Wayne, M. & C. R. Co. v. Mellett (1884) 92 Ind. 535; St. Joseph & D. C. R. Co. v. Smith (1877) 19 Kan. 225; City of New Orleans v. New Orleans Sav. Inst. (1880) 32 La. Ann. 527; Kinney v. Crocker (1864) 18 Wis. 74.

See post, § 1048, and notes thereunder.

149. —— Proceedings, and grant or refusal of leave.—Harper v. Printing-Telegraph News Co. (C. C. 1904) 128 Fed. 979; Ohio & M. R. Co. v. Fitch (1863) 20 Ind. 498.

150. Jurisdiction.—Comer v. Felton (1894) 61 Fed. 731, 10 C. C. A. 28; Palmer v. Scriven (C. C. 1884) 21 Fed. 354; Farmers' Loan & Trust Co. v. Houston & T. C. Ry. Co. (C. C. 1890) 44 Fed. 115; Cutting v. Florida Ry. & Nav. Co. (C. C. 1891) 45 Fed. 444;

Failey v. Talbee (C. C. 1893) 55 Fed. 892; Clyde v. Richmond & D. R. Co. (C. C. 1893) 56 Fed. 539; French v. Union Pac. Ry. Co. (C. C. 1899) 92 Fed. 26; City of New Orleans v. New Orleans Sav. Inst. (1880) 32 La. Ann. 527; Baltimore & O. R. Co. v. Flaherty (1898) 39 A. 524, 1076, 87 Md. 102; Tobin v. Central Vermont Ry. Co. (1904) 70 N. E. 431, 185 Mass. 337; Alexandria, L. & H. R. Co. v. Burke (Va. 1872) 22 Grat. 254; In re Attorney General (1902) 88 N. W. 912, 89 N. W. 915, 113 Wis. 623; State v. Frost (1902) 89 N. W. 915, 113 Wis. 623.

151. Parties.—Pendleton v. Russell (1892) 12 S. Ct. 743, 144 U. S. 640, 36 L. Ed. 574; Northern Pac. R. Co. v. Heflin (1897) 83 Fed. 93, 27 C. C. A. 460; Gray v. Davis (C. C. 1871) Fed. Cas. No. 5,715; Central Trust Co. v. Wabash, St. L. & P. R. Co. (C. C. 1885) 23 Fed. 858; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 27 Fed. 175; Phelps v. Elliott (C. C. 1886) 29 Fed. 53 (appeal dismissed [1891] 11 Sup. Ct. 1026, 140 U. S. 694, 35 L. Ed. 745; Farmers' Loan & Trust Co. v. Texas Western Ry. Co. (C. C. 1887) 32 Fed. 359; Clyde v. Richmond & D. R. Co. (C. C. 1893) 55 Fed. 445; Gableman v. Peoria, D. & E. Ry. Co. (C. C. 1897) 82 Fed. 790; Grand Trunk Ry. Co. v. Central Vermont R. Co. (C. C. 1898) 88 Fed. 622.

152. Joinder or intervention of receiver in actions by others.—Missouri, K. & T. Trust Co. v. German Nat. Bank (1896) 77 Fed. 117, 23 C. C. A. 65; Northern Pac. R. Co. v. Heflin (1897) 83 Fed. 93, 27 C. C. A. 460; Davis v. Duncan (C. C. 1884) 19 Fed. 477; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 26 Fed. 12; In re Winbourn (C. C. 1886) 30 Fed. 167; In re Pope (1886) Id. 169; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1887) 30 Fed. 344; Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co. (C. C. 1891) 46 Fed. 156; Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (C. C. 1891) 46 Fed. 508; Chamberlain v. New York, L. E. & W. R. Co. (C. C. 1895) 71 Fed. 636; Perry v. Godbe (C. C. 1897) 82 Fed. 141; State v. Port Royal & A. Ry. Co. (C. C. 1898) 84 Fed. 67; In re Seaboard Air Line Ry. (C. C. 1909) 166 Fed. 376.

153. Process and appearance.—Eddy v. Lafayette (1892) 49 Fed. 807, 1 C. C. A. 441 (judgment affirmed [1896] 16 Sup. Ct. 1082, 163 U. S. 456, 41 L. Ed. 225); Baltimore & O. R. Co. v. Freeman (1901) 112 Fed. 237, 50 C. C. A. 211.

154. Attachment and garnishment.—First Nat. Bank of St. Johnsbury v. Portland & O. R. Co. (C. C. 1880) 2 Fed. 831; Central Trust Co. of New York v. Chattanooga, R. & C. R. Co. (C. C. 1895) 68 Fed. 685; Irwin v. McKechnie (1894) 58 Minn. 145, 59 N. W. 987, 26 L. R. A. 218, 49 Am. St. Rep. 495.

155. Pleading.—Atlantic Trust Co. v. Chapman (1906) 145 Fed. 820, 76 C. C. A. 396 (decree reversed [1908] 28 S. Ct. 406, 208 U. S. 360, 52 L. Ed. 528, 13 Ann. Cas. 1155); Lavis v. Consumers' Brewing Co. (C. C. 1901) 106 Fed. 435.

156. Trial.—Wolf v. Lovering (1908) 159 Fed. 91, 86 C. C. A. 281.

157. Appeal and error.—Gay v. Hudson River Electric Power Co. (C. C. 1911) 184 Fed. 631, order modified (1911) 186 Fed. 1022, 108 C. C. A. 663.

158. Costs.—Haehnlen v. Drayton (1911) 192 Fed. 300, 112 C. C. A. 558; Ely v. Van Kannel Revolving Door Co. (C. C. 1911) 184 Fed. 459.

159. Judgment.—Central Trust Co. v. St. Louis, A. & T. Ry. Co. (C. C. 1890) 41 Fed. 551.

160. Execution and enforcement of judgment.—Wheeler v. Walton & Whann Co. (C. C. 1895) 65 Fed. 720; Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C. 1897) 79 Fed. 389; Houston City St. Ry. Co. v. Storrie (Tex. 1898) 44 S. W. 693, reversed Storrie v. Houston City St. Ry. Co. (1898) 46 S. W. 796, 92 Tex. 129, 44 L. R. A. 716.

161. Appeal and error.—Bosworth v. Terminal R. Ass'n of St. Louis (1899) 19 S. Ct. 625, 174 U. S. 182, 43 L. Ed. 941, modifying judgment (1897) 80 Fed. 969, 26 C. C. A. 279; Shields v. Coleman (1895) 15 Sup. Ct. 579, 576, 157 U. S. 168, 39 L. Ed. 660.

162. Costs.—Olyphant v. St. Louis Ore & Steel Co. (C. C. 1884) 22 Fed. 179; Mercantile Trust Co. v. Missouri, K. & T. Ry. Co. (C. C. 1889) 41 Fed. 8; Central Trust Co. v. Valley Ry. Co. (C. C. 1893) 55 Fed. 903 (distinguishing Investment Co. of Philadelphia v. Ohio & N. W. R. Co. [C. C. 1891] 46 Fed. 696, and Easton v. Houston & T. C. R. Co. [C. C. 1889] 40 Fed. 189); Pine Lake Iron Co. v. La Fayette Car Works (C. C. 1893) 53 Fed. 853.

VIII. ACCOUNTING AND COMPENSATION

163. Duty to account.—Conkling v. Butler (C. C. 1865) Fed. Cas. No. 3,100; Cowdrey v. Railroad Co. (C. C. 1870) Fed. Cas. No. 3,293; Lafayette Co. v. Neely (C. C. 1884) 21 Fed. 738; Hitner v. Diamond State Steel Co. (D. C. 1913) 207 Fed. 616.

164. Charges.—In re Allin (D. C. 1881) 8 Fed. 753.

165. Credits in general.—Morehead v. Striker (C. C. 1904) 132 Fed. 943.

166. Compensation for services.—Cake v. Mohun (1896) 17 S. Ct. 100, 164 U. S. 311, 41 L. Ed. 447; Dillingham v.

Moran (1897) 81 Fed. 759, 26 C. C. A. 596; Nowell v. International Trust Co. (1909) 169 Fed. 497, 94 C. C. A. 589 (writ of certiorari denied [1910] 30 S. Ct. 694, 217 U. S. 603, 54 L. Ed. 899); Burroughs v. Toxaway Co. (1911) 185 Fed. 435, 107 C. C. A. 505 (reversing decree [C. C. 1910] 182 Fed. 129); Cowdrey v. Railroad Co. (C. C. 1870) Fed. Cas. No. 3,293; In re Hinckley (C. C. 1880) 3 Fed. 556.

167. —— Amount.—Williams v. Morgan (1884) 4 S. Ct. 638, 111 U. S. 684, 28 L. Ed. 559; Cake v. Mohun (1896) 17 S. Ct. 100, 164 U. S. 311, 41 L. Ed. 447; Boston Safe Deposit & Trust Co. v. Chamberlain (1895) 66 Fed. 847, 14 C. C. A. 363; Montgomery v. Petersburg Sav. & Ins. Co. (1895) 70 Fed. 746, 17 C. C. A. 360; Dillingham v. Moran (1897) 81 Fed. 759, 26 C. C. A. 596; Dillingham v. Moran (1900) 101 Fed. 933, 42 C. C. A. 91; Braman v. Farmers' Loan & Trust Co. (1902) 114 Fed. 18, 51 C. C. A. 644; Drey v. Watson (1905) 138 Fed. 792, 71 C. C. A. 158; Farmers' Loan & Trust Co. v. Central R. of Iowa (C. C. 1881) 8 Fed. 60; Walker v. Quincy, M. & P. Ry. Co. (C. C. 1886) 28 Fed. 734; Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1887) 32 Fed. 187; Easton v. Houston & T. C. Ry. Co. (C. C. 1889) 40 Fed. 189; Central Trust Co. of New York v. Cincinnati, J. & M. Ry. Co. (C. C. 1892) 58 Fed. 500; Maxwell v. Wilmington Dental Mfg. Co. (C. C. 1897) 82 Fed. 214; Calhoun v. Dragon Motor Co. (C. C. 1909) 166 Fed. 980.

168, 169. Allowance and payment or recovery of compensation and expenses.—Merchants' Bank v. Crysler (1895) 67 Fed. 388, 14 C. C. A. 444; Ruggles v. Patton (1906) 143 Fed. 312, 74 C. C. A. 450; Maxwell v. Wilmington Dental Mfg. Co. (C. C. 1897) 82 Fed. 214.

170. Liabilities of parties, property, or funds for compensation and expenses.—Atlantic Trust Co. v. Chapman (1908) 28 Sup. Ct. 406, 208 U. S. 360, 52 L. Ed. 528, 13 Ann. Cas. 1155 (reversing decree [1906] 145 Fed. 820, 76 C. C. A. 396); Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Jacksonville, T. & K. W. Ry. Co. (1895) 66 Fed. 421, 13 C. C. A. 550; Couper v. Shirley (1896) 75 Fed. 168, 21 C. C. A. 288; Elk Fork Oil & Gas Co. v. Foster (1900) 99 Fed. 495, 39 C. C. A. 615; Beach v. Macon Grocery Co. (1903) 125 Fed. 513, 60 C. C. A. 557; Strain v. Palmer (1908) 159 Fed. 628, 86 C. C. A. 618; Nowell v. International Trust Co. (1909) 169 Fed. 497, 94 C. C. A. 589 (writ of certiorari denied [1910] 30 Sup. Ct. 694, 217 U. S. 603, 54 L. Ed. 899); Burroughs v. Toxaway Co. (1911) 185 Fed. 435, 107 C. C. A. 505 (reversing decree [C. C. 1910] 182 Fed. 129); Spencer v. Taylor Creek Ditch Co. (1912) 194 Fed. 635, 114 C. C. A. 407; Cornell v. Nichols & Langworthy Mach. Co. (1912) 201 Fed. 320, 119 C. C. A. 558; Ferguson v. Dent (C. C. 1883) 15 Fed. 771; Brown v. Toledo, P. & W. R. Co. (C. C. 1888) 35 Fed. 444; Bound v. South Carolina Ry. Co. (C. C. 1890) 43 Fed. 404; Girard Trust Co. v. McKinley-Lanning Loan & Trust Co. (C. C. 1906) 143 Fed. 355; Doddridge County Oil & Gas Co. v. Smith (C. C. 1909) 173 Fed. 386; Cornell v. Nichols & Langworthy Mach. Co. (C. C. 1911) 189 Fed. 556.

171. Forms and requisites of account.—Lafayette Co. v. Neely (C. C. 1884) 21 Fed. 738; Pennsylvania Steel Co. v. New York City Ry. Co. (C. C. 1908) 165 Fed. 463; Pusey & Jones v. Pennsylvania Paper Mills (C. C. 1909) 173 Fed. 629.

172. Objections to account and proceedings thereon.—Williams v. Morgan (1884) 4 Sup. Ct. 638, 111 U. S. 684, 28 L. Ed. 559; People's Sav. Bank & Trust Co. v. Rogers (1910) 177 Fed. 386, 100 C. C. A. 618; Gutterson & Gould v. Lebanon Iron & Steel Co. (C. C. 1907) 151 Fed. 72.

173. Settlement of account.—Hovey v. McDonald (1883) 3 Sup. Ct. 136, 109 U. S. 150, 27 L. Ed. 888; Kirker v. Owings (1899) 98 Fed. 499, 39 C. C. A. 132.

174. Discharge of receiver.—Texas & P. Ry. Co. v. Manton (1897) 17 Sup. Ct. 216, 164 U. S. 636, 41 L. Ed. 580 (affirming judgment Texas & P. R. Co. v. Bloom [1894] 60 Fed. 979, 9 C. C. A. 300); Howard v. La Crosse & M. R. Co. (C. C. 1864) Fed. Cas. No. 6,760; Massachusetts Mut. Life Ins. Co. v. Chicago & A. R. Co. (C. C. 1882) 13 Fed. 857.

IX. FOREIGN AND ANCILLARY RECEIVERSHIPS

175. Foreign appointment.—Olney v. Tanner (D. C. 1882) 10 Fed. 101.

176. Ancillary appointment.—Taylor v. Life Ass'n of America (C. C. 1880) 3 Fed. 465; Williams v. Hintermeister (C. C. 1886) 26 Fed. 889; Platt v. Philadelphia & R. R. Co. (C. C. 1893) 54 Fed. 569 (affirming decree Coe v. East & W. R. Co. of Alabama [C. C. 1892] 52 Fed. 531); Cohen v. Gold Creek, Nev., Min. Co. (C. C. 1899) 95 Fed. 580; Shinney v. North American Savings, Loan & Building Co. (C. C. 1899) 97 Fed. 9; Greene v. Star Cash & Package Car Co. (C. C. 1900) 99 Fed. 656.

177. Title to and possession of property.—Smith v. Taggart (1898) 87 Fed. 94, 30 C. C. A. 563; Atkins v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 20 Fed. 161.

178. Management and disposition of property.—Kirker v. Owings (1899) 98 Fed. 499, 39 C. C. A. 132; Union Trust Co. v. Atchison, T. & S. F. R. Co. (C. C. 1898) 87 Fed. 530.

179. Rights and remedies of creditors.—Sands v. E. S. Greeley & Co.

(1898) 88 Fed. 130, 31 C. C. A. 424; Pennsylvania Steel Co. v. New York City Ry. Co. (1913) 206 Fed. 663, 124 C. C. A. 463 (affirming order [D. C. 1913] 202 Fed. 607); Mercantile Trust Co. v. Kanawha & O. Ry. Co. (C. C. 1892) 50 Fed. 874.

180. Actions by and against foreign receivers.—Reynolds v. Stockton (1891) 11 S. Ct. 773, 140 U. S. 254, 35 L. Ed. 464 (affirming [N. J. Err. & App. 1887] 10 A. 385); Coal & Iron Ry. Co. v. Reherd (1913) 204 Fed. 859, 123 C. C. A. 155; Holmes v. Sherwood (C. C. 1881) 16 Fed. 725; Wheeling Bridge & Terminal Ry. Co. v. Cochran (C. C. 1898) 85 Fed. 500; Sullivan v. Sheehan (C. C. 1898) 89 Fed. 247; Johnson v. Southern Building & Loan Ass'n (C. C. 1899) 99 Fed. 646.

181. Accounting.—Fletcher v. Harney Peak Tin Min. Co. (C. C. 1897) 84 Fed. 555.

X. LIABILITIES ON BONDS OR UNDERTAKINGS

182. Nature and extent.—Baltimore Building & Loan Ass'n v. Alderson (1900) 99 Fed. 489, 39 C. C. A. 609.

183. Breach or fulfillment of condition.—U. S. v. Donohue (D. C. 1875) 2 MacArthur, 214.

184. Remedies in receivership proceedings.—Kirker v. Owings (1899) 98 Fed. 499, 39 C. C. A. 132.

185. Actions.—U. S. v. Boyd (1847) 46 U. S. (5 How.) 29, 12 L. Ed. 36.

CITED WITHOUT DEFINITE APPLICATION

U. S. v. Harris (1900) 20 Sup. Ct. 609, 610, 177 U. S. 305, 44 L. Ed. 780; Peirce v. Van Dusen (1897) 78 Fed. 693, 700, 24 C. C. A. 280, 69 L. R. A. 705, writ of error dismissed 19 Sup. Ct. 879, 43 L. Ed. 1184.

§ 1048. (Jud. Code, § 66.) Suits against receiver.

Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.

Act March 3, 1887, c. 373, § 3, 24 Stat. 554. Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 436. Act March 3, 1911, c. 231, § 66, 36 Stat. 1104.

Notes of Decisions

1. Construction of statute in general.
2. United States courts within statute.
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5. Rights of action against receivers.
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7. —— Proceedings and grant or refusal of leave.
8. District in which suit in federal court may be brought.
9. Jurisdiction of state courts.
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11. Removal of causes from state to federal courts —— Right of removal.
12. —— Suits involving federal questions.
13. —— Ancillary suits.
14. Orders of federal court not affecting right to sue receiver without leave.
15. Ejectment.
16. Injunction.
17. Intervention.
18. Garnishment.
19. Pleadings.
20. Defenses.
21. Trial.
22. Judgment.
23. —— Conclusiveness.
24. —— Operation and enforcement.
25. —— Review.

1. Construction of statute in general.—This section does not restrict the power of the circuit court to preserve property in the custody of the law from external attack. Ex parte Tyler (1893) 13 S. Ct. 785, 149 U. S. 164, 37 L. Ed. 689; Ex parte Riser (1893) 13 S. Ct. 793, 149 U. S. 191, 37 L. Ed. 698, affirming order In re Friedrich (C. C. 1892) 51 Fed. 747. The last clause in the section confers no other power on the court than to protect the possession of the receiver and provide for the payment of the judgment according to priority over other claims against the property. Trust Co. of America v. Norfolk & S. Ry. Co. (C. C. 1911) 183 Fed. 803, affirmed (1911) 190 Fed. 737, 111 C. C. A. 465. It does not prevent a suit in a state court against the receiver and the company, after the receivership has been dissolved, even though the federal court retains jurisdiction to require payment of all liabilities assumed by the receiver. Texas & P. R. Co. v. Johnson (1894) 14 Sup. Ct. 250, 255, 151 U. S. 81, 38 L. Ed. 81. It is merely declaratory of the previously existing law. Central Trust Co. v. St. Louis, A. & T. Ry. Co. (C. C. 1890) 41 Fed. 551, 555.

This section was applicable to existing causes of action and to pending receiverships. Texas & P. Ry. Co. v. Cox (1892) 12 S. Ct. 905, 145 U. S. 593, 36 L. Ed. 829. It applies to a receiver in respect of an act of his predecessor in the office. McNulta v. Lochridge (1891) 12 S. Ct. 11, 141 U.

S. 327, 35 L. Ed. 796. It authorizes a suit in any court of competent jurisdiction, state or federal, and the appointing court cannot enjoin it. Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co. (C. C. 1894) 59 Fed. 523, following Texas & P. Ry. Co. v. Johnson (1894) 14 S. Ct. 250, 151 U. S. 81, 38 L. Ed. 81. It was intended to place railroad receivers on the same plane with the railroad companies, both as respects their liability to be sued for acts done while operating railroads, and as respects the mode of service of process. Eddy v. Lafayette (1892) 49 Fed. 807, 1 C. C. A. 441 (following Central Trust Co. v. St. Louis, A. & T. Ry. Co. [C. C. 1889] 40 Fed. 426, and judgment affirmed [1896] 16 S. Ct. 1082, 163 U. S. 456, 41 L. Ed. 225); Lamb v. Whitman (Ga. App. 1916) 87 S. E. 1095. It applies to receivers in bankruptcy, but does not authorize a suit without leave against such a receiver unless he is carrying on the business of the bankrupt, or in respect to his acts relating merely to the care and preservation of the property of the estate. In re Kalb & Berger Mfg. Co. (1908) 165 Fed. 895, 91 C. C. A. 573; In re Roberts (1909) 169 Fed. 1022, 94 C. C. A. 668. See, also, In re Smith (D. C. 1903) 121 Fed. 1014.

The permission to sue receivers of federal courts for their acts in carrying on the business connected with the property, without leave of the appointing court, gives the right to sue in any court of competent jurisdiction. Louisville Southern Ry. Co. v. Tucker's Adm'r (1899) 49 S. W. 314, 105 Ky. 492, 20 Ky. Law Rep. 1303; Dillingham v. Anthony (1889) 73 Tex. 47, 11 S. W. 139, 15 Am. St. Rep. 753, 3 L. R. A. 634. And see Morse v. Tackaberry (Tex. Civ. App. 1911) 134 S. W. 273, holding that Sayles' Ann. Civ. St. Tex. 1897, art. 1483, authorizing suit against receivers without leave of court, only affects receiverships pending in the state court, and does not affect the common-law rule to the contrary applying to receivers appointed by a federal court.

One who neglects to institute a suit against the receiver of a railroad company under this section prior to the termination of the receivership cannot thereafter bring suit in the state court against the purchaser, who agreed to pay the debt contracted by the receiver. Jesup v. Wabash, St. L. & P. Ry. Co. (C. C. 1890) 44 Fed. 663, 665.

A receiver appointed by a federal court and in possession of property may be subjected to suits in the courts of the state without leave obtained in the first instance from the federal court, but the administration of the property in the hands of the receiver will remain with the federal court. Byers v. McAuley (1893) 13 Sup. Ct. 906, 910, 149 U. S. 608, 37 L. Ed. 867.

2. United States courts within statute.—This section applies to a receiver appointed by a territorial court for a corporation created by act of congress; as, in making such appointment, the court acts as a federal, and not as a local, court. Wheeler v. Smith (C. C. 1897) 81 Fed. 319.

3. Capacity to sue receivers in general.—Where an action for wrongful death of a servant accrued against a railroad company prior to the appointment of receivers for it, an action against the railroad company after the appointment of the receivers could be brought in any court of competent jurisdiction, without leave to sue the receivers. In re Seaboard Air Line Ry. (C. C. 1909) 166 Fed. 376.

4. Set-off and counterclaim.—A counterclaim or set-off comes within the spirit of this section, and gives a defendant sued by a receiver in a state court the right to plead a set-off against him in that court. Grant v. Buckner (1898) 19 Sup. Ct. 163, 165, 172 U. S. 232, 43 L. Ed. 430.

5. Rights of action against receivers.—A receiver is liable to suit in a court other than that by which he was appointed, even in a state court, for disregard of official duty which causes injury to the parties suing. Erb v. Morasch (1900) 20 S. Ct. 819, 177 U. S. 584, 44 L. Ed. 897, affirming judgment (1899) 56 P. 133, 60 Kan. 251.

Where receivers of a railroad company had been finally discharged and released from all liability on their bonds more than four years before the bringing of an action to enforce an interstate commerce reparation order for an alleged participation by the receivers in an illegal freight rate, and there was no evidence of any vacation of the orders of discharge, or any application in that behalf, the receivers were not liable as such. Western New York & P. R. Co. v. Penn Refining Co., Limited, of Oil City, Pa. (1905) 137 Fed. 343, 70 C. C. A. 23, judgment affirmed Penn Refining Co. v. Western New York & P. R. Co. (1908) 28 S. Ct. 268, 208 U. S. 208, 52 L. Ed. 456.

A receiver is not personally liable for injuries arising through negligent operation of the property not due to his personal negligence, but an action against him for such injuries is in law one against the receivership, and cannot be maintained after the receivership has been closed and the receiver discharged. Gray v. Grand Trunk Western Ry. Co. (1907) 156 Fed. 736, 84 C. C. A. 392, writ of certiorari denied Grand Trunk Western R. Co. v. Gray (1907) 28 S. Ct. 260, 207 U. S. 594, 52 L. Ed. 356.

And see Nash v. Ingalls (C. C. 1897) 79 Fed. 510, holding that an independent suit in equity will not lie against a

railroad receiver to recover a simple contract debt owing by him.

6. Leave of court to sue receiver.— Prior to this section a receiver appointed by a federal court could not be sued in a state for any purpose without the consent of the appointing authority. Central Trust Co. of New York v. Wheeling & L. E. R. Co. (C. C. 1911) 189 Fed. 82. And see In re Smith (D. C. 1903) 121 Fed. 1014.

Under Act Aug. 13, 1888, claimants against receivers of a railroad company appointed by the federal court may bring suit in the state court without consent of the appointing court, and it cannot, sitting as a court of equity, deprive claimants of that right. Kansas City, M. & O. Ry. Co. of Texas v. Latham (Tex. Civ. App. 1916) 182 S. W. 717. And see Central Trust Co. v. Wabash, St. L. & P. R. Co. (C. C. 1885) 23 Fed. 858, holding that the court will not permit a receiver to be sued outside of its jurisdiction. And see Farmers' Loan & Trust Co. v. Central R. R. of Iowa (C. C. 1880) 7 Fed. 537, holding that no action can be maintained against the receiver of a railroad after such officer has been discharged and the property transferred to a purchaser, under an order of the court, in foreclosure proceedings. And see Kennedy v. Indianapolis, C. & L. R. Co. (C. C. 1880) 3 Fed. 97, holding that property in the hands of a receiver is in custodia legis. His possession is the possession of the court appointing him. No suit can be brought against him to disturb his possession, or to charge him with liability for an act done in the performance of his duties as such receiver, without the consent of such court. Any one instituting such a suit without leave may be enjoined or attached for contempt. The proper proceeding is to apply to the court appointing the receiver by petition, setting forth therein the grounds of complaint. Thereupon the court will direct a trial by a jury, reference to a master, or such other mode or proceeding as in its discretion it may deem best. A person who desires to make a receiver of a federal court a party to an original bill or action at law relating to property in the custody of the receiver should first obtain leave of the court appointing him, unless the case is clearly one falling within this section. Minot v. Mastin (1899) 95 Fed. 734, 37 C. C. A. 234. Persons injured by the operation of a street railway by a receiver appointed in mortgage foreclosure proceedings in a federal court were not bound to apply for an allowance of damages in such proceedings, but could reduce their claim to judgment in a state or other court having jurisdiction. Nashville Ry. & Light Co. v. Bunn (1909) 168 Fed. 862, 94 C. C. A. 274. One having a claim against receivers of a railroad company appointed by a federal court need not apply to such court for leave to sue the receivers nor for a designation of the tribunal for the establishment of his claim against them. Chicago Great Western R. Co. v. Hulbert (1913) 205 Fed. 248, 125 C. C. A. 98. A receiver may be sued for a marine tort in another district, without leave of the court appointing him. Jones v. The St. Nicholas (D. C. 1891) 49 Fed. 671. Receivers appointed by federal courts can only be sued in such courts with reference to acts and transactions concerning the management of property in their control. Hayes v. Columbus, L. & M. R. Co. (C. C. 1895) 67 Fed. 630, 631.

The receiver of a federal court in a railroad foreclosure suit cannot be sued without its leave in a state court on a claim against the mortgagor, which arose prior to the receivership; and where recourse against the mortgaged property has been cut off by the sale and proceedings in foreclosure, after giving all claimants an opportunity to be heard, and the receiver has disposed of the funds in his hands by order of the court, it will enjoin the prosecution of such an action. Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (C. C. 1902) 118 Fed. 204. Where a receiver was appointed to operate a railroad, he was only subject to suit without leave under this section concerning matters having their origin in his operation of the railroad, and the act did not authorize the garnishment of funds in his hands alleged to belong to a debtor in the receiver's employ, especially where at the time the garnishment was instituted the amount due the debtor had not been adjudicated and ordered paid so that the receiver could be regarded as holding it merely as the debtor's agent or custodian. Central Trust Co. of New York v. Wheeling & L. E. R. Co. (C. C. 1911) 189 Fed. 82.

This section does not authorize the bringing of a suit, without leave, against a receiver, to establish a right to the property placed in his custody, adverse to his right thereto. J. I. Case Plow Works v. Finks (1897) 81 Fed. 529, 26 C. C. A. 46. Nor a suit to condemn a crossing over the right of way of a railroad company in the hands of a receiver appointed by a federal court. Since refusal of a receiver to agree on a crossing at a point and in a manner insisted upon by the petitioner, which the receiver considered as detrimental to the property in his custody as receiver, did not constitute "an act or transaction" by the receiver. Buckhannon & N. R. Co. v. Davis (1905) 135 Fed. 707, 68 C. C. A. 345.

This section does not authorize a suit by a stockholder of a corporation against its receiver and others, without leave of court, on a cause of action which accrued before the receiver was appointed, and on which the receiver has refused to sue. Swope v. Villard

(C. C. 1894) 61 Fed. 417. An action in a state court for injuries to a shipment of horses may not be brought without leave against a receiver of a railroad appointed in a federal court, where the claim arose two or three months before the receiver was appointed, as such claim is not within this section. Andrews v. King (Tex.' Civ. App. 1914) 170 S. W. 862.

A receiver for a road formerly constituting part of a larger system is not liable to be sued in another court, without permission of the appointing court, for alleged wrongful acts committed in the operation of the road by the receivers of the whole system, whom he has displaced; and such a suit will be enjoined. Jones v. Schlapback (C. C. 1896) 81 Fed. 274.

An independent suit to foreclose a mortgage on property in the hands of receivers cannot be maintained, except by leave of court obtained in that cause. Such leave will not be denied arbitrarily, but only for legal unfitness for the purposes when and where sought. American Loan & Trust Co. v. Central Vermont R. Co. (C. C. 1898) 84 Fed. 917.

An action in a state court against a receiver appointed by a federal court, the purpose of which is to recover land in the possession of such receiver in a suit to foreclose liens thereon, and damages for its detention cannot be maintained without leave of the federal court, but may be enjoined by such court as an unwarranted interference with its possession of the property. Love v. Louisville & E. R. Co. (C. C. 1910) 178 Fed. 507.

Where a receiver had been appointed for a corporation mortgagor, the mortgagee could not take any step towards foreclosing the mortgage after default while the receivership continued, without obtaining permission of the court in which the receivership proceedings are pending. Slade v. Massachusetts Coal & Power Co. (C. C. 1911) 188 Fed. 369.

An action can be maintained in the state courts against a receiver operating a railroad for negligence, without first obtaining leave from the United States court appointing him. Malott v. Shimer (1899) 54 N. E. 101, 153 Ind. 35, 74 Am. St. Rep. 278.

Jurisdiction of the subject-matter of a suit against a receiver for an insolvent joint-stock association, who was appointed by the same court as that in which the suit was brought, is not affected by the fact that the plaintiff did not obtain leave to sue, especially where, upon demurrer to the bill, the court entered a nunc pro tunc order giving leave to sue as of the date of the original bill. Ambrose v. Brown (1914) 42 App. D. C. 25.

Under Judicial Code, §§ 24, 66, 267 (this compilation, §§ 991, 1048, and 1244), held that court, granting leave to sue receiver, had no power, and, if it had a discretion, would not, limit the suit to one in admiralty. Berwind-White Coal Mining Co. v. Eastern S. S. Corp. (D. C. 1916) 228 Fed. 726.

7. —— **Proceedings and grant or refusal of leave.**—Where a petition was filed in a federal court for permission to sue its receiver of a railroad company to condemn a grade crossing over the railroad's right of way, the court had power, in granting such permission, to reserve the question as to the forum in which the suit should be brought, and, if necessary, to modify or revoke any order which it might have improvidently granted. An order requiring that a suit against a railroad receiver to condemn a crossing over the railroad's right of way should be brought in the federal court did not constitute an interference with the state in the exercise of its rights of eminent domain. Buckhannon & N. R. Co. v. Davis (1905) 135 Fed. 707, 68 C. C. A. 345, affirming order Coster v. Parkersburg Branch R. Co. (C. C. 1904) 131 Fed. 115.

It is an abuse of discretion for a court to deny leave to sue its receiver, or to permit a landlord to apply in the receivership proceedings for possession of a leasehold which the tenant had forfeited before the receiver was appointed. Odell v. H. Batterman Co. (1915) 223 Fed. 292, 138 C. C. A. 534, reversing order (D. C. 1914) 217 Fed. 305.

8. **District in which suit in federal court may be brought.**—Where receivers of a railroad running through Arkansas, who were appointed in that state, had removed into another state, the court would authorize them to be sued in the state courts of Arkansas by service on their station agents or clerks therein. Central Trust Co. v. St. Louis, A. & T. Ry. Co. (C. C. 1889) 40 Fed. 426.

Where a New Jersey corporation was adjudged insolvent and receivers appointed by a federal court in that state, and the same receivers were appointed in ancillary proceedings in other jurisdictions where the property of the corporation was located, a claim for services rendered to the receivers in disposing of such property may properly be presented to and adjudicated in the court of original jurisdiction, where equally as covenient to the parties, and especially in view of this section. Colonial Trust Co. v. Pacific Packing & Navigation Co. (C. C. 1906) 142 Fed. 298, decree reversed (1907) 158 Fed. 277, 85 C. C. A. 539.

Under this section a receiver may be sued for a marine tort in another district, without leave of the court appointing him. Jones v. The St. Nicholas (D. C. 1891) 49 Fed. 671.

9. **Jurisdiction of state courts.**—This section does not authorize a state court

to entertain an action against a federal receiver to prevent him from carrying out the orders of the court of which he is an officer. Royal Trust Co. v. Washburn, B. & I. R. Ry. Co. (C. C. 1902) 113 Fed. 531, judgment modified (1905) 139 Fed. 865, 71 C. C. A. 579. But gives to a state court jurisdiction of any cause instituted against a receiver appointed by a federal court where the subject-matter of the suit is an act or transaction of the receiver in carrying on the receivership business, and where such court has secured jurisdiction of the parties. Colonial Trust Co. v. Pacific Packing & Navigation Co. (C. C. 1906) 142 Fed. 298, 299, reversed (1907) 158 Fed. 277, 85 C. C. A. 539.

Persons injured by the operation of a street railway by a receiver appointed in mortgage foreclosure proceedings in a federal court were not bound to apply for an allowance of damages in such proceedings, but could reduce their claim to judgment in a state or other court having jurisdiction. Nashville Ry. & Light Co. v. Bunn (1909) 168 Fed. 862, 94 C. C. A. 274.

An order of the federal court, directing its receiver of a railroad to restore to the railroad its property in his hands, and directing the railroad to assume all liabilities and obligations of the receiver, and providing that the receiver shall be continued as such for the purpose of prosecuting and defending pending actions, and for the purpose of enforcing compliance with the order and for the adjustment of all claims of action by or against the receiver, etc., does not prevent one having a demand arising from negligence of a servant of the receiver from suing the railroad in the state court, in the absence of any motion to transfer the cause to the federal court. Vandalia Ry. Co. v. Keys (Ind. App. 1910) 91 N. E. 173.

A state court has no jurisdiction to enjoin the receiver of a telephone company, appointed by a federal court, and ordered by such court to charge a certain sum for telephone service, from withdrawing such service from a person unless he pays such sum, which is in excess of what is permitted by city ordinance. Rogers v. Chippewa Circuit Judge (1903) 97 N. W. 154, 135 Mich. 79, 10 Detroit Leg. N. 689.

A state court has jurisdiction of an action brought under the express provisions of Code Civ. Proc. N. Y. § 1785, to forfeit the charter and franchises of a domestic corporation insolvent for at least a year, and for the appointment of a temporary receiver, notwithstanding receivers of the same corporation have already been appointed in a suit by general creditors brought in a federal court to protect the corporation's franchises and property and preserve its corporate existence, since the objects of the two suits are different, although ordinarily, where two courts have concurrent jurisdiction, the one which first assumes jurisdiction has it exclusive of the other. People v. New York City Ry. Co. (1907) 107 N. Y. S. 247, 57 Misc. Rep. 114.

Under this section and Public Service Commissions Act (Laws N. Y. 1907, c. 429), providing that the term "street railroad corporations" includes receivers, and that an action to recover a penalty or forfeiture under the act may be brought in any court of competent jurisdiction in the state in the name of the people, the state Supreme Court has jurisdiction of an action against federal receivers of a street railway corporation to recover the prescribed penalty for failure to make and file the annual report required by law. People v. Joline (1909) 121 N. Y. S. 857, 65 Misc. Rep. 394.

This section does not affect the jurisdiction of a state court over an action against the sureties on a federal receiver's bond, to which the receiver is not made a party. U. S. v. Douglas (1893) 113 N. C. 190, 18 S. E. 202.

In view of this section, a provision in the decree confirming a sale by the receivers that the federal court retains exclusive jurisdiction to enforce the liability of the grantees for debts incurred by the receivers, and which the purchasers assumed, does not deprive the state court of jurisdiction over an action for the negligence of the receivers' employés. Lassiter v. Norfolk Southern R. Co. (1913) 79 S. E. 264, 163 N. C. 19.

A state cannot authorize judgments to be rendered against receivers of a federal court after their discharge. Fordyce v. Du Bose (1894) 87 Tex. 78, 26 S. W. 1050.

And see Denver & R. G. R. Co. v. Gunning (1905) 80 P. 727, 33 Colo. 280, holding that, inasmuch as an act of Congress provides that the receiver of any property appointed by any federal court may be sued without the previous leave of the court appointing him, and inasmuch as a decree appointing a receiver of railroad property expressly provided that he might be sued in any court of competent jurisdiction, the purchaser of the property under a decree of foreclosure which provided that the purchaser should take the property subject to any liability incurred by the receiver before delivery of possession, to the extent that the assets in the hands of the receiver were insufficient for that purpose, could be sued in a state court in an action for the death of a passenger while the railroad was being operated by the receiver.

10. —— Review of decision of state courts.—Whether a receiver appointed by a federal court can be sued for the act of his predecessor in office without leave of court, by virtue of

this section, is a question of general law, and the decision of a state supreme court that such a suit may be maintained will not entitle the receiver to a review of the ruling by the United States supreme court. McNulta v. Lochridge (1891) 12 Sup. Ct. 11, 141 U. S. 327, 35 L. Ed. 796.

Where cases are properly instituted in state courts, against receivers the United States court has no appellate jurisdiction. Central Trust Co. v. St. Louis, A. & T. R. Co. (C. C. 1890) 41 Fed. 551.

11. Removal of causes from state to federal courts—Right of removal.—Stipulations for removal will be enforced. Central Trust Co. v. Wabash, St. L. & P. Ry. Co. (C. C. 1886) 26 Fed. 74.

This section does not affect the right of receivers to remove suits from state to federal courts. Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co. (C. C. 1894) 59 Fed. 523; Tompkins v. MacLeod (C. C. 1899) 96 Fed. 927.

A receiver appointed by a federal court has not a right, by virtue of his personal standing as such, to remove from a state to a federal court a suit in which he is joined as defendant with a citizen of the state. Shearing v. Trumbull (C. C. 1896) 75 Fed. 33, disapproving Landers v. Felton (C. C. 1896) 73 Fed. 311.

Where a suit is instituted in a state court against the receiver of a railroad appointed by the federal court for that district, without leave of the court by which he was appointed, and the amount in controversy is less than the requisite jurisdictional amount, the receiver has no right to the removal of such cause to the court by which he was appointed, where his petition fails to show a state of facts making the removal necessary to the promotion of the ends of justice. Ray v. Peirce (C. C. 1897) 81 Fed. 881.

That no consent had been obtained to sue federal receivers of a street railroad company operating as lessee the lines of other railroad companies whose franchises plaintiff sought to forfeit, or that the suit was prematurely brought, did not warrant a removal of the cause to the federal court. People v. Bleecker St. & F. F. R. Co. (C. C. 1910) 178 Fed. 156.

That an action is against a receiver appointed by a United States court does not authorize its removal from a state court to the United States court where the action is in respect of acts of the receiver in carrying on the business; the state court having jurisdiction to determine the amount of the recovery, and the United States court having exclusive jurisdiction as to matters of distribution, such as time and mode of payment. Echols v. Smith (1897) 42 S. W. 538, 101 Ky. 707, 19 Ky. Law Rep. 1826.

12. —— Suits involving federal questions.—The fact alone that a defendant in an action in a state court is a receiver appointed by a federal court does not render the cause removable as one arising under the laws of the United States. Gableman v. Peoria, D. & E. Ry. Co. (1900) 21 S. Ct. 171, 179 U. S. 335, 45 L. Ed. 220; Gableman v. Peoria, D. & E. Ry. Co. (C. C. 1897) 82 Fed. 790; Pepper v. Rogers (C. C. 1904) 128 Fed. 987; Rural Home Telephone Co. v. Powers (C. C. 1910) 176 Fed. 986; Dale v. Smith (C. C. 1910) 182 Fed. 360. But see Evans v. Dillingham (C. C. 1890) 43 Fed. 177; Board of Com'rs of Van Wert County, Ohio, v. Peirce (C. C. 1898) 90 Fed. 764.

A suit against a receiver appointed by a federal court for a cause arising out of his management of the property is one arising under the laws of the United States, and may be removed from a state to a federal court, without regard to the citizenship of the parties or the nature of the controversy. Jewett v. Whitcomb (C. C. 1895) 69 Fed. 417.

An action brought, without leave of court, against a receiver appointed by a federal court, and other parties, who are citizens of the same state as the plaintiff, to establish a joint liability of all the defendants, is a suit arising under the laws and constitution of the United States, and, if originally brought in a state court, may be removed to a federal court. Landers v. Felton (C. C. 1896) 73 Fed. 311.

A suit against a corporation of the plaintiff's state, jointly with the Union Pac. Ry. Co., a corporation chartered by congress, and its receivers appointed by a federal court, such suit being also brought against the receivers, without leave, by virtue of the federal statute, is a suit arising under the laws of the United States. Lund v. Chicago, R. I. & P. Ry. Co. (C. C. 1897) 78 Fed. 385.

A corporation purchasing a railroad at foreclosure sale in a federal court, and assuming as part of the consideration all liabilities incurred by the receivers of that court in their management, is not entitled to remove a suit to enforce such a liability, on the ground that it involves a federal question, because the receivers, if sued, could have removed the suit on that ground. Reed v. Northern Pac. Ry. Co. (C. C. 1898) 86 Fed. 817.

An action against receivers appointed by a federal court is one per se arising under the laws of the United States, and when brought in a state court is removable, under the removal acts, where the jurisdictional amount is involved, regardless of the citizenship of the parties. The right of removal in such case is not affected by the provision of the judiciary act (25 Stat. 436) permitting such receivers to be sued in

state courts without first obtaining leave of the court which appointed them. Tompkins v. MacLeod (C. C. 1899) 96 Fed. 927.

An action by the people of the state of New York against certain street railroad companies in New York City to forfeit their franchises, granted by the common council of the city pursuant to legislative authority, was not removable to the federal courts on the theory that it arose under the Constitution and laws of the United States by reason of the fact that receivers appointed by the federal court to which removal was sought were in possession of the property, rights, and privileges of a lessee of the property of the companies whose franchises were sought to be forfeited. People of State of New York v. Bleecker St. & F. F. R. Co. (C. C. 1910) 178 Fed. 156.

Where receivers of an interstate railroad were appointed by a federal court, actions against them instituted by claimants in a state court were not removable to the federal court as involving a federal question on the theory that to permit such suits to be maintained in the state court would interfere with the receiver's operation of the road and their performance of its duties to the public. Dale v. Smith (C. C. 1910) 182 Fed. 360.

That, in a suit by the owner of bonds against trustees, who were to hold securities in trust for the benefit of the owners of said bonds, a receiver appointed by United States court had begun a suit against the defendants, was not ground for removal, as presenting a controversy arising under the Constitution and laws of the United States; the receiver not being a party, no relief being demanded against him, and the principal relief demanded being the removal of defendants, and the appointment of another trustee. Vanderbilt v. Kerr (C. C. 1911) 188 Fed. 537.

An action in tort against a railway company and its receivers appointed by a federal court is removable from a state to a federal court, as involving the construction of a federal statute. St. Louis, A. & T. Ry. Co. v. Trigg (1897) 40 S. W. 579, 63 Ark. 536.

An action against the receiver of a railroad, appointed by a federal court, to recover damages for the improper construction and operation of the road, is removable, as being a suit arising under the laws of the United States. Hardwick v. Kean (1894) 95 Ky. 563, 26 S. W. 589.

Whether the liability of the sureties on the bond of a receiver appointed by a federal court is joint or several does not involve a federal question, within the meaning of the removal acts of congress. U. S. v. Douglas (1893) 113 N. C. 190, 18 S. E. 202.

A controversy necessarily raising the power or duty of a federal receiver to perform acts expressly commanded, whether the power or duty is regulated by an express statute, or by the judgment, decree, order, or process of the court, arises under the constitution and laws of the United States in so far as that is necessary to the removal of the cause under Act Aug. 13, 1888, c. 866, §§ 1, 2, 25 Stat. 433, authorizing removal of causes of which United States circuit courts have original jurisdiction, and conferring such jurisdiction in cases arising under the constitution or laws of the United States. State v. Frost (1902) 89 N. W. 915, 113 Wis. 623.

13. —— **Ancillary suits.**—A suit against railroad receivers based on acts or transactions of the receivers in carrying out the business connected with the property is not removable as ancillary to the main suit in which the receivers were appointed. Pitkin v. Cowen (C. C. 1899) 91 Fed. 599; Pendleton v. Lutz (1900) 29 So. 164, 78 Miss. 322, 51 L. R. A. 649.

Where an action against a receiver, if originally brought in a federal court, would have been within its jurisdiction as being ancillary to the case in which the receiver was appointed, it may properly be removed to that court, if first brought in a state court. Carpenter v. Northern Pac. R. Co. (C. C. 1896) 75 Fed. 850.

Where a suit is instituted in a state court against the receiver of a railroad appointed by the federal court for that district without leave of the court by which he was appointed, the receiver may remove the cause to the court administering the trust, although the amount in controversy is less than $2,000. Sullivan v. Barnard (C. C. 1897) 81 Fed. 886.

Suits against receivers of a federal court, brought in a state court, cannot be removed from that court on the ground that they are ancillary to the receivership suit, and are not removable unless the amount in controversy is sufficient to bring them within the general removal provisions of section 2. Gilmore v. Herrick (C. C. 1899) 93 Fed. 525.

Where a federal court has taken possession of the property of an insolvent corporation for distribution among creditors, it may, in its discretion, remove to itself suits pending against the corporation in the state courts, and affecting the property, by virtue of its jurisdiction to administer the same and as incidental thereto, without regard to whether or not it would have had jurisdiction of the suit. Rice v. Durham Water Co. (D. C. 1899) 91 Fed. 433.

Where the amount in controversy was less than $2,000, and the state court had acquired actual possession of the property under attachment before the defendant became insolvent or a receiver had been appointed by a federal court, the receiver was not entitled to remove the case to the federal court,

since the effect of this section was to make such suits in the state court independent actions, and no longer ancillary to the litigation in the federal court. Pendleton v. Lutz (1900) 29 So. 164, 78 Miss. 322, 51 L. R. A. 649.

14. Orders of federal court not affecting right to sue receiver without leave.—An order of a federal court discharging a railroad receiver and restoring the property to the company without foreclosure, and requiring that all claims against the receiver shall be presented by intervention to the court before a given date, in default whereof they shall be barred, does not, in view of this section, prevent the subsequent recovery of a judgment in personam for personal injuries in a state court, or the enforcement thereof by the same court. Texas & P. Ry. Co. v. Johnson (1894) 14 S. Ct. 250, 151 U. S. 81, 38 L. Ed. 81.

An order of a federal court giving the receiver of a railroad authority to defend certain suits held not to authorize a suit in a state court against the receiver to recover damages to a shipment of cattle occurring before the appointment of the receiver. Andrews v. King (Tex. Civ. App. 1914) 170 S. W. 862.

15. Ejectment.—Where a tenant corporation was in the hands of receivers appointed by the federal court, the landlord's application to sue in ejectment would be denied pending possession by the receivers, except that it might sue the tenant alone, subject to the receivers' right to intervene and stay the action during their possession. Odell v. H. Batterman Co. (D. C. 1914) 217 Fed. 305, order reversed (C. C. A. 1915) 223 Fed. 292.

16. Injunction.—Under this section, and on the principle that state courts have concurrent jurisdiction to determine the rights or titles of third persons claiming property adversely to a bankrupt's estate, an injunction sought by the temporary receiver of a bankrupt's estate to restrain the prosecution of an action of trover in a state court by one claiming chattels in the receiver's hands is properly refused. In re Kanter & Cohen (1903) 121 Fed. 984, 58 C. C. A. 260.

An injunction by a federal court, prohibiting a stockholder of an insolvent bank from instituting proceedings to obtain control of the assets, where such court has taken jurisdiction of the suit by a receiver for the disposition of the assets, does not violate this section. Stateler v. California Nat. Bank (C. C. 1896) 77 Fed. 43.

17. Intervention.—Proceedings on petition of intervention in a suit in equity against a receiver therein, asserting a claim for damages for the death of an employé, alleged to have resulted from negligence in the operation and management of a railroad by the receiver, are equitable in character, and the petitioner is entitled to have the receiver plead in conformity to the rules and practice in equity. Mercantile Trust Co. v. Pittsburgh & W. Ry. Co. (1902) 115 Fed. 475, 53 C. C. A. 207. A petition in intervention in a federal court in the matter of a receivership, by one who has recovered a judgment against the receiver in another court, is a special proceeding for the purpose of presenting the judgment for adjustment and payment, and the court in its discretion has power to permit the pleadings to be reformed so as to properly present such matter. Willcox v. Jones (1910) 177 Fed. 870, 101 C. C. A. 84, affirming decree Meyer Rubber Co. v. Georgetown & W. R. Co. (C. C. 1909) 174 Fed. 731. And it is proper to adjudicate and allow a claim on a petition of intervention filed in the suit in which the receiver was appointed, without requiring it to be litigated and established in an action at law. Central Trust Co. of New York v. Denver & R. G. R. Co. (1899) 97 Fed. 239, 38 C. C. A. 143.

Where, after the enactment of this section a person seeks damages for personal injuries by intervening in the suit wherein the receiver was appointed, he cannot afterwards complain that the matter was determined by a master instead of a jury. Furrer v. Ferris (1892) 12 Sup. Ct. 821, 145 U. S. 132, 36 L. Ed. 649.

18. Garnishment.—Garnishment proceedings are not suits against the receiver for "any act or transaction of his," and the appointing court may enjoin the bringing of such proceedings, as well as suits on causes of action originating before the receivership. Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co. (C. C. 1894) 59 Fed. 523.

A receiver of a railroad appointed by a federal court cannot be compelled to litigate garnishment proceedings in state courts in order to reach wages of his employés in his hands. In re Barnard (C. C. 1894) 61 Fed. 531.

Independently of statute, a receiver is not subject to garnishment except by consent of the court appointing him. Central Trust Co. of New York v. Chattanooga, R. & C. R. Co. (C. C. 1895) 68 Fed. 685.

Where a receiver was appointed to operate a railroad, he was only subject to suit without leave under this section concerning matters having their origin in his operation of the railroad, and this section did not authorize the garnishment of funds in his hands alleged to belong to a debtor in the receiver's employ, especially where at the time the garnishment was instituted the amount due the debtor had not been adjudicated and ordered paid so that the receiver could be regarded as holding it merely as the debtor's agent or custodian. Where a receiver appointed by a fed-

eral court to operate a railroad, was garnished in an action at law in a state court, such garnishment being a nullity, the receiver incurred no responsibility by ignoring the service and all other subsequent proceedings based thereon. Central Trust Co. of New York v. Wheeling & L. E. R. Co. (C. C. 1911) 189 Fed. 82.

19. Pleadings.—A complaint by a judgment creditor of a railroad company against its receiver to enforce payment of the judgment, which alleges the receipt by the receiver of earnings properly applicable thereto, need not aver that such earnings have not been disbursed; such fact, if it exists, being matter of defense. Veatch v. American Loan & Trust Co. (1897) 84 Fed. 274, 28 C. C. A. 384, allowing a motion for a rehearing (1897) 79 Fed. 471, 25 C. C. A. 39. And see Ft. Wayne, M. & C. R. Co. v. Mellett (1884) 92 Ind. 535.

20. Defenses.—Although permission has been granted by a court to sue its receiver, the right of the receiver to set up any defense he may have is reserved; and this can be done by plea, answer, or demurrer. Davis v. Duncan (C. C. 1884) 19 Fed. 477.

21. Trial.—Where a receiver appointed by a federal court is sued in a state court as authorized by this section, and removes the suit into the federal court, plaintiff is entitled to a trial by jury, if he would have been so entitled in the state court. Vany v. Receiver of Toledo, St. L. & K. C. Ry. Co. (C. C. 1895) 67 Fed. 379. But, where a complainant, instead of proceeding at law, under this section, against a receiver appointed by a federal court, intervenes in the receivership proceeding on the chancery side, he waives his right to trial by jury; and, if the court submits an issue of fact to a jury, the verdict and findings are merely advisory. Flippin v. Kimball (1898) 87 Fed. 258, 31 C. C. A. 282. And see Kennedy v. Indianapolis, C. & L. R. Co. (C. C. 1880) 3 Fed. 97, 103, holding that one suing a receiver of a railroad company on a common-law cause of action is not, as a matter of right, entitled to trial by jury; such proceeding not being a suit at common law.

22. Judgment.—Where an action of unlawful detainer is brought before a justice of the peace for property in possession of a receiver without leave of court, a judgment for defendant is null and void. Comer v. Felton (1894) 61 Fed. 731, 10 C. C. A. 28.

A judgment rendered in an action in a state court against a receiver appointed in an action in the circuit court instituted prior to the passage of the judiciary act, and which had been brought without the consent of the court appointing such receiver, was not conclusive as against him, but was subject to the equity jurisdiction of the court appointing him. Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co. (C. C. 1890) 41 Fed. 311.

A judgment in an action against the receivers of a railroad is valid, where at the time of its rendition they had not been discharged in the suit in which they were originally appointed, although the receivership was subsequently extended to another suit against the company, and in such suit they had been discharged prior to the judgment. McCarley v. McGhee (C. C. 1901) 108 Fed. 494.

This section does not change the character of the liability of receivers, nor authorize a personal judgment against them. Hanlon v. Smith (C. C. 1909) 175 Fed. 192.

Contracts, misfeasances and negligences of a receiver are official, liability for or on which is payable only out of money in his hands; his liability being terminated by his discharge. Smith v. Jones Lumber & Mercantile Co. (D. C. 1912) 200 Fed. 647.

23. —— Conclusiveness.—The authority given by this section to sue federal receivers makes a judgment obtained against such receivers in a state court, for personal injuries, conclusive as to the right of the plaintiff therein and the amount of his recovery; and it is immaterial that, according to the state procedure, the case was tried without a jury, because neither party demanded a jury. St. Louis S. W. Ry. Co. v. Holbrook (1896) 73 Fed. 112, 19 C. C. A. 385, following Dillingham v. Hawk (1894) 60 Fed. 494, 9 C. C. A. 101, 23 L. R. A. 517. Under this section a judgment rendered against a federal receiver by a state court in an action brought against him for the death of an employé is conclusive on the federal court as to the right to recover, and the amount that should be recovered. Willcox v. Jones (1910) 177 Fed. 870, 101 C. C. A. 84, affirming decree Meyer Rubber Co. v. Georgetown & W. R. Co. (C. C. 1909) 174 Fed. 731. But a judgment rendered in an action in a state court against a receiver appointed in an action in the circuit court instituted prior to the passage of this section, and which had been brought without the consent of the court appointing such receiver, was not conclusive as against him, but was subject to the equity jurisdiction of the court appointing him. Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co. (C. C. 1890) 41 Fed. 311. The judgment of a state court having jurisdiction of the parties and subject-matter against a federal court receiver in his official capacity in respect of any act or transaction of his in carrying on the business connected with the receivership property is final and conclusive as to the existence and amount of the liability. Manhattan Trust Co. v. Chicago Electric Traction Co. (C. C. 1910) 188 Fed. 1006. And this section reserves to the appointing courts power over the

satisfaction of rights determined, so that the recovery of a judgment against a federal court receiver in another court would not entitle the judgment creditor or his assignee to an order on the receiver for payment as a matter of legal right. Investment Registry v. Chicago & M. Electric Ry. Co. (D. C. 1913) 204 Fed. 500. But the time and manner of its payment must be controlled by the federal court. Meyer Rubber Co. v. Georgetown & W. R. Co. (C. C. 1909) 174 Fed. 731 (decree affirmed Willcox v. Jones [1910] 177 Fed. 870, 101 C. C. A. 84); Dillingham v. Hawk (1894) 60 Fed. 494, 9 C. C. A. 101; Willcox v. Jones (1910) 177 Fed. 870, 101 C. C. A. 84, affirming decree Meyer Rubber Co. v. Georgetown & W. R. Co. (C. C. 1909) 174 Fed. 731.

24. —— **Operation and enforcement.**—Suits against a receiver are in effect only against the receivership, the judgment being against the funds in his hands. Gray v. Grand Trunk Western Ry. Co. (1907) 156 Fed. 736, 84 C. C. A. 392 (writ of certiorari denied Grand Trunk Western R. Co. v. Gray [1907] 28 Sup. Ct. 260, 207 U. S. 594, 52 L. Ed. 356); Smith v. Jones Lumber & Mercantile Co. (D. C. 1912) 200 Fed. 647. And should only be made payable therefrom. Hanlon v. Smith (C. C. 1909) 175 Fed. 192.

Petitioner furnished materials for the roadbed of a railroad leased to the R. & D. Co., and operated as part of its system. This lease was afterwards annulled. Petitioner recovered a judgment against the R. & D. Co., and pending his action receivers were appointed for the whole system. Held, that the judgment was not a judgment against the receivers, nor did it bind the realty in their hands, for it was not in existence when they were appointed. Clyde v. Richmond & D. R. Co. (C. C. 1893) 56 Fed. 539.

Where a judgment has been obtained in a state court against a receiver of a corporation appointed by a federal court, and execution has issued on the judgment, the state court has jurisdiction to stay the writ at least until after application has been made to the federal court and leave obtained to proceed with it. But an appeal from an order of the state court refusing to make an order staying the execution will be dismissed, where it appears that before the appeal was taken the receiver applied to the federal court and obtained a restraining order enjoining the plaintiff from proceeding on the judgment. Davis Coal & Coke Co. v. Hess (1906) 30 Pa. Super. Ct. 193; Mesta Machine Co. v. Same, Id. 198; Gingrich v. Same, Id. 199.

25. —— **Review.**—The rule that the federal courts are not invested with appellate or supervisory jurisdiction over the state courts, and cannot annul, vacate, or modify their judgments against a federal court receiver in a case where the state court has jurisdiction is not affected by this section. Central Trust Co. v. St. Louis, A. & T. Ry. Co. (C. C. 1890) 41 Fed. 551.

Cited without definite application, Bausman v. Dixon (1899) 19 Sup. Ct. 316, 317, 173 U. S. 113, 43 L. Ed. 633; U. S. v. Harris (1900) 20 Sup. Ct. 609, 610, 177 U. S. 305, 44 L. Ed. 780; Paxson v. Cunningham (1894) 63 Fed. 132, 134, 11 C. C. A. 111; U. S. v. Ramsey (1912) 197 Fed. 144, 116 C. C. A. 568, 42 L. R. A. (N. S.) 1031; Union Trust Co. v. Atchison, T. & S. F. R. Co. (C. C. 1898) 87 Fed. 530, 532; Winters v. Drake (C. C. 1900) 102 Fed. 545, 546; U. S. v. Murphy (C. C. 1890) 44 Fed. 39, 42; Peirce v. Van Dusen (1897) 78 Fed. 693, [illegible] C. C. A. 280, 69 L. R. A. 705, [illegible] error dismissed 19 Sup. Ct. 8[illegible] [illegible] Ed. 1184.

§ 1049. (Jud. Code, § 67, as amended, Act Dec 21, 1911, c. 4.) Certain persons not to be appointed or employed as officers of courts.

No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court: Provided, That no such person at present holding a position or employment in a circuit court shall be debarred from similar appointment or employment in the district court succeeding to such circuit court jurisdiction.

Act March 3, 1887, c. 373, § 7, 24 Stat. 555. Act Aug. 13, 1888, c. 866, § 7, 25 Stat. 437. Act March 3, 1911, c. 231, § 67, 36 Stat. 1105. Act Dec. 21, 1911, c. 4, 37 Stat. 46.

This section, as enacted in the Judicial Code, contained only the provision preceding the proviso set forth here. Said proviso was added by Act Dec. 21, 1911, c. 4, cited above.

Notes of Decisions

Validity of appointment prior to statute.—The provision that no federal judge shall "hereafter" appoint to any office or duty in the courts a person related to him within the degree of first cousin, does not invalidate an appoint-

ment previously made. Northwestern Mut. Life Ins. Co. v. Seaman (C. C. 1897) 80 Fed. 357.

Collateral attack.—The appointment of a master is impervious to collateral attack on the ground that he was a son of the judge. Seaman v. Northwestern Mut. Life Ins. Co. (1898) 86 Fed. 493, 497, 30 C. C. A. 212; Elgutter v. Northwestern Mut. Life Ins. Co. (1898) 86 Fed. 500, 502, 30 C. C. A. 218.

Validity of final decree.—A final decree entered on the report of a special master, appointed in violation of this section, is not thereby rendered absolutely void, so that the court will have power to set it aside on motion at a subsequent term. Farmers' Loan & Trust Co. v. Iowa Water Co. (C. C. 1897) 80 Fed. 467.

§ 1050. (Jud. Code, § 68.) Certain persons not to be masters or receivers.

No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment.

Act March 3, 1879, c. 183, 20 Stat. 415. Act March 3, 1911, c. 231, § 68, 36 Stat. 1105.

Provisions against the appointment of certain other officers receivers in any case were made by Act May 28, 1896, c. 252, § 20, post, § 1334.

Notes of Decisions

Selection and appointment of master in chancery.—A master in chancery should be selected and appointed by the court. Any arrangement or agreement by the parties for selecting the master and fixing his compensation, in advance of his appointment, is improper, in disrespect of the court, and should not be tolerated. Finance Committee of Pennsylvania v. Warren (1897) 82 Fed. 525, 27 C. C. A. 472.

Failure to assign special reasons as error.—Where a court determines that a special reason exists for appointing a deputy clerk special master, such appointment is not reversible error because, through inadvertence, the reason is not assigned in the order. Briggs v. Neal (1900) 120 Fed. 224, 56 C. C. A. 572, reversing decree Neal v. Briggs (C. C. 1900) 110 Fed. 477.

Where an order appointing a clerk of the court special master to conduct a judicial sale of certain land under a decree of the Circuit Court did not specify special reasons therefor, the order was erroneous to that extent. Quinton v. Neville (1907) 154 Fed. 432, 83 C. C. A. 252.

Failure to assign reasons as ground to set aside order.—Where the court makes an interlocutory decree in a suit for infringement of a patent, awarding a recovery of profits and damages, and directing a reference to a party "as master pro hac vice," to take and report an account of profits, and to assess the damages, and such party is at the time a deputy clerk of the court, and no "special reason" for his appointment is assigned, after his report has been made it will not be set aside, on motion of defendant, on the ground that no "special reason" for the appointment was assigned when it was made with the assent in open court of the solicitors of both parties, and they carried on the proceedings before the master for several months after the discovery that he was a deputy clerk; but the decree may be amended nunc pro tunc, by inserting the words, "the solicitors for the respective parties having in open court consented to the appointment of said master, although he is the deputy clerk of court, and the court now determining that such consent is a sufficient special reason for such appointment." Fischer v. Hayes (C. C. 1884) 22 Fed. 92.

Failure to assign reasons as ground for collateral attack.—An order appointing a standing master is impervious to collateral attack on the ground that he is ineligible because he was a clerk of the court. That question can be presented only by a direct proceeding to set aside the order of appointment. Seaman v. Northwestern Mut. Life Ins. Co. (1898) 86 Fed. 493, 30 C. C. A. 212; Elgutter v. Same (1898) 86 Fed. 500, 30 C. C. A. 218.

An order appointing a clerk of a federal court as master in chancery without assigning a special reason therefor is sufficient, however irregular, to clothe him with insignia of the office, so that his acts will be those of a de facto incumbent, and not subject to question in a collateral proceeding. Northwestern Mut. Life Ins. Co. v. Seaman (C. C. 1897) 80 Fed. 357.

Amendment of order.—Where an order appointing a clerk of the Circuit Court of the United States special master to conduct a judicial sale of certain land under a decree of the Circuit Court is erroneous in not specifying special reasons for making such appointment, the error will not affect the balance of the sale decree, as it is amendable in that respect. Quinton v.

Neville (1907) 154 Fed. 432, 83 C. C. A. 252.

Where the court makes an interlocutory decree in a suit for infringement of a patent, awarding a recovery of profits and damages, and directing a reference to a party "as master pro hac vice," to take and report an account of profits, and to assess the damages, and such party is at the time a deputy clerk of the court, and no "special reason" for his appointment is assigned, after his report has been made it will not be set aside, on motion of defendant, on the ground that no "special reason" for the appointment was assigned when it was made with the assent in open court of the solicitors of both parties, and they carried on the proceedings before the master for several months after the discovery that he was a deputy clerk; but the decree may be amended nunc pro tunc, by inserting the words, "the solicitors for the respective parties having in open court consented to the appointment of said master, although he is the deputy clerk of court, and the court now determining that such consent is a sufficient special reason for such appointment." Fischer v. Hayes (C. C. 1884) 22 Fed. 92.

Notice of appointment.—It is no objection to a sale by a master that a party had no notice of his appointment. Seaman v. Northwestern Mut. Life Ins. Co. (1898) 86 Fed. 493, 497, 30 C. C. A. 212.

Filing of order.—An order appointing a standing master is complete and effective when signed by the court and filed with the clerk. Seaman v. Northwestern Mut. Life Ins. Co. (1898) 86 Fed. 493, 496, 30 C. C. A. 212.

Recording of order.—It is not requisite to the validity of an appointment of a standing master that the order of appointment shall be recorded in any book of the court. Seaman v. Northwestern Mut. Life Ins. Co. (1898) 86 Fed. 493, 30 C. C. A. 212.

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